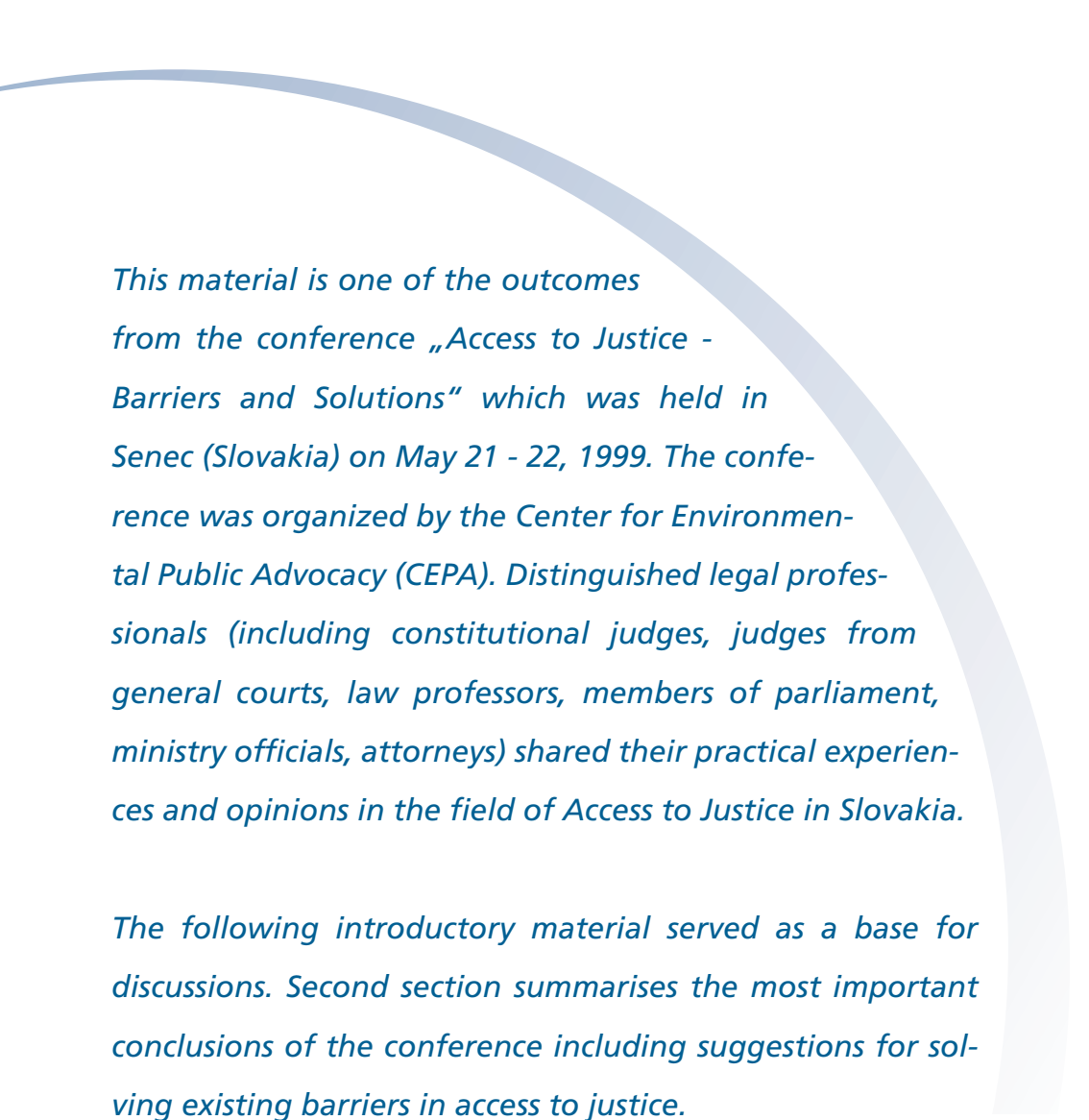


**Center for Environmental Public Advocacy
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**ACCESS
TO JUSTICE
- BARRIERS
AND SOLUTIONS**

Conference in Seneca • May 21-22, 1999



This material is one of the outcomes from the conference „Access to Justice - Barriers and Solutions“ which was held in Senec (Slovakia) on May 21 - 22, 1999. The conference was organized by the Center for Environmental Public Advocacy (CEPA). Distinguished legal professionals (including constitutional judges, judges from general courts, law professors, members of parliament, ministry officials, attorneys) shared their practical experiences and opinions in the field of Access to Justice in Slovakia.

The following introductory material served as a base for discussions. Second section summarises the most important conclusions of the conference including suggestions for solving existing barriers in access to justice.

You will find the list of participants at the end of this publication.

ACCESS TO JUSTICE – BARRIERS AND SOLUTIONS

Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs - that is to say, misuses of public power, and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.¹

(Justice Sedley)

This material is intended as an introduction to a discourse about the means of self-defence an individual may use in a situation of „wrongs or misuses of public power“ mentioned in the opening quotation. Its main topic is legal standing in judicial proceedings, in particular where the interest of a plaintiff (or anyone who wants to become one) is broader than is his personal interest in the traditional meaning of the word. The values this kind of litigant sometimes seeks to defend are the most often identified with the concept of public interest. We are far from perceiving public interest only as the interest of the state. Paradoxically, the citizens must sometime defend public interest against the state power. By opening a discourse on the possibilities available to the parties to the disputes of this kind we want to start taking inventory of the barriers that currently hinder an effective access to justice.

The first part of this material presents several interesting cases from the practice of foreign courts which resulted in changing approaches to provide legal standing in individual countries. The second part is devoted to the legislation and interesting cases in this country. In the conclusion we try to summarise the barriers and look for the solutions so as to ensure that „the citizens or organisations acting in good faith“ would not be at a disadvantage when confronted with the misuses of power.

¹ Ex parte Richard Dixon, CO/3410/96, High Court of Justice, QB Div, Crown Office, 1997

1. CERTAIN INTERESTING CASES FROM ABROAD

We will first present certain cases, perhaps surprising for our professional community, from the countries whose decisions are not often quoted.

