Environmental Delicts and Post-Communist Private Law in Bulgaria: Time for Reforms in View of UN's Sustainable Development Goals and the European Green Deal?

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Abstract. Can private law contribute to seeking solutions to environmental problems and aligning Bulgaria better with the United Nations' Sustainable Development Goals, which have informed the European Green Deal? This chapter highlights the importance of the procedural right of access to justice in environmental matters as it emerges from international and EU law to better delineate the potential role which tort law can play in supporting environmental protection. Then, it surveys the untidy notion of environmental delict in Bulgarian law. Finally, it suggests what reforms are necessary to help Bulgarian tort law become a useful tool in promoting environmental protection.

1. INTRODUCTION

The right of citizens to a 'healthy and favourable environment' was enshrined in Article 55 of Bulgaria's democratic Constitution which was enacted in 1991, shortly after the fall of the country's communist regime in 1989. Nevertheless, frightening data shows that this constitutional obligation remains an empty slogan. Bulgaria traditionally faces high levels of air pollution – among the Member States of the European Union (EU), it has the highest annual mean concentration of fine particles in urban areas.[1] Local civil society is often shaken by reoccurring controversies about ecological disasters in the Black Sea.[2] Social advocates have raised awareness of how thermal power stations in Bulgaria pollute water with impunity.[3] A rare study on the quality of drinking water in Bulgarian cities by a reputed consumer association revealed that between one and three pollutants in quantities significantly above the legally acceptable limit were present in the drinking water of 14 out of the 29 examined cities.[4]

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1 *Eurostat*, 'How Polluted Is the Air in Urban Areas?' (3 June 2021) <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/edn-20210603-1> accessed 1 December 2022.

2 See, for instance, Krassen Nikolov, 'Black Sea Faces Ecological Catastrophe due to Bulgaria's Inaction' (*Euractiv*, 30 September 2021) <https://www.euractiv.com/section/politics/short_news/black-sea-faces-ecological-catastrophe-due-to-bulgarias-inactio/> accessed 1 December 2022.

3 Desislava Mikova, 'Polluting Water with Impunity' (*Offnews*, 15 June 2021) <https://offnews.bg/obshtestvo/beznakazanoto-zamarsiavane-na-vodite-koeto-niama-koj-da-spre-753595.html> accessed 1 December 2022.

4 *Active Consumers Association*, 'Water Quality in 29 Bulgarian Cities' (2015) <https://aktivnipotrebiteli.bg/%d1%82%d0%b5%d1%81%d1%82/149/%d0%a2%d0%95%d0%a1%d0%a2-%d0%bd%d0%b0-%d0%bf%d0%b8%d1%82%d0%b5%d0%b9%d0%bd%d0%b0-%d0%b2%d0%be%d0%b4%d0%b0-(2015)> accessed 1 December 2022.

Regrettably, Bulgaria's EU membership has not led to a palpable change in the attitude of Bulgarian institutions towards the importance of environmental protection.[5] Infringement procedures by the European Commission before the Court of Justice of the European Union (CJEU), which concern the country's repeated violations of the Ambient Air Quality Directive, provide ample illustration.[6] In 2017, the CJEU held that Bulgaria had failed its obligations under this directive by exceeding the daily and annual limit values for PM^{10} 'systemically and continuously' in various parts of the country.[7] In 2020, the European Commission took Bulgaria to court again because it deemed that Bulgaria had not fulfilled its obligations to 'adopt and implement a series of measures' to comply with the 2017 CJEU judgment.[8] Meanwhile, in separate proceedings, in 2022, the CJEU established that Bulgaria had breached the directive by continuously exceeding the values of sulfur dioxide and failing to adopt appropriate measures to ensure compliance with EU requirements.[9]

More disturbingly, according to Eurostat, Bulgaria's performance is substantially below the EU average on most United Nations

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[5] Bulgaria joined the EU on 1 January 2007. As an EU Member State, it has transposed the environmental acquis.

[6] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1.

[7] PM stands for particulate matter. PM^{10} refers to small particles with an aerodynamic diameter smaller than 10 μm; Case C-488/15 *European Commission v. Bulgaria* [2017] ECLI:EU:C:2017:267.

[8] *European Commission*, 'Air quality: Commission decides to refer Bulgaria to the Court of Justice over its failure to comply with previous judgement. Press release IP/20/2150' (3 December 12 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2150> accessed 3 December 2022. At the time of writing of this chapter, the case is pending. See Case C-174/21 *European Commission v. Bulgaria.*

[9] Case C-730/19 *European Commission v. Republic of Bulgaria* [2022] ECLI:EU:C:2022:382.

Sustainable Development Goals (SDGs).[10] The seventeen SDGs were embraced by the 2030 Agenda for Sustainable Development which was adopted by all United Nations (UN) Member States in 2015.[11] They purport to 'balance the three dimensions of sustainable development' – namely, 'the economic, social and environmental' one.[12] In turn, the SDGs have informed the European Green Deal,[13] which 'resets the [European] Commission's commitment to tackling climate and environmental-related challenges'.[14]

It has been argued that when it comes to environmental protection, 'public law is *far better placed* than private law to engage with the collective public interest [emphasis added]'.[15] However, the drama surrounding the violations of the Ambient Air Quality Directive in Bulgaria alone shows the limits of public law. Moreover, recent literature has tried to bust the myth that the relationship between environmental law and private law is 'necessarily antagonistic'.[16] It has been contended, for instance, that private law may indeed have

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[10] *Eurostat*, 'SDG Country Overview' <https://ec.europa.eu/eurostat/cache/infographs/sdg-country-overview/> accessed 1 December 2022.

[11] United Nations, 'A/RES/70/1. Transforming Our World: the 2030 Agenda for Sustainable Development' (25 September 2015) 14 and ff.

[12] United Nations, 'A/RES/70/1. Transforming Our World: the 2030 Agenda for Sustainable Development' (25 September 2015) 1.

[13] In the eyes of the European Commission, 'the Green Deal is an integral part of [its] strategy to implement the United Nation's 2030 Agenda'. See Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Green Deal' COM(2019) 640 final, 11.12.2019, p. 3.

[14] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Green Deal' COM(2019) 640 final, 1.

[15] Fiona Donson and Robert Lee, 'Environmental Protection: Public or Private Law?' [1996] 1(1) *Judicial Review* 56, 58 (https://doi.org/10.1080/10854681.1996.11426861).

