Access to justice in environmental matters

Lussemburgu

I. Constitutional Foundations

In 1999, the Luxembourgish government amended the Constitution by adding the protection of the environment and animals as a new constitutional principle (Article 11bis). The State of Luxembourg guarantees the protection of the human and natural environment, by promoting the establishment of a sustainable balance between nature conservation and the satisfaction of present and future generational needs. The state promotes the protection and well-being of animals. Citizens can invoke the constitutional right directly in administrative and judicial procedures. If the judge believes that the party is rightfully challenging the constitutionality of a law, he will address a preliminary question to the Cour Constitutionnelle *(Constitutional Court)* . Parties to an administrative or judicial procedure can rely directly on European directives and Convention. They can invoke international agreements when they have been ratified by Luxembourg. Administrative courts refer to and directly apply the Aarhus Convention. In particular, the administrative tribunal refers to the Aarhus Convention directly to determine litigants' legal standing.

II. Judiciary

Luxembourg legislation is based on Roman Law and makes a clear distinction between public Law and private Law. Since there is a clear distinction between public law and private law in Luxembourg, the judicial system in the Grand Duchy of Luxembourg is divided into a civil court system and an administrative court system. The *Cour Constitutionnelle* in Luxembourg decides on the conformity of Laws with the Constitution. There is no direct recourse for litigants; only national courts can address a preliminary question to the *Cour Constitutionnelle*. The courts are charged by the constitution to exert judicial power. They are independent in the exercise of their functions. In Luxembourg, there are two orders of jurisdiction: the civil order and the administrative order. At the top of the hierarchy of the civil order is the *Cour supérieure de justice*, which includes a *Cour d'appel*, a *Cour de cassation* and the *Parquet général*. The cases in cancellation of the judgments delivered by the various chambers of the *Cour d'appel* are mainly carried before the *Cour de cassation*, which includes a chamber sitting with five judges.

In Luxembourg, there are no specific courts or tribunals to decide in environmental matters. Environmental cases are judged by administrative or judiciary tribunal according to the matter. There are two legal districts in Luxembourg, the district of Luxembourg and Diekirch, with in each district a *Tribunal d' arrondissement*. The judges of the courts are directly appointed by the Grand Duke. There are three small claims courts*, Justice de paix* in Diekirch, Luxembourg and Esch- sur- Alzette. The *Cour administrative*, administrative court, constitutes the supreme jurisdiction of the administrative order. Forum shopping is only available in judicial cases and does not exist in administrative cases. Parties can include a "choice-of-forum" clause in their contract. If both parties agree to this clause, they are allowed bring their motion before small claim court, the juge de paix, where it is otherwise not competent with respect to the value of the claim and territorial rules. All decisions of first instance ruled by the *Tribunal d'Arrondissement* of Luxembourg and Diekirch can be appealed before the *Cour d'appel*. To appeal a judgment, the appellant must bring his appeal within 40 days of the notification of the decision before the clerk of the court. The *Cour d'appel* will control the application of the law to the facts by the *Tribunal d'arrondissement* and will confirm or overrule the judgment of the *Tribunal d'arrondissement*. Judgments of small claim courts can be appealed before district tribunals. Decisions of the court of appeal and decisions of other tribunals ruled in last instance can be challenged before the *Cour de cassation*. The *Cour de cassation* will only control the application of the law and the rules of procedure. The deadline to bring an action before the *Cour de cassation* is two months from the notification of the judgment. The *Cour administrative* has cassation and reformatory rights. The administrative judge can rule on the legality as well as the proportionality of the administrative decision. The administrative judge can always annul a administrative decision, but can only substitute his decision to the decision of the administration if so provided by the law concerned. In environmental matters, cases can be brought before civil judges in order to obtain compensation from the defendant. Civil judges are competent to rule nuisance cases such as noise or pollution caused by neighbors. Nuisance cases can be brought even in the absence of misdemeanor. The criminal judge is competent to rule cases when a claim is brought either by the police or the general attorney. The judiciary judge is competent to rule on torts cases whether they are civil (i.e. between two individuals), or administrative (between the administration and an individual). Judges can from own motion order expertise or a visit of a site for the purpose of the case. Judges may also order any measures to allow witness' audition. The administrative judge can control the authenticity of the exhibits.

