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ECOLOGICAL COURT AS THE GUARANTEE OF PROTECTION OF RIGHTS OF HUMAN AND CITIZENS

Abstract. The article presents the results of the legal analysis of the foreign experience in the formation of the ecological courts, as one of the guarantees of the protection of rights of human and citizens. It is established that on the current date in the whole world there is a large number of the different variants and forms in which the environmental justice is carried out. Each country has its own specifics, related to its legal system and the place that is given up in its legal protection of the environment.

It is detected that there are three types of systems of ecological justice in the world, namely: 1) systems that transfer environmental affairs to the courts of the general jurisdiction; 2) systems based on the internal specialization of the judiciary (creation of green benches, so called «green shops» or green judges without formal change of the judicial structure); 3) systems in which innovative environmental courts or tribunals are created. The first type includes the judicial systems of the most countries of the Romano-Germanic law, as well as Ukraine. The second involves the US judicial system (Vermont and Hawaii), Austria, a number of countries in Asia and South America. The third type of environmental justice system is the most innovative and progressive, based on the practice of Sweden, Australia, New Zealand, India, etc.

It is considered that the analyzed examples of introduction the ecological justice, as well as the tendencies for the continuous increase in the number of ecological courts in the world, shall demonstrate the efficiency and viability of the specialized environmental justice. In our opinion, the main advantages of such courts are the expertise of the judiciary, public engagement, and a broad field for the use of mediation.

The introduction and establishment of the ecological courts in Ukraine is necessary, considering a number of problems that exist in the domestic environmental legislation and enforcement activities, as well as the progressive world trends. It should be gradual and include three functional stages: 1) preparation of judges who would be competent regarding the scope of their specification, which would begin their activity in courts of general jurisdiction, but their respective competence would include relevant environmental disputes; 2) creation of «Green benches». At this stage, it would be advisable to foresee, besides imposing the responsibility of ecological justice, also the obligation to allocate the resources; 3) creation of the system of the specialized ecological courts.

Keywords: ecological justice, ecological court, rights of human and citizen, environmental rights, guarantee of rights protection.

Relevance. The person should always be able to exercise his rights guaranteed by the Constitution of Ukraine and international agreements. The key to this is the ability to protect them in the case of violation. The real protection of human rights is the one of the most important problems of the Ukrainian reality. The constitutional desire to develop and strengthen the democratic state can not be realized without the approval of the social consciousness, social practice of inalienable human rights and freedoms, and the normative consolidation of their guarantees. The state is obliged to demonstrate its activity in the provision of human rights, the creation of material, organizational, social, political and other conditions for the full use of human rights and freedoms. In the current conditions the person can not always freely exercise its rights and freedoms. In particular, on the way to the realization of environmental rights and freedoms, because of the lack of real influence of the civil society on the adoption of environmentally relevant decisions, the person often has to face such a negative phenomenon as the ecological and legal nihilism, despite the fact that Part 2 of Art. 3 of the Constitution of Ukraine [1] states: «Human rights and freedoms

and their guarantees determine the content and direction of the state. The state is responsible to the person for his activities. The assertion and guarantee of human rights and freedoms is the main responsibility of the state». Consequently, only the effective system of guarantees of the implementation of the environmental rights of citizens is capable to overcome these obstacles.

On the current date such system includes a set of organizational, regulatory, enforcement, preventive and restrictive, procedural and legal, protective and securable means to ensure the implementation of the environmental rights [2, p. 51-52], as defined in the Art. 9 of the Law of Ukraine On Environmental Protection [3] and other normative legal acts of the ecological direction.

However, despite the extremely wide range of legal measures to ensure the implementation of environmental rights determined by the state, according to the status of the environment, given in the draft Law of Ukraine On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030 [4], the level of environmental pollution in Ukraine remains extremely high, which makes it impossible to adequately protect the most important environmental law - the right to the safe and healthy life and health environment.

The practice of non-effective environmental activities at the state level has led to an aggravation of the climate change in the world and raising the issue of the necessity to consolidate the concept of climatic human rights in the national policies [5, p. 115-121].

Such transformations in the system of ecological rights shall oblige to bring to the new level of the judicial way of protecting the ecological rights of human and citizen, namely, to create the specialized ecological court, whose practice of activity in the world is not new.

