

CITIZEN'S ENVIRONMENTAL ENFORCEMENT IN UKRAINE

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SUMMARY

The democratic provisions of new Constitution and legislation of Ukraine in the sphere of protection of environmental rights of citizens are described in the article as well as the obstacles for their transfer to reality. Case studies and recommendations are provided on how to overcome these obstacles and to improve environmental citizens' enforcement in Ukraine.

1 LEGISLATIVE FRAMEWORK OF CITIZENS' ENFORCEMENT IN UKRAINE

1.1 After the collapse of the Soviet Union the system of environmental legislation was created in newly independent states (NIS) including Ukraine. Many of democratic principles on citizens rights, access to information, transparency of decision making process and public participation in it as well as access to justice for citizens and NGOs were established in new legislation.

Article 50 of the Constitution of Ukraine, adopted in 1996, guarantees every citizen the right to an environment that is safe for life and health and to compensation for damages inflicted through the violation of this right. Everyone is also guaranteed the right to free access to information about the environmental situation and the quality of food and consumer goods and also the right to disseminate such information.

Article 16 of the Constitution of Ukraine declares the state's responsibility to ensure ecological safety and to maintain the ecological balance on the territory of Ukraine, to overcome the consequences of the Chernobyl catastrophe and other catastrophes of global scale, and to preserve the gene pool of the Ukrainian people.

Article 55 of the Constitution lays the foundation for court standing for citizens. It states, that every person is guaranteed the right to appeal the court decisions, actions and inactivity of state bodies, local authorities and public officials. Citizens also have the right to compensation from the state government or local authorities for physical and psychological (moral) damages caused by the unlawful decisions, actions and inactivity of state bodies, local authorities as well as by their public officials.

1.2 The Law "On Protection of Natural Environment" (adopted in 1991) contains the special chapter on citizens rights, among them the rights:

- to safe for life and health environment;
- to participate in discussion of draft laws, of the materials on siting, constructing and reconstructing of objects which can have negative impact on the environment and make a proposals to the state authorities;

- to participate in development and implementation of plans and measures for environmental protection and usage of natural resources;
- to assemble into public environmental organizations;
- to receive full and reliable information about the state of environment and its impact on the health of population;
- to participate in conducting of public environmental expertise; and
- to sue to the court versus state bodies, enterprises, institutions and organizations for compensation for damages caused to their health and property through negative impact on the environment.

Public organizations (NGOs) have most of these rights granted to them by article 21 of this law.

1.3 According to the Law “On Environmental Expertise” (adopted in 1995) the developer has to ensure publicity of Environmental Impact Assessment (EIA) procedures, publish the Statement about environmental consequences of planning activity in the mass-media and take into account public opinion. At the same time public organizations, NGOs, have the right to initiate and develop independent public environmental expertise.

This law also contains a possibility to create consultative councils in state bodies responsible for conducting of environmental expertise which consist of public experts and representatives.

2 OBSTACLES FOR CITIZENS’ ENFORCEMENT

The new democratic provisions in the Constitution and current legislation of Ukraine shows the establishment of a “rule of law” society in a post-communist country. However, the enforcement of these provisions is not so good because environmental rights granted by legislation are not used or exercised enough by the public and are not supported enough by governmental officials. Unfortunately, little has been done during the last seven years to translate legal provisions into the practice. Many of these principles are “democracy on paper”. Analyzing the reasons for this phenomenon, we can certify the following.

2.1 The laws in this sphere are very new. Citizens do not often know about their environmental rights granted them by the law. The low level of environmental consciousness and legal culture of the population and lack of traditions of public participation in environmental decision-making make citizens’ enforcement in Ukraine very weak and undeveloped.

It should be noted, that the level of environmental consciousness of judges and other governmental officials, dealing with environmental enforcement, is rather low too, as well as their knowledge of complicated environmental legislation.

