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ACCESS TO JUSTICE IN ENVIRONMENTAL DECISION MAKING

Introduction

Law is considered as the minimum of moral, and ethics is the science of moral. Thus no treatise on ethics, including geoethics, should miss the analysis of law. Description and understanding the activities of courts of justice is necessary to this purpose, since courts of justice are the authorities enforcing law.

Activities of any court could be analysed in several volumes; however, I try in this paper to demonstrate only very briefly the activities of both international and national (Czech) courts in the field of environmental protection and decision-making. The jurisdiction is demonstrated using several typical examples of trials.

Finally, position of the parties to the case is discussed from the perspective of equal rights.

The International Court of Justice

The International Court of Justice is the principal judicial organ of the UNO. There is a continuity with the Permanent Court of International Justice which was working in The Hague until 1940.

Only States may be parties to the cases in the trials before the International Court of Justice. An individual – if such be the case – must be represented by a State according to his citizenship; there must be a genuine link between the State and its citizen.

States may be parties to a case only if they declare that they accept the jurisdiction of the Court.

Trials concerning environmental problems are rather exceptional in the activities of the International Court of Justice.

One of the few exceptions was the case of Gabčíkovo. The case had its origin in the treaty between Czechoslovakia and Hungary from 1977. Both States agreed to build and subsequently use a system of water dams on the Danube river between Gabčíkovo (Slovakia) and Nagymaros (Hungary). Hungary abandoned in 1989 the works on the project and later (in 1992) notified to Czechoslovakia the termination of the treaty on the basis of the precautionary principle: according to this position, it was not sufficiently proved that the work would not do harm to the groundwater, to the ecosystems etc. Czechoslovakia continued the work on the Slovak territory and derived the water to the newly built dam so as to be able to use it even without the Hungarian part of the system. Hungary protested; on the basis of a mutual agreement the case was submitted to the International Court of Justice, demanding the answer to the following questions:

a) whether the Republic of Hungary was entitled to abandon the works on the project;
b) whether Czechoslovakia was entitled to proceed to the provisional solution, damming up the Danube river on the Czechoslovak territory;
c) what are the legal effects of the notification 1992 of the termination of the Treaty by Hungary.

The Court analysed the situation thoroughly, it paid even a site visit (the first ever in its history). The Court declared in the judgment, that „the perils invoked by Hungary were not sufficiently established nor were they imminent…A State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the other State." On the basis of this reason, the Court concluded that Czechoslovakia was entitled to build a system of water works on its own territory, yet it was disproportional to derive the whole flow of the Danube river. The Court concluded that both States should conclude an agreement on the use of the provisional solution and paying its costs; Hungary being obliged to pay for the damage caused by the wrongful termination of the treaty.

European Court of Human Rights

The European Court of Human Rights was created within the frame of the Council of Europe to enforce the European Convention on Human Rights. The present Court was instituted in 1998 in Strasbourg, replacing the former European Commission of Human Rights and European Court of Human Rights, both created in the fifties. Most of European States have incorporated the European Convention on Human Rights into their law, and thus the European Court of Human Rights may be considered as a supreme judicial organ of human rights, the access to which is open to anybody claiming violation of the Convention by the national courts. Exhaustion of the possibilities of remedy within the national judicial organs is posed as a preliminary condition before the complaint to the Court. The Court´s jurisdiction concerns all human rights and fundamentals freedoms, contained in the Convention, namely right to life, prohibition of torture, inhuman or degrading treatment, slavery or forced labour, right to liberty and security, right to a fair trial, respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of peaceful assembly and association with others, right to marry, right to an effective remedy before a national autority, prohibition of discrimination, protection of possessions etc.

There are hardly any cases concerning uniquely protection of environement in the activities of the Court. There are several cases in which the environment was concerned as a by-product in a trial concerning protection of home, private and family life.

One of the best known is the case „López Ostra v. Spain", decided in 1994. A waste treatment facility was built in the town of Lorca - some 12 m from the home of Mrs. Lopez Ostra. The problem was the State´s accountability for actions by private companies in its jurisdiction. The Court stated that the State had failed to find an adequate balance between economic development and the claimant´s right to the protection of her home. However the Court did not find a degrading treatment in this case.

