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TARAS SHEVCHENKO NATIONAL UNIVERSITY OF KYIV

ROMAN MARUSENKO

marusenko.r@gmail.com

ORCID ID: <https://orcid.org/0000-0003-3631-9593>

Land Use Policy and Access to Water Bodies in Ukraine

*Polityka użytkowania gruntów i dostęp
do zbiorników wodnych na Ukrainie*

Man is a biosocial being. Principle 1 of The Rio Declaration on Environment and Development¹ (1992) envisages that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”. The national legal orders define the relevant regulations that are designed to ensure the satisfaction of man’s natural needs. Provisions that determine the humanist orientation of legal regulation, as well as sustainable economic development, are also revealed by the national regulators.

In the present article we will focus our attention on meeting the human needs of access to water bodies. This issue seems vital. Land objectively has spatial characteristics, constraints that limit the ability to access particular land sites. Different actors tend to monopolize their usage of lands and to limit all other

¹ The Rio Declaration on Environment and Development, http://www.unesco.org/education/pdf/RIO_E.PDF [access: 20.01.2019].

people in their desire to have an access to public waters. The land, its subsoil, atmosphere, water, and other natural resources within the territory of Ukraine, natural resources of its continental shelf and of the exclusive (maritime) economic zone shall be the objects of property rights of the Ukrainian people. Property entails responsibility. The Constitution of Ukraine, Art. 13 declares that property shall not be used to the detriment of the individual or the society².

Ukrainian legislation guarantees the possibility to use land by special use rights (with the title being granted on a separate, exclusive use, with the allocation of the appropriate plot, assignment types of use, for a fee) and by the so-called general use. The latter possibility of land use is guaranteed to all individuals, given the special function of land as a natural resource and a means of human life. Citizens are guaranteed the general right to use natural resources for the satisfaction of vital needs (aesthetic, recreational, health-improving, material, etc.) free of charge, without obtaining these resources by individuals and granting permissions, with the exception of restrictions provided by the legislation of Ukraine (Law “On Environmental Protection”, Art. 38). This is the right *ex lege*. The circle of potential users who have the right to general land use is uncertain. The exercise of the right to general land use is only possible if the land is free from objects that impede it and when the owners and users of the coastal parcels will be required to provide such access to the water object. The norms of the legislation, which determine the number of prohibitions of activities within the coastal areas, as well as the prohibitions/restrictions of the transfer of such parcels to ownership and use for needs that may be an obstacle to the implementation of general land use theoretically could be used to satisfy the mentioned purpose.

Establishing of additional burdens and prohibitions for private owners, even in the interests of third parties or the whole society, is complicated by the provisions of the Constitution of Ukraine (Art. 41), which determine the inviolability of property. At the same time, it should be noted that the obligation to ensure the right to general land use for private owners on some occasions is explicitly established for certain categories of owners³. At the same time, disproportionately large restrictions may result in the actual loss of the right to ownership due to the impossibility of its full execution, and this violates a fair balance of interests between the interests of owners and all other persons⁴.

² The Constitution of Ukraine of 28 June 1996, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> [access: 20.01.2019].

³ Art. 17, Law of Ukraine “On Farming Enterprise” of 19 June 2003, No. 973-IV, <https://zakon.rada.gov.ua/laws/show/973-15> [access: 20.01.2019].

⁴ *Kryvenkyy v. Ukraine*, No. 43768/07, ECHR 2017, <http://hudoc.echr.coe.int/eng?i=001-171478> [access: 20.01.2019].

According to Art. 89 of Water Code of Ukraine, coastal protective strips are protected areas. In coastal stripes along rivers, around lakes and on islands it is forbidden: “the construction of any facilities (except hydraulic engineering, navigation, hydrometric and linear), including recreation centers, cottages, garages and parking lots (...)”.

