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THE NORMS OF THE AARHUS CONVENTION IN TERMS OF COMBINING THE RIGHT TO A HEALTHY ENVIRONMENT AND THE DUTY TO PROTECT IT

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By ratifying the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) Ukraine has committed itself to a change of established practices regarding the provision of environmental information and the right of the public to appeal to the court with claims for environmental protection. The implementation of the norms of this Convention has become quite problematic, not least due to the insufficient level of environmental awareness of Ukrainian society. However, positive changes in this area are still taking place, not least due to the active work of various public environmental organizations. It seems that the scientific study of the norms of the Aarhus Convention will also to some extent contribute to the progress of our state and society in the field of environmental protection.

We consider it necessary to enshrine the "automatic" recognition of legal interest (i.e. the right to sue in matters relating to environmental protection) for any non-governmental environmental organization registered and operating in accordance with Ukrainian law. This will meet the requirements of Part 4 of Art. 3 of the Aarhus Convention, according to which our state ensures "proper recognition of associations, organizations or groups that contribute to the protection of the environment, and provides them with appropriate support and ensures compliance of its national legal system with this obligation".

Among the trends that can be considered extremely positive is the recent legal conclusion of the Supreme Court in the case of banning the dolphinarium. In this case, the Supreme Court stressed that "the right to protection of the violated constitutional right to a safe environment belongs to everyone and can be exercised both personally and with the participation of a public representative". Given the binding nature of the Supreme Court's legal conclusions, we hope that this case will be a significant milestone in bringing domestic legislation and the practice of its application to the requirements of the Aarhus Convention.

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Key-words: Aarhus Convention; Supreme Court; the right to a safe environment; Access to Justice in Environmental Matters; implementation of the norms of Aarhus Convention.

By ratifying the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) [1], Ukraine has committed itself to a change of established practices regarding the provision of environmental information and the right of the public to appeal to the court with claims for environmental protection. The implementation of the norms of this Convention has become quite problematic, not least due to the insufficient level of environmental awareness of Ukrainian society. However, positive changes in this area are still taking place, not least due to the active work of various public environmental organizations. It seems that the scientific study of the norms of the Aarhus Convention will also to some extent contribute to the progress of our state and society in the field of environmental protection.

The right to appeal to the court to protect one's right is a kind of "service" auxiliary right necessary to protect an unrecognized, disputed or violated "fundamental" right. The right to appeal to the court for protection in the procedural aspect is directly related to the issue of the plaintiff's affiliation. As a rule, no problems arise if a person files a lawsuit to protect his or her rights and legitimate interests directly. However, the situation is much more difficult if the lawsuit is filed, for example, by a public organization (with regard to environmental rights, the share of lawsuits filed by public organizations is quite significant).

This issue is regulated, in particular, in the above-mentioned Aarhus Convention, in particular, Part 2 of Art. 9 provides that "each Party shall, within the framework of its national law, ensure that relevant representatives of the public concerned who show sufficient interest or, alternatively, b) who believe that there has been a violation of a right when it is stipulated by the administrative-procedural norms of the respective Party, had access to the procedure for reviewing decisions taken in court and/or another independent and impartial body, established in accordance with the law, in order to challenge the legality of any decision, acts or omissions from a legal and procedural point of view, subject to the provisions of Article 6 [1]. In this case, according to the Convention, the term "public concerned" means "the public which is or may be influenced by the decision-making process on environmental issues, or which has an interest in this process", in this case, "for the purposes of this definition, non-governmental organizations that promote environmental protection and meet the requirements of national legislation are considered to be of interest"[1].

It is also important (and this should be emphasized, as such a vision is not inherent in domestic law) that the Aarhus Convention considers the human right to a safe and healthy environment not only as a right but also as a duty, i. e. this right is rather a power.

Thus, the Convention recognizes not only that "each person has the right to live in an environment conducive to his or her health and well-being", but also that [each person] is also obliged both individually and jointly with other people to protect and improve the environment for the benefit of present and future generations (Preamble to the Convention) [1]. This wording seems extremely interesting, in part because it reflects the environmental awareness, typical, in particular, of the Scandinavian countries. In this case, we are talking about the lack of environmental absenteeism – manifestations of indifference or passive attitude to the exercise of their rights and responsibilities, including environmental [2, p. 99]. For comparison, according to Art. 16 of the Constitution of Ukraine, ensuring environmental security and maintaining ecological balance is the duty of a state alone [3]. Art. 50 of the Constitution proclaims the right of everyone to a safe environment for life and health and to compensation for damage caused by violation of this right [3]. According to Art. 66 of the Constitution of Ukraine, everyone is obliged not to harm nature [3]. The obligation to "protect and improve" the environment is not mentioned in the Constitution of Ukraine [3]. No, we do not consider it necessary to make legislative changes in this regard, because we believe that frequent changes and even proposals for changes in the Basic Law of the state negatively

affect its authority and legal awareness of the citizens of Ukraine as a whole. We would just like to draw attention to the peculiarities of the wording of the legal norms of the Aarhus Convention, where the right to a favorable environment for human health and well-being is inextricably linked with the duty of each individual or community to protect and improve the environment.

