

Helsinki Citizens' Assembly

Vanadzor NGO



Protection of the Public Interest in the RA

Prospects for non-governmental organizations and associations to file a legal action for protection of the public interest with domestic courts

Vanadzor

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Introduction

To gain a full picture of the right of indirect victims of infringements to apply to court for the protection of the public or collective interests (hereinafter referred to as public interest), this document provides a survey into the RA domestic legislation, relevant international norms and foreign legislation.

The survey into the domestic legislation mostly aimed to find out whether the effective domestic law provided for this right and if so, what regulations it offered, or if otherwise, whether the legislative regulations incorporated provisions that might hinder prescribing the right to apply to a court of law for protection of the public interest.

The survey into international norms aimed to find out the regulations recommended by the intergovernmental bodies and entities to be included in the domestic legislation. The survey into foreign practices mostly aimed to identify the mechanisms and capacities that can be applied to the effect of stipulating the right in question within the RA domestic legislative regulations.

The survey into the legislation of other countries was conducted by the Latham and Watkins¹ law firm at the request of the Helsinki Citizens' Assembly Vanadzor within and with the support of the PILnet: The Global Network for Public Interest Law² Program. The survey covered the domestic legislation of France, Germany, Italy and Russia. The section of this document entitled Foreign Legislation Survey outlines the key findings of the legislative analysis.

¹ See www.lw.com

² See <http://www.pilnet.org/>

Findings of the domestic legislation survey

The survey into the RA domestic legislation primarily aimed to find out the mechanisms prescribed by the RA legislation for the protection of public interest through functions by state authorities and activities of non-governmental entities.

- *Functions of state authorities for the protection of the public interest*

The following functions of state authorities for the protection of the public or collective interests within civil, administrative and criminal procedures can be distinguished:

1. Under the RA Administrative Procedure Code (hereinafter referred to as RA APC):
 - the power of a national or local authorities or officials to appeal against an administrative entity if they believe that the administrative acts, actions or inaction of that entity have directly violated or can violate the state or community rights the applicant is responsible to protect;
 - the power of administrative entities and officials to apply to a court of law to bring a physical or legal person to administrative responsibility if this function is reserved exclusively to courts by law;
 - the power of administrative entities and officials to apply to a court of law to deprive natural or legal persons of certain rights or impose on them certain duties if this function is reserved exclusively to courts by law.
2. Prosecutor's authority to support accusation in the court of law;
3. the power of the RA President, RA Government and Human Rights Defender to apply to the RA Constitutional Court to decide on the constitutionality of laws, National Assembly decrees, as well as RA President decrees, Government, Prime Minister and local government decrees.

Thus, the RA state authorities lack any legislative regulations to file an action under the civil procedure to protect the public interest in court, and the regulations within the criminal procedure are limited by the prosecutor's authority to support the accusation.

As for the functions to protect in courts of law the rights of other persons, as well as the public and community interest under the administrative procedure, the powers of the entities below can be mentioned:

- the power of the RA State Commission for the Protection of Economic Competition to bring to court any violations to the RA Law on Protection of Economic Competition, including claims to either declare fully or partially void or amend or

annul the acts by state authorities or officials as well as contracts in violation of the law signed by economic entities;

- the power of the National Commission on Television and Radio to ensure compliance with the election campaign procedures as prescribed by the RA Election Code and upon detecting any violations, to apply to court to bring the television and radio company (television or radio company) in question to responsibility under the law;
- the region governor's (marzpet) power to apply to court to take liability measures prescribed by law against the local authorities or to oblige the community to take relevant measures.

Hence, it follows that while the RA law provides for some instances for protection of the rights and legitimate interests of other persons or associations by administrative authorities, the cases of judicial protection above lack the protection of the rights of groups of persons in a number of essential fields.

- *Findings of the survey into the potential legislative regulations for judicial protection of collective and public interests for the purposes of protection of such interests as a part of full and effective realization of the objectives by public associations*

1. RA Constitution

According to Article 18(1) of the RA Constitution, everyone is entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies. And under Article 19, everyone has a right to restore his/her violated rights in a fair public hearing under the equal protection of the law and fulfilling all the demands of justice by an independent and impartial court within a reasonable time.