In 1993², the Supreme Court of the Philippines ruled that, in the cases involving the right to a healthy and sound environment, intergenerational responsibility may represent the ground for granting a litigant the right to file lawsuits also on behalf of the future generations.

The lawsuit brought by lawyer Antonio Oposa on behalf of his three children and of 41 other children challenged the minister of the environment and natural resources, and sought the withdrawal of licences for extensive exploitation of the rain forests. The complaint was based on the argument that the constitution guarantees every person the right to a healthy and sound environment and that the conduct of the defendant - i.e. the practice of issuing licences for rain forest exploitation in the Philippines - seriously encroached upon the constitutional rights of the plaintiffs and, at the same time, strongly interfered with the constitutional rights of succeeding generations not yet born.

By its ruling, the court established that the right to a healthy environment also includes the right to enjoy the rhythm and harmony of the nature, and the right to a sensible use of all natural resources, and that such use must be correspondingly accessible also to the future generations. The court granted the complaint and its judgement became the basis for similar decisions of courts in other countries (i.e. in Costa Rica).³

An interesting position on legal standing was taken by the Supreme Court of Tanzania in 1993⁴. The court determined that, in connection with the actions brought in public interest, it would not deny „standing to a genuine and bona fide litigant“ even where the litigant had no personal concern in the matter. Standing is to be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy. In the justification for its positive decision the court mentioned also the concept of a dual status of individuals. Every person is both an individual with the constitutionally guaranteed rights and freedoms, and a member of a community with all the rights and responsibilities ensuing therefrom. As

² Minors Oposa at al. v. Secretary of the Environment and Natural Resources Fulgencio Factoran, GR No. 101093)

³ Mejia Chacon v. el Ministerio de Salud y la Municipalidad de Santo Ana, Voto No. 3705-93, Sala Constitucional de la Corte Suprema de Justicia, Costa Rica).

⁴ Mtikila vs. the Attorney General, Civ. Case No. 5 of 1993

regards the correlation between the rights and the responsibilities, this correlation should be perceived as an obligation of individuals

to exercise their private rights also in order to contribute to an overall improvement of the quality of the society to which they belong. Any individual who strives, in any way, to restore or to remedy an ill functioning (because of active or latent violations of the law) system thus acts in public interest for the good of the entire society. The court took into consideration the socio-economic conditions of the country, poverty, illiteracy rate, as well as the „culture of apathy and silence“ resulting from the long-term institutionalised rule of one party which practised repression and thus suppressed initiative and courage. *„Given all these circumstances, if there should spring up a public-spirited individual and seek the Court’s intervention against legislation or actions that pervert the Constitution, the Court, as a guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing“.*

An extensive approach to the standing to sue in the cases involving public interest can be found also in the practice of English courts: *„It would, in my view, be a grave lacuna [missing item] in our system of public law if a pressure group, or even a single spirited taxpayer, were prevented by outmoded technical rules of „locus standi“ from bringing the matter to the attention of a court to vindicate the rule of law and get the unlawful conduct stopped.“*⁵

Similarly, Canadian courts use a relatively liberal interpretation of legal standing-to-sue, especially where violations of constitutionality are involved, but not only there. *„If there is a serious case of unlawfulness or invalidity of a legal provision, the person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other and effective manner in which the issue may be brought before the Court.“*⁶

Federal courts in the United States of America recognise the right of legal standing for environmental organisations in the cases involving environmental protection. It is sufficient if at least one organisation on the side of the plaintiff can demonstrate that its members use, in one way or another, the disputed element of the nature. In the opinion of the courts, if the environment in the region is endangered, active access of these organisations to the courts is natural and indisputable.

In Australia, legal standing underwent interesting developments. The first decision in this context was negative and the petition was dismissed on the ground that the environmental organisation that filed the lawsuit had only an „emotional or intellectual concern in the matter“⁷. However, in the following year, the same

⁵ IRC v. National Federation of Self - Employed and Small Businesses Ltd., 1981, 2 All E.R. 93, 107

⁶ Minister of Justice vs. Borowski, case from 1981.

court recognised the right of aboriginal people of Australia to sue an extraction company in order to protect their sacred sites, even though the plaintiffs did not own the land in question. In the opinion of the court, their relationship to the matter was so intimate that it granted them legal standing, because the sites have *truly a „great cultural and spiritual significance“*⁸ for them. Thus, while the emotional concern in the matter was not deemed as sufficient in the first case, the „spiritual relationship“ in the second case was enough. This progressive shift was followed by other changes as well. The courts at different levels recognised the right of forest protection organisations to fight the lawsuits, because these organisations served on official advisory committees to the government, received continuing grants (although modest) from the state budget, made submissions to government on forestry issues and therefore, their *„concern in the matter was far more than merely intellectual or emotional“*⁹.

In the post-communist world, a similar approach was first applied in Slovenia. In a case which involved access to courts of the „Društvo ekologov Slovenije“ and of 25 natural persons (U - I. 30/95 - 26), the constitutional court determined that, because of their constitutional right to a healthy environment, the plaintiffs had the necessary legal interest (required for this type of proceedings). The court ruled that, in connection with the activities which result in damaging the environment, any person may claim to be concerned. This concern is not limited only to the environment in which the plaintiff lives, but is „certainly broader“. The court did not hesitate to recognise also legal standing of environmental non-governmental organisations in ecological cases if the by-laws of these organisations provide for the protection of the environment.

