THE ISSUE OF LOCUS STANDI OF NON GOVERNMENTAL ORGANIZATIONS IN THE SPHERE OF ENVIRONMENTAL PROTECTION (CONSTITUTIONAL-LEGAL ANALYSIS)

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The development of human society in the modern world assumes progressively shifted role of the environment and its quality. Raise of human demands in natural resources for satisfaction of versatile needs often leads to disastrous consequences. In this process non-maintenance of the environmental balance eliminates the reproduction capacity of the natural environment and its elements. This, in its turn, brings to a decline in environmental quality and more often - to environmental catastrophe. Growing misbalance in ecosystems and that in the interactions of the human society and the natural environment raises concerns and anxiety in the world. Such a situation logically brings to intensification of international cooperation in the environmental protection, which in its turn stimulates the environmental policy, ecologization of human coincidence, widens adoption of adequate measures by the states.

Among the adopted measures to recover the ecological balance the law has its important role as a regulator in the sphere of interactions of the human society and the environment. The necessity to ensure healthy environment in the interests of human welfare, sustainable and favorable development as a principle, is established in the international treaties. Adequate protection of the environment is necessary also in terms of realization of the fundamental human rights, including the right to life[2].

Perfection of the rights to access to information and public

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[2] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN, New York and Geneva, 1999, pp. 38-71.

participation in the process of decision-making and their implementation facilitate the awareness-raising of the society on the environmental issues, enables the society to express its concerns and provides for the public authority to consider such interests duly[3].

It is a common ground that one of the main motivations for adoption of the UNECE Convention "On Access to Information, Public Participation and Access to Justice in Environmental Matters" (Aarhus, 1998) was the concern that both global and regional environmental treaties "did not work, did not function, were not applied" properly; their low efficiency was highlighted. Within the framework of the Program "Environment for Europe", European countries came to the conclusion that environmental protection depends on the public participation in the environmental decision-making. Therefore, the Aarhus Convention endowed the pubic with wide rights taking due consideration of the application of the national legislation. But the environmental protection is a process not a goal. And this process is not over with the adoption of the Law. Adoption of the Law in the sphere of environmental protection as a result of consensus on the necessity of regulation of the state of the environment opens a new chapter in the history of environmental protection and development of democratic abutment of the society.

Application of the citizens' capacities may significantly enrich and strengthen the process of adoption of legislative acts in the sphere of environmental protection. In the process of participation of the citizens in implementation of the environmental legislation direct connection of the citizens and the environment may be useful as their everyday observations provide with such information on the conditions of the environment, which the Government could not receive timely. The dynamics of relations between the citizens and the Government, organizations responsible for the protection of the environment as a whole or its specific elements supplements the potential efficiency of citizens' participation in the environmental protection.

Yet in the 20th century William O. Douglas, the Judge of the

[3] See ibid.

Supreme Court of the USA, in his truly valuable and interesting book "The Three Hundred Year War: A Chronicle of Ecological Disaster", comes to the conclusion that "legislative power is the force which determines for the environment to be as commodious as clean, sustainable and at the same time duly protected".

Within the framework of the discourse on the human right to healthy and favorable environment, which in the Western Europe goes on for more than thirty years and now also is actual for EECCA countries (Eastern Europe, Caucasus, Central Asia). They came to the conclusion that the formulation of the fundamental right granting the citizen the possibility to request in the court a "clean and healthy environment" is not possible. Even in those countries the constitutions of which had such a formulation, difficulties arose when applying and endowing real content of this right. The provisions of the Constitution of the Republic of Armenia (Articles 10, 18, 33.2, 48.10) are "definitions", the function of which reminds "declaration of state goals".

Nonetheless, in order to strengthen the right, its authority, the legal science of the Western Europe has interpreted the right to healthy and clean environment as "a formalized right" consisting of three elements: right to access to environmental information; right to participate in environmental decision-making; right to access to courts. For example, according to the Law of Germany "On Administrative Courts", each person may, pursuant to the guarantee established in the Article 19 para. 4 of the Main Law, apply to the court to challenge any more or less substantiated breach of individual rights by administrative measures either by not undertaking it.

For taking the case into consideration, it is a decisive issue whether the claimant citizen can prove that his individual right is breached. In this process freedom of action secured by the fundamental rights is often breached as the freedom of the citizen to act "as he or she wants" might be interfered into only on the legal bases and according to the existing law. If the norms on environmental protection are breached, e.g. the rules on protection of species and biotopes, this would not be considered as breach of

individual rights as the species and biotopes are protected not because as specific goods for a citizen but as a common good for society. In this case the individual case of the citizen is not possible even if he or she is willing to achieve correct application of the existing rule. Moreover, even if the permission issued by the authorized body establishes too strict emission normatives or if executive bodies do not take measures when the normative is exceeded, individual rights of the neighbors, according to the prevailing opinion, are considered not to be touched until their health, property are not threatened or essential obstacles raise for their functioning[4].