III. Access to Information Cases

In cases where a request for environmental information is refused or wrongfully/inadequately answered, the person can start an emergency interim proceeding before the administrative tribunal. The legal action must be brought before the administrative tribunal within 30 days of the notification of the refusal decision or after the silence of the administration kept for 3 months. If the judge considers the claim as valid, he can order the administration to disclose the information. The judgment may be appealed. Total or partial refusal of request for information must be motivated and sent by registered letter. The refusal shall include information on available remedies and legal recourse. The claim must be brought within 30 days from the notification of the refusal or inadequate decisions. The motion must include:
the names and address of the parties,
a summary of the facts
the conclusions
the description of the environmental information that access has been denied.
The motion must be produced in the same number as the parties and brought to the clerk office before the hearing date. The tribunal judgment will be notified to the claimant and the administrative authority. The administrative authority will produce the environmental information to the president of the tribunal through the clerk's office. The nature of the information will influence the decision-making as it can be excluded from divulgation by law. The tribunal will examine the information and order whether or not the administrative authority must disclose it to the claimant. The Tribunal can order a full or partial disclosure of the information.

IV. Access to Justice in Public Participation

In Luxembourg, there are no specific procedural rules in environmental matters. Regular administrative procedure applies. In principle administrative decisions of administrative bodies are subject to the "procédure administrative non contentieuse" (law of administrative procedure). Unless a legal provision foresees shorter time periods and/ or reformation procedures for taking action against an administrative decision, administrative decisions can be challenged before court directly within 3 months of their notification or publication. A case can be brought to court before having exhausted all administrative remedies. However, the appeal to the administrative authority suspends the deadline of appeal before the administrative tribunal. All claims before the administrative tribunal must be introduced and signed by a lawyer, *avocat à la Cour*,, in the form of a motion. The motion must include the names and address of the claimant, the questioned administrative decision, a summary of the facts, the object of the motion and a list of the exhibits. The original motion must be submitted with four copies to the tribunal's clerk. The judgment of the *Tribunal administratif* can be appealed before the *Cour administrative* within 40 days of the judgment. The administrative judge may only review the procedural and substantive legality of the administrative decision. In highly technical cases, administrative courts may have to verify material and technical findings. Judges may also ask for technical expertise and site visits to obtain more technical information and find an appropriate solution to the matter. Hence, they might base their ruling on scientific findings. This is particularly used in EIA (Environmental impact assessment) cases. First the *Tribunal administratif* judges on the merits of the case and the standing of the claimant, who needs to have a direct and certain interest. NGOs can have standing if they have been recognized of national importance. They are deemed to have a personal interest if the law concerned provides so . Procedural rules are the same as regular administrative procedure. . He will review the substantive legality of the environmental decision and rule the case accordingly. The judge will also review. He than will review the substantive legality of the environmental decision and rule the case accordingly. The legal action must be brought within 3 months of the notification of the administrative decision. In an emergency interim proceeding, the President of the *Tribunal administratif* might review Environment Impact Assessment scoping decisions. The applicant can bring a case before the administrative Tribunal. The claim must include the names and address of the claimant, the designation of the administrative decision, a summary of the facts and objections and the object of the claim. It must also include the list of the exhibits that the claimant will use in the trial. The *Tribunal administratif* can review final EIA decisions or authorizations. The applicant, ministers, communes, neighbors to the establishment who have a sufficient and direct interest and associations of national importance – as recognized by the law concerned- can bring a case before the administrative Tribunal. The claim must include the name and address of the claimant, the designation of the administrative decision, a summary of the facts and objections and the object of the claim. It must also include the list of the exhibits that the claimant will use in the trial. The *Cour administrative* will review the legality of the administrative decision and its validity. The *Cour administrative* reviews the procedural and the substantive legality of EIA decision. As they judge on the merits of the case, they will review the technical documents and the material evidence submitted. They can order expertise and visit the site. In order to have standing before national courts it is not necessary to participate in the public consultation phase of the EIA procedure, to make comments, or to participate at a hearing. The regular rules on standing before national courts apply to people who want to challenge a decision related to EIA. Injunctive relief is available in EIA procedures in the cases where there is a risk of serious damage. There are no special rules applicable to EIA procedures besides the regular national provision. Administrative Courts can review final IPPC decisions or authorizations. The applicant, ministers, communes, neighbors to the establishment who have a sufficient and direct interest and associations of national importance – as recognized by the law concerned- can bring a case before the *Tribunal administratif*. The claim must include the names and address of the claimant, the designation of the administrative decision, a summary of the facts and objections and the object of the claim. It must also include the list of the exhibits that the claimant will use in the trial. The Administrative court will review the legality of the administrative decision and its validity. The regular rules of administrative procedure apply as described above. The *Tribunal administratif* judges the procedural and the substantive legality of IPPC decision as it judges on the merits of the case. The judge will verify factual and technical criteria and all appropriate documents. He can order an expertise and order the administration to submit files and documents. He can also visit the site to collect information related to the situation. In order to have standing before national courts, it is not necessary to participate in the public consultation phase of the IPPC procedure, to make comments, or to participate at hearing. The regular rules on standing before national courts apply to people who want to challenge a decision related to IPPC. Injunctive relief is available in IPPC procedures in cases where there is a risk of serious damage. There are no special rules applicable to IPPC procedures besides the regular national provision.