Such a duty (and in connection with the law it can be considered as a power) is not inherent in Ukrainian law. Thus, as noted above, the Constitution does not provide for it, and, for example, the obligation of a citizen to keep nature safe, guard and rationally use it (Article 12 of the Law of Ukraine "On Environmental Protection" [4]) is not a similar to the duty to protect and improve the environment.

At first glance, this legal construction can be considered declarative, and unjustified, in the end, remains just a figurative artistic expression. However, this is not the case. In fact, in the current context of the global environmental crisis, such formulations are intended to emphasize the specifics of environmental rights, because when it comes to protecting the right to clean air, water or other components of a healthy and safe environment, then, of course, this will affect the interests of an indefinite number of persons, not just the person or organization filing the claim. Some countries, seeking to emphasize the special role of environmental rights, have resorted to interesting legal innovations, which, however, given the environmental situation in these specific countries and in the world as a whole, cannot be called impractical or unclear. Thus, in particular, Ecuador became the first country to enshrine in its Constitution the rights of nature and ecosystems to exist, reproduce and restore (2008) [5, p. 403]. These norms have already been applied by the courts of Ecuador in resolving several cases [6]. Bolivia has enshrined the status of "mother earth" in its Constitution, the logical continuation of which should be the "Ley de Derechos de la Madre Tierra" (Mother Earth Rights Act). This law enshrines a total of 11 rights to the biosphere and wildlife, including the right to life and existence, to life cycles without human intervention, to clean water and clean air, protection from pollution, to maintain balance, the right to preserve cellular structures in its original form and freedom from major projects that affect the balance of ecosystems and areas inhabited by indigenous peoples [7]. In 2011, the City Council of Pittsburgh (USA) passed a law that "completely prohibits the extraction of natural gas and states that nature has an inalienable right to exist and prosper" [5, p. 404].

Given this state of affairs, the above-mentioned legal construction of the Aarhus Convention becomes clearer. If the subject of the right to a healthy and clean environment is nature, then person only enjoys the positive consequences of exercising such a right, and accordingly, he/she may be obliged to protect [his/her right to a clean and safe] environment. Of course, the question is: is there and what should be the responsibility for violating this duty? After all, it is known that a legal obligation is effective, as a rule, only when it is secured by liability. Of course, to prosecute anyone who does not resort to any means of protecting their environmental rights is nonsense. Then what was the purpose of this duty? What is its role? In order to better understand the essence of this duty, it is necessary to resort to a targeted interpretation of the norms of the Aarhus Convention [1]. Thus, according to the Preamble to it, a number of important rights, which are, in fact, the heart of this convention, are granted precisely "to enable to assert this right and fulfill this duty" [1]. Thus, the right to access to information, the right to participate in the decision-making process, the right to access to justice in environmental matters is, in fact, tools to protect the environment, in particular, in court. It seems that the formulation of the right to a favorable and healthy environment as a link between right and duty (in fact, as a person's power) aims to emphasize the importance of going to court or another authorized state body for environmental protection. The mention of the duty to make such a request does not indicate a possible prosecution for failure to act in defense, but rather indicates the special importance of exercising the rights of access to information and justice. Thus, the Preamble to the Convention emphasizes "the importance of the respective roles that individuals, non-governmental organizations and the private sector can play in environmental protection" [1]. This is especially important and explains the Convention's rather broad interpretation of the legal interest, which gives the right to go to court on environmental issues. Thus, according to Part 5 of Art. 2 of the

