

Research Article

IMPLEMENTATION AND PROTECTION OF THE RIGHT TO GENERAL WATER USE IN UKRAINE: MAIN THEORETICAL PROBLEMS AND CERTAIN ASPECTS OF JUDICIAL DISPUTE RESOLUTION

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Summary: 1. Introduction. – 2. Ensuring the implementation of the right to general water use. – 3. Features of using coastal protection strips as a prerequisite for implementing the right to general water use. – 4. The practice of resolving disputes regarding the right to protect general water use in Ukraine and abroad. – 5. Concluding Remarks.

Keywords: *environmental rights of citizens, the right to use water, the right to general use of nature, the right to general water use, water fund land, the use of coastal protection strips, judicial practice regarding protection of the right to general water use, court decisions on the removal of obstacles to exercise the right to general water use, on the termination of a lease agreement on the water object.*

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ABSTRACT

Background: *The extraction and use of natural resources are reasons for environmental problems all over the world. The article examines one environmental right – the right to general water use, and its interrelation with the use of coastal protection strips (water fund lands), as well as specific problems of judicial practice in terms of protecting this right. There is a direct or indirect interrelation between utilised natural objects when confirming the environmental rights of citizens at the level of current national legislation, who are given the opportunity to use natural resources to meet their own needs and be in a harmonious state with the environment as much as possible. Such an interrelation is also reflected in cases of general water use, which is impossible without involving the use of water fund lands, namely coastal protective strips.*

Methods: *With the help of scientific methods, the article uses and analyses international acts, data of international organizations, conclusions of scientists, and legal scientific literature. The legal regulation for using coastal protection strips as a prerequisite for exercising the right to general water use has been investigated within the framework of a systemic approach, as well as analysis and synthesis.*

Results and Conclusions: *It is concluded that the lack of physical access to water bodies and non-compliance with the requirements regarding the proper water quality in water bodies, unfortunately, does not allow for the implementation of the right to general water use either properly or without harming the life and health of citizens.*

It is noted that in most instances, the result of court case consideration regarding protection of the right to general water use was the refusal to satisfy the claims due to the lack of reasoning and proper argumentation by the claimants, and to hold the decision against them. Claimants have to overcome a number of difficulties in order for their evidence to be recognised by the court as reliable and well-founded. The presence of certain deficiencies in the normative legal acts regarding the right to general water use plays a major role in this process.

In order to solve the aforementioned problems and improve water legislation, appropriate proposals in the form of changes and additions to the general provisions of the Water Code of Ukraine have been argued and proposed.

1 INTRODUCTION

While implementing the right to general use of nature, the principle stipulated in the Rio Declaration on Environment and Development¹ is carried out with the assumption that the care of people occupies a central place in order to ensure sustainable development. They have the right to a healthy and fruitful life in harmony with nature (principle 1). Unconditionally, the harmony of a human with nature is maintained as a result of deliberate human intervention on the environment when using natural resources and engaging in sustainable development activities. As noted in paragraph 10 Annex of the 7th Environment Action Programme 2020 – ‘Living well, within the limits of our planet’ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union

1 Rio Declaration on Environment and Development’ in United Nations, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992) (United Nations 1993) vol 1, 3 <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> accessed 20 July 2022.

Environment Action Programme 2020 ‘Living well, within the limits of our planet’²: to live well in the future, urgent, concerted action should be taken now to improve ecological resilience and maximise the benefits environment policy can deliver for the economy and society, while respecting the planet’s ecological limits.

The right to general use of natural resources is one of the rights stipulated by the current legislation of Ukraine, which is provided to citizens in the course of their life activities to satisfy their own vital needs without excessive impact on or interference in the surrounding natural environment. The existence of an interrelation between natural objects and their influence on each other and on the life and health of people creates the need to minimise the anthropogenic impact on the environment, which has been repeatedly noted at the general theoretical scientific level.³ The extraction and use of natural resources are reasons for environmental problems all over the world.⁴ It is emphasised that economic development, social justice and environmental health are the three dimensions of sustainability and directly related to the use of natural resources. Sustainable use of natural resources requires the correct relationship between the minimisation of the impact on the environment and the promotion of long-term use of resources, while maximizing relevant social favorable conditions.⁵

According to paragraph d) part 1 of Art. 9 of the Law of Ukraine “On Protection of the Natural Environment”⁶, every citizen of Ukraine has the right to the general and special use of natural resources. According to part 2 of Art. 38, the legislation of Ukraine guarantees citizens the right to general use of natural resources to meet vital needs (aesthetic, health, recreational, material, etc.) free of charge, without appropriating these resources to individuals, and granting appropriate permits, excepting restrictions stipulated by the legislation of Ukraine. That is, when exercising such a right, natural resources are used to meet the corresponding needs in compliance with the specified requirements, with the minimum possible negative impact and without restrictions that would not allow such an opportunity to be implemented regarding certain circumstances.