Moreover, the Court took into consideration, that the town of Lorca had borne the expense of renting a flat in which the applicant and her family lived one year, so that the harm was sensibly reduced. Nevertheless, the Court concluded that the applicant sustained a non-pecuniary damage, so the State was to pay the amount of 4 mil pesetas, which was much less than originally required.

Another case of the same type is the case of Electricité de France. The claimant´s family had been living in a house near the bank of the river Loire
for two generations; the Society Electricité de France built a nuclear plant on the other side of the river, some 300 m from the claimant´s house. The claimant obtained from the Society a compensation of 250000 francs, yet demanded a higher compensation, claimig the violation of her right to the respect for her home and private and family life, including destruction of the environment, high level of noise, industrial light at night, change of the

local climate, decrease of the value of her propriety. After having exhausted the possibilities of appeal offered by the French national law, the claimant adressed the Commission (tribunal preceding the present Court). The Commission decided that noise and other immissions may interfere with the well-being of a person, thus falling within the regulation of the Article 8 of the Convention: „Everyone has the right to respect for his private and family life, his home and his correspondence.“ Subsequently, the Commission examined whether the interference was justified. The Commission found that the nuclear plant had been built legally, in accordance with the economic well-being of the country. Thus there remains just the question whether the interference was proportional. The Commission took into consideration that no impact was neglected by the national tribunals. The Commission concluded that process before the national tribunals was fair and there was no violation of the Art. 8..

The Court of Justice of the European Union

The Court of Justice of the European Union is composed of the Court of Justice, the General Court (former Court of the First Instance) and the Civil Service Tribunal (which has little or nothing to do with environmental matters). The Court delivers various acts: judgments, orders, decisions, opinions. The mission of the Court is to ensure that the law may be observed in the interpretation and application of the Treaties. The General Court deals with matters of less importace, with posibility of appeal to the Court of Justice. There is no appeal against the judgment of the Court of Justice; it is not clear, whether a trial at the European Court of Human Rights is admissible as a remedy. The activity of the Court in the field of environment is very large: more than 100 judgments per year are delivered by the Court of Justice in the field of Environment and Consumers, not including the General Court and not including the orders and opinions. In more than one third of the cases, the Commission and a Member State are parties to the case and the trial concerns non – implementing or incorrect implementing of an act of the legislation of the EU. A general characterization of the Court´s activity in the field of environment is very difficult, in view of the amount of decisions. Recently, the access to environmental information against the confidentiality of commercial information has become a topic, e.g. the Judgment of the Court of 16 December 2010 in the case Stichting Natuur en Milieu and others. A Dutch NGO demanded information on pesticides, which were submitted to the Dutch authorities within the process of authorisation of a plant protection product. However, the judgment was rather evasive, referring to the individual consideration on the balance between the public interest (disclosure of environmental information) and the specific interest (refusal to disclose).

Another very interesting issue is the necessity of performing administrative procedures in repeated and prolonged activities. The Court decided in the case Kokkelvisseij that repeated activities had to be examined and approved repeatedly; on the other hand, in the case Brussels Hoofstedelijk Gewest (Judgment 17 March 2011), the Court decided that „the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a project or construction.“

Czech courts and their activities in environmental matters

Trials concerning environmental problems may take place before criminal courts, civil courts or administrative courts. Criminal courts are rarely concerned with

environmental matters since only very serious damage to environment is considered as a criminal delict. Civil courts are mostly concerned with compensation for a damage and disputes of land-owners concerning adjacent pieces of land.

Most of the trials take place before administrative courts. There are two instances of administrative courts: an administrative court of the first instance in each region and the Supreme Administrative Court which is the court of review (cassation). Access to the administrativě courts is reserved only to physical and legal persons who were previously parties to the administrative process, the legality of which is challenged. This condition is easily satisfied by non-governmental organizations promoting environmental protection, since they are concerned in most administrative processes if they so wish.