[16] David Howarth, 'Ch.48: Environmental Law and Private Law' in Emma Lees and Jorge E. Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford, Oxford University Press 2019) 1091, 1117 (https://doi.org/10.1093/law/9780198790952.003.0048).

a role to play in deterring or repairing environmental damage.[17] Furthermore, in countries which face severe rule of law backsliding[18] and rampant corruption,[19] such as Bulgaria, state institutions may be captured and may intentionally disregard the public interest.[20] Such institutions may purposefully ignore their responsibilities and turn a blind eye to violations of environmental legislation – such an example is examined in section 3 below. In this context, private law has the potential to empower concerned citizens and civil action groups to litigate and try to push national judges – assuming at least some of them have remained independent– to take a stand, too.[21]

This chapter considers if Bulgarian private law may contribute to seeking solutions to the country's serious environmental problems and aligning Bulgaria better with SDGs, such as Clean Water and Sanitation (SDG6), Sustainable Cities and Communities (SDG11), and Life Below Water (SDG14). Unfortunately, the hands of citizens have been tied for years because the notion of environmental delict is not well understood in Bulgaria. The deficiencies of the Law on

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[17] David Howarth, 'Ch.48: Environmental Law and Private Law' in Emma Lees and Jorge E. Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford, Oxford University Press 2019) 1091, 1096 (https://doi.org/10.1093/law/9780198790952.003.0048).

[18] In the latest Rule of Law Index by the World Justice Project, Bulgaria has received the second worst score in the EU after Hungary; World Justice Project, *Rule of Law Index 2022* (Washington DC, World Justice Project 2022) <https://worldjusticeproject.org/rule-of-law-index/downloads/Index-2022.pdf> accessed 1 December 2022.

[19] The latest 2021 Corruption Perceptions Index by Transparency International ranked Bulgaria 78th in the world – Bulgaria has received a similar score to Belarus; Transparency International, *Corruption Perceptions Index 2021* <https://www.transparency.org/en/cpi/2021> accessed 1 December 2022.

[20] Captured states are those in which public power is exercised for private gain. For captured states in the EU, see Abbey Innes, 'The Political Economy of Captured States' [2014] 52(1) *Journal of Common Market Studies* 88–104 (https://doi.org/10.1111/jcms.12079).

[21] The lack of independence of the judiciary is a traditional source of concern in Bulgaria. See European Parliament resolution of 8 October 2020 on the rule of law and fundamental rights in Bulgaria, P9_TA(2020)026 <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0264_EN.html> accessed 4 December 2022.

Obligations and Contracts of 1950, which governs tortious liability, as well as its messy relationship with laws governing environmental protection may shed light on Bulgaria's lack of a steady track record of successful environmental litigation.[22] In view of promoting compliance with the SDGs and, respectively, the European Green Deal, the shortcomings of Bulgarian legislation are surely problematic.

First, this chapter highlights the importance of the procedural right of access to justice in environmental matters as it emerges from international and EU law to better delineate the potential role which tort law can play in supporting environmental protection (section 2). Then, it surveys the untidy notion of environmental delict in contemporary Bulgarian legislation, scholarly writing, and case law (section 3). Finally, it suggests what reforms are necessary to help Bulgarian private law become a useful tool in promoting environmental protection and contributing to Bulgaria's better alignment with the UN's SDGs (section 4).

2. Setting the Scene: Access to Justice in Environmental Matters and Tortious Liability

Before delving into the specific Bulgarian case, it seems relevant to explain the vital role assigned to access to justice in environmental

[22] For the sake of terminological clarity, it should be noted that in this chapter 'tort' and 'delict' are used synonymously. Bulgarian legal terminology in this field is imprecise too – in the 19th century, Bulgarian legislation referred to delicts as 'semi-crimes' (*poluprestupleniya*). In contemporary law, delicts are known as *nepozvoleno uvrejdane*, which can be translated as 'unallowed harm'. The latter appears paradoxical for harm should not be allowed in principle.

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matters by international and EU law. One of the main goals of this procedural right of citizens is to ensure that the consequences of acts and omissions jeopardizing environmental protection can be reversed. Nevertheless, this procedural right also paves the way for citizens' holding wrongdoers liable in tort.

Considering that access to justice in environmental matters is a key value of both international and EU law, it is not surprising that improving access to justice in environmental matters is also one of the priorities of the European Green Deal. Sadly, however, the EU's policies underestimate tort law's potential to contribute to environmental protection.

2.1. THE AARHUS CONVENTION

The EU and its 27 Member States are parties to the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (Aarhus Convention) of 1998. It has been asserted that this international instrument is 'ground-breaking in linking environmental rights and human rights'.[23] The main goal of the Aarhus Convention is to

[23] Áine Ryall, 'The Aarhus Convention: Standards for Access to Justice in Environmental Matters' in Stephen J. Turner et al (eds), *Environmental Rights: The Development of Standards* (Cambridge, Cambridge University Press 2019) 116 (https://doi.org/10.1017/9781108612500.006).

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'…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 well-being… [emphasis added]'[24]

Article 9 defines the various rights to access to justice which should be granted to citizens. Article 9(3) of this convention, which is the most relevant to our study, requires that:

'members of the public have access to administrative or judicial procedures to challenge acts and omissions by *private persons and public authorities* which contravene provisions of its national law relating to the environment [emphasis added]'.

From a private law perspective, it is surely notable that a convention promoting environmental protection purports to ensure that citizens have the right to litigate against other citizens rather than merely against public authorities. Moreover, one of the examples given in *The Aarhus Convention: An Implementation Guide* in relation to Article 9(3) is the following:

'…individuals and environmental organizations that meet the national criteria may challenge a violation by a facility of wastewater discharge limitations in its permit. One means of challenging such a violation would be to take the owner or operator of the facility to

[24] Art. 1 of the Aarhus Convention.

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court, claiming a violation of the law, and receive a remedy such as a court order to stop the illegal wastewater discharges.'[25]

While there is no overt reference to tortious liability in the passage, the scenario described may, under certain conditions, fall in the realm of tort law in many jurisdictions – namely, if there is damage to property, a person's health, etc. Moreover, it should be remembered that injunctions are one of the two main remedies in tort along with damages in the common law. The debate on the importance of injunctive relief has paved its way to leading continental jurisdictions, too.[26] While it may sound unusual to public lawyers, the Aarhus Convention may be interpreted to indicate that tort law has some role to play in its enforcement. In fact, section 3 below shows an example of how Bulgarian civil society obtained injunctions against the Municipality of Sofia from a Bulgarian *civil* court, forcing the municipality to comply with environmental legislation and to take action against private actors violating the law. It should also be stressed that the EU has adopted a number of directives and regulations which are in line with its obligations under the Aarhus Convention – the Access to Environmental Information Directive,[27] the Public Participation Directive,[28] and the so-called

[25] United Nations, *The Aarhus Convention: An Implementation Guide* (2nd edn, Geneva, United Nations 2014) 199.

[26] Paula Giliker, 'La cessation de l'illicite' [2019] 4 *Revue des contrats* 284.