Art. 88 of Water Code of Ukraine contains the provision that coastal protective stripes belong to the state or communal ownership and may be provided for use (lease) only. They are established by individual land management projects. Along the seas and around the sea bays and estuaries a coastal protective strip is set at a width of not less than two kilometers from the edge of the water. Within the existing settlements, the coastal protective strip is established taking into account urban planning documentation. Coastal protective strips are installed by individual land management projects. The width of these stripes is determined by law. For small rivers, ponds (less than 3 ha) – 25 m, middle-sized rivers, ponds (larger than 3 ha) – 50 m, big rivers, lakes – 100 m.

The Land Code also contains similar norms (Art. 60): Coastal protective strips are established along rivers, seas and around lakes, reservoirs and other water bodies in order to protect surface water bodies from pollution and contamination and to preserve their water content. In addition, it is indicated that coastal protective strips are established by individual land management projects. The boundaries of the established coastal stripes and beach areas are specified in land management documentation, cadastral plans of land, as well as in urban planning documentation. Coastal protective strips may be provided to interested persons on a lease basis. At the same time, the possibility to obtain the ownership of these parcels is not directly stipulated. The purpose of use can be hay mowing, fishing needs, cultural, recreational purposes, sports, and tourist purposes, conducting research works, placing hydrotechnical structures, etc. (p. 4 of Art. 59 of the Land Code of Ukraine). Coastal protective strips are considered as protected areas with a limited economic activity regime. In the coastal strips it is forbidden, in particular, to construct any structures (except hydrotechnical, navigational purposes, hydrometric and linear).

From the above-mentioned norms we have the following conclusions:

- land parcels along water bodies within coastal protective strips can be provided only for lease, not for ownership. Under these conditions, the owner obviously reserves the right to determine the usage peculiarities, set restrictions, etc.,
- free access to water objects cannot be provided only by the prohibition of granting ownership or use rights of the parcels on the river banks. Instead, a general land use construct should be used that permits trespass even

- through land plots that are provided to other persons for separate, exclusive use on the lease basis,
- types of use of lands of coastal protective strips should not physically make it impossible to access water bodies. Construction of residential, industrial buildings and structures is prohibited,
 - dimensions of coastal protective strips outside the settlements are determined by law.

At the same time, in practice, everything is not as unambiguous. In fact, contrary to the cited legal provisions, the banks of many water bodies are built up. In most cases, land users ignore such norms, construct fences, build different constructions that make citizens' access to water bodies impossible⁵. This situation is a result of the lack of effective control measures over the use of land, and sometimes also of the adoption of dubious decisions. For example, the Obukhiv City Council by its decision granted the ownership of land plots for the construction and maintenance of a residential building, commercial buildings and structures in the city of Obukhiv on the lands of the coastal protective strip. The project was developed and approved by the city council in violation of the requirements of the legislation. The court later noted that “since, in accordance with Articles 5 and 6 of the Water Code of Ukraine, the land of the water fund is not subject to transfer to the [private] property, the city council, making decision No. 619-44-VI, went beyond its powers. Consequently, the disputed land plots were illegally withdrawn from the state property and should be reclaimed (...)”⁶.

At the same time, the court substantiated the possibility of returning of the land plots using the relevant practice of the ECHR and Art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms: “In the cases of *Risovsky v. Ukraine* (decision of October 20, 2011, application No. 29979/04), *Kryvenkyy v. Ukraine* (decision of February 16, 2017, application No. 43768/07) (...), The ECtHR, having established violations of Article 1 of the First Protocol, noted the right of the *bona fide* owner to receive appropriate compensation or other form of appropriate compensation in connection with the deprivation of the right to land. At the same time, the conclusions of the ECtHR should not be applied unconditionally, but taking into account the actual circumstances of the case (...) certain cases of violations which the person refers to as grounds for the application of Article 1 of the First Protocol may be related to the unlawful conduct of the person acquiring the property”⁷.

⁵ S. Andrushko, *Captured banks*, <https://www.radiosvoboda.org/a/27910751.html> [access: 20.01.2019].

⁶ Judgment of the Supreme Court of 15 May 2018, case No. 372/2180/15-c, <http://reyestr.court.gov.ua/Review/75287005#> [access: 20.01.2019].

⁷ *Ibidem*.

