

Conference session 3: How to promote access rights.

Summary

ClientEarth held this third session of the conference “*Access to justice in environmental matters: obstacles, impacts and ways forward*” on 16th October. This session gave the opportunity to hear from different stakeholders what they consider being the next challenges to address in order to promote access rights.

This session opened with the participation of **Luc Lavrysen**, President of the Belgian Constitutional Court and professor of Environmental Law at Ghent University. Luc Lavrysen is also President of the EU Forum of Judges for the Environment and Member of the Interim Board of the Global Judicial Institute on the Environment.

Luc Lavrysen’s presentation focused on what he considers the judiciary could do to improve access rights in environmental matters, namely training and specialisation.

To explain his point of view, Luc Lavrysen started by emphasising the complexity of environmental law compared to other areas of law, due to its technicality and its multilevel construction. He stressed that consequently, one needs to have a comprehensive understanding of environmental law to be able to apply it correctly. He considers also that this necessity does not only apply for judges but for the entire enforcement chain, including for example the environmental inspectors, the police, and the prosecutors.

Then, Luc Lavrysen expressed his gratefulness to the European Commission for having significantly boosted the organisation of environmental law trainings targeted to the judiciary with the project “*Cooperation with national judges in the field of environmental law*”, which started in 2008. However, while this project already trained more than 500 judges and public prosecutors on EU level legislation, Luc Lavrysen calls on the Member States judicial training institutions to join their effort and train judges in the transposed EU law in the domestic legal order. Also, he fears that because the trainings of the European project are held mainly in English, they do not reach the judiciary of some Member States.

In order to build knowledge, Luc Lavrysen also highlighted the importance of networking, such as through the EU Forum of Judges for the Environment, the law-working group of the association of European administrative judges, or the association of supreme administrative court for instance.

However, Luc Lavrysen considers that training without daily practicing is not efficient. Therefore, he calls for the establishment of environmental law as a specialisation for judges, so that specialised judges apply environmental law on a daily basis.

Drawing our attention to the global tendency to create environmental courts and tribunals on most continents, Luc Lavrysen shared his regrets to see that Europe is an exception in this matter. Welcoming such evolutions of the judicial system, he adds that it would also help improving the timeline and therefore avoid having cases won on paper but lost on the ground because meanwhile the situation has changed.

The conference kept on with **Jerzy Jendroska**, Managing Partner at Jendrońska Jerzmański Bar and Partners, environmental Lawyers and adjunct Professor at Opole University (Poland) and Riga Graduate School of Law. He is also member of the Aarhus Compliance Committee and of the EU Expert Group on Access to Environmental Justice.

Jerzy Jendroska provided an analysis of the text of Article 9.2 and 9.3 of the Aarhus Convention.

First, he explained that the final text was a result of a difficult compromise. He explained that back in the late 90', it was clear that the convention was about procedural rights, namely access to information and right to participate, but the purpose of the general access to justice provisions was controversial. For some, access to justice was supposed to be only a mechanism to protect the procedural rights of the Convention, while others perceived access to justice in a broader way, as a mechanism to protect the environment. Therefore, Jerzy Jendroska explained that when finally the right to environment was introduced in Article 1 and in the preamble, the procedural rights became a mechanism to implement environmental law and protect the right to environment.

Jerzy Jendroska explained that this compromise between the two approaches is responsible for the difficulties in interpreting the Article 9.2 and 9.3. Indeed, for instance the possibility to not only challenge the procedural legality but also the substantive legality was added to Article 9.2 as a result of this approach, likewise the complete Article 9.3 was an addition.

Finally, Jerzy Jendroska decided to emphasize two challenges in Article 9.2 and 9.3, resulting from the compromise between the two approaches:

- First, he highlighted the differences on the standing provisions of Article 9.2 and 9.3, and admitted that it leads to discrepancies between those who can participate and those who can challenge a decision. He also highlighted the importance of having a wide standing to make sure that both the public authorities and the private bodies feel accountable.
- Then, he pointed out the difference about who should be the review body, and underlined the discrepancy with the scope of review. Not fully satisfied, he welcomed nonetheless that in the end both the judiciary and administrative procedures are covered by the possibility to trigger some kind of review.

The third speaker was **Csaba Kiss**, environmental attorney at the Environmental Management and Law Association (EMLA) in Hungary, and coordinator of the Justice & Environment network of EU public interest environmental law organizations. In this position he also coordinates the LIFE-funded project EARL A2J within which this conference was organised.