A convention signed in the summer of last year in Aarhus, Denmark, indicates that the approach of the Slovene court is by far not an isolated „escape“ in this part of the world, and that it is a modern and progressive trend. The UN ECE Convention on Access to Information, Public Participation in the Decision-making and Access to Justice in Environmental Matters was signed thus far by 40 countries (besides the United Kingdom and the Czech Republic

it was signed also by Albania and Belarus, but not yet by Slovakia). All the signatories gave, *inter alia*, an undertaking to create the necessary conditions for enabling the public to gain the widest possible access to the courts in the decisions concerning environmental matters.¹⁰

⁷ Australian Conservation Foundation v. Commonwealth, (1980) 146 CLR 493, 28 ALR 257, High Court of Australia

⁸ Onus v. Alcoa, (1981) 149 CLR 27, 36 ALR 425

⁹ North Coast Environmental Council v. Minister for Resources, 1994, No. NG614

¹⁰ In the Czech Republic, this approach was applied already before the adoption of the Aarhus Convention. The status of parties to administrative proceedings in environmental protection cases (including land-use proceedings, granting of exceptions, issuing of licences, etc.) can be granted also to environmental civil organisations (Act No. 114/1994 Coll.). These organisations have therefore the right to lodge their claims also to the administrative courts.

2. EVALUATION OF THE SITUATION IN SLOVAKIA

The lawsuits brought in public interest, such as those admitted by the American, English, Australian, Filipino, Tanzanian, many South American, Indian courts, but also by the Slovene constitutional court, do not exist in Slovakia yet. The protection of public interest is entrusted exclusively to the state organs. But do the available means such as criminal information, complaint, petition, proposal to open misdemeanour proceedings and other institutions of, for the most part, public law provide a sufficient guarantee for the protection of public interest? Would our law not lend itself to considering equally creative, although perhaps less exotic approaches than the ones described above?

Let us summarise what our law says about standing to sue in civil and constitutional law, and in administrative judiciary:

In our legal system, the answer to the question of legal standing is provided in the relevant provisions of substantive law and, the most often, it has the form of a substantive (**creditor, neighbour, owner...**), or of a substantivized adjective (**endangered, injured**). The second way in which the requirement of standing to sue is defined probably allows a somewhat broader interpretation and, in connection with the cases involving the protection of certain fundamental rights and freedoms, this broader interpretation is completely justified (both as regards human rights and their restriction, and the right to a favourable environment where the class of affected persons - either endangered or injured - is really broad).

Where the review of the decisions of public authorities is concerned, legal standing is derived from the definition of parties to administrative proceedings. Any person, whose rights, legally protected interests or obligations are to be dealt with in the proceedings, or whose rights, lawfully protected interests or obligations can be directly affected by a decision, can become a party to administrative proceedings. This also applies to any person claiming that he is liable to be directly affected by a decision (until such claim is not reversed) and to any person who, under specific legal provisions, has the right to sue in administrative courts. As regards administrative courts, the debate is mainly about whose rights and lawfully protected interests are considered as being directly affected.

Any person whose rights are violated by the decision of a public authority has the right to lodge a constitutional complaint with the Constitutional Court of the Slovak Republic (provided that the disputed rights are not subject to a litigation pending before any other court). Another option is to file a petition pursuant to Article 130 para. 3 of the Constitution. Any person, alleging violation of his rights, has the right to file a petition with the Constitutional Court.

Let us now consider two interesting instances of the application of the aforesaid provisions:

2.1. „WHOSE RIGHTS ARE DIRECTLY AFFECTED.“

In 1994, a civil association called Forest Protection Group „Vlk“ asked to be allowed to take part in the adoption of the forest management plan in the Čergov Mountain Range. The forest management plan represents an administrative decision which determines the direction of forest management (the volume and mode of exploitation, etc.) in the next decade. The key argument of the association was that its members were citizens who were affected by the forest management practices in the region and who were concerned about the damages caused, in particular, by the clearing of forests. Other equally important factors included a steadily deteriorating water retention capacity of the forest landscape and the related danger of floods in the basin.¹¹

In the procedures conducted before the state administration bodies, a number of arguments were presented with the objective of denying the association the right to become a party to the proceedings in question.¹² The dispute ended up before the Supreme Court of the Slovak Republic, to which the association lodged a complaint challenging the decisions of the state administration bodies whereby these bodies denied the association the right to stand as a party to the proceedings. The Court

¹¹ The association argued that, among other things, water management features of the region in question are exceptionally valuable because they ensure the accumulation of drinking water for the population of the region, including members of the association. According to professional studies, the damages caused by indiscriminate use of the forests amounted to 96 million crowns a year in water and soil losses alone. The forest management plan is a document which can make this trend either continue or be reversed. The association pointed to Article 44 of the Constitution of the Slovak Republic and Article 35 of the Charter on Fundamental Rights and Freedoms (the right to a healthy environment), to the legal obligation of every person to prevent damages, laid down in Section 415, to the right of persons to invoke protection under Section 417 of the Civil Code, and to the right of every person to seek the exercise of his right under Section 15 of Act No. 17/1991 Coll. on the Environment. Moreover, the association pointed out that the interest to preserve natural forests is protected also in the opening provisions of the Forestry Act and the Act on State Administration in Forest Management. Because of the above facts, the association felt that its rights, legally protected interests and obligations can be directly affected by the decision.

¹² The state administration body noted in its decision that forest management indirectly concerns every citizen of the Republic because it is related also to other aspects of the environment. If the proposal of the association Vlk were adopted, any citizen could obtain legal standing; this is „absurd, does not have support in the law, and is organisationally unmanageable „ and, moreover, it casts doubt on the professional competence and expertise of other bodies.

¹³ Decision 4 SZ 122/95.

issued a ruling¹³ whereby it dismissed the complaint and, as regards legal standing, stated the following: *To satisfy the section of the definition which grants the right to become a party to the proceedings to anyone whose rights, legally protected interests or obligations may be directly affected by a decision, the decision adopted in the proceedings concerning a third person would have to affect the legal status of another natural or legal person*“. There is an underlying assumption that, if a person is to be directly affected by a decision, his post-decision legal status must be different from his pre-decision legal status. In the opinion of the Court, the situation of the plaintiff did not meet the above requirement; however, the Court also stated that there was a possibility that this requirement would be met by other parties - the parties which the plaintiff did not specify in more detail and which could be

injured as a result of the alleged calculable damages in the particular region, and/or an organisation which represented specific injured parties in order to protect their substantive rights. „The plaintiff's active interest in the problem, which arises from his indisputable public interest to protect natural forests . does not, by itself, constitute a sufficient ground to grant him legal standing in administrative proceedings.“

This case raised several issues: Who really are the injured parties in the cases of damage to the environment? How should the notion of „the change in the legal status“ - a precondition for obtaining legal standing in administrative proceedings - be interpreted? Whose legal status has changed as a result of the damage to the environment and/or deterioration of the quality of life? We repeat that modern law in Europe clearly takes the road of strengthening the role of the citizens and civil organisations in the decision-making processes. Can anything be done in this respect even within the existing legislation, or is it necessary to change it?