[27] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26.

[28] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.

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'Aarhus Regulation' which implements the Aarhus Convention to EU institutions[29] and which was recently amended by another regulation.[30] Article 10 of the Aarhus Regulation allows non-governmental organisations meeting certain criteria to make requests for internal review to relevant EU institutions and bodies that have 'adopted an administrative act under environmental law' or, alternatively, have omitted to adopt such an act. The 2021 regulation, which amended the Aarhus Regulation, extended the prerogative under Article 10 to 'members of the public' meeting certain criteria.[31]

Meanwhile, Article 12 of the Aarhus Regulation states that non-governmental organisations, which have made requests for internal review, can institute proceedings before the CJEU in accordance with the relevant provisions of the EU Treaties. The most relevant provisions seem to be Articles 263 and 265 of the Treaty on the Functioning of the European Union (TFEU).[32] Pursuant to Article 263 TFEU, applicants may seek the annulment of a measure contrary to EU law. Pursuant to Article 265 TFEU, natural persons or artificial legal persons may bring an action against EU institutions or

[29] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

[30] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2021] OJ L356/1.

[31] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2021] OJ L356/1.

[32] See Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

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bodies for failure to act. In both scenarios, according to Article 266 TFEU, the EU institution or body found in violation is supposed to 'take the necessary measures to comply' with the CJEU judgment. Finally, acts or omissions jeopardizing environmental protection may also pave the way to the application of the second paragraph of Article 340 TFEU in case damage has been caused:

'In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

The liability of the EU envisaged in this paragraph is tortious in nature. This specific type of tort is known under different names – in a study by the European Parliamentary Research Service, it was referred to as 'public tort law'.[33] In some East European jurisdictions, including Bulgaria, it is known as an administrative delict.

2.2. The European Commission's Recent Efforts to Foster Access to Justice in Environmental Matters on a National Level

In view of the efforts by EU institutions to foster accountability for administrative acts or omissions jeopardizing the environment on an

[33] Rafal Mańko, 'Action for Damages against the EU' (2018) *European Parliamentary Research Service* <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf> accessed 5 December 2022.

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EU level, it does not seem surprising that the European Green Deal attempts to promote access to justice and, as a consequence, compliance with the Aarhus Convention on a national level, too. After all, a chain is as strong as its weakest link.

Already in the communication on the European Green Deal, the European Commission promised to 'take action to improve [citizens'] access to justice before national courts in all Member States.'[34]

In a subsequent communication dedicated to enhancing access to justice in environmental matters, the European Commission stressed the importance of civil society in identifying potential breaches of EU law by submitting administrative complaints or taking cases to court.[35] To this end, the European Commission monitors citizens' access to justice in environmental matters via the Environmental Implementation Review (EIR) – a new reporting tool purporting to improve the implementation of EU environmental laws and policies,[36] which was embraced as playing 'a critical role in mapping the situation in each Member State' in the Communication on the European Green Deal.[37]

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[34] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Green Deal' COM(2019) 640 final, 23.

[35] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions on Improving Access to Justice in Environmental Matters in the EU and its Member States' COM(2020) 643 final, 3.

[36] The Commission has published monitoring reports under this mechanism in 2017, 2019, and 2022.

[37] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Green Deal' COM(2019) 640 final, 23.

A quick look at the latest reports under the EIR, nevertheless, demonstrates that when monitoring access to justice in environmental matters, the European Commission has a very narrow understanding of this notion – it is primarily focused on the opportunities to challenge administrative acts and regulatory decisions in the realm of administrative law.[38] Regrettably, the European Commission does not seem to monitor the opportunities for civil society to challenge acts and omissions by 'private persons', as envisaged in Article 9(3) of the Aarhus Convention cited above.

Moreover, when it comes to tortious liability, under the EIR, the European Commission solely follows the implementation of the Environmental Liability Directive.[39] This directive enshrines a specific type of liability for damage caused to natural resources rather than to private property or a person's physical integrity and health. Here it should be clarified that literature distinguishes between two types of environmental damage – damage to a private interest, which is the traditional subject of tort law, and '(pure) ecological damage … where the harm is not to a private interest but to the environment itself'.[40] The directive is focused on the latter.

In other words, the EU's monitoring of access to justice in environmental matters seems to disregard the potential which

[38] See, for instance, Commission, 'Environmental Implementation Review 2022. Country Report – Bulgaria' SWD(2022) 262 final, 42–43.

[39] Commission, 'Environmental Implementation Review 2022. Country Report – Bulgaria' SWD(2022) 262 final, 44–45; See also Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

[40] Gerhard Wagner, 'Environmental Liability' in Jürgen Basedow et al (eds), *Max Planck Encyclopedia of European Private Law* (Germany, Max Planck Institute 2012) <https://max-eup2012.mpipriv.de/index.php/Environmental_Liability> accessed 5 December 2022.

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traditional tort law must contribute to environmental protection. This is unfortunate for in the latest communication on the EIR, the European Commission itself stresses that:

'[The EIR] is not simply one more report among many others. It raises public awareness, it builds the case for accountability, and it enables people across the EU to be part of joint effort by giving them a better understanding of what can be and/or still needs to be done at individual, local, national or EU level. The EIR seeks to empower all of these stakeholders to act coherently, but from different angles, in pursuit of the same common-sense objective: to apply the rules we have.'[41]

In this light, relying on private law to help promote compliance with environmental legislation has some advantages:

- First, tort law allows injured parties to circumvent state institutions, which have abdicated from their duties to enforce environmental legislation, and directly engage the responsibility of private actors.
- Second, the threat of having to answer in damages in tort on its own may serve as an incentive for private actors to comply with environmental legislation.
- Third, as explained below, there are mechanisms at the blurry boundary between private law and administrative law, which can be

[41] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Environmental Implementation Review 2022: Turning the tide through environmental compliance' COM(2022) 438 final, 22.

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employed to incentivise both public authorities and private actors to comply with their obligations via injunctions by national courts and at the threat of answering in damages.

3. The Untidy Notion of Environmental Delict(s) in Bulgarian Law

Now that we have examined the potential of tort law to promote compliance with environmental legislation, we focus on the amorphous notion of environmental delict, which emerges from Bulgarian legislation, scholarly writing, and case law. In the various pieces of legislation that can be relied upon to impose tortious liability for environmental damage surveyed below, delicts have different elements. This untidiness, coupled with other contextual factors, limits the opportunities of civil society to hold those responsible for environmental damage liable in tort.