As part of the civil society world, Csaba Kiss brought a users' perspective to the discussion and highlighted the need of four components to promote access rights:

- Agreeing fully with Luc Lavrysen, the first component Csaba Kiss wanted to mention was the need to have trainings targeted to legal professionals.
- The second component Csaba Kiss highlighted was the need to raise public awareness in order that civil society uses access to justice and contributes to a better implementation of the European Union environmental policies. On this matter, he expressed his satisfaction to see a wide range of publicly available information on access to environmental justice. He especially drew our attention to the various resources created by the European Commission, with insightful material at European and national level. He also mentioned some materials disseminated by the UNECE, as well as the resources created within our EARL A2J European project on access to justice. This non-exhaustive list of legal informative material is available here on Csaba Kiss's presentation. (link to be added)
- Thirdly, Csaba Kiss highlighted the need to have an active civil society in order to promote access rights. He gave the example of the Justice & Environment network of NGOs, and shortly presented the actions carried out by this network. He explained that one of the main activities is to give pro bono advices on national environmental legal framework, and to bring cases at EU level as well as communications to the Aarhus Convention Compliance Committee. Among other challenges, Csaba Kiss informed that the network in the past had tried to improve the transparency of the infringement documents. He also highlighted that Justice & Environment tries to promote public awareness with publications on access to justice and trainings targeted to all legal professionals.
- Finally, Csaba Kiss emphasised the importance of having a vivid academic life. He explained that the role of the academics is to analyse all the legal developments such as new judicial decisions, legislative proposals, or legal amendments, and to provide clarifications on consequences for access to justice in environmental matters. On this component as well, Csaba Kiss expressed his satisfaction to see a "very lively" academic life, resulting in abundant sources of information. However, in order to actually result in an elevated level of knowledge, Csaba Kiss warned us regarding the necessity to make sure those information get to the users.

Finally, our last speaker in this panel was **Marie Toussaint**, a lawyer and climate justice activist who co-founded the association Notre Affaire à Tous and is at the origin of "L'affaire du siècle" (The Case of the Century). Elected as a Green MEP in May 2019, she sits on the environment, industry and legal affairs committees.

First, Marie Toussaint emphasised three remaining issues:

- The first one was a standing issue. On this matter, she referred to her French experience with the case "L'affaire du siècle" still pending. She denounced a problem of independence around the recognition criteria granting NGOs standing. Indeed, she explained that in France for instance the state is empowered to decide, even when involved in a case, which is the problem with the association Notre Affaire à Tous.
- The second issue highlighted by Marie Toussaint relates to the criteria of being individually concerned. To illustrate this hurdle, she reminded us of the People Climate Case which she supports. In that regard, she recognised that the Commission proposal opens some doors for

NGOs but regrets that it keeps on restraining access to justice for individuals. Therefore, she calls for the some amendment in this matter during the trilogies.

- The third issue is the lack of comprehensive data about infringements in environmental law. She said that her association is currently fighting to get money to invest in research, and to receive information and indicators on the planet boundary as well as on the relation between environmental and social justice.

Then, Marie Toussaint gave us some insights about the ongoing discussions in the European parliament. She affirmed the willingness of the members of the Parliament to address the remaining access to justice issues. She also believes in the good will of the Commission, which recently requested the parliament to pay more attention on provisions providing access to justice when drafting a new legislative piece. However, she is afraid that the Council will not follow the trend and fears for the provisions on access to justice in the Climate law, as well as in the deforestation file.

About the Commission proposal, Marie Toussaint said that overall she welcomes it, as it broadens the scope of review and expands the timeline for NGOs. However, she regrets that it does not address the above-mentioned issues, namely the necessity to have independent criteria to grant NGOs access to justice, and the necessity to build information on environmental data. To illustrate the importance of this last point, Marie Toussaint gave the example of ongoing criminal investigation, about which no one is alerted so no one can intervene in the procedure.

To conclude, Marie Toussaint left us with three complementary propositions:

- First, the need to have specialised Courts, with specialised judges and prosecutors, as mentioned by the previous speakers. On this matter, she drew our attention to the French report on “Environmental justice” given to the government. She said she would welcome the creation of an ombudswoman, as she believes it would help to bring cases to the public debate and to the legal and political representatives.
- Secondly, Marie Toussaint also highlighted the need to have a mechanism to protect nature defenders/ protector, as the number of issues arising at member states level increases.
- Thirdly, to ensure environmental rights for all, Marie Toussaint stressed the need for recognising the right of nature and granting the ecosystem legal standing. She said that the discussion slowly begins at EU level inside the parliament and with the commissioners.