The theoretical basis for the investigation of the formation of the specialized ecological court were laid down in the scientific papers by B. Birdsong, F. Jacobs, L. Lavrysen, K. Mulqueeny, G. Pring, C. Pring, R. Sharma, D. Sheppard, R. Stein, O. Muzaleva, A. Solntsev, A. Chikildin, A. Shvarova.

Constructive analysis of the scientific results in this subject area suggests to draw conclusions about the significance of the theoretical and methodological scientific developments. At the same time, it was established that in the domestic legal science the issue of the establishment of an environmental court has not yet been investigated, and therefore the purpose of this article is to study the existing experience of the foreign countries in the formation and operation of such courts in order to choose the most optimal option for the creation of its own ecological court.

Main points. It should be reminded that the proposals for the establishment of the new institute in the UN system were put forward in 1989 in the Hague Declaration on the environment [6]. Within referring all states of the world and international organizations competent in this matter, it was proposed to participate in the elaboration of the framework of the conventions and other legal instruments necessary to establish the institutional authority of such a court in order to prevent climate change and global warming.

Additionally, in the same year, it was hold the conference in the Rome regarding «Improving the effectiveness of the international environmental law and the creation of the court for environmental matters within the United Nations», the rules and procedures for which were discussed until the mid-1990s of the twentieth century. However, in 1999, UNEP's Executive Director rejected the proposals [6].

The creation of the such court was also proposed at the conference at the National Academy of Linceia in Rome in 1989. The activities of the such court should be governed by the special convention on the environment and human rights. This proposal led to the adoption in 1992 the draft of the convention, which in 1999 acquired the form of the draft treaty establishing an international environmental court [6].

The special role in the preparation of the program for the national and international judges in the field of environment and policy during the creation of the new international environmental court was discussed at both the Aarhus Conference at 1998 and the World Summit on Sustainable Development in Johannesburg at 2002.

In 2012, the International Court of the Environment Foundation (the International Court of the Environment Foundation) submitted a new draft for the creation within the framework of the UN International Ecological Court to the Conference on Environment and Development. As a result of the consideration of this project, a Commission on the formation of the International Ecological Court was established [7, 8].

Improving the ecological rule of law, access to justice and resolving of the environmental disputes has become an indispensable tool for achieving the United Nations Agenda for Sustainable Development for 2030 and the Sustainable Development Goals, in particular, Goal 16 – «Ensure access to justice for all

and build effective, accountable and inclusive institutions», where specialized ecological courts and tribunals are seen as a successful way to achieve this important goal.

In order to support the idea of introducing the ecological courts at the state level, till the 2010 year it was originated more than 380 national and regional environmental court instances in more than 50 countries of the world (for example, in the UK, Belgium, the Netherlands, Denmark, Finland, Sweden, China, Vermont USA, Mexico City (Mexico), New South Wales in Australia, Ontario Province in Canada, Paraguay, Philippines, South Africa, Thailand, etc.) [9, p. 11-23].

The main reasons for the creation of such courts are: 1) increasing the number and extent of the environmental problems; 2) adoption in many countries of the integrated environmental legislation; 3) activation of the position of civil society; 4) the inability of courts of the general jurisdiction to effectively administer justice in the field of the environmental protection [10, p. 15].

The conducted analysis shall allow to distinguish the three types of systems of implementation of environmental justice: 1) systems that transmit environmental affairs to courts of general jurisdiction; 2) systems based on the internal specialization of the judiciary (creation of the green benches, so-called «green benches» or green judges without formal change of the judicial structure) (for example: in Vermont, Hawaii, DC, Massachusetts, Texas USA, Austria, a number of countries in Asia and South America); 3) systems in which separate ecological courts or tribunals are established (for example: New South Wales Australia, Ontario Province Canada, New Zealand, Sweden, India, etc.) [11].

The first system is widespread in the western countries, especially in the European countries of the Roman-Germanic legal family, where individual courts dealing with the environment are rather the exception. As a rule, ecological justice is carried out in traditional courts. Environmental affairs are not singled out separately, for them there is no separate procedural form. Depending on the specifics of the particular case, they are considered, respectively, by civil, criminal, administrative or constitutional courts.