Consequently, this means that in the German environmental law legal protection is structured asymmetrically: every single breach of law cannot be basis to apply to the court. Generally, breach of law which makes harm to the environment but not to its goods, which does not enjoy judicial remedies for the reason of absence of violated individual subjective rights.

In the legal system, where the protection of the rights first of all depends on the breach of individual subjective rights, symmetrical and full-scale protection of the existing environmental norm might be achieved only if for the cases when objective but not subjective right is breached, special possibilities are established to file a claim[5].

From the viewpoint of the legal policy, the right to file a complaint might be endowed to the environmental associations as it is envisaged in the Aarhus Convention (Article 9, para. 2, 3).

In a democratic society the citizens should be enjoy the right to challenge before the court implementation of legal norms which are accepted by the state power on behalf of the citizens. In many states with democratic traditions, e.g. France and USA, such a right does exist. Legal norms should be secured by the possibility of judicial protection. Otherwise they are risky to become symbolic instruments

[4] O.L. Dubovik, G. Ljube-Volf, Environmental Law, Textbook. Moscow, 2005, pp. 660-661.

[5] O.L. Dubovik, G. Ljube-Volf, Environmental Law, Textbook. Moscow, 2005, pp. 660-661.

of the only "imaginative" environmental policy.

When initiating a case in the court, the "requirement of permissibility" should be satisfied. The issue of *locus standi* is the most important one for the claimant. From the other hand, understanding of these issues may help the public authority whose decisions are being challenged to determine whether the claim will be accepted or not.

In order to initiate a case in the court the claimant should persuade the judge that he or she is actually interested in the concrete case and one or more rights and legal interests are really breached. And here again the standards differ based on whether the case relates to civil or administrative proceedings. The main criteria for whether the person has the right to file a claim depends on what procedure or action is being challenged (Article 9, para. 1, Aarhus Convention): "*Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law*".

As in the decision-making process meeting the category of "public concerned" is a precondition, the claimant needs to prove that he or she will be actually affected by the particular decision (for example, living in the territory for which the permission is issued or where the plan will be realized)[6].

Perhaps this is the most difficult case to prove the right to file an action. Majority of countries are not inclined to recognize the right of natural or legal entities to file environmental action in the court which do not directly affect their right.

In this regards it is important to mention the provision of the Article 9, para 3 of the Aarhus Convention, which highlights certain

[6] Guide on Access to justice; Vol. 4. Implementation of the provisions of the Aarhus Convention in the EECCA countries. Guide for the representatives of civil society. Kiev, Ukrain, p. 203.

possibilities to file actions concerning enactment of the legislation in this sphere.

Discussing the issue of the *locus standi* of NGOs in the meaning of the Aarhus Convention, it becomes obvious that the main criteria to apply to the court is the fact of breach of right but, at the same time, sufficient attention is not paid to the aspect that the functions of the court are not limited explicitly to examination of the fact of the breach of right.

Often locus standi of NGOs is connected to their "legal interest". In this present case the content of the term "legal interest" is connected to the term "justice". When comparing the mentioned terms it becomes obvious that the grounds to apply to the court are both "subjective" and "objective" interest. Herewith, this division is based on the ambiguous meaning of the term "right", which is "subjective" and "objective" right. As for NGOs, breach of objective right is decisive as only in this case public interest might exist. Even if it is accompanied with breach of subjective right, the last *per se* is not a ground for endowing the NGO with a right to apply to court to seek protection of public interests. In other words, NGO acts for protection of the third parties' rights not in classical understanding or according to the "*actio popularis*" principle, but on the ground of "objective legal interest", e.g. when objective right is breached. At the same time, every single breach of objective right is not sufficient for the NGO to have *locus standi*. Breach of objective right might be considered as such only if it has public significance, derives from public relations and when the NGO has "sufficient interest" based on its statutory goals.

Upon the decision of the Constitutional Court of the Republic of Armenia SDVo-906 of 07 September 2010 concerning the constitutionality of Article 3(1)(1) of the RA Administrative Procedure Code, explanation is provided why namely NGOs are endowed with the right to apply to court on the bases of "objective legal interest" in the light of interpretation of the word "his or her" coming after the word "breach".

