

Conclusions on application of the Aarhus Convention based on the experience of the Ecological Society Green Salvation

Introduction

From 2004, the Ecological Society (ES) submitted 4 statements to the Aarhus Convention Compliance Committee. Two of them (No.01 and No.02) were considered in favor of the claimant, the other two (No.010 and No.020) were declined. Although, the Committee believes that the latter statement (No.020) should have been considered in relation to the Kazakhstan's strategy of implementation of the decision II/5a. Overall, there were 6 statements submitted to the Committee from Kazakhstan.

Our organization defends citizens' rights in courts from 2002. On average every year, the ES initiates and continues from 6 to 10 court cases, conducts from 80 to 100 consultations for various target groups. Starting from 2007, brief overview of all legal proceedings is being posted on the web-site in Russian and English. More detailed information is presented in our publications which are also uploaded to the web-site in Russian and English (www.greensalvation.org). We believe that the organization has accumulated a certain experience in human rights defense, which allows it to make certain conclusions.

1. Why people address the Committee with specific issues?

1.1. The country does not provide a real access to information and effective public participation in decision making process neither on legal, nor on practical levels.

1.2. System of justice does not provide effective environmental protection and defense of human rights on favorable environment¹.

1.3. Activists are subjected to oppression and acts of violence. This leads to increasing mistrust to the organs of government, justice, and law enforcement.

1.4. State apparatus of environmental protection is being destroyed. As a result, the government is not able to stabilize the environmental situation and assure protection of human rights².

1.5. The above stated reasons push the people to seek for help outside of the country.

1.6. The country did not sign the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the citizens of Kazakhstan do not have an access to the European Court on Human Rights³.

1.7. The public address to the Committee with specific issues results from the objectives of the Convention which, in K.A. Annan's opinion, can become a "**a global framework for strengthening citizens' environmental rights**"⁴.

In the Article 1, the objective of the Convention is determined as follows: "**In order to contribute to the protection of the right of every person** of present and future generations to live in an environment adequate to his or her health and wellbeing, **each Party shall guarantee** the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

In the Statement about the Committee⁵, it is said that any public report will be considered, in the exclusion of those which do not comply with the requirements by the form⁶.

We understand that the Convention does not aim to solve specific problems. But when addressing to the Committee, the public inevitably raises specific environmental problems. May be, it is partially a result of a contradiction between objectives of the Convention and the mechanism of its implementation.

1.8. In certain extent, the public considers the Convention as a rostrum for informing the world community about real matter of facts in the country, and for attraction of attention to massive violations of human rights.

2. Conclusions and recommendations of the Committee and the decision of the Meeting of the Parties.

2.1. Conclusions and recommendations of the Committee, in general, satisfy public's expectations. The public indignation is caused by practically being totally ignored by the

Kazakhstan's side, including the courts, and continuing violations of the same statements of the Convention. For example, new statement No.059 to the Committee from Kazakhstan is related to the same problems which were raised in the statement No.02 from our organization.

2.2. Disappointment of the public comes from insufficient attention of the organs of the Convention to the facts of continuing incompliance with the Convention by Kazakhstan, which is constantly being reported to the organs of the Convention by the public.

For example, the decision II/5a adopted in 2005, is still not implemented in its main part. Failure to implement the decision II/5a is not reflected in the decision III/6c and decision IV/9c of the Meeting of the Parties. But in the decision III/6c, p.5a it is said that "the Government of Kazakhstan has overall undertaken effective and comprehensive measures to implement most of the provisions of decision II/5a."

In other words, lack of a proper control from the organs of the Convention over implementation of their decisions leads to the situation when the same problems occur again, but in other regions of the country and in a different form.

May be, the organs of the Convention do not possess of enough resources to study in more detail the situation in the countries, from which the public submits such statements. But objectively, such inattention to the facts of continuing incompliance with the Convention promotes violations of human rights in these countries. Ineffectiveness of the mechanisms of the Convention gives the authorities a reason to neglect its provisions.