Convention, the term "public concerned" means the public that is or may be influenced by the decision-making process on environmental issues, or which has an interest in this process [1]. Such an understanding is generally not new for either Ukrainian legislation or domestic law enforcement practice. However, the continuation of this norm is not always accepted by Ukrainian courts without reservations: non-governmental organizations that promote environmental protection and meet the requirements of national legislation are considered to be of interest [see, for example, 8]. Such "automatic" recognition of legal interest (i. e. the right to sue in environmental issues) for any non-governmental environmental organization in general has not yet been adequately reflected in Ukrainian law and the explanations of higher courts. As a rule, domestic courts try to find some additional circumstances, first of all, related to the territorial principle (place of registration of a public organization, place of residence of an individual, etc.) to further substantiate the legal interest of such plaintiffs. Meanwhile, the analysis of the norms of the Aarhus Convention allows to identify several factors that should not be taken into account when determining the presence of interest in environmental protection (respectively, and when determining the presence or absence of the right to sue): 1) quantitative (according to the preamble to the Convention [1], the term "public" means an association, organization, group of persons, and one or more individuals or legal entities); 2) territorial, national or other affiliation (Part 9 of Art. 3 of the Convention [1] provides the public with the opportunity to participate in the decision-making process and access to environmental justice without discrimination on grounds of citizenship, nationality or place of residence, and for legal entities – without discrimination on the grounds of its registered location or actual center of activity).

Another interesting fact to note is that the Convention [1] uses the phrase "legitimate economic interests", while the legality or illegality of environmental interests is not mentioned. Thus, it can be assumed that the interests related to environmental protection (environmental interests) are automatically perceived by the Convention as legitimate, so there is no need for the domestic law enforcer to check for legitimate interest, at least in the case of a lawsuit filed by a public environmental organization.

Among other features related to the definition of legal interest is that in paragraph a) of Part 1 of Art. 4 of the Convention in the case of a public request for environmental information, it is deprived of the obligation to formulate (i.e. justify) its interest [1].

The Convention [1] also deals with the balancing of different types of interests in case, when they conflict with each other (only in terms of access to environmental information). In particular, a request for environmental information may be denied if its disclosure may adversely affect the following interest groups: 1) the legal confidentiality of the activities of public authorities; 2) international relations, national defense or national security; 3) administration of justice, its impartiality and fairness, the ability of state bodies to conduct investigations of a disciplinary or criminal nature; 4) confidentiality of commercial and industrial information protected by law in order to protect legitimate economic interests – with the proviso that information on emissions related to environmental protection is subject to disclosure; 5) intellectual property rights; 6) confidentiality of personal data, archives relating to an individual; 7) the interests of the third party that provided the information (under certain conditions); 8) the environment to which such information applies (for example, places of reproduction of rare species) – Part 4 Art. 4 of the Convention [1].

Thus, the Aarhus Convention attaches special importance to the activities of non-governmental environmental organizations, in particular, automatically recognizing the existence of their legitimate legal interest [1]. However, there are many cases when public environmental organizations pursue in their activities not only and not so much environmental interests. Thus, the Canadian journalist Naomi Klein in her book on global warming covers many aspects of cooperation of various "green" organizations with oil companies, although in fact this contradicts their statutory goals [5, p. 183–189]. In particular, the author describes the case with environmental organization The Nature Conservancy, which declared the struggle for the conservation of black grouse in Texas, USA [5, p. 183–187]. One of the reasons for the extinction of this species was the destruction of their habitats, in particular, due to the activities of oil and gas

companies in these areas. One of the last nesting sites for this endangered species was on land owned by Mobil off the coast of Galveston Bay in southeast Texas. These lands already had active deposits that reached the habitat of black grouse. In 1995, Mobil donated its property in these areas to The Nature Conservancy. Later, The Nature Conservancy, as an environmental organization, also engaged in oil and gas production. Thus, notes N. Klein, under the auspices of the Environmental Union, which in the press was called "the largest non-governmental environmental organization in the world", the rare species completely disappeared from one of its last habitats, due to oil and gas production by the environmental organization for fifteen years [5, p. 185–187]. N. Klein states that most of the environmental movements simply merged with economic interests [5, p. 187].

Of course, this is just one of the possible cases. However, in the case of the Aarhus Convention [1], its norms do not give environmental organizations any extraordinary benefits or advantages in their activities; in no way weaken their responsibility, and so on. Even if there is a risk that the right to go to court will be used not only to protect environmental interests, the harm of restricting access to justice can be much greater. In today's world, the economic, environmental and other interests of various social groups and businesses are so closely intertwined that even environmental organizations sincere in their struggle for a clean environment can contribute to someone's purely economic interests. Thus, due to the increasing popularity of movements for a clean environment today, even unscrupulous producers have the opportunity to make a profit using environmental issues; Volkswagen's opponents made a profit by exposing fraud with concealment of exhaust gas levels, and so on. [9].

The Aarhus Convention [1] only gives the public and environmental organizations greater access to environmental information and justice, thus placing greater responsibility on the judiciary and, in particular, on the judge who will hear a particular case. Instead of asking whether the plaintiff had the right to file the lawsuit, he/she should focus on the environmental and legal nature of the case. Thus, if a violation of environmental legislation is indeed detected, the case will result in the prevention or cessation of illegal damage to nature, which is positive, even if it also benefits someone's economic interests.