Considering that these articles, insofar as they are of interest within the issue at hand, fail to stipulate the right to protection of the public interest in a court of law, it should be noticed that the RA Constitutional Court stated its position on these Articles in its Ruling N 906 dated 07.09.2010 emphasizing that in compliance with Articles 18 and 19 of the RA Constitution and Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms, the RA legislation is hinged on the principle that the effective protection of violated rights, inter alia, includes the right to directly apply to a court of law of the persons whose rights have been violated³. At the same time, the Constitutional Court stated that both Articles 18 and 19 of the RA Constitution and Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms by no means exclude the alternative to apply to court to protect the

³ First sentence of Para. 5(9) of the Constitutional Court Ruling N 906 dated 07.09.2010 on the case of deciding on the constitutionality of the word "his/her" following the word "violated" in Article 3(1) of the RA Administrative Procedure Code based on the application of the Helsinki Citizens' Assembly Vanadzor NGO.

violated rights of other persons.⁴

⁴ First sentence of Para. 6(1) of the Constitutional Court ruling N 906 dated 07.09.2010.

2. RA Code of Civil Procedure

According to Article 2(1) of the RA Civil Procedure Code, the interested person is entitled to apply to court in compliance with the procedure established in the Code to protect his/her rights, freedoms or legal interests stipulated and envisaged in the RA Constitution, laws and other legal acts or agreements.

Article 2(2) of the RA Civil Procedure Code provides that in cases envisaged in this Code and other laws, the authorized person can apply to court to defend the rights, freedoms and other legal interests of other persons.

The RA Constitutional Court has expressed in its ruling N 906 dated 07.09.2010 its legal position on the regulations in Article 2 of the RA Civil Procedure Code. Accordingly, the RA Constitutional Court stated that Article 2 of the RA Civil Procedure Code provides the interested party with the right to apply to a court of law. The analysis of the RA Civil Procedure Code shows that term ‘interest persons’ first of all covers the persons whose rights have been or are at risk of being violated. Meanwhile, the Code prescribes the right of an interested person to apply to the court to protect the violated rights of others in a number of cases. Particularly, such person comes to be the legal representative⁵.

In its Ruling N 747 dated 04.04.2008, the RA Constitutional Court also stated that the concept of “interested person” is subject to legal assessment, and it is the court that is competent, in each particular case and guided by the circumstances of the particular case, to assess this concept and find out whether the person in question has any legal interest in the outcome of the case.

Thus, the concept of the “interested person” as prescribed under Article 2 of the RA Civil Procedure Code can as well cover NGOs since based on the definition of the concept of “non-governmental organizations” in Article 3(1) of the RA Law on Non-Governmental Organizations, NGOs are associations of natural persons for the purpose of protecting the rights and interests of both of these and other persons, to provide material and non-material assistance to the society and its individual groups and to perform other activities for the public benefit.

Furthermore, Article 2 of the RA Civil Procedure Code allows for the right to apply to court for the protection of the rights, freedoms and legal interests of others to be stipulated by other laws.

3. RA Code of Administrative Procedure

Article 3 of the RA Code of Administrative Procedure provides the full list of physical and legal

⁵ First sentence of Para. 5(3) of Decree N 906 dated 07.09.2010.

persons entitled to apply to the administrative court.

Particularly, Article 3 of the Code reads that any natural person or legal entity shall have the right to apply to administrative court in accordance with the procedure established by this Code if he/she finds that the administrative acts, actions or inaction of national or local authorities or their officials have resulted in the consequences below:

- 1) direct or potential violation of their rights and freedoms prescribed by the Constitution of the Republic of Armenia, international treaties, laws and other legal acts, including, if:
 - a. there are obstacles for implementation of these rights and freedoms;
 - b. the conditions necessary for implementation of these rights which, however, shall be provided owing to the Constitution, the international treaty, the law or other legal acts of the Republic of Armenia, are not provided;
- 2) any obligation is wrongfully assigned to them;
- 3) they are wrongfully brought to administrative responsibility under administrative procedure.

Thus, the RA Code of Administrative Procedure has no mention of the right to apply to the court for protection of the interests of others.

4. Position of the RA Constitutional Court on the right to apply to court for the protection of the public interest

The Ruling of the RA Constitutional Court N 906 of 07.09.2010 covered the possibility to apply to court for protection of the public interest under the RA domestic legislation. Particularly, upon analyzing Articles 18 and 19 of the RA Constitution and Article 3 of the RA Code of Administrative Procedure as well as the role of NGOs and civil society institutes for the country, the RA Constitutional Court stated its position below: “Considering the role of non-governmental organizations in the life of the state and the civil society and guided by the purposes of enhancing the efficiency of their activity, the Constitutional Court hereby finds that based on the current European development trends of the institute of *actio popularis* complaints, the RA Code of Administrative Procedure can establish the cases and procedure for interested NGOs, in their capacity of legal persons (with relevant statutory jurisdiction), to exercise the right of applying to court to restore the violated rights of persons in this field. Such a legal regulation would increase both the efficiency of the protection, including legal protection of violated rights and legal interests and the role of NGOs as a constituent of the civil society. This being so, only the NGOs aiming to protect particular collective or community interests should be considered when establishing the cases and procedures to exercise the right to apply to court or other competent authorities or officials for the protection of the violated rights of

others.”⁶

The RA Constitutional Court has expressed its position on including the ruling above in the in legal practice and legislation, particularly stressing that the NGOs or other associations acting under the law and pursuing civil initiatives should have the opportunity to protect the collective rights of a certain group, if such protection falls within the particular statutory aims of the associations.⁷