2.2.

„IT IS POSSIBLE TO CHALLENGE ONLY SUCH A DECISION WHICH HAS BEEN IMPLEMENTED IN PRACTICE.“

The second case which may raise interesting questions dates from 1997. The foundation Kesaj, the Good Romany Fairy, turned to the Constitutional Court of the Slovak Republic with a „*Petition to open proceedings, based on the admission of the petition at a preliminary hearing*“. It sought the annulment of the resolutions adopted by local government authorities of Ňagov and Rokytovcce. Under the former resolution, „*Romany citizens were not allowed entry to the village and were prohibited from taking accommodation in the dwelling units located within the Ňagov cadastral limits*“. The resolution of the Rokytovcce local government authority „*declared that if the Roma forcibly move in into the municipality, they will be moved out (evicted) outside of the cadastral limits of the municipality*“.

The petitioner (foundation) derived its substantive and procedural standing to sue from the argument that, „*because of our Romany origin, we are prohibited from entering the municipality, and are thus prevented from fulfilling the objective of our foundation which includes assistance to the groups of disadvantaged and needy persons, support for health, social and charitable activities designed to strengthen and enhance spiritual values of the Roma*“. This amounts to the violation of constitutional rights, namely Article 121 of the Constitution (equality before the law), Article 23 of the Constitution (freedom of movement) and Article 33 of the Constitution (prohibition of discrimination).

Given the substance of the submission, the Constitutional Court qualified it as a constitutional complaint (*inter alia*, probably also because the peti-

tioner sought a ruling whereby the aforesaid resolutions would be annulled - as this is possible only in the proceedings held in respect of constitutional complaints) and, as regards legal standing, it noted: „ *Article 12 para. 2 of the Constitution of the Slovak Republic can be invoked only in connection with other fundamental rights and freedoms, Articles 23 and 33 of the Constitution regulate only those fundamental rights and freedoms which are exclusively granted to natural persons (any citizen, any alien), but not to legal persons.*” The petitioner, being a legal person, therefore challenged the violation of the rights which, under the Constitution, are granted only to natural persons and the Constitutional Court dismissed the complaint as „clearly unsubstantiated”, stating also: „*A constitutional complaint may be deemed as clearly unsubstantiated if the Constitutional Court, during the preliminary hearing on the complaint, does not establish any direct causal relationship between the final decision of a state administration body or a self-governing authority and the fundamental right or freedom the violation of which the petitioner claimed.*”

The same case, although with other petitioners and with different arguments, continued with the lodging of two petitions to the Constitutional Court of the Slovak Republic. These petitions, which also challenged the aforesaid decisions of local government authorities, sought a ruling determining the violation of the same constitutional rights. One of the petitions was lodged by J. D., a Romany woman who had permanent domicile in the community of Rokytovec, and the other by J. L., a Romany man who had permanent domicile in the community of Ňagov. Other petitioners, M. L. and A. K., Slovak citizens and ethnic Roma, did not have permanent residency in either of the two municipalities. They used, e.g., the following arguments to prove their legal standing: „ *The disputed resolution, which has a normative character and determines the rights and obligations, affects not only J. L. who is an inhabitant of the municipality, but it directly affects and injures also the rest of us who are Roma. When it refers to the Romany citizens, it has in mind a precisely identifiable group of a specific number of persons. The entry to the municipality is forbidden for the entire group. In our opinion, every person who belongs to this group (the Constitution guarantees free choice of one's ethnicity) fulfils the requirement of standing to sue necessary to claim the protection of his rights, if these rights are clearly connected with the fact that a person belongs to a particular group.*”

The Constitutional Court dismissed also the petitions lodged by J. L. and J. D. as clearly inadmissible; as regards other petitioners (i.e. persons who did not have permanent residency in the municipalities in question), the Court ruled that they did not have the capacity to sue. The Court ruled that in neither of the two cases did the municipality in question implement the challenged resolution in such a manner which would result in the restriction of the constitutionally guaranteed private rights. It further stated that no causal relationship was established between the alleged violation of rights and the decisions of local government authorities. Several conclusions can be derived from the aforesaid facts:

- the simple fact that a normative decision has been adopted, whatever is its substance (we believe that the text of the decision in our case is

clearly unconstitutional) cannot be invoked as the ground for alleging the violation of constitutional rights, i.e. „it is all right“, and it is possible to claim that the law has been violated only if the decision is implemented in conflict with the constitutionally recognised rights,

- the difference between „clearly inadmissible“ and „clearly unsubstantiated“ petitions is not clear, because the court chamber which heard the matter gave an identical interpretation of these two concepts, i.e. as *„a failure to establish a causal relationship between a final decision of a state administration or self-governing body on the one hand and a fundamental right or freedom whose violation was claimed by the petitioner on the other hand“*,
- according to the decision made in respect of the first petition, the rights invoked by the petitioner are granted only to natural persons and, as such, may not be claimed by legal persons,
- a brief analysis of the two decisions indicates that access to the courts was denied and that, in the Court's opinion, none of the petitioners had, because of different reasons, substantive standing to sue.

It should be added that, as regards the merits of the case, all the technically available means of legal redress have been used to challenge the aforesaid resolutions (because they do not have the character of generally binding regulations issued by municipalities, it was not possible to challenge them before the National Council of the Slovak Republic and, because Section 200ha of the Code of Civil Procedure on reviewing the lawfulness of local government authority resolutions on a motion filed by a district authority or a public prosecutor did not exist at the time, it was not possible to challenge them in ordinary courts, either); the Constitutional Court also dismissed the matter, even though always on different grounds.