Therefore, the relevance of the chosen topic consists of the consolidation of opportunities at both the national and international legislative levels, allowing relevant entities to properly exercise the right to use natural resources, based on the rationality of intervention in the surrounding natural environment and care for the harmonious interaction of human and nature. Studying the regulatory and legal basis, scientific positions, and judicial practice, allow us to form conclusions for improving each of the identified areas of research.

2 Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 ‘On a General Union Environment Action Programme 2020 “Living well, within the limits of our planet”’ <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013D1386>> accessed 20 July 2022.

3 Vitalii Pashkov and Maryna Trotska, ‘Natural environment as component of public health: some aspects of its legal regulation’ (2019) 72(2) *Wiad Lek* 261; Vitalii Pashkov, Maryna Trotska and Liudmyla Leiba, ‘Factor of natural curative resources in context of legal regulation of medical rehabilitation’ (2019) 61(1) *Acta Balneol* 49; Alla Sokolova and Maryna Cherkashyna, ‘The legal regulation of the use of natural healing resources: the theory and practice of disputes resolution’ (2021) 2(10) *AJEE* 144.

4 H Muilerman and H Blonk, Towards a sustainable use of natural resources (Stichting Natuur en Milieu 2001) 3 <<https://ec.europa.eu/environment/enveco/waste/pdf/muilerman.pdf>> accessed 20 July 2022.

5 Jennifer Bansard and Mika Schröder, ‘The sustainable use of natural resources: the governance challenge’ (IISD, 15 April 2021) 2–3 <<https://www.iisd.org/system/files/2021-04/still-one-earth-natural-resources.pdf>> accessed 20 July 2022.

6 Law of Ukraine No 1264-XII of 25 June 1991 ‘About protection of the surrounding environment’ <<https://zakon.rada.gov.ua/laws/show/1264-12#Text>> accessed 20 July 2022.

2 ENSURING IMPLEMENTATION OF THE RIGHT TO GENERAL WATER USE

Before examining the regulatory and legal basis within the defined sphere of relations, let us note that in the list of environmental terms used by the European Environment Agency, the term water use is defined as the utilisation of water by end users for a specific purpose within a territory, such as for domestic use, irrigation or industrial processing.⁷ In turn, according to part 1 of Art. 47 of the Water Code of Ukraine,⁸ general water use is carried out by citizens to meet their needs (swimming, boating, recreational and sport fishing, drinking water for animals, taking water from water bodies without the use of structures or technical devices and from wells etc.) free of charge, without securing water bodies objects by individual persons and without the appropriate permits. The importance of the specified right is confirmed by the constant regulatory and legal improvement for its implementation (for example, the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Ensuring Unobstructed Access of Citizens to the Coast of Water Bodies for Public Water Use⁹”), as well as existing judicial practice at national and international levels.

That is, the right to general water use is connected to the definition of the right to general nature use, which is stipulated by the provisions of the Law of Ukraine “On the Protection of the Natural Environment” and is reflected through certain types of activities that are related to the satisfaction of relevant needs in compliance with specified requirements. Moreover, it is necessary to consider the specifics of such activity, for example, in accordance with part 2 of Art. 16 of the Law of Ukraine “On the Animal World”¹⁰: amateur and sport fishing is carried out in water bodies of general use within the limits of free catch established by law.

Before focusing on the needs, the satisfaction of which is the basis for the right to general water use, let us pay attention to the objects that are involved in their implementation. As a general rule, the right under investigation is carried out on water bodies (part 1 of Art. 47 of the Criminal Code of Ukraine). Certain types of rights to general water use are exercised on so-called general water objects (part 2 of Art. 16 of the Law on “Animal World”, Art. 26 of the Law on “Fish Farming, Industrial Fishing and the Protection of Aquatic Bioresources”¹¹). It should be emphasised that the concept of a water body is stipulated in Part 1 of Art. 1 of the Water Code of Ukraine, and there is no definition of a general water object in the specified laws and code. Meanwhile, the detailing of the procedure for exercising the right to general water use should be stipulated by subordinate legal acts – the rules to general water use, which determination belongs to the authority of the relevant councils (paragraph 7, part 1, Art. 9 and paragraph 3, part 1, Art. 10 of the Water Code of Ukraine). Such documents are being developed, namely, for example, in paragraph 1 of the Water Use Rules on the territory of the Korostyshiv City Council,¹² it is assumed that general water use can be carried out both on water objects of general water use and on water objects that are not of general use and do not require permissions.