2.2 The principle of separation of legislative, executive, and judicial branches of power has been implemented in Ukraine just from 1995 after the adoption of the Constitutional Agreement. So, the court system is just forming now as an independent branch of power. Citizens’ suits versus state or governmental bodies or their officials for protection of public environmental interests are a very new phenomenon. Such a practice is in the process of birth and creation.

2.3 The laws in this sphere are rather general and do not contain concrete mechanisms for their enforcement. For instance, the most powerful tools for citizens' enforcement in Ukraine are the Environmental Impact Assessment (EIA) and Environmental Expertise (EE) of the projects which can have a negative impact on the environment and on the health of the population. The general obligation of the developer to conduct public hearings is contained in the legislation of Ukraine. However, it is violated very often in practice without any liability.

It is difficult to enforce these provisions because the procedure of public involvement, especially public hearings, submitting of public comments and proposals are not regulated in the legislation.

One of the most significant obstacles for enforcement of the above mentioned provisions is the lack of access to information about EIA or EE being conducted. The developer and local authorities should be made responsible for informing the public about planned activities which can have a negative impact on the environment, and for taking into consideration public comments and proposals, otherwise public participation provisions will be no more than declaration.

2.4 Access of citizens and NGOs to environmental information plays a very important role in citizens' enforcement. However, the duty of the state bodies and governmental officials to give the public full and reliable information on the state of the environment and its impact on the health of the population in requested form and terms, determined by law, is violated very often in practice.

The substantial questions for citizens of payment for information or receiving it free of charge, forms of information available for public are not clearly regulated in current legislation. These questions should be addressed by the legislation of Ukraine in accordance with the Convention on Access to Information and Public Participation in Environmental Decision-making after its ratification by Ukraine. The possibility to place environmental information on the INTERNET would be welcomed by the public, although the opposite opinion of governmental officials and their arguments about the bad economic situation in the Newly Independent States (NIS) could be expected.

2.5 The Current economic crises in Ukraine is not a favorable situation for solving environmental problems. The stopping of economic development and activity of a huge amount of industrial enterprises has promoted the improvement of environmental situation in terms of reduction of pollution. On the other hand, the main obstacles for environmental enforcement are:

- The lack of financing for environmental protection measures and for introduction of purifying equipment, saving energy and other environmentally sound technologies.
- Inability to make payment of fees for pollution of the environment and penalties for environmental transgressions. Even in cases when the court or other state body responsible for environmental enforcement made the decision to impose fines or to compensate the damages inflicted by polluter, the decision is not implemented very often because of the absence of money even to pay salaries for the employees.

2.6 The next substantial obstacle for citizens' enforcement is lack of finances to pay state duty and other court expenses which are usually huge (from one to one hundred minimum salaries for a month) in order to bring a suit.

For example, in the case called “Sosnivka” for the name of a small town in which more than 2000 children are sick on fluorosis and osteoporosis because of fluoride pollution of underground waters used for drinking water supply, the amount of state duty which NGO Ecopravo-Lviv had to pay for bringing the case to arbitration court on behalf of an NGO of mothers whose children suffered from fluorosis was 9 000 grivnas (about US \$ 4 500). It made access to justice for citizens unaffordable. The amount of state duty is calculated as 5% of the value of the suit - costs for the construction of fluoride treatment plant by the polluter, a coal mining company. According to the Arbitration Procedure Code it is impossible to waive payment of state duty even for an NGO which is trying to defend environmental rights of citizens. As a result, the amount of sick children has grown from 600 up to about 2500, as well as the territory of pollution and aggravation of diseases.

According to the legislation only a few groups of citizens are released from paying of state duty and court fees (for instance citizens who suffered from the Chernobyl catastrophe, disabled veterans of the Great Patriotic War and their families, all Ukrainian and international unions and others).

The most expensive part of the court expenditures is the cost for a court to obtain the ecological expertise that is necessary to prove causation between the fact of pollution of the environment, violation of environmental legislation, activity of some enterprise and damage caused to the environment and the health of the population.