As a result, an interesting situation was created where there is practically no possibility to seek the annulment of the aforesaid decisions. (It should be added that a public prosecutor did not comply with the request to bring a protest, arguing that he did not have the competence to deal with the matter because it had already been resolved by the Constitutional Court .)

We are of the opinion that the unshakeable position of these resolutions vis-a-vis the available domestic legal remedies creates a very unhealthy climate in the society. This case raises also a number of other questions. Is it really possible for a public authority to adopt a decision like the one mentioned above without running into any problem? Is it possible to allege violation of the law only after a decision has been implemented in practice? We should mention that, in similar cases, the European Court of Human Rights in Strasbourg adopted a different opinion. In the case *Johnston et al.*, 1986 the Court ruled that, under Article 25 of the Convention, the petitioner has the right to challenge a law as violating his rights if he is directly affected by such a law, even if there is no particular implementing regulation. The Court expressed a similar opinion also in the cases *Open Door* and *Dublin Well Woman*, 1992 and *Mallone*, 1992.

3, SUMMARY OF THE BARRIERS AND THE SEARCH FOR SOLUTIONS

There is no doubt that access to justice is restricted by a number of barriers. In the following section we shall outline some of the barriers without pretending to give their exhausting list:

- Restrictive approach of the legislation and/or the decision-making practice of administration bodies and courts as regards the right to sue.
- Impossibility to review certain acts of public authorities (either apparent or real)
- Some provisions of Annex A to the Code of Civil Procedure (OSP) to which Section 248 para. 3 of OSP refer; the Annex sets out the cases where it is not possible to request the review of the decisions of administrative bodies by courts. It is, to say the least, open to question whether certain provisions of the aforesaid Annex and of the entire Section 249 of the Code of Civil Procedure are in conformity with the Constitution, because the Constitution does not allow to exclude the review of the decisions which affect fundamental rights and freedoms from the jurisdiction of the courts (Article 46 of the Constitution of the Slovak Republic).
- The right to seek protection of certain fundamental third-generation rights is strongly restricted also by Article 51 of the Constitution. This Article provides that the rights set out in Articles 35, 36, Article 37 para. 4, Articles 38 to 42 and Article 44 of the Constitution can be invoked only within the boundaries of the laws by means of which these provisions are implemented. The discussion concerning this subject will probably focus on the key concept of „positive commitment of the state“ - a constitutional commitment of the state to adopt the laws without which the rights set out in Article 51 are inaccessible. At the same time, we are of the opinion that „every person“ should have a real and effective possibility of enforcing his constitutional rights. It is not sufficient to adopt the laws which place the protection of citizens' rights exclusively into the hands of the state and which turn the citizens into observers or, in a better case, informants.
- As regards access to the Constitutional Court, access to justice in the broader meaning of the term is restricted also due to the fact that, after a person has exercised his right to have a decision or a procedure of a public authority reviewed (Article 130 para. 3 of the Constitution), there is no guarantee that the established unlawful state will be really and effectively remedied.
- The status (or access to justice) of injured parties or informants under criminal law is also limited. The model where all the important powers are vested with a state organ is not the only model that is available, and its functioning in our country should be re-examined.

WHAT ARE THE POSSIBLE SOLUTIONS?

We shall now try (maybe not too systematically) to recapitulate the options which are presently available to the „public-minded persons“ in Slovakia. At this point, we shall not deal with the classical institutions such as the petitions requesting the review of lawfulness by a prosecution office, complaints, etc. We are mainly concerned with the access of citizens to an effective judicial protection of their rights.

First of all, even the current legal situation offers a possibility to introduce certain changes into the decision-making practice. Thus, if a matter involves public interest, it is realistic to expand the interpretation of the phrase „any person whose rights and legally protected interests can be directly affected by the decision“, without the risk that bypassing the existing stereotypes would be qualified as legal voluntarism.

Moreover, certain Civil Code provisions could be applied with greater vigour. These range, for instance, from Section 4 which - in conjunction with Article 46 of the Constitution - lays down the right to seek protection against anybody who endangers or violates the law from a body competent to provide such protection, to the provisions which govern, e.g., liability for damage and improper enrichment. These are the instruments that can also be used for the protection of public interests. Even though they are conceived as classical instruments for the protection of private rights, in our opinion they can be used (in particular as regards damage prevention) also to protect public affairs.¹⁴

Another interesting possibility is offered by the use of the provisions of Section 417 of the Code of Civil Procedure. Under this Section, any person exposed to the threat of damage is obliged to take an appropriate action to prevent the damage; and, if the threat is serious, the endangered person has the right to seek a court ruling whereby appropriate and adequate measures would be imposed to avert an impending damage. This means that any natural and legal person can allege he feels such a threat, and the nature and the environment may also be exposed to the threat of damage. Because the environment is significant for all the persons without exception, all those who believe that there is a threat to the environment should be granted access to the courts.

Certain initial considerations have been given also to a broader use of the institution of the so-called „neighbour disputes“ or „nuisance“ (Section 127 of the Code of Civil Procedure). This provision (although originally conceived to settle „minor“ neighbour disputes) can be successfully used in certain cases also for the protection of entire communities from the influence of operations which have adverse effects on the quality of life of people (especially if, because of different reasons, it was not possible to obtain the desired changes by means of applications lodged with the state administration and urging that the environmental legislation be properly enforced).

¹⁴ Under Section 415 of the Code of Civil Procedure, no one can be engaged in a conduct which may cause injury to health, property, nature or the environment. A guide to defining the concept of „damage to the environment“ can be found in the provision of Section 10 of the Act No. 17/1992 Coll. on the Environment which defines the so-called harm to the environment. It defines this concept as the loss or weakening of natural functions of ecosystems caused by the damage inflicted to individual components thereof, or by disturbing internal links and processes due to human activities. This definition is clearly broader than is the classical definition of damage and it has and should have an implication also for expanding the class of persons that meet the standing to sue requirement in the cases of damage to the environment.