7 'Glossary: List of environmental terms used by EEA' (European Environment Agency, 10 April 2017) <<https://www.eea.europa.eu/help/glossary/semide-emwis-thesaurus/water-use>> accessed 20 July 2022.

8 Code of Ukraine No 213/95-BP of 06 June 1995 'Water code of Ukraine' <<https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80#Text>> accessed 20 July 2022.

9 Law of Ukraine No 233-IX of 29 October 2019 'On the introduction of amendments to some legislative acts of Ukraine on ensuring unhindered access of citizens to the coast of water bodies for public water use' <<https://zakon.rada.gov.ua/laws/show/233-20#Text>> accessed 20 July 2022.

10 Law of Ukraine No 2894-III of 12 December 2001 'About Fauna' <<https://zakon.rada.gov.ua/laws/show/2894-14#Text>> accessed 20 July 2022.

11 Law of Ukraine No 3677-VI of 08 July 2011 'About fishery, industrial fishing and protection of water bioresources' <<https://zakon.rada.gov.ua/laws/show/3677-17#Text>> accessed 20 July 2022.

12 Judgment of the Korostyshiv city council No 362 of 18 May 2012 'Rules of water use on the territory of the Korostyshiv city council' <<https://www.korostyshiv-rada.gov.ua/rehuliatorna-polityka/52-rishennya-miskoji-radi-za-2012-rik-2>> accessed 20 July 2022.

Depending on the specific type of general water use, it is implemented either on all water bodies, or on water bodies of general use, etc. Therefore, taking into account the relevance of this issue at the legislative level, it would be appropriate to define the signs and concepts of “general water body”.

Regarding the understanding of the needs related to the implementation of such activities, as noted in separate sources, the UN Watercourses Convention was the first water-related agreement introducing the term ‘vital human needs’, which has been defined as ‘sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation.’¹³ Accordingly, it is entirely appropriate to assume that the use of the above term in relation to human needs is intended to focus on the most pressing needs – to prevent starvation or death from lack of water.¹⁴

In addition, if we refer to the provisions of the legislation of European countries, for example, in part 1 of Art. 22 Law on water rights,¹⁵ part 1 of Art. 32 Water Law¹⁶ envisages the possibility of using relevant waters by anyone within the limits of the specified legislation. Paragraph 8 of the Water Act¹⁷ establishes the general use of water. In turn, part 2 of Art. 32 of the Water Law indicates that the appropriate use of water serves to meet personal, domestic or agricultural needs, without using special technical devices, as well as for recreation, tourism, water sports and, under the conditions determined by separate provisions, recreational fishing.

It is prohibited to put restrictions on general water use, including restrictions on swimming and boating, recreational and sport fishing, and mooring to the shore in daylight due to the presence of land plots of coastal protective strips (beach zone) used by legal entities or individuals, except in cases stipulated by law (part 2 of Art. 47 of the Criminal Code of Ukraine). Relevant provisions are also contained in part 2 of Art. 49 Law on water rights. However, at the level of current legislation, there are cases in which such a right may be limited. Thus, part 1 of Art. 45 of the Water Code of Ukraine states that in the case of low water, the threat of epidemics and epizootics, as well as in other cases stipulated by law, the rights of water users may be limited, or the conditions of water use may be changed in order to ensure the protection of people’s health and in other state interests. For example, part 5 of chapter II “Safety requirements for beaches, places of mass recreation of people on water bodies” on the Rules for protection of people’s lives on water bodies of Ukraine¹⁸ stipulates that the restriction, termination or prohibition of the use of water bodies for swimming, mass recreation of people, using small-sized/small vessels, engaging in relevant sports, tourism, or other recreational purposes is established according with the requirements of

13 International Law Commission, Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater: Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (at para. 222) (United Nations 2005) 110 <https://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf> accessed 20 July 2022.

14 UN Watercourses Convention: Online user’s guide (2012) art 10.1.1 <<https://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-10-relationship-between-different-kinds-of-uses/10-1-1-vital-human-needs/>> accessed 20 July 2022.

15 Law of the Swiss Confederation (Nidwalden) of 30 April 1967 ‘Law on water rights (Water Rights Law)’ <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC083159>> accessed 20 July 2022.

16 Law of the Republic of Poland of 20 July 2017 ‘Water Law’ <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC181663>> accessed 20 July 2022.

17 Law of the Republic of Austria of 16 October 1959 ‘Water Act 1959’ <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC089407>> accessed 20 July 2022.

18 Order of the Ministry of internal affairs of Ukraine No 301 of 10 April 2017 ‘Rules for protecting people’s lives on water bodies of Ukraine’ <<https://zakon.rada.gov.ua/laws/show/z0566-17#Text>> accessed 20 July 2022.

the Water Code of Ukraine - with mandatory notification of people through mass media, by installing special information signs and other methods.