The next issue is to find out how the extensive construction of coastal land plots is carried out despite the existing prohibitions. As a rule, the vagueness of the law is used, namely “within the boundaries of existing settlements, the coastal protective strip is established taking into account urban planning documentation. Coastal protective strips are installed by individual land management projects. Land management projects regarding the establishment of boundaries of coastal protective strips (with their established beach zone) shall be developed in accordance with the procedure provided for by law” (Art. 88 of the Water Code of Ukraine). Land Code contains similar provisions. Often from this norm it is concluded that since it is necessary to develop a project, then the size of the coastal protective strip can be set individually and without observance of the fixed size mentioned in the law.

In addition, developers sometimes manipulate the rules of law, giving the desired for the real. For example, in documentation, a gulf of a large river can be counted as a separate object – a lake. And this allows a developer to reduce the size of the coastal protective strip⁸. Such examples are not uncommon even in the capital⁹.

A reference to the size of the strips “taking into account the city-planning documentation” allows applying another scheme – to use such documentation, which will satisfy the customer. Often, it becomes possible when in the coastal protective strip some objects were built many years ago, before the entry into force of the current rules of water protection. As a general rule, the law has no retroactive effect in time (Art. 58 of the Constitution of Ukraine). This allows to use an old building within the borders of a modern coastal strip quite legitimately. And at the same time, other (new) buildings are being built close to the old one using the fact that that building was erected in accordance with the law within the particular land plot.

Violations also occur when approved projects regarding the size of coastal protective strips do not exist at all. The absence of a coastal protective strip project is intentionally misunderstood by some individuals as the absence of the lane itself. The Supreme Court, in considering such a situation, notes that “(...) while granting of a land plot in the absence of a land management project for the establishment of a coastal protective strip, it is necessary to take into account standard sizes

⁸ B. Bohdan, *Construction in coastal stripes: How legitimate?*, <https://sud.ua/ru/news/blog/95995-bydvnitstvo-y-priberezhnih-zahisnih-smygah-nasklki-zakonno> [access: 20.01.2019].

⁹ *We start the project “Dnieper for Kiev”. Access to the river is limited by fences, construction, industrial zones*, http://texty.org.ua/pg/article/editorial/read/61188/Pochynajemo_projekt_Dni-pro_dla_kyjan_Dostup_do [access: 20.01.2019].

of coastal protective strips established by Art. 88 of Water Code Ukraine (...)”¹⁰. A similar position was expressed earlier by the Supreme Court of Ukraine¹¹. We agree with this interpretation. Nevertheless, we should note that sometimes the findings of the courts, even of the highest instance, may also be erroneous. By the way, in the judgment cited, the court applied a norm that was replaced by another 6 years before the relations which became the subject of the trial, took place. In fact, the court made reference to the non-existent provision of the law.

In practice, the proper justification of a decision of a higher court is critically important, since “the conclusions on the application of the legal provisions set forth in the Supreme Court rulings are taken into account by other courts when applying such rules of law” (Law “On Judiciary and Status of Judges”, Art. 13)¹². The fuzziness of the law and of the interpretation of the existing rules of the law led to a situation in which the legislator did not follow the example of other countries of the unpopular complete demolition of illegally located facilities¹³ but attempted to provide free access to water bodies, if not everywhere, then at least partially.

In 2010, in the amendments to Water Code, the allocation of beach zones was introduced. Within the coastal protective zone of the seas and around the sea bays and estuaries a beach zone is established, the width of which is determined depending on the landscape-forming activity of the sea, but *not less than 100 m* from the water cut (Art. 88 of Water Code).

According to the law referring to the coast of the seas, sea bays and estuaries within the limits of the beach zone, *unrestricted and free access* to citizens for general water use should be ensured (except for land plots, which contain hydro-technical, hydrometric and linear structures, sanatoriums and other medical and recreational facilities, and children’s health camps). In the case of granting the right to use the beach area, users are required to provide *an unobstructed and free passage* along the coast, the sea gulf or the estuary. Thus, the norm regarding the establishment of a two-kilometer coastal protective zone around the seacoast was reinforced by the obligation to provide access to beach zones.