The predominant and exclusive role of the state in such matters as nature protection and sometimes also the protection of human rights is not a healthy phenomenon and makes it impossible to strike a balance between the interests of the state and the interests of the communities, individuals and general public. These and many other arguments clearly indicate that, to improve access to justice, it would be worthwhile to consider the incorporation of public actions - such as they are conceived by many foreign courts - also into our private law.

To support this argument, we bring the following quotation:¹⁵

„To enable a person to bring an action in public interest would require practically no change of the Code of Civil Procedure. It would be sufficient only to expand the class of entitled persons whose rights can be affected by certain types of conduct; at present, the courts would dismiss any attempt at bringing a public action in the true meaning of the term, arguing that the citizen concerned is not directly affected by the intentions of the entity which causes the damage. A special law would have to be adopted whereby the legislator would define the types of activities liable to actions brought in public interest. If these activities are defined in a sufficiently compact manner (and, in the first stage, rather narrowly), this would probably not require such a revolutionary change as it might seem at first glance. The legislation would obviously have to ensure that the companies be prevented from lodging fictitious complaints against themselves in an effort to avoid genuine public actions brought in respect of the same matter. It would also be necessary to adjust the amount of fees for the defeated actions so as to prevent an impulsive lodging of complaints by anyone, anywhere, etc.

In the initial period, it would probably not be possible to prevent the misuse of public actions by the extremists who would try to use them to raise publicity for their objectives. The courts will need to cope with such cases and make a series of rulings whereby they would lay down unwritten rules to guide the decisions on similar matters. Public complaints would be probably more demanding on individual judges than the resolution of routine disputes - but, in my view, these cases could help the judges deepen their sense of justice, provided it has not been totally eroded by an often surrealistic concept of judicial justice in the Czech Republic, and the judges could prove that they truly deserve their exclusive position among public officials. I think that there are quite a few young judges who would enjoy deciding such cases.

This is what judge Sedley's quotation from the beginning of the article was basically about. At this point, it is not appropriate to enter into polemics about public law vs. private law, the result being the same irrespective of whether we refer to our approach or Prokop's approach as the control of public law by private law institutions or otherwise. Our intention was only to make a train with new ideas move also in this direction.

¹⁵ „Odpověď mému vnukovi“,
Mgr. Martin Prokop, The Last Generation,
october 1997, p. 15.

CONCLUSIONS OF THE DISCUSSION: BARRIERS AND SOLUTIONS

Apparent/real impossibility to review
certain acts of public authorities

Use of private law instruments
Changing restrictive practices of courts
Changing the laws (Constitution)

To illustrate this barrier, a case of two Eastern Slovak communities (Rokytovec, Ňagov) was presented at the conference. The plaintiffs (the Roma with habitual domicile in the municipality and other Roma who were not permanent residents of the municipalities) filed petitions pursuant to Article 130 para. 3 of the Constitution, seeking a ruling on the violation of their rights by local government authorities which, in fact, prevented the Roma from entering the villages. The Constitutional Court dismissed the above mentioned petitions, as well as one previously filed by a judiciary person- the Foundation of a good Roma Fairy Kesay- seeking protection of its rights and abolition of local government Acts in task.

The following views were expressed in the discussion:

- The above resolutions do not meet the characteristics of the decisions of public authorities. Rather than constituting an outcome of the decision-making activities of local government authorities, they represent the outcome of legal acts of these authorities. Their reversal would require the use of private law instruments, namely of the application for a declaratory order (the cause of action should include the request that legal acts of local government authorities be declared invalid, that the right of entry to the municipality be determined, and that the implementation of the resolution be banned.).
- Some participants considered them as „false resolutions“, i.e. acts whose legal form was not in harmony with their subject. As such, these acts have no legal effects and should be ignored.
- The Constitutional Court would have admitted the petitions if they had been lodged, within a two-month time limit, by persons who had the capacity to claim protection (so not as it has been done in the first part of the case - complaint brought by the legal entity).
- This barrier can be overcome by means of interpretation of the relevant provisions of the Constitution and the laws. This argument is supported also by the case-law of the Strasbourg bodies of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court of Human Rights ruled, in particular in *Open Door and Dublin Well Woman*, 1992 and *Malone*, 1984, that mere existence of a law or a decision may constitute the violation of fundamental rights and freedoms, even if it had not been actually implemented. Related to this ruling, as far as an act of a public authority is concerned, public law should not be and is not powerless in remedying situation, which is in contradiction to the Constitution.

Limited possibilities of informants and of injured parties in criminal proceedings to use legal remedies (raise a complaint against the decision not to start the investigation)

→ **New instruction issued by the Prosecutor-General
Fostering a novel interpretation of the provisions of the Code of Criminal Procedure
Private penal actions**

As agreed, we drafted a letter to the Prosecutor-General of the Slovak Republic concerning opinion of the Prosecutor General's Office No. 1/95 according to which neither the plaintiff (the victim) nor the informant were entitled to lodging a complaint against the decision not to start an investigation. A copy of this letter has been attached for all participants.¹⁶

No response was evoked by the idea of introducing the instrument of private penal actions into our system.

Restricted access to court resulting from Section 248 of the Code of Civil Procedure (OSP), Annex A OSP

→ **Changing the law
Access to the Constitutional Court**

Section 248 of the Code of Civil Procedure (OSP), Annex A OSP sets out the types of the decisions of administrative bodies which cannot be subjected to a review by the courts. These decisions cover a wide range and Section 248 does not always set them out in an unambiguous manner.

The solution could have the form of the change in the law, although in some cases it could be represented by improving access to the Constitutional Court. Thus, the decision of an administrative body which, pursuant to Section 248 of the Code of Civil Procedure (OSP), Annex A to OSP, is excluded from the jurisdiction of ordinary courts, and which violates a constitutionally guaranteed right or freedom, may be challenged by means of a constitutional complaint lodged in conformity with Article 127 of the Constitution, or a petition lodged in conformity with Article 130 of the Constitution. Another option is that a judge of an ordinary court suspends the proceedings by reason of requesting the opinion of the Constitutional Court in conformity with Section 109 (b) of the Code of Civil Procedure.