Having considered a complex of issues related to challenges and threats to the national security of Ukraine in terms of ensuring the state's water security, taking into account the high level of risks for water bodies caused by significant pollution and depletion etc., the Council of National Security and Defense of Ukraine determined the main areas of activity for state power and local self-government bodies.¹⁹ In particular: improvement of normative legal acts on ensuring the safety and quality of drinking water intended for human consumption; improvement of the procedure for keeping state records of water use, as well as control over the condition of water objects; ensuring proper control over compliance with the requirements of environmental legislation by enterprises that discharge wastewater into water bodies that are sources of drinking water supply; and development of measures aimed at ecological improvement of rivers, etc.

Therefore, when implementing the researched right, the proper condition of water bodies during their use is of great importance. In particular, the use of a water object is the process of using water in production for the purpose of obtaining products, for the economic and drinking needs of the population, the needs of hydropower, fish farming, water and air transport, for people's recreation, the organisation of beaches, places for mass recreation of people, the use of floating facilities, arrangement of water attractions, places for sports, physical and recreational activities, and places for amateur and sport fishing, etc. (paragraph 3, section "General Provisions" of the Rules for the Protection of People's Life on Water Bodies of Ukraine). Paragraph 11 section 1 "Safety requirements for beaches, places of mass recreation of people on water bodies" among other things, states that during the arrangement of beaches and places of mass recreation of people on water bodies, the following requirement must be observed: the water must meet the requirements of current sanitary standards.

Starting January 1, 2017, in accordance with the order of the Cabinet of Ministers of Ukraine of January 20, 2016 No. 94-r On recognition of acts of sanitary legislation, acts of sanitary legislation issued by central bodies of executive power of the Ukrainian SSR as having lost their validity and as not applicable on the territory of Ukraine, their officials who approved sanitary, sanitary-hygienic, sanitary-anti-epidemic, sanitary-epidemiological, anti-epidemic, hygienic rules and regulations, state sanitary-epidemiological standards and sanitary regulations are recognised as having lost their validity, including SanPiN 4630-88 "Sanitary rules and norms for the protection of surface waters from pollution". SanPiN 4630-88 determined the hygienic requirements and standards of water quality depending on the economic purpose of the reservoir and regulated various types of economic activity that could lead to pollution of surface reservoirs since the water quality standards in reservoirs consist of a set of permissible values of indicators of its composition and properties, within which the health of the population, favorable conditions for water use and the ecological well-being of the water body are reliably ensured. Unfortunately, there is still no legislative act to establish hygienic requirements and water quality standards for surface reservoirs, which will inevitably lead to catastrophic environmental consequences over time.

Thus, paragraph 1.5 of the Sanitary Rules and Norms for the Protection of Surface Water from Pollution states that: water bodies for economic, drinking and cultural and domestic purposes are considered polluted if the indicators of the composition and properties of water at the points of water use have changed under the direct or indirect influence of economic activities or domestic use and have become partially or completely unsuitable for water use by the population.

19 Judgment of the National Security and Defense Council of Ukraine of 30 July 2021 'About the state of water resources of Ukraine' <<https://zakon.rada.gov.ua/laws/show/n0049525-21#Text>> accessed 20 July 2022.

Therefore, the deterioration of the state of water in water bodies can be the result of various activities, but for a person who wants to exercise the right of general water use it will not be of significant importance, since regardless of the type of activity, if the water in the water body does not meet the specified requirements, a person will not be able to fully exercise this right.

Therefore, it is appropriate to turn to the analysis of regulatory legal acts, the prescriptions of which determine the competence of state bodies and local self-government bodies in the researched area. Thus, the provisions of the water legislation establish that the control over the use and protection of water and the reproduction of water resources is entrusted, for example, to the relevant bodies of local self-government (Art. 8-1, Art. 9, Art. 10 of the Water Code of Ukraine) and state authorities (chapter II "State management and control of water use and protection and reproduction of water resources"), but the specified provisions are of a general nature, without establishing specifically defined powers of these bodies within the outlined issues. At the legislative level, namely in the Water Code of Ukraine, it would be appropriate to clearly establish the algorithm of actions for the relevant bodies with the definition of the scope of their control and response when certain offenses are detected.

The introduction of the proposed additions should be considered expedient, especially considering the current provisions of the laws of Ukraine: On Local Self-government in Ukraine,²⁰ namely Art. 33, which emphasises that local self-government bodies exercise control over ensuring unobstructed and free access of citizens to the coast of water bodies and islands for public water use in accordance with the law and the Law of Ukraine On Local State Administrations,²¹ where Art. 21 states that local state administrations exercise control over ensuring unobstructed and free access of citizens to the coast of water bodies and islands for general water use in accordance with the law. Thus, the proposed additions to the Water Code of Ukraine should be recognised as necessary, given that this code is the main normative legal act in the sphere of regulating water relations.