The party whose requirements were satisfied by the court decision has to be reimbursed for all court expenses (state duty, court expenses including conducting of the court expertise) from the other party.

2.7 The principle of filing a lawsuit about termination or prohibition of some kind of activities of enterprises, institutions and organizations which pollute the environment is missing in the legislation of Ukraine. However, there is such a provision in the draft Civil Code of Ukraine which will be adopted soon.

In this case it is possible to use provisions of the Law “On Environmental Expertise.” This law contains a possibility for citizens to sue illegal construction of some objects without a positive conclusion of state ecological expertise but which can have a negative impact on the environment.

The successful example of citizens’ enforcement against both government and business is represented in the NGO Ecopravo-Lviv case called “Terminal”.

The project, a chemical fertilizer terminal to be located in Mykolaiv, is financed by an Irish/Russian/Ukrainian joint venture. On the day the joint venture registered to do business, it donated thirty trams and thirty trolley buses to the city. Local authorities subsequently approved the project, and construction began in August 1995, in violation of environmental laws requiring that an Environmental Expertise be conducted prior to project approval.

However, the local Ministry of Environmental Protection and Nuclear Safety (Ecosafety) ordered the company to conduct an Environmental Expertise of the project, and a prosecutor with the Sanitary Epidemiological Station (SES) ordered the company to stop the work.

The company then submitted the project to the local EcoSafety office for Environmental Expertise. The company failed, however, to publish the Environmental Impact Assessment Statement, in violation of the Law on Environmental Expertise. Local EcoSafety officials subsequently rejected the project on the grounds that it might have unacceptable negative environmental impacts. However, the company then requested the national EcoSafety office in Kiev to review the local EcoSafety office’s Environmental Expertise, and officials in Kiev reached a positive conclusion in their Environmental Expertise, overturning the local EcoSafety office’s rejection of the project.

The Ecopravo-Lviv sued the Minister of EcoSafety in the High Arbitration Court, claiming that the Environmental Expertise it conducted was deficient on procedural grounds. The Ecopravo-Lviv represented two clients in the action filed in the High Arbitration Court: Zeliony Svit (Green World), an environmental non-governmental organization and a shipbuilding company that claimed that the health of its workers would be adversely affected by the terminal. Over 10,000 local citizens also signed a petition opposing the project. By the conclusion of the case, this number had increased to 100,000, including the members of the representative bodies such as local cooperatives and labor unions.

In its lawsuit, the Ecopravo-Lviv claimed that the Ministry's Expertise was invalid primarily on the following grounds:

First, the Ministry failed to require the company to publish the Environmental Impact Statement prior to commencement of the Environmental Expertise, thereby depriving the public of the opportunity to participate meaningfully in the process.

Second, construction of the project began before the Ministry completed its Expertise. This is strictly prohibited under the Law on Environmental Expertise.

Third, the Ministry failed to publish the Conclusion of the Environmental Expertise. A news article announcing the Expertise was published after the fact, and differed from the actual Conclusion.

Fourth, the Ministry failed to take public opinion into account, as required by the Law on Environmental Expertise. In the face of 100,000 citizens voicing opposition to the project, and a public expertise that found the project to be unsuitable, the Ministry approved the project.

Fifth, the Ministry failed to consider adequately the negative environmental impacts associated with the project, including but not limited to possible impacts on endangered species, the surrounding estuary, and pre-existing elevated contaminant levels in the South Bug River. In fact, a representative of the shipbuilding company recently observed significant numbers of dead fish in the estuary. This was brought to the judge's attention during the hearing.

The judge G. made a decision in favor of the Ecopravo-Lviv, and ordered the Ministry to require the company to cease the work on the project. The Court exercised its authority under the Law on Environmental Expertise to find the conclusions of an Expertise invalid when procedural requirements are violated. The Court found that the Environmental Impact Assessment (EIA) Statement was published two months after the Expertise was completed, in violation of the public's rights to be informed and to participate in the Expertise process.