Returning to the question whether the breach of the sole

subjective right might be the only condition to apply to court, the answer is negative – based on the analysis of the Civil Procedure Code and the Administrative Procedure Code of the Republic of Armenia.

In our opinion, when discussing the issue of NGOs *locus standi*, it is not completely lawful to consider only Articles 18 and 19 of the Constitution of Armenia[7]. Neither the Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms gives an explicit answer. The problem is that these legal acts are related solely to the fundamental rights of natural persons, and the procedural norms are established in so far as they are considered to be guarantees for realization of the right of access to justice.

Article 42.1[8] of the RA Constitution highlights that the fundamental human and citizen's rights and freedoms shall extent also to legal persons insofar as those rights and freedoms are inherently applicable to them. The approach according to which the mentioned formulation is sufficient to determine the content of *locus standi*, especially for legal persons, including NGOs, is not substantiated.

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[7] ***Article 18.*** Everyone shall – for the protection of his or her rights and freedoms – have the right to effective judicial remedies, as well as effective legal remedies before other state bodies.
Everyone shall have the right to protect his or her rights and freedoms by all means not prohibited by the law.
Everyone shall have the right to receive – on the grounds and as prescribed by law – assistance of the Human Rights Defender for the protection of his/her rights and freedoms.
Everyone shall, in accordance with the international treaties of the Republic of Armenia, have the right to apply – with regard to the protection of his or her rights and freedoms – to international bodies for protection of human rights and freedoms.
Article 19. Everyone shall have the right to a public hearing of his or her case by an independent and impartial court within a reasonable time, in equal conditions, meeting all the demands of justice, for restoring his or her violated rights, as well as determining the grounds for the charge brought against him or her.

[8] ***Article 42.1.*** Fundamental human and citizen's rights and freedoms shall extend also to legal persons insofar as those rights and freedoms are inherently applicable to them.

The RA Law "On non-governmental organizations" established several provisions which are understood ambiguously and raise scientific discourse. Article 15(1)(3) of the mentioned Law[9] provides that for realization of its statutory goals non-governmental organization shall enjoy the right "to represent and protect its rights and lawful interests as well as those of its members before the state and local self-government bodies".

Herewith, the given formulation raises several problems:

Non-governmental organizations may not be limited to the protection of the rights and legal interests of its members only before the mentioned bodies and the court since Article 18 of the Constitution does not make any reservation in terms of protection of rights. Unambiguously, it is about "judicial remedies" and "legal remedies before other state bodies", and the term "state body" involves local self-government bodies as well. This was also mentioned in several decisions of the Constitutional Court of Armenia.

It is not clear why the issue of protection of freedoms has not been paid attention to, as Article 15 of the Law indicates only about "rights and legal interests". But as it is mentioned in the Decision SDVo-906 of the Constitutional Court of 7 September 2010, the given formulation does not exclude the right of non-governmental organizations having legal interest to protect rights and freedoms of third parties.

Herewith, it is worth to mention that the Law "On non-governmental organizations" establishes the status of non-governmental organizations in a slightly different way. According to Article 3 of the Law: "A public organization (hereinafter referred to as "the organization") is a type of (not for profit) public association which does not pursue the purpose of gaining profit and

[9] **Article 15.** ***The Rights of the Organization***
1. For the implementation of its statutory goals, the organization shall, in the manner prescribed by law, have the right to:
3) represent and protect its rights and lawful interests as well as those of its members in other organizations, before the court, state and local self-government bodies.

redistributing this profit among its members, and into which (the organization), based on their common interests, in the manner prescribed by the law, physical persons, including RA citizens, foreign citizens and those without a citizenship, have joint for meeting their non-religious spiritual and non-material other needs, for protecting their and other persons' rights and interests, for providing material and non-material assistance to certain groups and for carrying out other activities for public benefit".

It should be mentioned that in the formulation "their and other person's" the conjunction "and" has clear legal meaning. According to Article 45(10) of the RA Law "On legal acts", "[i]*f the application of a norm stated in a legal act depends on conditions separated by the conjunction "and", the existence of all the listed conditions shall be mandatory for the application of that norm*." Consequently, the status of non-governmental organizations may fully correspond to the requirements of the law only if both conditions exist at the same time. Besides, if there is contradiction between different provisions of the same law, in the relations of natural and legal persons with state and local self-government bodies, the provision which is more favorable for natural and legal persons is applied. However, we do not think that the Law of "On non-governmental organizations" has contradictions, as the Article 15 establishing the rights is not exhaustive.