In turn, in order for this right to be properly implemented, it is necessary to have access to the coast of water bodies on land plots of coastal protection strips that have the appropriate legal regime. Having the right of general water use in the absence of proper access to the coast of water bodies in any of its manifestations makes it impossible to use.

Both rights and freedoms provide for rights to natural resources and land. As for freedoms, it is the right to maintain access to natural resources and land, as well as their management and use, which are necessary to satisfy the rights to health, an adequate standard of living and participation in cultural life. These freedoms also include, for example, the right to be free from certain interference, namely from the destruction of water bodies and their pollution, etc.²² Taking into account the complex aspects when using natural resources in general, in this case in particular, is important in understanding possible consequences as a result of interference in their functioning, awareness of how such activity can negatively affect each object, and their existence as a whole as components of the natural environment. In particular, according to paragraph 17 of the preamble Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community

20 Law of Ukraine No 280/97-BP of 21 May 1997 'About local self-government in Ukraine' <<https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text>> accessed 20 July 2022.

21 Law of Ukraine No 586-XIV of 09 April 1999 'About local public administrations' <<https://zakon.rada.gov.ua/laws/show/586-14#Text>> accessed 20 July 2022.

22 Sofia Monsalve Suárez, The right to land and other natural resources (December, 2015) <https://www.researchgate.net/profile/Sofia-Monsalve-Suarez/publication/308631743_The_right_to_land_and_other_natural_resources/links/57e9343d08aeb34bc08fc44f/The-right-to-land-and-other-natural-resources.pdf?origin=publication_detail> accessed 20 July 2022.

action in the field of water policy,²³ it is noted that since the balance of vulnerable aquatic ecosystems located in closed seas or in bays or near coasts and estuaries is strongly affected by the quality of inland waters flowing into them. Accordingly, vulnerability of these systems should be taken into account by a coherent and effective water policy. The value of water reveals its greatest and special importance, first of all for our society, both as a whole and in terms of guaranteeing social functions relating to wealth and health and all areas of economic activity, as well as the (potential) economic usefulness of resources (chemical substances, metals, minerals, nutrients) and, accordingly, the hydroelectric energy.²⁴

3 FEATURES OF USING COASTAL PROTECTIVE STRIPS AS A PREREQUISITE FOR IMPLEMENTING THE RIGHT TO GENERAL WATER USE

The glossary of terms from The Coastal Zone Management Unit defines a coastal strip as a zone directly adjacent to the waterline, where only coast related activities take place. Usually this is a strip of some 100m wide. In this strip, coastal defense activities take place and there may be restrictions to land use.²⁵

According to Art. 60 of the Land Code of Ukraine "Coastal protective strips"²⁶ it is noted that coastal protective strips are established to protect against pollution and clogging, and to preserve the water content of surface water bodies along seas and rivers, as well as around reservoirs, lakes and other bodies of water. Within the limits of the above-mentioned waterways, citizens are provided with free and unhindered access to sea bays, sea coasts, estuaries and islands in inland sea waters within the beach zone. It is indicated that such access is provided to the shores of reservoirs, rivers and islands for the implementation of general water use, except for certain lands: lands of protection zones, sanitary protection zones, zones with a special regime regarding land use, as well as certain land plots, where the specified objects and structures are located (objects of increased danger; linear, hydrometric and hydrotechnical structures); boarding houses, sports facilities, rehabilitation facilities, sanatoriums and other medical and health facilities, and children's health camps, which have the documents required by law for the relevant facilities and the implementation of the relevant activities; and objects of cultural heritage and objects of the nature reserve fund.

According to Part 1 of Art. 1 of the Water Code of Ukraine: the beach zone is a part of the coastal protective strip along the seas, around sea bays and estuaries adjacent to the water cut, with a regime of limited economic activity. In turn, in paragraph 3 of the Rules for the protection of human life on water bodies of Ukraine, a beach is a land plot of coastal territory adjacent to a water body and intended for people's recreation.

Therefore, taking into account the above prescriptions, we can come to the conclusion that a "beach" can be provided for all water bodies and intended for people's recreation, and a "beach zone" is related to seas, sea bays, and estuaries with a regime of limited economic activity. Considering the essence and meaning of the above concepts, there is an urgent need

23 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000L0060>> accessed 20 July 2022.

24 'The value of water. Multiple water for multiple purposes and users: Towards a future proof model for a European water-smart society' (WssTP, 25 January 2017) 4 <<http://www.suschem.org/highlights/new-wsstp-strategic-innovation-and-research-agenda-published>> accessed 20 July 2022.