For such an example, ecological justice is also is executed in Ukraine. However, comprehensive study provided by the author of the issue of activity of such courts in resolving environmental disputes has shown their low effectiveness that proves once again the fact that the disputes of this category should be carried out by qualified specialists who have a thorough knowledge of the current environmental legislation [12, p. 357-360].

Thus, the creation of «green benches» (or «single green judges») is a simple solution used by the countries that already have a consolidated and structured judicial system. Such a system is used in some European countries and the USA.

The tendency for unofficial specialization of individual chambers or subdivisions of courts (for example, separate lobes of administrative courts) also exists. As it is rightly observed, «... this model allows the court to manage cases where the number and complexity of environmental cases fluctuates, and gives a guarantee that the workload of the court will be evenly distributed among all judges. It does not involve applying to a separate court, which may be in another place, and does not require plaintiffs to know about what constitutes an environmental matter. The appointment of judges who will be specially trained or even interested in the environmental legislation is not the mandatory requirement» [13, p. 21].

For example, the Environmental State Division Court of Vermont (United States of America), which was established in 1990 [9, p. 12] is the state court of the Vermont state, a full and independent part of the judicial system of Vermont as a sovereign subject of the federation dealing with the environmental law. The Vermont Environmental Court reviews appeals from municipal councils and commissions, appeals for decisions adopted under Act 250, as well as cases filed by the Agency for the Natural Resources, the Council for Natural Resources Management and municipal authorities. The court consists of two judges specializing in the environmental law and appointed to the Vermont Environmental Protection Department. The court is located in Barre, Vermont [14].

The Environmental State Division Court of Vermont specializes in examining lawsuits and enforces enforcement measures, which include: applications for decisions based on the Act 250 (regulatory document governing the use and development of state land); appeals from municipal councils, including the use of coercive measures; appeals from the Agency for Natural Resources and the Council for the management of the natural resources and natural resources, including enforcement of coercive measures.

The procedure for reviewing cases by the Court is governed by the Vermont Rules of the Court Proceedings. The court reviews and resolves approximately 300 cases a year [15]. However, there are two

types of cases that the Court does not deal with: cases involving the execution of criminal penalties and cases involving administrative delinquencies, since such cases are required to participate the jury trial as it is demanded by the law of the state.

The court holds hearings throughout the state. This judicial division has the right to organize the earliest telephone hearings, if the judge does not want to hear the parties and other participants in the trial in an orderly manner or if there are evidences that are subject to the direct investigation by the court. In the event that the hearing is subject to be conducted in the court, it is should be executed in the area where the incident has occurred, which is the basis for the trial in order the litigants not to overcome the long distances [14].

Law of the state does not impose any requirement for the Vermont Environmental Court judges to have the academic background. Two judges who are currently judges of the Vermont Ecological Court attend court education courses to support and develop their competence in the ability to understand the specialized environmental laws and evaluate scientific and technical data. In addition, it is recommended that judges should feel comfortable in the scientific field and have scientific literacy [14].

At the same time, the ecological court, adopted by the legislative body of Hawaii, is the significantly different from the Vermont court. The Hawaiian Environmental Court exists within the framework of the state judicial system. The judges of environmental courts are appointed in the district and district courts throughout the state. Courts have jurisdiction over civil and criminal matters relating to water, forests, beaches, air and mountains, as well as land and sea life.

The purpose of the environmental court, as it is described by the Supreme Court of Hawaii by Mark E. Recktenwald, is «to ensure the fair, consistent and effective resolution of the environmental affairs» [16].

Environmental courts in Hawaii have been created in accordance with the Act No. 218 of the Charter of the Hawaiian Islands, adopted as revised Chapter 604A «Environmental Courts» in Hawaii. They started their business on July 1, 2015.

The Chief Justice of the Supreme Court appoints an environmental judge or judges for each district and district court in each district if necessary; provided that the volume of environmental affairs in the district or district in which the environmental judge presides is not sufficient to provide the judge a full-time environmental court, the judge may consider cases arising out of other areas of law. In any district where more than one judge is appointed to the ecological court, the chief judge appoints one of the judges as the senior judge. The Chief Justice may temporarily appoint a judge of the environmental court to preside in another district, where the chief judge decides that the urgency of one or more cases in the district court or district court or the volume of cases before the district court or district court requires it [17].