3.1. Preliminary Remarks: The Messy Post-Communist Legal Landscape

To understand why the notion of environmental delict is untidy, however, one needs to appreciate the specific way in which Bulgarian private law developed. It has been asserted that:

'in the realm of [Bulgarian] private law, one observes a complex patchwork – creative compilations from jurisdictions that many

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jurists would find incompatible, which were sewn together in different political contexts.'[42]

The development of Bulgarian private law can roughly be divided into three periods – re-establishment and development of the Bulgarian State after the Liberation from the Ottoman Empire (1878 – 1944), Communism (1944 – 1989), and Democracy (1989 – present).[43] Each of them has left a mark on the complex legal landscape in the country today.

Moreover, it is helpful to know that Bulgarian legislators are often oblivious of the necessity for coherence, which usually leads to gaps and contradictions. One should also be aware that the line between public and private law in Bulgaria may be blurry – the main reason for this is that communism denied the Roman distinction between public and private law altogether.[44] The public/private law dichotomy was restored only partially post-1989.

3.2. Delicts in the Law of Obligations and Contracts

One of the vibrant patchworks, which is relevant to this study, is the current Law of Obligations and Contracts (LOC). It was enacted in 1950, during communism, for the needs of a planned economy in which there was no right to private initiative. The LOC bears a secret

[42] Radosveta Vassileva, *Bulgarian Private Law at Crossroads* (Cambridge, Intersentia 2022) 43.

[43] Radosveta Vassileva, *Bulgarian Private Law at Crossroads* (Cambridge, Intersentia 2022) 43.

[44] See Vitali Tadjer, *Civil Law of People's Republic of Bulgaria: General Part. Section 1* (Sofia, Nauka i izkustvo 1972) 30.

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which has been discovered only recently due to years of communist censorship – while it harbours principles borrowed from Polish and Soviet law, it is heavily based on the relevant sections on the law of obligations in the Italian Civil Code of 1942.[45] When reforming the law of obligations after the fall of communism in 1989 to adapt it to the needs of a market economy, legislators looked to the Bulgarian LOC of 1892, which was in force prior to communism, as well as to the contemporary laws of both East and West European jurisdictions, further enhancing the mélange.[46]

Articles 45–54 comprise the section on tortious liability in the LOC. While the rules on tort were not conceived with environmental damage in mind, three of them appear relevant to such cases. Article 45, which is regarded as a general and as a fall-back provision, states: 'Everyone is obliged to repair the damage they have caused to others through their own fault. In all cases of tort, fault is presumed until proven otherwise.'

According to Article 49, anyone who assigns work to another is liable for damage caused by the other in performing the assignment. Article 50 enshrines the liability of owners and custodians of a thing or an animal for damage caused by the thing or the animal.

The most interesting provision from a comparative perspective is Article 49 of the LOC. I suspect that it was inspired by Article 2049 of the Italian Civil Code, which governs the liability of the 'master' for damage caused by his servant. One should remember, however,

[45] Radosveta Vassileva, *Bulgarian Private Law at Crossroads* (Cambridge, Intersentia 2022) 53–55.
[46] Radosveta Vassileva, *Bulgarian Private Law at Crossroads* (Cambridge, Intersentia 2022) 57–58.

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that the LOC's authors had to comply with the values of communist ideology which denies such relationships of subjugation. That is why, Article 49 is so neutrally phrased and refers to 'assigned work' which has a broad scope.

In an ironic twist, this provision started living a new life post-1989 which surely was not envisaged by the LOC's drafters. It has been used to engage the responsibility of media which have published libellous content.[47] It has been relied upon to impose liability on hospitals for medical negligence.[48] In this light, it is interesting that contemporary Bulgarian authors consider that Article 49 of the LOC is best suited to hold wrongdoers liable for environmental damage.[49] In essence, Article 49 of the LOC imposes liability on third parties who are not themselves at fault – it only requires 1) the existence of damage; 2) a causal link between the assigned work and the damage. Hypothetically, the defendant can either argue that the damage was not caused in relation to the assignment or that the performer of the assignment was not at fault, as required by Article 45 of the LOC. However, when it comes to large industrial facilities, which often face allegations of polluting, establishing who exactly has caused the damage may be difficult, if not impossible. Bulgarian (communist) courts have resolved such issues in favour of the claimant – pursuant

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[47] Supreme Court of Cassation (27.11.2019), 3rd Civil Chamber, 1140/2019.

[48] Supreme Court of Cassation (16.09.2022), 1st Civil Chamber, 4132/2021.

[49] Ivaylo Vassilev, 'Liability of Merchants for Damage due to Environmental Pollution under Article 49 of the Law on Obligations and Contracts' (*Gramada*, 29 May 2015) <http://gramada.org/%D0%BE%D1%82%D0%B3%D0%BE%D0%B2%D0%BE%D1%80%D0%BD%D0%BE%D1%81%D1%82-%D0%BD%D0%B0-%D1%82%D1%8A%D1%80%D0%B3%D0%BE%D0%B2%D1%86%D0%B8%D1%82%D0%B5-%D0%B7%D0%B0-%D0%B2%D1%80%D0%B5%D0%B4%D0%B8-%D0%BF%D1%80/> accessed 8.12.2022.

to a decree on interpretation of 1959, the fact that the person who actually caused the damage cannot be identified does not preclude liability under Article 49.[50]

Because the liability of the one who delegates the work is not based on fault, Article 49 can be weaponised against artificial legal persons that do not comply with environmental legislation and pollute the environment causing damage to property or citizens' health. Article 49 may also hold the key to holding accountable powerful private actors who act with impunity because they are shielded by state institutions vested with responsibilities to enforce environmental legislation.

Unfortunately, to the best of my knowledge, Bulgaria has not seen a successful application of Article 49 of the LOC in environmental matters. At first glance, this appears suspicious. Nevertheless, it has been suggested that the main reasons for this include distrust in the judiciary and the financial expenses associated with such litigation.[51] While Bulgaria is the country with the *lowest median earnings* in the EU and more than 22% of Bulgarian citizens live below the national poverty line,[52] court fees are notoriously high – when bringing an action for damages, the claimant has to pay 4% of the amount it seeks

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[50] Decree 7 of the Plenum of the Supreme Court of 1959; Decrees on interpretation are a distinctive feature of Bulgarian law evidencing the law-making powers of the judiciary. They are binding and concern questions of principle.

[51] Ivaylo Vassilev, 'Liability of Merchants for Damage due to Environmental Pollution under Article 49 of the Law on Obligations and Contracts' (*Gramada*, 29 May 2015) <http://gramada.org/%D0%BE%D1%82%D0%B3%D0%BE%D0%B2%D0%BE%D1%80%D0%BD%D0%BE%D1%81%D1%82-%D0%BD%D0%B0-%D1%82%D1%8A%D1%80%D0%B3%D0%BE%D0%B2%D1%86%D0%B8%D1%82%D0%B5-%D0%B7%D0%B0-%D0%B2%D1%80%D0%B5%D0%B4%D0%B8-%D0%BF%D1%80/> accessed 8.12.2022.