The Constitutional Court also mentioned in its Annual Report that despite declaring the establishment of the civil society as a priority objective, our country still lacks necessary legislative guarantees to grant the NGOs the status of procedural legal personalities in frames of the legal positions of the RA Constitutional Court.⁸

⁶ Para. 7(3) of the Ruling N 906 dated 07.09.2010

⁷ See RA Constitutional Court report on the state of implementation of the rulings adopted in 2012, January 2013, Yerevan.

⁸ See Ibid.

Findings of the foreign legislation survey

I. *What is the scope of the issues that can be challenged in a court of law as matters of public interest? What are the grounds for an issue to be recognized as a matter of public interest?*

1. As a rule, the matter of public interest lacks clear definition.
2. It can be stated that public or collective interests frequently include:
 - Issues related to the rights of children and disabled persons;
 - State auction results (such as land acts);
 - National and community contracts and operations;
 - Environmental damages and environmental safety issues;
 - Issues related to traffic safety and state of roads;
 - Personal data protection issues;
 - Requirements to remove billboard and online advertisements with illegal or immoral contents;
 - Demands to collapse any structures or buildings constructed in violation of construction or environmental regulations as well as regulations of cultural heritage preservation and urban planning requirements;
 - Issues related to consumers' rights;
 - Certain discrimination issues.

II. *Who can be entitled to apply to a court of law for the purpose of public interest protection? Who can be the defendant under the claim of public interest protection?*

1. While the legislative regulations of the countries surveyed are hinged on the common principle that in any case the person can bring a legal action to protect his/her allegedly violated rights and legal interests, each of the countries still provides some exceptions that allow certain persons to bring actions on behalf of others as well or to protect the public interest.

2. Under certain circumstances, the protection of the public interest can be initiated by associations and other organizations that are entitled to apply for the protection of the rights and legal interests of their members and largest groups within their activities if the right to file a legal action for the protection of such public interest is clearly envisaged by law.

3. In some cases, the concept of "public interest" is considered equivalent to that of "collective interests".

Protection of the public interest under the civil law

4. As a rule, an action for the protection of the public interest within the civil law can be filed by certain organizations. For instance, it is a common practice in France that an association can file a legal action to protect the collective interests of its members if the interests of one, several or all the members are impaired.

5. In some cases, the law expressly provides some associations/unions with the right to seek judicial protection for the collective interests of their members. For instance in France, such unions may include associations for the protection of disabled employees, registered consumers associations, registered investors associations, registered environmental associations.⁹

6. The judicial practice also contributes to the development of the right to protection of the public interest. Thus, despite the fact that the French Code of Civil Procedure provides only a limited number of associations with the right to apply for the protection of the public interest, the legal practice has some registered precedents when the courts approved the possibility of non-registered associations to file a legal action when the protection of the public interest in question was counted among their objectives.¹⁰

7. As a rule, the protection of the public interest is initiated by organizations that are entitled with such right by law. For instance, the German laws on consumer protection prescribe that the only organizations entitled to bring an action to suspend an illegal activity and requirement to refrain from its resumption are the consumer associations registered either in the annual list of the Federal Office of Justice (*Bundesamt für Justiz*) or in the list of the European Commission.

8. The civil legislation of the Russian Federation entitles individuals and NGOs to file a legal action against any activity that is most likely to be detrimental to the applicant and the public at large. Such legal practices cover construction and industrial production (cleaning, energy, metallurgy, other industries) or any actions against the public morals (such as gambling business).

Protection of the public interest under the administrative law

9. Organizations/associations are entitled to file a legal action to declare void both normative and individual legal acts if such acts come to impair the public interests that fall within the activities of the association. In some cases, this right of such organizations must be stipulated by the legal acts on the relevant issues (for instance, environmental organizations in Germany

⁹ To be registered, the association must meet various requirements, including (i) contribute to the general well-being, (ii) have a democratic administration, and (iii) abide by the French rules of transparent operations.