2.3. Due to the fact that the governmental authorities ignore conclusions of the Committee and decisions of the Parties, despite of the numerous changes to the legislation, legal conditions of public participation in the decision-making process and access to information and justice in Kazakhstan did not improve.

Under excuse of bringing the national legislation in compliance with the provisions of the Aarhus Convention, it is, in fact, being weakened.

Moreover, normative legal acts which directly contradict the provisions of the Convention are being adopted, for example, the Rules of conducting of public hearings. The organization filed two lawsuits to a court with a purpose to acknowledge these rules to be invalid. The first case was not accepted for consideration, and the second one (as for June 1, 2012) is awaiting the court's decision.

2.4. Often, governmental authorities openly misinform the public of Kazakhstan and the organs of the Convention. We warned the Committee about this⁷

3. How did the public's appeal to the organs of the Convention influence solution of specific problems?

In order to answer this question, we will briefly describe two cases, on which the Parties of the Convention took decisions.

3.1. Decision II/5a adopted in 2005 based on the appeal from the residents of Gorny Gigant micro district, Almaty. No improvements took place in Gorny Gigant after the decision was adopted. The citizens addressed a court using this decision. But the court did not consider this document as a newly appeared circumstance. People ran out of the legal means of defense and had to put up with the situation. And as a consequence, the situation in the district worsened. At the end of 2011 and beginning of 2012, near the high voltage bearings in the micro district, another high voltage cable was installed. The construction was conducted without notification of the residents, without environmental assessment, and without participation of the residents in the decision making process⁸.

3.2. Decision III/6c adopted in 2008 based on the appeal from the Gatins family, city of Almaty. On the Forth Meeting of the Parties in the decision IV/9c, it was admitted that the decision is still not implemented.

In 2007, the enterprise, in which sanitary and protection zone the Gatins family has to live, started construction of new industrial facilities because of increase of production volumes. Public hearings on the construction project were conducted with gross violations. The Gatins were not notified, and their opinion was not accounted in the decision making process.

In 2011-2012, environmental situation in this district sharply worsened, due to expansion of the auto road which passed near residential houses, including the Gatins' house. Public hearings on the project of construction of the auto road did not take place, the engineering norms and rules were grossly violated. This caused indignation of more than 200 people living in this area. Defending their rights, with a help of the ES, a number of residents filed a lawsuit to a court to accuse Akim of the city of Almaty in their discrimination by a place of residence.

3.3. Starting from December 2011, there was a sharp increase in a number of facts of oppression and violence against residents whose rights we are defending, and activists (orders to show up at the law-enforcement bodies, violent attacks causing damage and injuries). Possibly, it is connected to the fact that Kazakhstan completed its mission in the OSCE.

3.4. Starting from December 2011, none of the four lawsuits of the Green Salvation was accepted by the courts, in our opinion, with no actual reasons (<http://www.greensalvation.org/index.php?page=iski2012>; <http://www.greensalvation.org/en/index.php?page=Lawsuits2012>).

Our expectations and recommendations

1. Often, public authorities refer to the internal law, in order to justify incompliance with the Convention. This is a violation of the Articles 26 and 27 of the Convention about the right of international agreements⁹. We believe that it is necessary to draw attention of the Parties of the Convention to these facts. This is important, as the Convention is open for signing by new states, including the ones which have less developed legal systems than the European countries.

2. We expected the organs of the Convention, first of all, to perform an objective environmental and legal evaluation of compliance of the Convention in Kazakhstan, which would stimulate the government to have a more responsible attitude to act on its international obligations.

In general, conclusions and recommendations of the Committee meet our expectations. But this cannot be attributed to the latest decisions of the Meetings of the Parties of the Convention - III/6c and IV/9c. Those decisions, in our opinion, do not reflect the real situation in the country, and in some extent, favors suppression of the existing problems.

3. We believe that it is necessary to raise a question about a more thorough preparation of the decisions of the Parties and a stricter control over their implementation.

