Citizens access to court and enforcement in Poland

Jerzy Jendroska

1. Introduction

In Poland, similarily to many other European countries, both legislation and jurisprudence related to environmental issues can be traced back to the Middle Ages. In 1960s and 1970s the harmful effects of forceful industrialization increased significantly number of cases where affected persons were seeking court's protection against pollution. A number of landmark verdicts of the Supreme Court taken at that time "blazed a trail" for further use of the Civil Code provisions protecting their property, health or personal rights to prevent or compensate for an environmental damage. In 1970s the progress in environmental awareness made citizens think of protecting not only their own legal interests infringed by harmful impacts on their immediate environment but also of protecting the environment in public interest. However, the first public interest environmental case ended up with a defeat when in 1975 the Supreme Court denied the plaintiffs to have standing in a case whereby a private person and an ecological NGO (Nature Protection League) filed a lawsuit seeking injunction against municipal sewage operator in the city of Szczecin for polluting a small lake being used by people from Szczecin for recreational purposes. The court hold that both plaintiffs were not immediate neighbours and did not have any other legal grounds to get standing and file a lawsuit in this case (I CR 356/75).

Shortly after this verdict, in 1976, an amendment to Constitution granted the citizens the right to the environment. This legislation, however, did not give the expected rise of civil lawsuits brought by individual citizens to protect the environment. The development of public interest environmental litigation has taken different direction. The year 1980 brought along two of the three factors that influence the most the current state of "green access to justice" in Poland. First, the 1980 amendment to the 1960 Administrative Procedure Code (Kodeks Postê powania Administracyjnego - hereinafter referred to as KPA 1960) introduced judicial review over administrative action and made it relatively accesible and cheap, as well as established a special court for the purpose: Main Administrative Court (Naczelny S¹d Administracyjny - hereinafter referred to as NSA). Second, the Environmental Protection Act of 1980 (hereinafter referred to as EPA 1980) granted special rights to ecological NGOs to protect public interests in both administrative and civil proceedings, including the right to file genuinely public interest lawsuits against polluters. The Environmental Protection Law Act of 27 April 2001 – (hereinafter referred to as EPLA 2001), which replaced EPA 1980, has sustained, and reinforced to some extent, this right.

The third factor that shaped the current state of "green access to justice" in Poland was the rapid growth of ecological NGOs which resulted from the democratic changes after 1989, in particular from the liberalization of the hitherto restrictive legislation concerning associations, as well as from a flow of western funding for independent ecological initiatives. Ecological NGOs, originally focused on direct

actions, started to appreciate legal ways of solving conflicts, the more as to that since 1992 they have had professional, yet free of charge, legal advice provided by the Ecological Law Information Service run originally by Polish Environmental Law Association, and recently by Environmental Law Center[1].

2. Constitutional Rights

The Constitution of the Republic of Poland of 1997 provides a number of safeguards for access to justice. The most direct ones are being granted in Articles 77 and 78 of the Constitution.

Article 77

1. *Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.*
2. *Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.*

Article 78

Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute.

Article 79 of the Constitution provides that everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgement on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

The details of the procedure are provided for in the Constitutional Tribunal Act of 1997.

Poland on 21 June 2001 ratified the Aarhus Convention. This means, according to Article 91 of the Constitution, that after promulgation of the Polish text of the Convention, it shall constitute part of the domestic legal order and shall be applied directly. Moreover, it shall have a precedence over statutes, if its provisions cannot be reconciled with the provisions with such statutes.

3. Civil lawsuits

a) traditional damage

[1] See J.Bonine, The Construction of Participatory Democracy in Central and Eastern Europe (in:) Public Participation in the Sustainable Development of Mininig and Energy Resources: Emerging National, EU and International Law, Donald N.Zilman, Alistair R.Lucas, and George (Rock) Pring (eds.), Oxford University Press, 2002

compensation for damage

Article 435 sec.1 of the Civil Code of 1964 is the most commonly used provision for bringing lawsuits concerning compensation for environmental damages. It provides a legal basis for a strict liability, which is based on the concept of control over a plant "set in motion by natural forces" (i.e. steam, gas, electricity etc.) and the assumption of risk of damage arising therefrom. A defendant is held liable under this Article unless the damage occurred due to "vis major" (force majeure), or exclusively through the fault of the injured party or a third person for whom the defendant is not liable. The plaintiff may choose (Art 363) whether to seek remedies in form of "restitutio ad integrum" or financial compensation.