25 'Glossary of Terms' (Coastal Zone Management Unit, 2020) <<http://www.coastal.gov.bb/document-repository/glossary-of-terms>> accessed 20 July 2022.

26 Code of Ukraine No 2768-III of 25 October 2001 'Land code of Ukraine' <<https://zakon.rada.gov.ua/laws/show/2768-14#Text>> accessed 20 July 2022.

to enshrine in the Water Code of Ukraine the concept of “beach” and the peculiarities of the legal regulation of relations with this object.

In contrast to the above, the Water Code of Ukraine contains provisions on determining the legal regime of beach zones. Thus, it has been established that the boundaries of coastal protection strips and beach zones are indicated in land and urban planning documentation and are marked by executive authorities and local self-government bodies with informational signs. Information about the boundaries of coastal protection strips and beach zones is entered into the State Land Cadastre as information about land use restrictions (Art. 88 of the Water Code of Ukraine).

Within the boundaries of populated areas, local executive bodies and local self-government bodies allocate and arrange beach areas for unobstructed and free use (Part 15, Art. 88 of the Water Code of Ukraine).

In addition, within the beach zone of the coastal protective strips, it is prohibited to build any structures except hydraulic, hydrometric and linear, as well as engineering and technical works, fortification structures, fences, border signs, border crossings, and lines of communications (Part 3 of Art. 90 of the Water Code of Ukraine).

That is, at the level of the current legislation, the question is about unhindered and free access of citizens within the beach zone to the coasts of seas, sea bays, estuaries and islands in inland sea waters and the banks of rivers, reservoirs, and islands for public water use.

When studying the possibility of implementing the right to general water use, it is necessary to pay attention to one more aspect, namely the ratio of terms used to define the objects of legal regulation. As it was already emphasised, we are talking about terms that are actively used in water legislation: “water bodies”, “water bodies of general use”, and “places of mass recreation of the population on water bodies”.

Let us dwell on the characteristics of the prescriptions regarding the last object. In accordance with the Resolution of the Cabinet of Ministers of Ukraine of March 6, 2002 No. 264 “On Approval of the Procedure for Accounting of Places of Mass Recreation of the Population on Water Bodies”²⁷ it was established that mass recreation places include land plots for organised recreation on islands, coastal protective strips of water facilities, as well as places for recreational and sport fishing in the winter. The document also emphasises that these places are subject to constant maintenance by emergency and rescue services. Thus, we are talking about certain territories, their location, and composition (in particular, recreational and sports fishing sites in the winter) - and their features are highlighted. The competence of local self-government bodies regarding the characterisation of these places, as well as the mandatory coordination of them with the competent state bodies and the recording of places of mass recreation of the population in special documents is more than sufficient.

Limiting the access of citizens in any way (including by putting fences or other structures) to the coast of water bodies on the land plots of coastal protection strips that are in use by citizens or legal entities, as well as charging a fee, is the basis for termination of the right to use land plots of coastal protection strips by court decision (paragraph 2, part 4, Art. 60 of the Land Code of Ukraine; Art. 88 of the Water Code of Ukraine).

In addition, it is necessary to pay attention to Part 1 of Art. 61 of the Land Code of Ukraine and Part 1 of Art. 89 of the Water Code of Ukraine, which note that coastal protective strips are a nature conservation area with a regime of limited economic activity. It is prohibited to

²⁷ Resolution of the Cabinet of Ministers of Ukraine No 264 of 06 March 2002 ‘About approval of the Procedure for accounting for places of mass recreation of the population on water bodies’ <<https://zakon.rada.gov.ua/laws/show/264-2002-%D0%BF#Text>> accessed 20 July 2022.

carry out the relevant types of activities which are provided for in Part 2 of Art. 61 of the Land Code of Ukraine in coastal protective strips along rivers, around reservoirs and on islands.

Thus, the report on the strategic environmental assessment of the city target program for the development of the information and communication sphere of Kyiv city for 2022–2024 determines that the current state of small water bodies in the city causes concern, because many are clogged - the coastal protective strips of water bodies are littered with unauthorised landfills of domestic and construction waste.²⁸ It is prohibited to erect fences or other structures that prevent citizens from accessing the banks of rivers, reservoirs, and islands in coastal protective strips, except for cases stipulated by law (Part 5, Art. 61 of the Land Code of Ukraine). For example, allocating and granting the ownership or rental use of land plots on the Dnieper floodplain leads to the impossibility for citizens to gain free access to the water area and their limited movement in the 100-meter coastal protective strip.²⁹

Therefore, at the legislative level, if the conditions are observed, it is possible to realise the right to general water use and having access to the water object. In particular, there must be physical access to the water object itself, and the waters in such an object must be suitable to exercise such a right. In this case the requirements regarding limited economic activity within the coastal protection zone must be met.