The organs of the Convention should be more considerate towards the information provided by the public, including alternative reports.

4. We believe that based on the Article 36 b) (Decision I/7), a question of expanding the Committee's authorities for consideration of specific problems could be raised; because by signing the Convention, different countries express their interest in solving internal problems with a help of the international legal instruments.

5. But we think that based of the Articles 36 b) and 37 d), the Committee already possesses of some specific authorities for evaluation and preparation of recommendations for specific cases, while staying within the frames of the Convention¹⁰. When considering public appeals, the Committee analyzes provisions of the national legislation, which ensures implementation of the requirements of the Convention. Many problems raised by the public appeals to the Committee are typical for Kazakhstan. Therefore, solution of a specific problem could become a precedent establishing a legal order for solving similar problems.

6. It would be reasonable to organize a consulting group within the Committee to help preparing higher quality public appeals.

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¹ See: Green Salvation Herald 2011; <http://www.greensalvation.org/index.php?page=publikatsii2005-2010>.

² The report “Avenues for Improved Response to Environmental Offences in Kazakhstan” published by the Organization for Economic Co-operation and Development in 2009, states the following: “... a poorly orchestrated decentralisation creates the **danger of institutional over-fragmentation and inconsistency, as well as raises concerns over the capacity of sub-national bodies to undertake roles given to them**”. Avenues for Improved Response to Environmental Offences in Kazakhstan. – OECD, 2009, p.15. <http://www.oecd.org/dataoecd/2/20/42072582.pdf>.

³ Status as of: 12/5/2012; <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

⁴ «Although regional in scope, the significance of the Aarhus Convention is global. It is by far **the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens’ participation in environmental issues and for access to information on the environment held by public authorities**. As such it is the most ambitious venture **in the area of “environmental democracy”** so far undertaken under the auspices of the United Nations. Furthermore, the Convention will be open to accession by non-ECE countries, giving it the potential to serve as **a global framework for strengthening citizens’ environmental rights.**” The Aarhus Convention: An Implementation Guide. – UN, New York and Geneva, 2000, p.IV.

⁵ Decision I/7 Review of Compliance, paragraphs 13a, 18, 20.

⁶ Anonymity, misuse, groundlessness, incompatibility.

⁷ Letter of the ES No.140 dated on November 9, 2007, to the Aarhus Convention Compliance Committee: “Ecological Society Green Salvation (ES) would like to draw attention of the Aarhus Convention Compliance Committee to the fact that the official information supplied by the state authorities of the Republic of Kazakhstan (RK) needs to be checked for credibility. This is important not only on the threshold of the 3d Meeting of the Parties of the Convention and presentation by Kazakhstan of the National Report on Compliance with it, but also for consideration of the statement ACCC/C/2007/20.

In April 2007, the ES received a letter from the Ministry of Environmental Protection (MEP) of the RK in which it was said that the Ministry of Economy and Governmental Budget Planning (MEBP) of the RK excluded the Plan of realization of decisions adopted at the Second Meeting of the Parties from the governmental financing in the Program “Protection of the environment of the Republic of Kazakhstan for 2005-2007” (Letter of the MEP RK 2-2-2-12/2247 dated on 04.04.2007). The ES informed the Secretariat of the Convention about that (Letter of the ES No.049 dated on April 20, 2007). But from the answer which was received by the ES from the MEBP RK in May 2007, it became clear that the “information provided to the Ecological Society Green Salvation by the MEP was not true”. Moreover, no suggestions on the Convention were received by the MEBP from the MEP”.

⁸ Reply to the letter of the ES No.001 dated on January 10, 2012, to the Department of natural resources and nature management regulation of the city of Almaty.

⁹ The Vienna Convention about the right of international agreements. Vienna, May 23, 1969. Article 26. **Pacta sunt servanda**. “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 27 **Internal law and observance of treaties** “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

¹⁰ Decision I/7 Review of Compliance, paragraph 37d: “In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public”.