Editorial
Upholding the right to clean air in the courts

Mr Alan Andrews
Lawyer, Health and Environment, Clean Air Project Leader, ClientEarth, United Kingdom

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Introduction

EU law grants its citizens a right to breathe clean air. This right is underpinned by several procedural rights, which have been used by a pan-European movement of citizens and NGOs to bring a series of cases before national courts.

The law of the European Union (EU) aims to achieve a high level of protection for human health and the environment. This principle is particularly evident in the field of air pollution law. Directive 2008/50/EC (the Ambient Air Quality Directive) sets limit values – legally binding limits on ambient concentrations of harmful pollutants such as particulate matter, nitrogen dioxide, ozone and sulphur dioxide, that must be achieved by a certain date and are not to be exceeded once attained.

EU law has also influenced, and been influenced by, the Aarhus Convention – an international treaty which aims to establish the right to a healthy environment in law. Its preamble states that:
"Every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations."
This right to a healthy environment rests on three procedural rights: the right to access environmental information, the right to participate in environmental decision-making and the right to access the courts where environmental laws are broken. While the EU has failed to fully implement its legal obligations under the Aarhus Convention, its principles and values are reflected in EU air quality laws.

While air pollution in Europe has improved steadily over the last few decades, significant problems remain. Up to a third of Europeans living in cities are exposed to levels of pollution which exceed the limit values. It is estimated that exposure to air pollution is associated with 420,000 premature deaths in 2012, making it one of the biggest public health challenges faced in Europe. One of the main reasons for the failure of the legislation to adequately protect human health is that it is not properly enforced. Public and private bodies alike can breach air pollution laws with impunity, safe in the knowledge that they are unlikely to face any significant penalties. The European Commission is responsible for enforcing compliance by EU member states but lacks the resources, political independence and will to do so.

Alan Andrews: Environmental Lawyer at Client Earth, working on issues affecting health and the environment, especially air pollution and climate change.

However, individuals and NGOs are increasingly stepping in to fill this "enforcement gap", assisted by a series of rulings by the Court of Justice of the EU (CJEU) which have clarified the nature of both the rights conferred on EU citizens and the obligations imposed on national institutions by air pollution laws.

In 2007 the CJEU ruled that where air quality limit values were breached, "individuals concerned" had the right to go before national courts to demand action. The courts must provide an effective judicial remedy, namely an order requiring that an adequate plan is adopted by the relevant authorities. The legislation was subsequently strengthened to include a requirement that where limit values are breached after the relevant deadline, the authorities must adopt an air quality plan containing measures to achieve compliance "in the shortest time possible."

In 2014, in a case brought by ClientEarth relating to breaches of air quality laws in the UK, the CJEU confirmed previous case law that established that air quality limits impose an "obligation of result": that is the limits must be achieved by the relevant deadline regardless of cost or technical or administrative problems. Where those limits are breached, national courts must provide remedies to ensure that plans are adopted which comply with the "as shortest time possible" requirement[1]. Judgments of the CJEU are binding on all 28 EU Member States, so ClientEarth has been using this powerful precedent to work with other NGOs and lawyers to bring cases in national courts across Europe.

In the two years since this landmark judgment, national courts have responded with increasingly strong rulings in which the failures of national, regional and municipal governments to take appropriate action to improve air quality have been ruled unlawful, and new, improved air quality plans have been ordered.

For example, in 2015, the UK Supreme Court ordered the national government to take "immediate action", in the form of a new air quality plan, to remedy ongoing breaches of the limit value for nitrogen dioxide in 16 cities and regions. In November 2016, following a further legal challenge by ClientEarth, the High Court ruled that the new plan was unlawful as it would not achieve compliance in the shortest time possible (even the overly optimistic assumptions in the plans projected compliance would not be achieved until 2025) and ordered it to be modified. In doing so the court clarified that in preparing air quality plans, the overriding aim is to protect human health through the achievement of air quality limits in the shortest possible time, which outweighs other considerations such as cost or administrative difficulty.

In a series of cases brought in Germany, the courts have similarly struck down inadequate plans and held that "drastic measures" such as bans on diesel vehicles in city centres needed to be considered.

A court in Poland recently upheld a ban on the combustion of solid fuel for domestic heating in the city of Krakow, on the basis that the ban, which will be introduced in 2019, is lawful, proportionate and indeed necessary to ensure compliance with EU law.

Beyond Europe

In many ways Europe is playing catch up with the rest of the world in these matters. The US, while not normally celebrated as a paragon of virtue in environmental protection, was nevertheless a pioneer in tackling air pollution through the 1970 Clean Air Act. This introduced the concept of the "citizen attorney general": arming ordinary citizens with the right to go to court to enforce pollution laws when governments and regulators failed.

In a series of cases brought by NGOs and activist lawyers beginning in the 1980s, the Indian Supreme Court has ordered the removal of diesel buses, vans and taxis from the roads of Delhi. The appalling levels of pollution in Delhi show that there is still much work to be done if the right to breathe clean air is to become a reality there, but the situation would likely be even worse were it not for these cases.

Even China has responded to its own "airpocalypse" by passing laws which confer rights to environmental information, public participation in environmental decision making and the right of citizens and NGOs to go to court to enforce laws against polluting companies (although unsurprisingly these rights do not extend to breaches of the law by the state).

Conclusion

Breathing clean air is essential to healthy life. It is therefore too important to be left to the whims of politicians, or the good intentions of under-resourced and overworked government officials. The right to breathe clean air must be enshrined in law, with government bodies given clear obligations to monitor and assess air quality and take measures to achieve clearly defined and legally binding air quality standards. The choice of what standard of air quality is acceptable is ultimately a political choice, which must weigh up the costs and benefits of reduced health and environmental impacts with the costs of mitigation measures, and the relative importance of air quality among other public health and environmental issues, there should not be a choice over whether to meet those standards. Further, that political choice should be made based on a good understanding of the range of health and environmental impacts and their societal cost – not just among scientists and technocrats but also among politicians and the public.

Strong, independent regulators are needed to oversee compliance by public bodies and the private sector, but this will not be sufficient. Regulators too often fall victim to industry capture or political interference – see for example the failure of European regulators to deal with the Volkswagen scandal. The impotence of EU regulators stands in stark contrast with the actions of the US EPA, in both uncovering the scandal and imposing punitive sanctions against the automotive giant. However, the US EPA is not immune to political interference and now faces emasculation by the incoming Trump administration.

Citizens must therefore be empowered to uphold their right to clean air when governments, industry and regulators fail them. They must be armed with three procedural tools: First, the right to access information about air quality (ideally through the provision of live data from monitoring stations, supplemented by regular reports from trusted government or academic sources). Second, the right to participate in decisions and policies which affects air quality, such as the granting of industrial permits or formulation of air quality plans. Finally, and crucially, the right to go to court to enforce pollution laws against governments and companies alike.

[1] *Case C-404/13 R (on the application of ClientEarth) v Secretary of State for the Environment.*