The Ministry argued that its failure to publish the EIA Statement did not affect the outcome of the Expertise, because the public knew about the project. The Court rejected this argument outright, since the Expertise Law does not provide for substitution of the notice requirement. Because of the absence of the notice of the Expertise, the Court observed that the citizens could not fully take part in the process.

This case represents a landmark victory for environmental NGOs on issues fundamental to a meaningful citizens' enforcement. Not only does the decision uphold basic principles of participatory democracy, it sends a clear message to governmental officials and citizens that public officials can be held accountable under the law for their actions. This case proves the citizens currently suffering violation of their environmental and civil rights, those rights can be enforced.

The Ministry of Ecosafety has filed an appeal to the Colleguageum of High Arbitration Court. The battle is continuing.

2.8 Citizens can obtain an interim or injunctive relief against governmental bodies or polluters. However, the problem in this case is that the court can oblige the plaintiff to make a bond which would guarantee the compensation of the damages which would be caused to

the defendant by the injunctive relief. Usually, the sum of such bond in environmental cases against polluters is huge and citizens or NGOs can not pay it. It makes the provision a “paper rule” which is impossible to enforce and leads to discrimination of public interests.

2.9 The next obstacle for citizens enforcement is the lack of lawyers, specialized in the sphere of environmental law and the shortage of public interest environmental lawyers in Ukraine. Only the network of Ecopravo public interest environmental firms is working pro bono for citizens and NGOs in three cities of Ukraine - Kyiv, Lviv and Kharkiv. They consult citizens and NGOs and represent their interests in the state and governmental bodies as well as in the court. Three Environmental Public Advocacy Centers (EPAC) are doing great and new job-creating precedents of court defense of environmental citizens rights, citizens’ enforcement with the financial support of Central and Eastern Environmental Law Initiative American Bar Association (CEELI/ABA) realizing the joint EPAC project.

2.10 Lack of traditions to solve environmental problems and to protect environmental rights of citizens in the court, lack of people’s trust to the independent court connected with the corruption of judges and governmental officials are the next groups of hurdles for citizens’ enforcement in Ukraine.

What could be recommended in order to improve citizens’ environmental enforcement?

3 RECOMMENDATIONS

Accordingly to the mentioned above are the following:

- a) To make environmental information more accessible for the public. To exercise and to enforce the right of information by writing requests for information to different state and governmental bodies, and to appeal to the high level authority or to the court in case of refusal of the request; to place the most important environmental information in the Internet.
- b) To develop environmental legislation in order to promote mechanisms of enforcement of general democratic provisions of transparency and public participation in environmental decision-making; to create and to lobby the adoption of regulations on procedure of public hearings in EIA, EE, and mechanisms of public participation in siting, permitting, licensing, management of environmental funds and other types of decision-making.
- c) To include the provisions about the possibility of waiving state duty and court expenditures or at least its reduction for the citizens and NGOs which sue to the court to defense public interests in order to improve affordability of citizens’ enforcement.
- d) To create precedents and to develop court practice on citizens’ suits against state and governmental bodies and its officials which violate the law or are inactive in compliance of their duties in the sphere of environmental protection, as well as the court defense of environmental rights of citizens.
- e) To develop and support the network of public interest lawyers, to create new public interest environmental law firms, to exchange experience with colleagues in Central and Eastern Europe and Newly Independent States (NIS) region.

- f) To promote environmental education, especially in the sphere of environmental law and environmental rights of citizens and NGOs;
- g) To conduct training programs for lawyers on environmental enforcement including explanation of the importance of citizens' enforcement and court defense of environmental rights of citizens.
- h) To actively spread information about successful court cases in mass-media in Ukraine and NIS. That could encourage people to go to the court for solving environmental problems or for defense of violated citizens' rights and to overcome people's disbelief in independent justice.