Restricted exercise of constitutional rights by Article 51 of the Constitution Changing the Constitution (removing the restriction)

→ **Adopting the concept of positive commitment of the state**

¹⁶ Significant progress has been achieved in case of this barrier during the preparation of this publication. The Prosecutor General, Mr. Milan Hanzel, has answered our letter and he promised to consider it in the terms of upcoming amendment of the Criminal Procedure Law. The change of the law has entered into force on November 1999. Since this day, any injured party has a right to raise complaint against the refusal to start investigation.

Under Article 51 of the Constitution, certain fundamental „second- or third-generation“ rights can be invoked only within the bounds of the laws by means of which they are implemented. This constitutio-

nal provision represents a barrier to the access to justice, in particular if the aforesaid laws simply do not exist or if they interpret the guaranteed right in such a narrow manner that, in fact, they prevent its implementation. This situation could be remedied either by deleting the above Article from the Constitution (and thus increasing the discretion of ordinary courts and of the Constitutional Court), or by adopting the concept of a positive and legally enforceable commitment on the part of the state which would pledge to pass the laws that will provide for these rights in conformity with constitutional guarantees.

Lack of effectiveness of the petitions lodged to claim the protection of the rights provided for in Article 130 of the Constitution of the Slovak Republic

**Changing the Constitution (the law)
Novel interpretation of the relevant provisions**

Under Article 130 para. 3 of the Constitution, the Constitutional Court may decide to institute proceedings on the basis of the petitions filed by legal or natural persons complaining of the violation of their rights. In the existing case-law of the Constitutional Court, the class of persons that have legal standing to be sued on the above grounds is broader than the class of persons that have legal standing to be sued in connection with constitutional complaints lodged under Article 127 of the Constitution; petitions can be lodged to challenge the conduct of any public authority or the conduct of the authorities involved in criminal procedure, including the courts. However, the usual outcome of the proceedings conducted in respect of a petition is the adoption of a ruling whereby the Court only determines whether a fundamental right has been really violated. This cannot be considered as an effective remedy.

The situation could be improved by amending the Constitution (i.e. by broadening the class of persons having legal standing to be sued in the provisions which govern the constitutional complaints and, at the same time, by changing the provisions governing the petitions which should be turned into instruments whereby the petitioners could claim unconstitutionality of the laws or of secondary legislation), or by changing the approach of the Constitutional Court. This means that the Constitutional Court should adopt a different interpretation of the aforesaid constitutional Article and should consider it as a procedural rather than a substantive norm; per analogiam, it should hear and decide the cases in conformity with the relevant substantive norms of the Constitution, having the constitutive consequences.

2-month time limit for lodging constitutional complaints

**Changing the Constitution
Prolongation of the time limit in the event
of continued violation of the right**

Unlike the petitions, constitutional complaints must be lodged within two months from the date on which the challenged decision took effect. If legal certainty is given priority over the justice (especially where the fundamental rights and freedoms are concerned), this often means that

formalism is given priority over correcting an unconstitutional situation.

However, in certain situations the wording of Section 53 para. 3 of Act No. 38/1993 Coll. on the Organisation of the Constitutional Court of the Slovak Republic, Proceedings before It and the Status of Its Judges allows certain „play with the words“. These are the cases for which no legal remedies are available. The time limit in such cases starts running as from the date of the violation of a fundamental right or freedom. But where the decision of an authority creates a permanently unconstitutional situation, the violation of the right may be considered as taking place „every day“ and, consequently, any day can be considered as the date on which the time limit for lodging a constitutional complaint starts running. „If there is a continued violation of a right, it is not possible to allege that the time limit for lodging the complaint has expired.“

As regards the two-month time limit for bringing administrative action challenging the decisions in administrative proceedings, administrative authorities should be imposed an obligation to advise the parties to the proceedings of the right to sue in administrative courts.

Decision-making stereotypes

(e.g., concerning the issue of who is a party to administrative proceedings)

Changing the restrictive approach of the courts („the judge as a solution“)
Changing the law

When we speak about the decision-making stereotypes, we do not have in mind only the restrictive approach which the courts routinely apply when deciding to whom they will accord standing, but also their general reluctance to abandon the „beaten track“. In order not to run into possible problems, the judges apply the laws in a restrictive manner so as to avoid criticism or to avoid the need to walk on an uncharted path. On the other hand, if the broadened interpretation is used in all the situations and at any cost, this could result in legal voluntarism and could ultimately erode legal certainty. But, in our opinion, the use of a broadened interpretation with the aim of expanding the class of persons having legal standing in public interest, for instance to cover also the groups of active citizens who are clearly and bona fide engaged in various spheres of public life, would not *per se* result in weakening legal certainty. It would only represent a **possibility** of taking into account the interests of a broader spectrum of affected, threatened, injured persons.. and, consequently, a **possibility of** refining the very notion of public interest. This, in turn, could contribute to striking a right balance between equilibrium and justice.

Specific definition of parties to the proceedings
 (e.g. in the proceedings concerning the ban on new construction)

Changing the law

Among other barriers we should mention also Section 34 of Act No. 50/1976 on Land-use Planning and Building Code (Building Act); under this Act, the right of legal standing in the proceedings concerning a protected territory, a protected zone or the ban on new construction can be accorded only to the plaintiff. While the aforesaid provision has its logic where the protected zones and protected territories are concerned (even though even in this case the expansion of the class of persons who could claim being affected would broaden the range of interests to be taken into consideration), in connection with the ban on new construction this provision means only one thing - that the only party which can make a relevant presentation of its case in the proceedings is the plaintiff who complains of the restriction of his property rights - in most cases investors in large construction projects). The result is a situation where the persons whose rights are restricted are not allowed to present their cases in judicial proceedings, although (unlike in two former cases) public interest is more likely to be on their side.