[52] *World Bank*, 'Poverty Headcount Ratio at National Poverty Lines (% of population) – Bulgaria', <https://data.worldbank.org/indicator/SI.POV.NAHC?locations=BG> accessed 15 December 2022.

as part of the court fees.[53] Crowdfunding is still relatively unpopular, too. Because of such contextual factors, below we will see that Bulgarian civil society has resorted to unexpected ways of enforcing environmental legislation – namely, via a class action suit against a municipality.

3.3. Delicts in Environmental Legislation

A survey of contemporary Bulgarian environmental legislation reveals a rich catalogue of environmental delicts, which were introduced in different contexts.[54] This section focuses on the Law on Environmental Protection (LEP) because it enshrines a general provision on liability for environmental damage.

3.3.1. Background

The first LEP was enacted in 1991. It was superseded by a law of the same name in 2002. The enactment of the first LEP indicated an important shift in legislative values – it was aligned with Article 55 of Bulgaria's democratic Constitution of 1991, which, as explained in the introduction to this chapter, protects the right to a 'healthy and favourable' environment.

Before the change of political regime in 1989, the attitude of the Bulgarian communist legislator to environmental damage was

[53] See Tariff for State Fees Collected by the Courts under the Civil Procedure Code.

[54] For an overview, see S Tasev, *Delictual Liability* (Sofia, Ciela 2009) 93–126.

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purely pragmatic. For instance, the Law on the Protection of Agricultural Property (the LPAP) of 1974 contains a detailed provision defining a specific type of delict to agricultural land. Its Article 29 stipulates:

Anyone who pollutes air, water, and soil with his activity, making them unsuitable or dangerous for agricultural animals and birds or for the development of agricultural crops, perennials, and flower crops, is responsible for all the immediate consequences of the pollution.

However, one should remember that during communism agricultural land was either owned by the state or by communist cooperatives because of the process of collectivisation.[55] The verbatim report of the sitting at which the adoption of the LPAP was discussed shows that the communist legislator was mostly concerned about the fact that state-owned industrial facilities were damaging state-owned agricultural land and, as a consequence, were decreasing the production of communist cooperatives.[56] Examples given during the parliamentary debate include a mine whose activities led to arsenic levels 30 times above the norm, which in turn led to deaths of cattle, and 'dustiness' of air caused by a cement factory, which in turn was worsening the quality of the harvested plums, grapes, and apples.[57]

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[55] M Gruev, 'Collectivisation and Social Change in the Bulgarian Village (1940s–1960s)' in Ivalyo Znepolski (ed), *History of the People's Republic of Bulgaria: The Regime and Society* (Sofia, Ciela 2009) 179–188; Communism initially significantly curtailed the right to private property. Subsequently, Bulgaria's Constitution of 1971 completely denied the right to private property.

[56] Verbatim Report of the Sitting of the Bulgarian Parliament of 2.07.1974.

[57] Report of the Sitting of the Bulgarian Parliament of 2.07.1974.

3.3.2. Liability for Environmental Damage in the LEP

The LEP, in contrast to other laws pertaining to environmental damage enacted during communism, echoes greater sensitivity towards the relationship between environmental damage and citizens' health. Article 29 of the original 1991 LEP stated: 'Whoever causes damages to another by fault because of pollution or harm to the environment shall be obliged to compensate them.' The current 2002 LEP contains an identical provision in its Article 170(1). Moreover, the current LEP has preserved the definition of 'pollution to the environment' of the original LEP:

'the deterioration of the qualities and as a result of the occurrence and introduction of physical, chemical or biological factors from a natural or anthropogenic source in the country or outside it, *regardless of whether the norms in force in the country are exceeded* [emphasis added]'.[58]

Its definition of 'harm to the environment' is also the same as the definition in the original LEP:

'such a change to one or more of its constituent components, which leads *to a deterioration of the quality of life of people*, to the impoverishment of biological diversity or to the difficult restoration of natural ecosystems [emphasis added]'[59]

[58] Additional Provisions, §1, point 5.
[59] Additional Provisions, §1, point 6.

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In principle, the definitions of 'pollution to the environment' and 'harm to the environment' make Article 170(1) relevant to a wide range of factual circumstances, enabling both citizens and public authorities to seek its application. It encompasses the traditional notion of environmental damage as damage to a private interest and the more modern conception of environmental liability for pure ecological damage which made its way to the Environmental Liability Directive mentioned in section 2.2.

Sadly, however, comparing the provisions of the 2002 LEP and the 1991 LEP shows that the 2002 reform sought to curtail civil society's involvement in environmental matters. Namely, Article 30 of the 1991 LEP allowed not only those who had suffered damage, but also municipal authorities, non-profit associations of citizens, or 'any citizen' to submit a claim demanding the cessation of the violation of environmental legislation and the elimination of all consequences of the pollution. Article 171 of the new LEP, in stark contrast, allows such a claim *only* by those who have suffered damage or, in case public property was damaged, by the minister of environment, the regional governor or the mayor depending on the case.

Such limitations on who can seek an injunction for cessation do not seem justified. First, it is more likely that experts or civil action groups have better knowledge of environmental legislation, which is often very technical, than ordinary citizens, so they are better placed to submit a well-argued claim regarding what injunction is necessary. Second, there are citizens who may not be directly injured but who may have a vested interest in seeking the cessation of

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pollution – personal convictions, such as environmental consciousness, may play a role. Third, in case public property is damaged, the minister, governor or mayor may be negligent, so concerned citizens may be more motivated to seek injunctions.

3.3.3. Interpretation Difficulties

In principle, the section titled 'Civil Liability' in the current LEP, which comprises Articles 170–172, provides ample examples of the sloppiness of the Bulgarian legislator – it is short and poorly drafted. For instance, while Article 170 mentions 'fault', it does not specify if it is presumed or not. Moreover, it does not stipulate the type/degree of fault – whether there should be intentional actions/omissions, gross negligence, or simply negligence. There is no overt indication regarding the instances when damage is excused, either – force majeure is an obvious omission. In other words, courts are left with the only option of construing this section by analogy to other rules – for instance, the general rules on tort in the LOC and the case law pertaining to them. Yet, as this is not explicitly specified in the LEP, the relationship between the LEP and the LOC remains messy, which may give rise to interpretation difficulties.