¹⁰ See Cass. 2^e civ., 27 May 2004; Cass. 3^e civ., 26 September 2007.

(*Naturschutzverbände*) are competent to raise issues on the protection of the public interest concerning violations of particular environmental laws, such as the Federal Pollution Control Act (*Bundesimmissionsschutzgesetz*) or the Law on Environmental Impact Assessment (*Gesetz über die Umweltverträglichkeitsprüfung*). Or, the disability rights organizations in Germany (*Behindertenverband*) officially recognized by the Ministry of Health are entitled to claim declaratory actions (*Feststellungsklage*) in some cases of discrimination against the disabled.

Protection of the public interest under the criminal procedure

10. There are a limited number of associations in France authorized to file a criminal action or join the criminal proceedings to protect the public interest. In this case, the law should expressly provide certain types of associations with the option to be a party to criminal proceedings.

III. *What are the judicial authorities or courts of law that can be applied to file an action for public interest protection? What is the procedure of case investigation? What are the fundamentals of criminal investigation?*

11. As a rule, there is no specific procedure for filing a legal action for the protection of the public interest. Each legal action is examined in compliance with the common investigation rules at the courts of law of relevant field (civil, administrative or criminal) and instance.

12. Thus, the Arbitration Procedure code of the Russian Federation contains a chapter on the procedure for investigation of cases on protection of the rights and legal interests of a group of persons.

IV. *What legal norms (substantive, procedural) can and must be used to define the right and procedures of filing an action to protect the public interest?*

13. The acts under both the substantive and procedural law contain provisions on the court protection of the public interest. Thus, the substantive acts in some cases set out the fields and organizations competent to file such legal actions, and the procedural acts regulate the filing and examination of such actions by establishing specific procedures in certain cases and common procedures in some other cases. The procedural norms can also define the scope of entities authorized to file a legal action, also by reference to the relevant substantive norms.

V. *How are issues related to court costs resolved under legal cases on protection of the public interest?*

14. According to the analysis, the issues of the state duty and court costs are resolved under the general rules of the legislation.

International norms

The Recommendation (2004)20 of the Committee of Ministers on Judicial Review of

Administrative Acts dated December 15, 2004, referred to in the RA Constitutional Court Ruling N 906 of 07.09.2010, can be counted among the instruments providing for the international norms for a free trial and access to judicial protection.

According to the Recommendation, Member States are encouraged to examine whether access to judicial review should not also be opened to associations or other persons and bodies empowered to protect collective or community interests (Principle 2, Para. 1).

By reference to this provision, the Explanatory Memorandum to the Recommendation prescribes that the Recommendation encourages the member states to enable the non-governmental organizations, associations or other persons and bodies empowered to protect collective or community interests to protect such rights and apply to court to this effect. This provision covers administrative acts on the interests of a group of persons rather than a single individual. This being so, the notion of “administrative acts” means: 1. both individual and normative legal acts passed by an administrative public authority which may affect the rights or interests of natural or legal persons; and 2. situations of refusal to act or an omission to do so in cases where the administrative authority is under an obligation to implement a procedure following a request.

Recommendations

Considering that the prospects of filing a legal action and joining the legal proceedings for the protection of the public interest can act as a locomotive for the development of the civil society and the law in general, and furthermore, that reserving this right by non-governmental organizations also derives from the need for full and effective realization of their own objectives,

it is recommended to:

1. Study and reveal the spheres in need of urgent solutions, where it would be possible to introduce by priority the right for NGOs to apply to courts for the protection of the public interest. Particularly, it is recommended to highlight the issues related to disability rights¹¹, consumer rights, electoral rights, anti-discrimination initiatives, legal relations within environmental protection, preservation of historical and cultural values, human rights, etc.

2. Make relevant legislative amendments to the RA Code of Administrative Procedure, so that the law entitles persons or groups of persons to apply to the Administrative Court for the

¹¹ To the effect of protection of the rights of the disabled, the HCA Vanadzor suggested to define this right for the particular NGOs addressing the particular rights of the disabled under the RA draft Law on the Protection of Rights and Social Integration of Persons with Disabilities currently under way. However, the suggestion was qualified as undue.

protection of the rights and legal interests of other persons.

3. Make relevant legislative amendments to the legislative acts regulating various fields to reserve an option for the NGOs acting in relevant fields to file legal actions for the protection of the public interest. Particularly, it is recommended to introduce such provisions by priority within the RA draft Law on the Protection of Rights and Social Integration of Persons with Disabilities and the RA Anti-Discrimination draft Law.