We touched also upon certain other issues which create economic barriers to the access to justice, such as the right to legal aid, legal costs and mandatory representation. In the administrative judiciary, a barrier can sometimes have the form of decisions made without a hearing (Section 259f), limited jurisdiction of the courts to review administrative decisions (Section 245 para. 2), or a situation where, after a decision has been made on the merits of the case, the outcome may no longer be meaningful for the party concerned (because of ill-defined criteria for the suspension of enforceability of a decision which has been challenged by an administrative action). In some cases, a barrier to the access to justice may be represented by the delays in the proceedings (sometimes not even a court injunction is sufficiently expedient).

These and other relevant topics will be the subject of our next meeting.

SUMMARY: BARRIERS AND SOLUTIONS

Apparent/real impossibility to review certain acts of public authorities

- Use of private law instruments
- Changing restrictive practices of courts
- Changing the laws (Constitution)

Limited possibilities of informants and of injured parties in criminal proceedings for using legal remedies

- New instruction issued by Prosecutor-General
- Fostering a novel interpretation of the provisions of the Code of Criminal Procedure
- Private penal actions

Restricted access to court resulting from Section 248 of the Code of Civil Procedure (OSP), Annex A OSP

- Changing the law
- Access to the Constitutional Court

Restricted implementation of constitutional rights by Article 51 of the Constitution

- Changing the Constitution (removing the restriction)
- Adopting the concept of a positive commitment of the state

Lack of effectiveness of the petitions lodged to claim the protection of the rights provided for in Article 130 of the Constitution of the Slovak Republic

- Changing the Constitution (the law)
- Novel interpretation of the relevant provisions

2-month time limit for lodging constitutional complaints

Changing the Constitution

- Prolongation of the time limit in the event of continued violation of the right

Decision-making stereotypes (e.g., concerning the issue of who is a party to administrative proceedings)

- Changing the restrictive approach of the courts („the judge as a solution“)
- Changing the law

Specific definition of parties to the proceedings (e.g. in the proceedings concerning the ban on new construction)

- Changing the law

LIST OF PARTICIPANTS:

Táňa Aschenbrennerová
Supreme Court of SR
Župné nám. 13 , 813 01 Bratislava

Juraj Babjak
District Court
Skuteckého 7-9, Banská Bystrica

Marek Benedik
Attorney's office of Dr. Havlát
Gorkého 6, 811 01 Bratislava

Ľudovít Bradáč
District Court B. Bystrica
Skuteckého 7-9, Banská Bystrica

Ladislav Briestenský
EQ Klub, Radničné nám. 9
902 01 Pezinok

Martin Buzinger
Faculty of Law, Comenius Univ.
Šafárikovo nám. 6, Bratislava

Ivana Datlová
District Court B. Bystrica
Skuteckého 7-9, Banská Bystrica

Vítěslav Dohnal
Environmental Law Service (EPS)
Jakubské nám. 7, 602 00 Brno

Ján Drgonec, DrSc.
Constitutional Court of SR
Hlavná 72, 042 65 Košice

Pavel Doucha
Environmental Law Service (EPS)
Jakubské nám. 7, 602 00 Brno

Eva Handlová
County Court Bratislava I.
Záhradnícka 10, 811 01 Bratislava

Peter Haňdiak
Personnel Slovakia, s.r.o.
P.O.BOX 175, 814 99 Bratislava

Ján Havlát
Attorney
Gorkého 6, 811 01 Bratislava

Viera Horniaková

Press Agency SR
Tajovského 2, Košice

Peter Hrnčiar

County Court Liptovský Mikuláš
031 01 Liptovský Mikuláš

Tomáš Kamenec

M.S. Trnavského 18
841 01 Bratislava

Grazyna Kopinska

The Ford Foundation
Ul. Flory 1/8, 00 586 Warszaw

Ján Klúčka

Constitutional Court of SR
Hlavná 72, 042 65 Košice

Ján Klúčka

Faculty of Law, Safarik Univ.
Kováčska 26, Košice

Andrej Králik

Attorney's office of Dr. Dedák
Sládkovičova 2, 811 06 Bratislava

Peter Kresák

Faculty of Law, Comenius Univ.
Šafárikovo nám. 6, Bratislava

Petr Kužvart

ul. Za zelenou liškou 967/B
140 00 Praha 4

Daniel Lipšic

Ministry of Justice of SR
Župné nám. 13, 813 01 Bratislava

Dana Mareková

Lipského 4 , 841 01 Bratislava

Ingrid Mencerová

Faculty of Law, Comenius Univ.
Šafárikovo nám. 6, Bratislava

Lajos Meszaros

Parliament of SR
Mudroňova 1, 812 80 Bratislava

Roman Oleksik

Attorney's office
of Arzinger-Hydáková
Šafárikovo nám. 4, Bratislava

Mária Patakyová

Faculty of Law, Comenius Univ.
Šafárikovo nám. 6, 818 06 Bratislava

Stanislav Pazderka

Environmental Law Service (EPS)
Jakubské nám. 7, 602 00 Brno

Martin Prokop

Environmental Law Service (EPS)
Jakubské nám. 7, 602 00 Brno

Ivana Pruchová

Faculty of Law, Masaryk Univ.
ul. Veverí 70, 602 00 Brno

Edwin Rekosh

PILI, Columbia Law School
435 W. U6 St. New York

Zuzana Strapáková

EQ Klub, Radničné nám. 9
902 01 Pezinok

Ján Šikuta

UNHCR
Štúrova 6, 811 02 Bratislava 75

Lenka Škorpilová


District Court B. Bystrica
Skuteckého 7-9, Banská Bystrica

Robert Urban

County Court Žilina
Oroľská 3, 010 01 Žilina

Ernest Valko

Attorney
Záhradnícka 33, Bratislava



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Center for Environmental Public Advocacy, 1999
Ponická Huta 65, 976 33 Poniky
Editors:
Ján Hrubala, Eva Kováčechová, Pavol Žilinčík
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