Environmental court judges are assigned to district courts throughout Hawaii to handle both civil and criminal environmental matters, as well as other types of cases.

The parties may appeal the decision of the Ecological Courts in accordance with the Hawaiian Rules of Appeal through the Hawaii Intermediate Court of Appeal and / or the Hawaii Supreme Court.

Jurisdiction of the Hawaiian Environmental Court include: HRS Chapter 340E: Safe drinking water; HRS Chapter 342B: Air Pollution Control; HRS Chapter 342D: Water Pollution; HRS Chapter 6D: Protection of caves; HRS Chapter 6E: Preserving History (Ivy Kupun, Archaeological Research); HRS Chapter 174: Water and Land Development; HRS Chapter 183: Forest Reserves, Water Resources Development, Zoning; HRS Chapter 183B: Hawaiian Bets; HRS Chapter 183D: Wildlife; HRS Chapter 188: Rights and Rules of Fisheries; HRS Chapter 189: Commercial Fishing; HRS Chapter 195D: Conservation of aquatic life, wildlife and terrestrial plants; HRS Chapter 199: Resource Conservation and Recovery Program; HRS Chapter 343: Statements of negative environmental impact.

Numerous criminal offenses are dealt with in the Ecological Court. Examples include: the illegal catch of some marine animals (octopus, tacos, calamari); illegal hunting; catching or destroying Hawaiian monk seals, representative of the genus Monachus, seals (Phocidae). Mentioned family members and others mebers are the threat of extinction [16].

The third model is based on the creation of environmental courts (or tribunals), specialized courts, dealing only with environmental affairs. It is an exception to Europe and the United States, but is widespread in the rest of the world. As a rule, environmental courts have certain advantages: the speed of the trial, the efficiency, readiness and specialization of judges, as well as the presence of extrajudicial experts in this area.

For example, in New Zealand, the Environmental Court was created in 1991 on the basis of the Resource Management Act (RMA). It is an independent specialized court consisting of 8 permanent and 10 reserve judges specially trained in the field of environmental and environmental law and 15 environmental commissars (experts in the certain areas of science and technology, economics, agriculture, as well as mediation specialists). Functions and powers of this court cover not only the interpretation of law and resolution of disputes, but also the execution of decisions [18, p. 38].

The judges are permanently located in three districts (Wellington, Auckland and Christchurch). If necessary, judges from these three districts go to the place of hearings on environmental issues. This allows the Court to exercise the environmental justice and to ensure the uniform application of the environmental law, protect rights and be accessible to all citizens, including the indigenous Maori population [19].

The Ecological Court considers disputes between individulas and legal persons in the field of ecology and disputes between citizens and executive authorities, local self-government bodies. In the most issues, cases are heard with the participation of one judge and one or two specialists, the judge decides complex cases with three specialists, and minor ones – alone. Another feature of this body's activity is that the procedure for examining disputes is not as formalized as in courts of general jurisdiction. Preference is given to the written evidence, expert opinions, experts, oral evidence is practically not used in deciding on the case [13].

In accordance with the Law on Resource Management, the Environmental Court may, in accordance with the applications and complaints related to: the content of regional / district plans and development programs, as well as publicly important projects (energy projects, projects for the construction of hospitals, schools, prisons, projects sewage works, landfills, fire departments, transport communications, etc.).

Individuals may require changes to the plans, and the Resource Management Act specifically authorizes the Court to confirm, correct or cancel regional / district plans. In fact, the Ecological Court today is the only court in New Zealand that has the right: 1) to amend or abolish subordinate legislation [20]; 2) to agree on the use of natural resources (for example, use of land, coastal strips, water supply and drainage, granting of permits for discharges of pollutants); 3) meet the requirements for the termination of environmentally harmful activities, ensuring compliance with environmental requirements, restoration of the disturbed state of the environment; 4) issue declarations to determine the legal status of environmental measures and instruments; 5) to declare the presence or absence of contradictions between the provisions of various political declarations, management decisions, plans or programs on environmental protection, etc. [21].

The court has the right to make a retrial decision on the basis of decisions of local and regional authorities and is empowered to carry out civil and criminal proceedings in matters relating to the environment. Within execution of its jurisdiction, the Ecological Court has the status and authority of the ordinary court of first instance, but does not adhere the usual procedural and evidence formalities of the other New Zealand courts [20].