Concerning the constitutionality of the legislation on NGOs' *locus standi*, it is stated by the decision of the Constitutional Court SDVo-269 of 26 December 2000, considering the constitutionality of the Aarhus Convention, that Armenia has a range of obligations, including "… ensuring under national legislation utmost simplified possibilities for restoration of rights provided by the Convention by means of the justice system or independent and impartial bodies, up to establishing a relevant system for eliminating or reducing the financial or other obstacles to ensuring the access to justice".

The Constitutional Court also came to the conclusion that both the Law of the Republic of Armenia "On non-governmental organizations" (Article 15(3)) and the Administrative Procedure

Code of the Republic of Armenia (Article 3(1)) do not exclude the possibility of protection of the rights of third parties by non-governmental organizations by the "*actio popularis*" principle provided that there is "sufficient interest". Articles 18 and 19 of the Constitution of the Republic of Armenia which do not exclude the possibility of applying to court "with the aim of protection of the third parties' rights", serve as background for such a conclusion.

The Constitutional Court also made a conclusion that both international treaties and the Constitution along with the current legislation do not exclude the *locus standi* of non-governmental organizations if "objective legal interest" exists.

The right of non-governmental organizations to apply to court for protection of the third parties' rights in environmental issues is generally connected with the Aarhus Convention which relates only to specific spheres of public relations within environmental protection. Particularly, Article 9, paragraph 2 of the Convention ("Access to Justice") is related only to disputes with regard to public participation in decision-making on specific environmental issues (access to information and public participation). It is obvious that the Convention regulates the access to justice only from the mentioned viewpoint with a certain logical consistency, e.g. access to justice is norm-guarantee for realization of the two previous rights: right to access to information and the right to public participation in environmental decision-making.

Almost all international treaties related to the given issue recognize the *locus standi* of non-governmental organizations and highlight the importance to secure it in the national legislation. "Each state is entitled to extend the capacity to bring court proceedings. This remedy may for example be available to third parties concerned by the act"[10]. European Commission "Democracy through law" (The Venice Commission) has expressed the following position: "It is a priority, that each person may challenge a decision on a ground that

[10] Recommendations Rec(2004)20 of the Committee of the Ministers of the European Council for the member states on the judicial review of administrative acts. (Issues of state and municipal governance, 2009, N2), para. 38.

it breaches his/her rights. However, if the decision has not directly breached his/her rights, endowing with the right to challenge it is a task for national legislation".

According to the Recommendations Rec(2004)20 of the Committee of Ministers of the European Council "On the judicial review of administrative acts" of 15 December 2004, "Member States are encouraged to examine whether access to judicial review should not be opened to associations or other persons and bodies empowered to protect collective or community interests". "The Recommendation applies solely to cases where the rights or interests are directly affected. This means that there must be a close link between the act and the rights or interests concerned. If the link between the challenged act and the right asserted is too tenuous and distant, the Recommendation does not apply"[11].

Both in the international practice and national level there is not an absolute right to represent third parties. According to the decision of the Constitutional Court, establishment of relevant criteria is required to ensure proper access to justice. The state through law may establish objective criteria. However, preventive measures are required to avoid abuse of right as in this case public interests might be infringed. In-depth examination of the judicial practice is necessary. The position of the Constitutional Court to improve the situation in this sphere, as even the international practice does not specify clear criteria for determining the "legal interest". And in this connection it would be useful to open the content of the institution of "interested public" and "sufficient interest".

For example, such criteria might be timely submission of a request to receive information, active participation in the hearings of the project making suggestions for improvement; including substantiated changes and addendums to the EIA project, etc. The mentioned documentation would help the court in determining the non-governmental organization as interested.

[11] Recommendations Rec(2004)20 of the Committee of the Ministers of the European Council for the member states on the judicial review of administrative acts. (Issues of state and municipal governance, 2009, N2), para. 39.

Thus, in our opinion systematic approach to the interpretation of the three pillars of the Aarhus Convention, following the internal logic of the Convention brings to application of Article 9 where the main steps are envisages in the paragraph 1 of Article 9. This is the right to access to information, public participation in the decision-making and access to justice through formulation of legal and philosophical grounds of these rights. This demonstrates, that the mentioned rights are not results *per se*, and their content is that these are measures to achieve the protection of material right – to live in a healthy environment (however, another interpretation of the reference to this right also exists as expression of intentions, but not a subjective right).

The main role given to the public within the soul of the Convention is not encountering shortcomings and criticizing planned activities, but assisting the authorized bodies to develop scientifically substantiated environmental policy.

At the same time, we think that there is a necessity for improvement and perfection of the national legislation, especially in terms of criteria for determining "legal interest" with the aim to follow the philosophy of the Aarhus Convention and its realization.