V. Access to Justice against Acts or Omissions

In environmental matters, claims can be submitted to judicial court directly against private individuals or legal entities. The claimant needs to demonstrate a sufficient interest to the matter. Private individuals can bring action before judicial courts in cases of damages. They can also bring a claim to obtain the cancellation of an administrative decision that may cause damages to themselves or their property. One may claim repair of once damage, the suppression of the action that is damaging the environment or the restoration of the environment. Claims against the decisions of the Ministry or the competent administration may be brought before the *Tribunal administratif*. NGOs – as recognized by the law concerned- can also submit a claim against the decision of the Minsitry. Claims may be submitted by the person who is directly affected by the environmental damage, suffered a violation of his/her right or by a person who has a sufficient interest with respect to the environmental decision. The Judge will rule on the merits of the case. In environmental liability matters, the Minister who is in charge of the environment, and the Minister who is in charge of the water and their respective administrations are the competent authorities by Luxembourg in environmental liability matters. A request for action may be filed with the Ministers or the competent administration in the event of environmental damage or in the case of imminent danger. The request for action must include all the necessary information on the situation. The competent authority will then examine the request for action and make the appropriate decision. The *Tribunal administratif* is competent to review the administrative decision made by either the Minister or the competent administration. The legal action must be taken to court within 40 days of the notification of the

administrative decision. 30 days of silence of the administration equals a decision of refusal of the administration. Only the person who has a sufficient interest can bring a claim to the administrative tribunal. Actions to enforce environmental liability are brought directly to the competent Minister or administration. NGOs who have received an accreditation from the State can also submit a claim.

VI. Other Means of Access to Justice

In Luxembourg, apart from legal means of remedies, people can file a claim against administrative decision to the Ombudsman who will act as a mediator between the parties. However, the Ombudsman will not rule the case but instead help the parties to reach an agreement. The ombudsman (also called "the Mediator") is the main organ that rules conflicts between the administration and individuals. As an impartial intermediary, the ombudsman will organize inquiries to help solve the conflict. It will provide a proposal to solve the matter that the parties will be free to follow or not. The ombudsman may also address recommendations to the administration in order to remedy to the situation and improve the administration's functioning. He may also recommend amendments to the legal acts that served as legal base for the decision when a complaint was submitted against an administrative decision. Individuals can inform the police or the public prosecutor in case of a criminal environmental offence who might later decide to prosecute the offender. A complaint against an inappropriate administrative action can be submitted to the Ombudsman who will act as a mediator between the private party and the administration.

VII. Legal Standing

Legal Standing	Administrative Procedure	Judicial Procedure
Individuals	Only individuals who have a direct and certain interest to the matter can bring a case before Administrative courts. Their interest must be different from the general interest.	Only individuals who have a direct and certain interest to the matter can bring a case before courts. Their interest must be different from the general interest.
NGOs	NGOs have legal standing if they have received an official approval by the State of Luxembourg based on their national importance. To receive an official approval, the protection of the environment must have been included in their bylaws for 3 years.	NGOs have legal standing if they are authorized by Luxembourg based on their national importance. To receive an official approval, the protection of the environment must have been included in their bylaws for 3 years.
Other legal entities	Municipalities have legal standing to bring an action against a ministerial authorization, as they have to control the implementation of the environmental legislation on their territory. They must have a personal interest.	Public prosecutors, police agents, agents of the water and forests administration and agents of the custom administration can bring actions against offenders in environmental matters.
Ad hoc groups	N/A	N/A
Foreign NGOs	Foreign NGOs have legal standing if the law concerned provides so.	Foreign NGOs have legal standing if the law concerned provides so.
Any other	N/A	N/A

To have legal standing, the claimant must have a personal, direct, actual, certain, effective and legitimate interest. In Luxembourg, actio popularis does not existPublic prosecutors, police agents, agents of the nature and forests administration and agents of the custom administration can pursue breaches to environmental rules. These breaches can lead to actions brought before can be brought before a criminal court under environmental laws.