Finally, the Convention provides for two remarks to control the legitimacy of an interest. Thus, not every non-governmental organization is recognized as interested, but only one that promotes environmental protection and meets the requirements of national legislation [1].

Although back in 2009, researchers stated that the level of implementation of Art. 9 of the Convention is quite low [10, p. 68], however, as the analysis of the decisions placed in the Unified state register of court decisions of Ukraine shows, there are noticeable positive changes in this area.

Thus, the wording of the Preamble to the Aarhus Convention, where the human right to a safe and healthy environment is closely linked to the duty to protect it, is intended to emphasize the particular importance of environmental claims. Going to court with such a claim, a citizen or a non-governmental organization shall, in fact, act in the exercise of its powers under this Convention. Therefore, neither quantitative nor territorial factors should be taken into account when determining the presence of interest in the case of environmental protection. The Aarhus Convention "between the lines" emphasizes the special value of environmental interests. Thus, interests related to environmental protection (environmental interests) are automatically perceived by the Convention as legitimate, so there is no need for the domestic law enforcer to check for legitimate interest, at least in the case of a lawsuit by a public environmental organization.

We consider it necessary to enshrine the "automatic" recognition of legal interest (i.e. the right to sue in matters relating to environmental protection) for any non-governmental environmental organization registered and operating in accordance with Ukrainian law. This will meet the requirements of Part 4 of Art. 3 of the Aarhus Convention, according to which our state ensures "proper recognition of associations, organizations or groups that contribute to the protection of the environment, and provides them with appropriate support and ensures compliance of its national legal system with this obligation" [1].

Among the trends that can be considered extremely positive is the recent legal conclusion of the Supreme Court in the case of banning the dolphinarium [8]. In this case, the Supreme Court stressed that "the right to protection of the violated constitutional right to a safe environment belongs to everyone and can be exercised both personally and with the participation of a public representative" [13]. Given the binding nature of the Supreme Court's legal conclusions, we hope that this case will be a significant milestone in bringing domestic legislation and the practice of its application to the requirements of the Aarhus Convention.

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НОРМИ ОРХУСЬКОЇ КОНВЕНЦІЇ В АСПЕКТІ ДУАЛІЗМУ ПРАВА НА БЕЗПЕЧНЕ ДОВКІЛЛЯ І ОБОВ'ЯЗКУ ЙОГО ЗАХИЩАТИ

Ратифікувавши Конвенцію про доступ до інформації, участь громадськості в процесі прийняття рішень та доступ до правосуддя з питань, що стосуються довкілля (Орхуська конвенція), Україна взяла на себе зобов'язання змінити усталену практику щодо надання екологічної інформації та права громадськості на звернення до суду з позовами про охорону навколишнього середовища. Реалізація норм цієї Конвенції стала досить проблематичною, не в останню чергу через недостатній рівень екологічної свідомості українського суспільства. Проте позитивні зміни в цій сфері все ж відбуваються, не в останню чергу завдяки активній діяльності різноманітних громадських екологічних організацій. Видається, що наукове вивчення норм Орхуської конвенції також певною мірою сприятиме прогресу нашої держави та суспільства у сфері охорони довкілля.

Вважаємо за необхідне закріпити "автоматичне" визнання правового інтересу (тобто права на позов у справах, що стосуються охорони навколишнього природного середовища) для будь-якої громадської екологічної організації, зареєстрованої та діючої відповідно до законодавства України. Це відповідатиме вимогам ч. 4 ст. 3 Орхуської конвенції, згідно з якою наша держава забезпечує "належне визнання асоціацій, організацій чи груп, які сприяють захисту навколишнього середовища, та надає їм відповідну підтримку та забезпечує відповідність своєї національної правової системи цьому обов'язку".

Серед тенденцій, які можна визнати надзвичайно позитивними, – правовий висновок Верховного Суду у справі про дельфінарій. Верховний Суд наголосив, що "право на захист порушеного конституційного права на безпечне довкілля належить кожному і може бути реалізоване як особисто, так і за участю представника громадськості". Враховуючи обов'язковість правових висновків Верховного Суду, сподіваємось, що ця справа стане суттєвою віхою у приведенні національного законодавства та практики його застосування до вимог Орхуської конвенції.

Ключові слова: Орхуська конвенція; Верховний Суд; право на безпечне довкілля; доступ до правосуддя з питань, що стосуються довкілля; імплементація норм Орхуської конвенції.