¹⁰ Judgment of the Supreme Court of 25 April 2018, case No. 904/5974/16 <http://reyestr.court.gov.ua/Review/73700024> [access: 20.01.2019].

¹¹ Judgment of the Supreme Court of 1 July 2015, case No. 6-184cs15, <http://reyestr.court.gov.ua/Review/46078576> [access: 20.01.2019].

¹² Law of Ukraine “On Judiciary and Status of Judges” of 2 June 2016, <https://zakon.rada.gov.ua/laws/show/1402-19> [access: 20.01.2019].

¹³ C. Mcguire, *British couple left facing bankruptcy after spending life savings on £600,000 villa in Spain... only for it to be demolished following seven-year red-tape nightmare*, <https://www.dailymail.co.uk/femail/article-3048975/British-couple-left-facing-bankruptcy-spending-life-savings-600-000-villa-Spain-demolished-following-seven-year-red-tape-nightmare.html> [access: 20.01.2019].

In practice, these norms continue to be ignored. Partially it can be explained by the provision: “this Law applies to the legal relationship that has arisen *after* its entry into force”¹⁴. On the other hand, some current situations of violations of land and water legislation gave rise to force conflicts, since they were not resolved in the legal field¹⁵. For the sake of justice, we should note that the situation of ignoring the norms of the law on access to water bodies and the illegal construction of buildings, fences, etc. is not easy to solve. On the one hand, we have the pressure of time to provide a solution, on the other – every solution will result in some losses. Illegal, but sometimes supported by quasi-legal decisions of the relevant bodies coastal construction continues. In Ukrainian realities, it is easier to prevent the construction of new buildings than to try to demolish already existing ones.

The considered interpretation of the norms on the automatic law-setting of the size of the coastal protective strips, which is supported by many of the court decisions given, also has its drawbacks. Thus, for example, the well-known resort town Skadovsk is located within a two-kilometer zone around the Black Sea. That is, even if all the old buildings could be legitimate at the time of their erection, according to the above-mentioned decisions of the courts, new buildings should not be constructed – they fall within the boundary of the coastal protective strip. That is, by protecting the right to access the water object, as a result, we make it impossible to develop all coastal settlements. Obviously, this is also not the best option. On the other hand, the approach to setting the size of coastal strips by individual projects without proper control actually leads to uncontrolled coastal development in settlements and the physical impossibility of access to water bodies. For instance, in Kyiv, only about 15% of the length of the banks of the Dnieper is currently available to public access¹⁶.

Another attempt to improve the situation was the draft of a law called to ensure unhindered access of citizens to the coast of water objects for general water use. It proposes the responsibility for limitation of access to water bodies up to the termination of the right to use of the relevant land plots by a court decision¹⁷.

¹⁴ Sec. 2, par. 2, Law of Ukraine “On amendments to the water and land codes of Ukraine regarding coastal protected strips” of 2 December 2010, N2740-VI, <https://zakon.rada.gov.ua/laws/show/2740-vi> [access: 20.01.2019].

¹⁵ *Clashes on Lanzheron in Odessa: Activists demolished the fence at the construction site and fought with the police*, https://censor.net.ua/news/3087567/stolknoveniya_na_lanjerone_v_odesse_aktivisty_snesli_zabor_na_stroyiploschadke_i_podralis_s_politsieyi [access: 20.01.2019].

¹⁶ O. Oksimets, R. Kulchinsky, Y. Mikhailishin, *Stolen Dnieper. As the citizens were deprived of access to the river*, <http://texty.org.ua/d/longs/dnipro2/> [access: 20.01.2019].

¹⁷ Draft Law “On Amendments to Certain Legislative Acts of Ukraine on Ensuring Unhindered Access of Citizens to the Water Bodies for Water Use for General Purposes”, No. 1107 of 28 November 2014, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52527 [access: 20.01.2019].

It should be noted that the litigation is a long and not always effective way of protecting you from being deprived of access to a water facility. In addition, we are skeptical of the introduction to the draft the more severe rules in addition to the existing ones, when the latter are simply being ignored in practice. The said bill passed the first reading in parliament in 2015 and has not yet been voted on as a whole. The experience of other countries often helps to solve a difficult problem. Comparing the legal regulation of access to water bodies and its practical implementation in Ukraine and Poland, it is possible to note the following.