VIII. Legal Representation

In judicial court, representation by a legal counsel is compulsory when a procedure is written. Hence, when the value of a dispute is under €10,000, the *Justice de paix*, small claims' court, is competent to judge the matter. Litigants do not need to be represented by a lawyer and litigants can appear in person. When the value of the dispute is over €10,000, the Tribunal d'arrondissement is competent and litigants must be represented by legal counsel, *avocat à la Cour*. Legal counsel is also compulsory before the court of appeal. A legal counsel must represent litigants before administrative tribunals and the motion must be signed by a legal counsel, *avocat à la Cour*. In Luxembourg, only a few lawyers are specialized in environmental law and most of them practice administrative law and planning law. The best way to find a lawyer specialized in environmental law is to contact the Bar of Luxembourg, (*Barreau de Luxembourg)*.

IX. Evidence

The burden of proof belongs to the claimant. He must bring the evidence of the facts and damages. The different kinds of proof are documentary evidence, oral evidence, presumptions, admission and sworn evidence. The form of evidence is discretionary except in the case of a legal document where the proof needs to be written. The decision as to whether a witness should be heard is left to the judge's discretion. The court can request evidence on its own motion if it considers that it is useful to clarify a case. For instance, the court can request experts' opinion or organize site visits. In order to get expert opinions in the procedure, parties must submit the name of an expert to the court. In administrative matters, experts should be chosen from the expert list published by the Ministry of justice. The judge will determine whether the expert witness should be heard or not. Judges can order other experts if they are not satisfied by the first one. However, judges must consider expert opinion with the highest diligence and only reject it when there are serious grounds proving it has not been prepared properly.

X. Injunctive Relief

In administrative law, the appeal or the action submitted to an administrative court against an administrative decision does not have a suspensive effect. The administrative decision is considered as legal and enforceable even if its legality is challenged. Appeals and court actions do not have a suspensive effect and administrative decisions are immediately executed. Appeals and court actions will only suspend the administrative decision in the case of an emergency or serious doubt on the legality of the decision. In environmental matters, action against an administrative decision may have a suspensive effect if it is based on serious grounds and the execution of the decision may cause serious and irreparable damages. The administrative decision can either be positive or negative. It is possible to obtain an injunctive relief to prevent an imminent damage or to stop a statutory nuisance by the way of an interim emergency procedure. The emergency interim procedure is available in the case of an emergency before the judge of interim procedures, *juge des référés*. He can order any measures to protect evidence, to order witness to appear or make any decision to prevent imminent damage. The procedure is not written. Parties do not need to be represented by a lawyer. The judge's decision is only temporary and can be modified by the same judge later on or by the judge ruling on the merits. The court decision can be appealed within 15 days of the notification of the decision. The president of the court of appeal is competent to rule the case. An emergency procedure will be following as in first instance.

XI. Costs

Applicants seeking access to justice in environmental matters face bailiff fees, expert fees and lawyer fees. Bailiff fees are determined by a flat fee and governed by Grand-Ducal regulation. Expert, witness, translator and interpreter fees are also governed by a Grand-Ducal regulation. Lawyers will individually determine their own fees. Their fees may be calculated on an hourly basis or according to the complexity of the case. The Bar of Luxembourg prohibits contingency fees (pacte de *quota litis*) for the entire lawyer's fee. Lawyers will generally ask for retainers for their fees, costs and disbursement other than the

statutory fees. In Luxembourg, no court fees are due for bringing a case to court, nor for bringing an appeal. Bailiff costs and lawyers' fees are very high in Luxembourg. Bailiff's fees run from €100 to €300. Expert fees can run from €1500 to €6000 according to the complexity of the expertise. Lawyers' fees account for 60 to 95% of the whole procedure cost. Lawyers may charge on a time-spent basis and the hourly rate can range from €100 to €650. Witness fees run from €60 to €300. Professional's fees are subject to Luxembourg VAT at a rate of 15% (also for private clients established within the EU). The cost of an injunctive relief/interim measure may vary according to the complexity and the stake of the case. Although the injunctive relief procedure should be straightforward and inexpensive, lawyers may charge higher fees for this work than for other simple procedures. In Luxembourg, all Parties have to bear their own costs irrespective of the outcome of the case. Procedural indemnities are very rarely allowed to parties. There is no general rule according to which the losing party will have to bear the prevailing party's lawyer's fees. Other costs must usually be borne by the losing party.