4 PRACTICE OF RESOLVING DISPUTES REGARDING PROTECTING THE RIGHT TO GENERAL WATER USE IN UKRAINE AND ABROAD

Before analysing court decisions within the outlined issues, it should be noted that in the current legislation of Ukraine, it is possible to resolve certain disputed situations outside of court proceedings. In particular, according to paragraph 14 part 1 Art. 33 of the Law of Ukraine “On Local Self-Government in Ukraine”³⁰, under the authority of the executive bodies of village, rural and city councils there are delegated powers to ensure unhindered and free access of citizens to the coast of water bodies and islands for general water use in accordance with the law. According to part 3 of Art. 158 of the Land Code of Ukraine, among others, local self-government bodies resolve land disputes within the territory of territorial communities regarding land use restrictions. That is, there is a possibility of solving disputed issues within the defined sphere without going to court.

In turn, analysing judicial practice regarding the outlined issue, it can be noted that there are certain cases that were considered by the courts regarding the illegality and cancellation of relevant decisions, as a result of which the right of citizens to general water use was violated, the elimination of obstacles to general water use³¹ (although the courts refused to satisfy the claims due to the groundlessness of the claims).

28 Anna Tretjakova, Ghennadij Marushevsjkyj and Nadija Redjkina, Report on the strategic environmental assessment of the City target program for the development of the information and communication sphere of the city of Kyiv for 2022–2024: Project (KNDU NDIRoM 2021) 27 <<https://dsk.kyivcity.gov.ua/files/2021/4/30/ZvitCEO.pdf>> accessed 20 July 2022.

29 Ibid 11.

30 About local self-government in Ukraine (n 20).

31 Case No 297/807/20 (Berehivskiyi raion court of Zakarpatska oblast, 14 May 2020) <<https://reyestr.court.gov.ua/Review/89439103>> accessed 20 July 2022; Case No 133/2348/19 (Koziatynskiyi city-raion court of Vinnytsia oblast, 04 February 2020) <<https://reyestr.court.gov.ua/Review/87529538>> accessed 20 July 2022; Case No 495/9608/19 (Bilhorod-Dnistrovskiyi city-raion court of Odessa oblast, 13 July 2020) <<https://reyestr.court.gov.ua/Review/90345757>> accessed 20 July 2022; Case No 141/983/13-ц (Orativskiyi raion court of Vinnytsia oblast, 21 November 2013) <<https://reyestr.court.gov.ua/Review/35767855>> accessed 20 July 2022; Case No 160/5771/20 (Dnipropetrovsk circuit administrative court, 19 February 2021) <<https://reyestr.court.gov.ua/Review/95271667>> accessed 20 July 2022.

Examining judicial practice in more detail, we can come to the conclusion that quite often persons that fall into certain circumstances in which the right to general water use is violated do not turn to the relevant authorities to properly record the manifestations of such an offense nor take action aimed at restoring this right. Of course, to prove the fact of violation of such a right, a sufficient amount of evidence must be collected to prove the commission of an offense with reference to the norms of current legislation.

Analysing the circumstances of the case in which the court ruled in favor of the claimants and satisfied the claim,³² it can be noted that the violation of the right to general water use took place due to the actions of the relevant city council, as a result of which changes were made to the document that regulated the issue at the local level regarding access to the water body. In connection with this, the general access of citizens and the plaintiff personally to the beach area was actually eliminated, and access to the water body was limited. Having these factual circumstances of the case and relying on the relevant provisions of the current legislation, which regulate the powers of local self-government bodies and the procedural features of making such decisions, the claimant proved in court the illegality of the defendant's actions and, accordingly, the violation of the right to general water use. Analysing all the circumstances of the case, the court concluded that in this case the disputed decision violated the rights and interests of the claimant as a member of the territorial community (resident) of the city.

In turn, with regard to other court decisions in which the courts refused to satisfy the claims due to their groundlessness, the arguments related to proving certain circumstances, which, according to the claimants in various cases should have convinced the court of the existence of obstacles which did not allow them to carry out general water use. In particular, in most cases, attention was focused precisely on the performance of certain actions by the relevant entities which were given water bodies for use under certain conditions, or on the inaction of bodies authorised to take specific actions, as a result of which, according to the claimants, their rights to general water use were violated.

In addition, there is foreign case law, for example, the decision of Newhaven Port and Properties Ltd, R (on the application of) v East Sussex County Council & Anor (25 February 2015)³³ and *Blundell v Catterall* (7 Nov 1821)³⁴ which, among others, related to the resolution of issues related to the implementation of opportunities pertaining to access to the coast of the relevant water bodies.