According to the Water Law Act (Art. 32, p. 1), “everyone has the right to general use of public inland surface waters, internal sea waters and territorial waters if the provisions of the Act do not state otherwise”. Additionally, p. 1 Art. 232 of this act states: “it is forbidden to enclose properties adjacent to public inland surface waters and to the shore of sea waters and the territorial sea at a distance of less than 1.5 m from the shoreline, or to prohibit or prevent passage through this area”¹⁸.

In practice, some problems also exist: “(...) the fencing of access to public lakes is also a huge problem”¹⁹. Among other problems of the use of coastal lands (illegal construction), specialists also outline cases of violations of the right to access to water bodies: “inspection of fragments of the coastline of 25 lakes showed that 15 of them experienced 75 cases of fencing that prevented the passage along the lakeside”²⁰. As in Ukraine, such cases do not bypass the big cities, for example: “The developer fenced a high-rise housing estate in Poznań, located on the Warta River near the Old Town. Thus, he closed the access of other Poznań residents to the river (...)”. It is noted that “(...) the fencing of the banks of rivers and lakes in Poland is unfortunately widespread”²¹.

The number of violations of the right to access to public waters also indicates that there is a problem of a fulfillment of the law. For example, inspections conducted in accordance with the report in 2007–2010 found that “shoreline of 18 lakes (being public waters) on sections with a total length of 9.7 km, showed as many as 125 cases of restriction of access to these lakes at a distance of less than

¹⁸ Act of 20 July 2017 – Water Law, <http://www.dziennikustaw.gov.pl/du/2017/1566/1> [access: 20.01.2019].

¹⁹ *Wody Polskie kontrolują dostęp do jezior*, 2018, <https://portalkomunalny.pl/wody-polskie-kontroluja-dostep-do-jezior-galeria-380661/> [access: 20.01.2019].

²⁰ *Zapewnienie przez organy administracji publicznej dostępu do jezior stanowiących wody publiczne*, 2015, p. 30, <https://www.nik.gov.pl/plik/id,10687,vp,13019.pdf> [access: 20.01.2019].

²¹ R. Krupa-Dąbrowska, *Ogradzanie jeziora i rzeki jest w Polsce powszechne. Gminy zaś nie-specjalnie się tym przejmują*, <https://www.rp.pl/artykul/883417-Plot-przy-jeziorze-jest-zakazany.html> [access: 20.01.2019].

1.5 m from the shoreline, and thus in a way that prevents passage”²². The actual situation also demonstrates the inconsistencies between the documented state of the boundaries of the water objects and the actual one. This also caused some violations: “as a result of the inspection of the shoreline of 18 lakes, it was found that this line along 270 adjacent plots (97.5% inspected) is located differently from that specified in the register of lands and buildings. In fact, it was located far away from the plot boundary, in the extreme case up to 80 m deep into the »lake« plot (...). Part of this land (with a total area of 60.7 thousand m²) was used arbitrarily by the property owners who illegally built 339 objects on them (...)”²³.

As we can see, in Poland’s practice, access to water bodies and even the usual placement of water platforms for fishing is under the watchful eye of the controlling authorities. This again leads us to the conclusion that preventive measures, preclusion of violations of the law, are more effective ways of guaranteeing rights in comparison to responding to existing offenses and eliminating existing structures, fences, etc.

Our opinion is also confirmed by the position of Polish practitioners regarding the observance of similar norms of Polish law, that state: “we do not have a bad law, but there is no control as to how it is used. The result is wild development in Masuria and the Suwałki region. The one who has obtained a plot here, does not ask for any regulations at all, only erects the fence up to the water, and even enters it with a fence”²⁴. A similar conclusion can be seen on the results of control activities of NIK (Supreme Chamber of Control), which were conducted in 2010–2015: “the number of control measures regarding the enforcement of access to lakes and control of Treasury property is disproportionately small in relation to the scale of irregularities identified by NIK”²⁵.