An example is provided by the scarce case law on Article 170 of the LEP. In 2013, the Supreme Court of Cassation quashed a decision by the Varna Appellate Court which had granted damages to a claimant under Article 170(1) of the LEP in conjunction with Article

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49 of the LOC.[60] The claimant was suing the Municipality of Varna for pollution on their land caused by construction waste discarded by a contractor of the municipality. In the eyes of the Supreme Court of Cassation, neither the LOC was applicable, nor civil courts had jurisdiction to examine the case.[61] It referred the case for re-examination to the administrative courts, arguing the facts had to be evaluated in light of Article 170 of the LEP in conjunction with Article 1(1) of the Law on the Liability of the State and Municipalities for Damage (LLSMD).

As explained in more detail in section 3.5 below, administrative justice is a recent development in Bulgaria, so disputes regarding the jurisdiction of courts are common. It is already revealing that both the first instance and the second instance entertained a different view from the Supreme Court of Cassation regarding their jurisdiction. Moreover, the fact that Article 170 of the LEP will be interpreted by different courts (civil and administrative) and in conjunction with different general rules on tortious liability entails the danger of creating a multiplicity of standards.

Finally, the LEP has a hidden strength, which has not been tested before Bulgarian courts yet. No matter whether the liability under Article 170 is construed against the LOC or the LLSMD, Article 171 of the LEP allows both civil and administrative courts to issue injunctions for cessation of the violation. The Bulgarian legislator has extended the available remedies for environmental damage

[60] Supreme Court of Cassation (27.6.2012), 4th Civil Chamber, 1063/2011.

[61] Supreme Court of Cassation (27.6.2012), 4th Civil Chamber, 1063/2011.

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beyond the traditional damages in tort, albeit clumsily. The potential of this interpretation of Article 171 should not be underestimated. One can envisage a scenario where a local factory pollutes waters. The owner of even a small orchard, which has been damaged, may submit a strategic small claim for damages on the grounds of Article 170 of the LEP and the rules on tortious liability in the LOC, along with a demand for injunctions to cease pollution under Article 171 of the LEP – in this way, while formally defending his/her private interest, he/she will be defending the public interest in limiting pollution.

3.4. Class Action and Tortious Liability

The messiness of Bulgarian traditional tort law may explain why Bulgarian civil society has resorted to creative legal means to engage the responsibility of wrongdoers. The provisions of the Code of Civil Procedure (CCP) of 2007 pertaining to class action suits have proven useful in obtaining mandatory injunctions by the Sofia City Court against the Municipality of Sofia, the capital of Bulgaria, to force it to comply with and enforce environmental legislation – what became known as the *Group for Clean Air* case discussed below.

3.4.1. The CCP

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The current CCP was drafted by a working group composed of experts from Austria and Bulgaria.[62] Yet, neither Bulgarian law prior to this reform, nor Austrian law disposed of provisions similar in spirit to Articles 379 and subsequent of the CCP governing class action suits. In principle, the CCP has been criticised for being ill-written.[63] In the field of consumer law, the application of the provisions on class action has resulted in disappointing outcomes, depriving injured parties of justice.[64] In this light, it is surprising that Articles 379 and subsequent could become a helpful tool promoting environmental protection. That is why, before explaining the details of the case, it is useful to explain why the rules on class action in the CCP must have appealed to those who initiated the proceedings.

Article 379(1) of the CCP, which defines the scope of class action, is vaguely worded: 'A class action may be brought on behalf of persons damaged by a violation, when, according to the nature of the violation, their circle cannot be determined precisely, but is determinable.'

It only requires that a determinable circle of persons be injured by a violation. Since it does not specify the nature of the violation, it is applicable to both contractual and extra-contractual contexts. In addition, Article 379(2) allows both injured parties and organisations

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62 Silvy Vasilev Chernev, 'Civil Procedure Reform in the Republic of Bulgaria' in *International Conference 2010* (Burgas, Burgas Free University 2010) 298.

63 Silvy Vasilev Chernev, 'Civil Procedure Reform in the Republic of Bulgaria' in *International Conference 2010* (Burgas, Burgas Free University 2010) 298. See also Mario Bobatinov, 'Collective Claims Proceedings' in *National Conference Proceedings* (Sofia, New Bulgarian University 2015) 98 <https://ebox.nbu.bg/lawofright/images/Text-sbornik.pdf> accessed 6 December 2022.

64 Radosveta Vassileva, 'Monetary Appreciation and Foreign Currency Mortgages: Lessons from the 2015 Swiss Franc Surge' [2020] 281 *European Review of Private Law* 173, 183-184 (https://doi.org/10.54648/erpl2020008).

representing them to initiate such proceedings, so the standing threshold appears low.
Furthermore, Article 379(3) of the CCP specifies:

'Persons who claim that their collective interest is damaged or threatened by a violation under paragraph 1, or an organisation, which protects the injured persons, the injured collective interest or against such violations, may bring a collective action on behalf of all injured persons against the violator for the cessation of the violation, the remedying of the consequences of the violation of the injured collective interest, or compensation for the damage caused to that interest.'

There are three key aspects which seem crucial here. First, one may either prove that damage has occurred *or* that there is a mere threat of damage taking place. Second, the Article refers to a 'violator' without putting any restrictions on who they might be – that is why, while it may sound unusual, it was possible to take the Municipality of Sofia to a civil court. Third, one chooses what remedies to ask for. Relatedly, Article 385(1) of the CCP pertaining to injunctions in class action suits states: 'The court may sentence the defendant to perform a certain act, not to perform a certain act, or to pay a certain amount.'
In other words, the claimants may choose not to ask for damages but aim at prohibitive or mandatory injunctive relief instead. This is important because, as mentioned above, Bulgarian court fees are

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notoriously high – when bringing an action for damages, the claimant must pay 4% of the amount it seeks as part of the court fees.

3.4.2. The Group for Clean Air Case

The Group for Clean Air is an informal initiative, which unites civil organisations and concerned citizens who want to improve the air quality in Bulgaria. It is important to mention that Sofia, the capital of Bulgaria, has severe problems with air pollution and that the Municipality of Sofia is often accused of inaction (ignoring its obligations under the law) and alleged corrupt practices by prominent members of Bulgarian civil society.

3.4.2.1. Brave Claimants, Brave Judge

In 2017, members of the Group for Clean Air initiative submitted a claim against the Municipality of Sofia pursuant to Articles 379 and subsequent of the CCP before the Sofia City Court, arguing that the municipality had repeatedly violated the Ambient Air Quality Directive through inaction and lack of due care.[65] The claimants identified the determinable circle of injured parties as 'citizens living, working or studying' on the territory of the Sofia municipality in the period 2015-2017 as well as the heirs of those who have died because of dirty air.[66] They asked the court to establish unlawful inaction by the municipality, sentence it to put an end to the inaction,

[65] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1.

[66] The text of the claim is available on the website of the 'Group for Clean Air' initiative <https://chistvazduh.spasisofia.org/kolektivniyat-ni-isk/> accessed 5.12.2022.