XII. Financial Assistance Mechanisms

In Luxembourg, there are no specific exemptions from costs in environmental matters. There are no procedural costs apart from lawyer fees, expert fees, witness fees and bailiff fees. Legal aid is available for people who have financial difficulties. They have to fill in a request to the Bar of Luxembourg or to the Central Social Assistance Services. This financial assistance covers all fees linked to the legal procedure and the lawyer, notary, bailiff and translator's fees. Legal aid is available for civil, commercial and administrative legal cases for both plaintiffs and defendants. It is available in litigation and in extra judicial recourses. Legal aid may also be granted in the case of precautionary measures and procedures to enforce court decisions or any other authority to execute. There is no specific legal aid available in environmental matters. However, regular legal aid rules apply to environmental cases that are to be brought before either a civil or an administrative court. Legal aid is only available to individuals of insufficient means. There is no pro bono legal assistance provided by firms in Luxembourg. The legal information service provides free legal information but is not specialized in environmental law. There are no legal clinics dealing with environmental cases in Luxembourg. There are no public interest environmental law organizations or lawyers in Luxembourg.

XIII. Timeliness

In principle, administrative organs are required to deliver a decision within 3 months of the request sent by an applicant. If the administration does not provide a decision within 3 months or less if provided so by law, its silence equals a negative decision. No sanction is foreseen for disrespect of the timeframe. The administrative tribunal can verify the legality of the refusal decision and rule the cancelation of the decision based on the absence of motive. Prescription rules are set in the Civil Code. Legal actions must be brought before judicial court within 30 years from the date of the damage or from the day the victim was informed of the damage. The legal action of the claimant against his insurance shall be brought before civil courts within 5 years from the date of the damage or from the day the victim was informed of the damage. The prescription delay to bring a public action is 10 years against a crime, 5 years against a misdemeanor and 1 year against smaller offence. There is no typical duration of an environmental court case in Luxembourg. It varies according to the complexity of the case. Once the claimant has submitted his claim, the defendant has to send his brief (defense) within three month. The claimant will be able to submit his reply within 2 month and similarly for any additional replies. Time limits can be extended by the juge de la mise en état The *juge de la mise en état* controls that both parties comply with the procedure time frame. No deadline has been set for the court to deliver its judgment; judgment deadlines vary significantly among cases. There are no sanctions against courts delivering decisions in delay in Luxembourg.

XIV. Other Issues

In most cases, the public may challenge environmental decisions once they are made aware of the decision. Information on access to justice in environmental matters is provided to the public via several websites.

Information on access to justice in environmental matters is accessible through the government sites: http://www.emwelt.lu/, http://www.developpement-durable-infrastructures.public.lu/fr/index.html. ADR exists in the form of arbitration, mediation and conciliation but is rarely used in environmental matters in Luxembourg. Although mediation is available in environmental matters in Luxembourg, it is not frequently used.

XV. Being a Foreigner

In Luxembourg, there are no anti-discrimination clauses regarding language or country of origin found in the procedural laws. Foreigners can bring a claim before a Luxembourgish forum if they have legal standing. They can also benefit from legal aid. In Luxembourg, there are three administrative languages: French, German and Luxembourgish. All procedural documents must be written in French but hearing may be done in these three languages. Translation can be provided to parties in court and will be paid by the government. However, if a party wants to produce a witness who needs a translator, the party will have to pay for the witness as well as for the translator.

XVI. Transboundary Cases

In EIA and IPPC procedure, when the establishment may have an impact on the environment of another country, the request file will be transmitted to the country that will be able to provide its comments. It will then be informed of the final decision. The public concerned in a transboundary context includes individuals that have a direct and sufficient interest whether they are a Luxembourgish resident or not. The notion of interest as described above remains the main condition to have standing. Individuals of the affected country that have a direct interest have standing and can bring an action before a Luxembourgish court. They are eligible to legal aid in the same condition as Luxembourgish residents. They can bring an action and request for injunctive relief or interim measures under the same conditions as Luxembourgish residents. Foreign NGOs have legal standing if the law concerned provides so. Individuals can bring actions against the State of Luxembourg to obtain damages before Luxembourgish court. Foreign individuals can bring actions against Luxembourgish citizens before Luxembourgish or foreign courts even if the damage occurred outside of Luxembourg.

Related Links

http://www.emwelt.lu/

http://www.developpement-durable-infrastructures.public.lu/fr/index.html

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