Thus, in the current situation in Ukraine, there is no easy way out. As we demonstrated in the article, none of the existing in Ukrainian legislation ways to ensure the right to access water bodies is perfect. The drafts also do not offer a new solution, since all the necessary prohibitions are actually already formulated in the current legislation. And the problem is only deepening. Taking into account the experience of Poland, which has similar situations, we can note that the effective control of violations as well as preventive measures can become an

²² *Informacja o wynikach kontroli zapewnienia przez organy administracji rządowej i samorządowej w województwie warmińsko-mazurskim dostępu do jezior stanowiących wody publiczne*, 2011, p. 7, <https://www.nik.gov.pl/plik/id,3189,vp,4024.pdf> [access: 20.01.2019].

²³ *Ibidem*, p. 8.

²⁴ D. Frey, *Dostęp do jeziora dla każdego*, <https://www.rp.pl/artykul/909114-Dostep-do-jeziora-dla-kazdego.html> [access: 20.01.2019].

²⁵ *Zapewnienie przez organy administracji publicznej dostępu do jezior stanowiących wody publiczne*, 2016, <https://www.nik.gov.pl/kontrola/P/15/091/LSZ/> [access: 20.01.2019].

effective solution to the problem. Prevention of a violation at an early stage is always more effective than combating the consequences of an activity that violates the requirements of the law.

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Abstract: Free access to water bodies to meet basic human needs in Ukraine is currently complicated. The banks of rivers and lakes are built up in violation of the law. The author analyzes the widespread ways of substantiating the development of the banks of rivers and lakes in Ukraine that undermine the possibility to access these water objects. The conclusion of the inconsistency of the legislative provisions on access to water bodies is made. It is proved that free access to water objects cannot be provided only by the prohibition of granting ownership or use rights of the parcels on the banks. The regime of the coastal protective strips is confusing, contradicts to the regime of development of coastal settlements and does not ensure free access to water bodies. A general land use right may be used to guarantee free access to water objects. A comparison of ways to overcome similar problems in the Republic of Poland is conducted. The necessity of increasing the effectiveness of control activity, which would allow at the early stages to detect and stop illegal activity, that leads to the impossibility of free access to water objects, is substantiated.

Keywords: access to water bodies; general land use right; violation of rights to land; restrictions of coastal land use

Streszczenie: Wolny dostęp do zbiorników wodnych w celu zaspokojenia podstawowych potrzeb człowieka jest obecnie bardzo skomplikowany na Ukrainie. Brzegi rzek i jezior zostały zabudowane nielegalnie. Do tego celu wykorzystano różne sposoby mające na celu obejście prawa. W artykule analizie poddano szeroko rozpowszechnione metody uzasadniania rozwoju wybrzeży rzek i jezior, których celem jest ograniczenie bądź zakaz dostępu do zbiorników wodnych. Ponadto wskazano na wady przepisów prawnych dotyczących dostępu do zbiorników wodnych. Udowodniono, że wolny dostęp do zbiorników wodnych nie może być zabezpieczony tylko poprzez zakaz wykonywania prawa własności lub wykorzystania działek znajdujących się przy ich brzegach. Reżim prawny nadbrzeżnych pasów ochronnych jest niejednoznaczny i zarazem sprzeczny z reżimem rozwoju miejscowości przybrzeżnych, ponieważ nie zapewnia wolnego dostępu do zbiorników wodnych. Należy podkreślić, że dla zapewnienia możliwości wolnego dostępu do zbiorników wodnych może być wykorzystane prawo adresowane do ogólnego użytkowania gruntów. Porównując rozwiązania stosowane w przypadku podobnych problemów w Polsce, stwierdzono, że konieczne jest zwiększenie skuteczności działań kontrolnych, co pozwoli na wykrywanie nielegalnej działalności na wczesnych etapach i jej zapobieganie.

Słowa kluczowe: dostęp do zbiorników wodnych; prawo do ogólnego użytkowania gruntów; naruszenie praw do ziemi; ograniczenia w użytkowaniu gruntów przybrzeżnych