The possibility of an administrative remedy (appeal) must be applied before challenging the administrative decision in a trial of justice.

When an administrative decision is challenged, the claimant and the administrative body who delivered the last decision are parties to the case before the administrative court. In environmental matters, the claimants are often successful (about 50%). This is an interesting phenomenon, taking into account that every administrative process has two phases: in the first instance, the case is decided, and in case of appeal, the case is re-examined both from material and procedural point of view by the administrative body of the second instance. In case of a wrongful decision, the case is returned to the first instance. The decision enters into force only when the administrative body of the second instance (body of appeal) refuses the appeal (or there is no appeal at all).

Analysis

Since the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 of June 1998) access to the courts examining environmental decisions has become very broad. Members of the public concerned, having a sufficient interest or claiming impairment of right, have access to the court of law. In the Czech system of law, the „public concerned“ are physical and legal persons whose rights and/or duties are concerned by the administrative decision; moreover, non-governmental organizations are deemed to be concerned for this purpose.

Thus, the number of parties to the case may increase out of any limits. The idea of public participation in environmental desision is widely accepted; however, some limits seem to be necessary. It should be taken into account, that administrative decision is delivered so as to organize the common well-being (le bien public). The court of law delivers the sentence only when the administrative decision has been in force for a certain time; constructions of buildings or roads or dams have started, contracts have been concluded etc. Very often, subventions have been agreed for a project and delaying implies loss of the subvention. Cancelling the administrative decision in this situation may cause a never-ending series of problems.

The number of cancelled administrative decisions (about 50%) may be hardly explained only by insufficient qualification of the offices. It should be noted that there are lawyers in the offices with the LLM degree from the same universities as the judges.

There are at least three possibilities of explanation.

One of them is the extreme complication of the administrative process, which gives much advantage to anybody wishing just to cause problems and never to reach a result. There may be a great number of NGO´s, each of which presents tens of

objections. If just one of them is ommitted, the court may consider this ommission as a wrongful act and cancel the administrative decision. Useless to say that there is an open space to anybody wishing to pose conditions like „We will not challenge the administrative decision if that or another problem is subject to a special study – and our company is ready to make the study."

The other explanation is the non-equilibrated position of the parties to the case before the administrative courts. In theory, there are two parties with equal rights: the claimant and the administrative body which delivered the last decision (i.e. the body of the second instance, since the appeal must be duly applied). It should be noted, however, that remedies against the decisions of administrative courts are open only to the claimant: pleading to the Constitutional Court or to the Europen Court of Human Rights. In practice, any sentence may be challenged claiming a violation of human rights, and thus the judges of administrative courts are under a permanent pressure.

The third posibility of explanation is the lack of priority of public interest in the law. Protection of individual rights is a good thing, yet it should be taken into account that minor errors in substance or procedure cause a harm which is often negligible when compared with the damage caused to a very large number of persons when a project must be stopped.

Conclusion

Access to justice could be a topic of a thesis in the field of law, economy, sociology or philosophy. From the ethical point of view, it is interesting to investigate how the notion of good and bad has developed during the last two centuries. Until the French revolution, it seemed to be good to discriminate human rights according to the social position. Since then, still more rights are considered as general, independent of social position, sex, religion and even responsability. This development seems to reach its end: at present, every person is entitled to challenge (through non-governmental organization) almost any decision. The situation seems to be near to the principle of „liberum veto" in Poland in the 18th century: every free man was entitled to stop any decision. The result is well-known: the Polish State stopped to exist. The present situation is still worse, since the governmental, regional or local authorities, bearing responsability for the organization and reasonable arrangement of any activities in their region, have even less rights than non-governmental organizations.

A solution could be found defining the peaceful state of the art as a public interest which might be denied only when a very serious harm was caused to the claimant. Otherwise, the court of justice should be entitled to accord (in case of a proven, yet minor damage) a financial compensation. There exist precedents to this approach – see the above mentioned cases López-Ostra and Electricité de France.