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and sentence it to undertake actions to remedy or mitigate the consequences of its inaction.

Beyond the unusual choice of legal instrument used to force the Municipality of Sofia to comply with its obligations under the law, there are a few notable features of this litigation, which may be interesting in the EU context. One of the pieces of evidence used by the claimants to prove the repeated violations by the Municipality of Sofia was CJEU's 2017 judgment in Case C-488/15 establishing that Bulgaria had breached the Ambient Air Quality Directive, including in the Sofia area, cited in the introduction of this chapter.[67] As visible from the decision handed down in the *Group for Clean Air* case in 2021, the Sofia City Court relied on this CJEU judgment to conclude that it was 'objectively established' that Bulgaria had breached the directive.[68]

The Sofia City Court referred to the relevant sections of the Law on the Cleanliness of Atmospheric Air, which transposes the Ambient Air Quality Directive, which indicate that municipal bodies are competent to control and manage the activities related to ensuring the cleanliness of air on their territory.[69] Then, based on the relevant legislation and a court-appointed expert assessment, the Sofia City Court established the nature and scope of the omissions by the Municipality of Sofia which had endangered the health of the citizens, upholding most of the claim by the Group for Clean Air.[70]

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[67] Case C-488/15 *European Commission v. Bulgaria* [2017] ECLI:EU:C:2017:267.

[68] Sofia City Court (8.11.2021), 6614/2017; Note the decision is 122 pages long. Regrettably, Bulgarian court decisions neither have page numbers nor numbered paragraphs.

[69] Sofia City Court (8.11.2021), 6614/2017.

[70] Sofia City Court (8.11.2021), 6614/2017.

While the Sofia City Court recognised that the type of measures necessary to remedy the consequences of omissions are, in principle, in the competences of the municipality, the circumstances demanded mandatory injunctions vis-à-vis such measures. The Sofia City Court not only continued the preliminary mandatory injunctions it had issued when starting to examine the case on the merits in 2019 but also issued new ones. In general, the injunctions by the Sofia City Court concern very specific details – for instance, what section on its website the Municipality of Sofia must maintain, what information it has to provide to the public, what research and planning it should undertake, how often it has to clean the streets when it has to enforce parking regulations, etc. In its decision, the court also gave the municipality a deadline for compliance.[71]

3.4.2.2. THE IMPLICATIONS

The fact that the Sofia City Court chose to impose concrete rather than abstract mandatory injunctions merely stating that the municipality had to remedy the consequences of its inaction is notable. In principle, the CJEU leaves the choice of measures to comply with its judgments on the violating Member State – for instance, the burden to comply with the judgment in Case C-488/15 was on the Bulgarian state authorities. However, vigilant members of the Sofia civil society anticipated that Bulgaria would be unwilling to comply with this judgment – as explained in the

[71] Sofia City Court (8.11.2021), 6614/2017.

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introduction to this chapter, the European Commission is now suing Bulgaria for not complying with the same judgment – and entered the courtroom to attempt to force at least the Municipality of Sofia to fulfil its obligations under the law. On its own, the *Group for Clean Air* case shows not only how important civil society may be in the enforcement of EU law, including CJEU judgments, but also how helpful national legislation pertinent to tortious liability is to this end.

Yet, the case also illustrates the risks of civil society involvement in a country facing rule of law backsliding. The case took so long to examine at the first instance (2017 to 2021) because three judges prior to the judge who ended up examining it recused themselves – this is indirect evidence of political pressure behind the scenes.

Moreover, the Municipality of Sofia tried to put tremendous financial pressure on the claimants. Because of the outcome of the case – part of the claim was upheld while part of it was not – the defendant had to compensate the claimant for the expenses incurred to sustain the successful part of the claim while the claimants had to compensate the defendant for the expenses made in defending itself in the unsuccessful part of the claim.[72] The Municipality of Sofia sought reimbursement of 108,000 Bulgarian leva (54,000 EUR) for legal advice. This is exorbitant for Bulgarian standards considering the country has the lowest median earnings in the EU – the *average monthly salary* in the country in 2021 was barely 800 EUR. Luckily

[72] Article 78 of the CCP.

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for the claimants, the judge ordered that they reimburse only 2649.57 Bulgarian leva (1324.785 EUR).[73]

The exorbitant claim for the reimbursement of expenses by the Municipality of Sofia can easily be interpreted as an attempt to deter future claims by civil society under the CCP. The claimants were indeed fortunate that after three self-recusals, their case was distributed to a judge who was not easily influenced behind the scenes.

Finally, the rules governing class action suits in the CCP can clearly be relied upon in diverse circumstances to seek injunctions against private actors or public authorities. However, there are at least two caveats. Sofia is the capital of Bulgaria and the most affluent city, so it has an active civil society. In less developed areas, civil society is still in the process of emerging, so it is unlikely that they would take such a brave step – taking a municipality or a powerful private actor to court could be daunting. Second, if the Municipality of Sofia may abuse its right to compensation of expenses, one can reasonably suspect that other defendants may do so in bad faith too – this prospect may have a petrifying effect on those considering litigating.

3.5 Administrative Delicts

In Bulgaria, state institutions and municipalities are often complicit with those polluting the environment. Hence it is worth examining if the rules on liability for administrative delict can be helpful in

[73] Decision 266455 of 8.11.2021 on civ.c. 6614/2017.

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holding such institutions liable for environmental damage. As explained in section 3.4, it is highly likely that the claimants in the *Group for Clean Air* case did not ask for damages because the court fee would have been exorbitant. This is where seeking liability under the Law on the Liability of the State and Municipalities for Damage (LLSMD) has a strategic advantage – claims under this law are exempt from the 4% of money claim court fee. One simply pays a small flat fee.

The LLSMD has a peculiar communist heritage. It was enacted in 1988. However, the Western reader should not be mistaken to believe that the totalitarian regime hoped to hold itself accountable – this was a mere move to pretend compliance with the International Covenant on Civil and Political Rights, which Bulgaria had ratified in 1970.[74] The LLSMD became a powerful tool for promoting accountability only after amendments in 2006. These amendments coincided with an overhaul of the Bulgarian court system, introducing two separate sets of courts – civil and administrative.

Article 1(1) of the LLSMD states:

'The state and the municipalities are responsible for the damage caused to citizens and artificial legal persons by unlawful acts, actions or inactions of their bodies and officials during or on the occasion of the performance of administrative activities, as well as for the damage caused by the operation of acts that were declared unlawful or regulations that were declared null and void.'

[74] Radosveta Vassileva, *Bulgarian Private Law at Crossroads* (Cambridge, Intersentia 2022) 127.