Thus, the Ecological Court, through the implementation of justice not only by the qualified lawyers, but also by experts in the field of environmental protection experts, has the right to review decisions of the regional and local authorities and self-government authorities. This legal capacity provides the Court with the opportunity to review the main planning, regional and local planning and regional planning and reporting tools, as well as the approval of the provision of natural resources to the property or use. Only program documents of the national level are not subject to review by the Court of the main instruments of the environmental policy [21].

Conclusions. It should be emphasized that such courts in the most countries play the significant role in improving the effectiveness of the environmental law and the implementation of the environmental human and civil rights. It is no coincidence that the UN General Assembly decided to give priority to strengthening the rule of law at the national and international levels (Resolution 61/39 in the report of the Sixth Committee A/61/456 [22]), which will be implemented through the creation of new environmental courts and tribunals in the world.

It is considered that the introduction of such court in Ukraine should take place in the form of the separate specialized court or chamber, as, as practice in the courts [23, c. 34], it is today the least efficient in the environmental sphere: courts and arbitration courts have not turned to the environmental issues,

generalization of the environmental issues is not executed, proper ecological specialization of judges is not carried out, environmental affairs are very reluctant to be accepted into production, rarely considered in substance, provision of ecological actions of citizens in court instances is delayed.

The objective reasons of this are the following: judges' workload, lack of qualifications, the relevance of many other non-environmental cases (corruption, organized crime, elections, honor and dignity), insufficient public attention to environmental issues, and the economic crisis in the country. Elimination of these shortcomings will mean the advancement of the legal reform of the courts in the environmental sphere, taking into account existing foreign experience and domestic specifics.

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ЭКОЛОГИЧЕСКИЙ СУД КАК ГАРАНТИЯ ЗАЩИТЫ ПРАВ ЧЕЛОВЕКА И ГРАЖДАНИНА

Аннотация. В статье представлены результаты правового анализа зарубежного опыта формирования экологических судов, как одной из гарантий защиты прав человека и гражданина. Установлено, что сегодня во всем мире действует большое количество различных вариантов и форм, в которых осуществляется экологическое правосудие. Каждая страна имеет свою специфику, связанную с ее правовой системой и местом, которое отводится в ней правовой охране окружающей среды.

Установлено, что в мире действует три типа систем осуществления экологического правосудия, а именно: 1) системы, передающие экологические дела судам общей юрисдикции; 2) системы, опирающиеся на внутреннюю специализацию судебных органов (создание green benches, так называемых «зеленых скамеек» или зеленые судьи без формального изменения судебной структуры); 3) системы, в которых созданы инновационные экологические суды или трибуналы. К первому типу относятся судебные системы большинства стран романо-германского права, а также и Украина. Второй включает судебные системы США (штаты Вермонт и Гавайи), Австрии, ряда стран Азии и Южной Америки. Третий тип систем экологического правосудия является наиболее инновационным и прогрессивным, опирается на практику Швеции, Австралии, Новой Зеландии, Индии и тому подобное.

Считаем, что рассмотренные нами примеры внедрения экологического правосудия, а также тенденции к постоянному увеличению количества экологических судов в мире убедительно демонстрируют эффективность и жизнеспособность специализированного экологического правосудия. По нашему мнению, основными преимуществами таких судов есть экспертность судопроизводства, привлечения общественности и широкое поле для использования медиации.

Внедрение и становления в Украине экологических судов необходимо, учитывая ряд проблем, имеющихся в отечественном экологическом законодательстве и правоприменительной деятельности, так и на прогрессивные мировые тенденции. Оно должно быть постепенным и включать три функциональные этапы: 1) подготовку судей, которые были бы компетентны относительно сфер спецификации и начнут свою деятельность в судах общей юрисдикции, но к их компетенции будут отнесены соответствующие экологические споры; 2) создание «зеленых рядов». Целесообразно на данном этапе было бы предусмотреть кроме возложения обязанности экологического правосудия, также обозначить обязанность выделения ресурсов; 3) создание системы специализированных экологических судов.

Ключевые слова: экологическое правосудие, экологический суд, права человека и гражданина, экологические права, гарантия защиты прав.

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