In particular, for example, in the case *Newhaven Port and Properties Ltd, R (on the application of) v East Sussex County Council & Anor* (25 February 2015) Edwin Simpson acted for Newhaven Town Council in its attempt to register a sandy beach within Newhaven harbour as a village green, from the public inquiry all the way to the Supreme Court. The Supreme Court held that the use by local people was not 'as of right' because it was implied as permitted by the by-laws in force in connection with the land, and such registration would in any event have been incompatible with the statutory purposes of the port.³⁵ In turn, as regards the *Blundell v Catterall* case (7 Nov 1821), this early English case concluded that the public has no use rights in privately owned wet-sand areas.³⁶

32 Case No 310/4071/16-a (n 31).

33 *Newhaven Port and Properties Ltd, R (on the application of) v East Sussex County Council & Another* (Supreme Court of the United Kingdom, 25 February 2015) <<https://www.supremecourt.uk/cases/uksc-2013-0102.html>> accessed 20 July 2022.

34 *Blundell v Catterall* (Court of the King's Bench, 7 November 1821) <<https://vlex.co.uk/vid/blundell-against-catterall-802230897>> accessed 20 July 2022.

35 *Newhaven Port and Properties Ltd, R (on the application of) v East Sussex County Council & Anor* (n 34).

36 David W Owens and David J Brower, *Public use of coastal beaches* (Sea Grant Publication 1976) 292 <<https://www.govinfo.gov/content/pkg/CZIC-gc57-2-n6-1976/pdf/CZIC-gc57-2-n6-1976.pdf>> accessed 20 July 2022.

That is, in the absence of access to the coast of water bodies on land plots of coastal protection strips, the right of citizens to general water use is limited, which cannot be properly implemented.

5 CONCLUDING REMARKS

As a result of developing the norms of environmental legislation at the national and international levels, judicial practice, and general theoretical scientific provisions in the spectrum of the right to general water use, it is possible to come to certain conclusions. The state of Ukraine guarantees its citizens environmental rights defined by the legislation. Basic environmental rights include the right to general use of natural resources, in particular the right to general water use. Any citizen has the right to access and use water bodies according to the law. These rights are regulated in detail in a number of environmental legislative acts. Accordingly, a certain legal basis for ensuring the rights of citizens is currently provided for in the environmental (in particular, water and land) legislation of Ukraine. These rights are guaranteed. Thereby, there are reasons to seek the environmental rights provided for in the law by applying to the court. The functioning of courts regarding protection of environmental rights given the judicial reform acquires significant importance.

Until recently, citizens have mostly not gone to court to protect their environmental rights, there were only rare cases of judicial review of such cases.

Recently, there has been an increase in the number of appeals by citizens to the courts, including on the investigated problems, and the number of cases under consideration is also increasing. But it should be emphasised that claimants have to overcome a number of difficulties in order for their evidence to be recognised by the court as reliable and well-founded. In most cases, the lack of proper argumentation from claimants leads to the adoption of a decision not in their favour. Having certain deficiencies in regulatory legal acts plays an important role in this process. Therefore, the legislator should pay attention to the need to improve legislation in terms of ensuring the implementation of the environmental rights of citizens, namely their implementation of general water use.

Taking into account the importance of the Water Code of Ukraine in the modern period as a foundation of water legislation, which establishes the goals and directions of water relations regulation, relevant proposals are argued for improving water legislation – making changes and additions to this code.

Thus, it is expedient to introduce additions to the general provisions of the Water Code of Ukraine regarding the formulation of objects of legal regulation of general water use, namely “water object of public use”, “places of mass recreation of the population on water objects”, and “beach”. In addition, there is a need to determine the relationship between the specified terms and those already established in the code – “water body”, “beach zone”, and “coastal protective strip”.

Also, an addition should be made to chapter II “State management and control in the field of water use and protection and reproduction of water resources” regarding a clear definition of the powers of local self-government bodies and state bodies regarding control in the researched area. In addition, there is a need to classify types of general water use rights depending on the purpose of use (for example, bathing, boating, recreational and sport fishing, etc.). Accordingly, for certain types of use, it is necessary to establish unequal legal regimes. The differences between the mentioned regimes should be reflected in the code.

Identified problematic issues must be resolved, especially considering that the observance of the environmental rights of citizens is one of the leading principles according to which the

state environmental policy of Ukraine are implemented (the Law of Ukraine “On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period Until 2030”).³⁷

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³⁷ Law of Ukraine No 2697-VIII of 28 February 2019 'About the Basic principles (strategy) of the state environmental policy of Ukraine for the period till 2030' <<https://zakon.rada.gov.ua/laws/show/2697-19#Text>> accessed 20 July 2022