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The liability envisaged in this provision is not based on fault similarly to the liability in Article 49 of the LOC – one needs to prove damage and a causal link between the damage and the actions/omission of the institution in question. It is also noteworthy that determining the competent court (civil or administrative) does not depend on the personality of the defendant (whether they are a state institution, etc.), but primarily on whether the contested behaviour (acts, actions, inactions) falls under the scope of 'administrative activities' mentioned in Article 1(1) of the LLSMD. If it does not, the claimant must sue pursuant to the rules on tort in the LOC.

In this light, if the Municipality of Sofia does not comply with the injunctions in the *Group for Clean Air* case, it is interesting to consider if affected citizens will be able to ask for damages under the LLSMD. The answer is not straightforward because many of the injunctions in the case require actions that do not necessarily fall under the scope of administrative activity – for instance, research.

4. Conclusions and Recommendations for Law Reform

As a country facing serious environmental problems, Bulgaria illustrates the limits of public law in ensuring environmental protection. Even CJEU judgments have not sufficiently motivated Bulgarian institutions to enforce environmental legislation. That is why, it is worth considering if tort law may contribute to the prevention and repair of environmental damage and, as a

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consequence, better alignment of Bulgaria with UN's SDGs and the European Green Deal.

An examination of both the international and EU framework pertaining to access to justice in environmental matters indicates that tort law may promote environmental protection by means of injunctions. The threat of having to answer in damages may further incentivise private actors to comply with environmental legislation and motivate public authorities to fulfil their obligations to enforce environmental legislation. Regrettably, while the European Commission recognises the significant role of civil society in supporting environmental efforts, it seems to ignore the potential of tort law to discipline those harming the environment through their actions or omissions.

The legislation of Bulgaria contains a rich catalogue of delicts, including explicit provisions on environmental delicts. However, Bulgarian tort law developed in a piecemeal fashion and in different political contexts – it is messy and challenging to apply. As a post-communist country, Bulgaria needs reforms aimed at modernising legislation and improving its coherence.

In its latest communication on the EIR, the European Commission emphasised:

'While we each have a part to play, the *political will* is the crucial ingredient for governments and decision-makers to drive the timely,

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correct and efficient implementation of EU environmental policies and regulations, achieve their objectives and reap their benefits.'[75]

A similar conclusion can be drawn regarding the feasibility of law reform which can empower citizens to seek justice in environmental matters – such reform depends on the will of the Bulgarian National Assembly and the Council of Ministers. While realising that reforms aimed at developing tort law are not a high priority on Bulgaria's agenda, I argue that the following amendments to legislation and bylaws should be considered in view of improving access to justice in environmental matters and unleashing the potential of tort law to promote environmental protection.

4.1. Broadening the Scope of Injunctive Relief

Injunctions may play a vital role in the enforcement of environmental legislation. Nevertheless, as seen above, the Bulgarian approach to injunctive relief is piecemeal. The provision of Article 385(1) of the CCP pertaining to injunctions in class action suits, which allows the courts to sentence the defendant to perform a certain act, not to perform a certain act, or to pay a certain amount, may inspire amendments to the general rules on tort.

As explained above, the LOC envisages only damages as a remedy for tort. In many cases, however, even going beyond environmental matters, obtaining an injunction may be more valuable to a claimant

[75] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Environmental Implementation Review 2022: Turning the tide through environmental compliance' COM(2022) 438 final, 23.

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than receiving damages. Introducing a provision similar in spirit to Article 385(1) of the CCP to the LOC will provide courts with more flexibility to address more adequately a wider range of factual circumstances. Relatedly, injunctive relief could be explicitly provided for administrative delicts via an amendment to the LLSMD.

4.2. Expanding the Circle of Those with Standing before the Court

As explained above, the 2002 LEP clipped the wings of civil society by limiting the circle of who can demand an injunction for cessation of pollution/harm to the environment. In this light, the provision of the 1991 LEP, which bestowed this right upon non-profit associations and 'any citizen' in addition to harmed citizens, is to be preferred – its reintroduction to legislation requires a minimal amendment to the 2002 LEP.

4.3. Reconsidering Court Fees

As argued above, the 4% of money claim court fee deters citizens from defending their rights in court. This 4% court fee, for instance, almost certainly guarantees that damages in a class action suit will not be sought. Meanwhile, as explained above, claims against a municipality under the LLSMD are exempt from such a fee while claims against a municipality under the LOC are not. This distinction

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is arbitrary. Moreover, the concept of 'administrative activity' is fuzzy.

In this light, the Tariff for State Fees Collected by the Courts under the Civil Procedure Code adopted by the Council of Ministers should be revisited.[76] The Council of Ministers may consider a more nuanced approach – the proportional fee in class action suits could be replaced with a reasonable flat fee. As a sign of goodwill, the Council of Ministers may exempt all claims against state institutions and municipalities from the 4% of money claim fee and merely impose a reasonable flat fee, irrespective of the legal grounds of the claim (be it the LOC, the LLSMD, etc.).

4.4. Curtailing Abuses of the Rules on Reimbursement of Costs

The exorbitant claim for reimbursement of fees for legal advice by the Municipality of Sofia in the *Group for Clean Air* case calls for a reflection on how to curtail such bad faith behaviour in the future. Article 78(5) of the CCP contains a vaguely phrased provision allowing the reduction of exorbitant claims for reimbursement of expenses. However, such reduction depends on the discretion of the judge. Meanwhile, Article 248(1) of the CCP allows any of the parties to a dispute to request that a court supplement or amend the part of a judgment which concerns the reimbursement of costs.

[76] Decree 38 of the Council of Ministers of 7.02.2008.

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Nevertheless, the court examines such requests in camera, without the participation of the parties.

The vagueness and the non-transparency of the mechanism for challenging excessive costs seem problematic because Bulgaria faces long-standing challenges to judicial independence. Moreover, Bulgaria has an established track record of violating Article 6(1) of the European Convention on Human Rights on the right to a fair trial via exorbitant fees in legal proceedings.[77]

Thus, the objectivity and transparency of the mechanism for the appeal of orders on costs need to be enhanced. Bearing in mind the historic record of controversies, such appeals should be heard in open court. Furthermore, legislators may consider if the expertise of Bulgaria's Supreme Bar Council may not be of help in such proceedings. For instance, the CCP may be amended to require that the Supreme Bar Council and/or the local bar association submit a non-binding opinion regarding the reasonableness of the fees for legal advice to the court. While this approach may be criticised for increasing the length of the proceedings in a country already known for slow justice, it may foster public trust in the courts by partially alleviating the concerns that decisions are taken arbitrarily behind closed doors.

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World Justice Project, *Rule of Law Index 2022* (Washington DC, World Justice Project 2022) <https://worldjusticeproject.org/rule-of-law-index/downloads/Index-2022.pdf>

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