It is worthwhile to mention that many of the biggest polluters at least since 1970s have established compensation schemes based on voluntary agreements with affected people. Most of these schemes seem to be working quite satisfactorily for both sides.

Liability under Article 435 sec.1 of the Civil Code has significant shortcomings as a tool for access to environmental justice. First of all, it relates only to injury to the person or damage to property, and does not recognize a damage to the environment itself (to the environment considered as the common good). Secondly, it is limited only to plants "set in motion by natural forces" which, however broadly interpreted by courts (to cover i.a. mining works, transport or gas companies), by far do not include all "polluters". Environmental legislations have always attempted to address these shortcomings. The most clear results of such attempts can be found in EPLA 2001.

Article 324 of EPLA 2001 extends aplication of Article 435 sec.1 of the Civil Code. In case of plants considered to be major-accidents hazard establishments (in the meaning of Seveso II Directive) it is applied regardles of whether these plants are being "set in motion by natural forces" or not.

"preventive" actions

The most commonly used legal basis for the so called "preventive" lawsuits concerning harmful activities are Articles 144 and 222 of the Civil Code related to "actio negatoria" (similar to the concept of "nuisance" under common law). Similar protection can be sought under Article 439 of the Civil Code which allows to seek injunction in case of the risk of damage.

The most controversial civil environmental lawsuits being brought to courts are those established under Articles 23 and 24 of the Civil Code, which provides protection of the personal rights. Courts long were reluctant to accept environmental lawsuits not related to real estate, however recently there were few cases concerning protection against noise, in which courts accepted standing under these Articles.

In preventive actions the usual remedy is injunction, but plaintifs may limit themselves and demand from polluters mitigation measures instead.

rights of associations

Article 61 sec 3 of the Civil Procedure Code enables some associations to participate and support the plaintiff in cases related to certain issues (alimentation, consumer's protection, environmental protection). Those listed associations enjoy broad procedural rights when they support individual plaintiffs in such cases, and -as opposed to the plaintiffs themselves - they are released from paying any court fees.

In cases related to environmental protection such rights are granted not only to ecological associations but also some other associations (human rights associations, consumers associations etc.).

According to Article 3 point 16) of EPLA 2001 – as environmental associations there shall be considered all registered associations which have environmental protection as their main statutory goal.

b) damage to the environment

In addition to the possibility of sueing polluters to protect individual interests, Polish law envisages also, since 1980, some genuinely public interest environmental lawsuits.

Article 100 sec 1 of the EPA 1980, granted ecological associations the right to sue polluters on behalf of the public interest and demand:

- that specific environmentally harmful activity be stopped end either the environment be restored to its previous state or compensation for damages be paid, or
- a ban or limitations be imposed on the harmful activity.

This provision have been replaced by the more general provisons of Article 323 of EPLA 2001 which relates clearly both to personal injury and damage to property, and to damage to the environment considered as the common good.

This Article provides for that every person which, as a result of unlawful impact on the environment, is exposed to hazard of a damage or has suffered a damage, may claim from the entity liable for this infringement, to restore the state conforming to law, and to undertake remedies, in particular by means of installing the facilities which safeguard against hazard or infringement; in case, when the aforementioned is not feasible or it is excessively difficult, the plaintiff may demand cessation of the activity, that causes the hazard or the infringement.

In cases when the claim relates to the environment as a comon good the lawsuit may be brought by the State Treasury, or by territorial self-government, or by an environmental organisation, and the compensation can take only form of "restitutio ad integrum".

Certain novelty in Polish legal system is provided for in Article 326 which entitles every person which restored damaged environment to claim its expenses incurred for the purpose. The claim is limited however only to to reasonable costs incurred for the restoration of the original state.

c) practicalities: causal link (nexus), costs etc.

causal link

Already in the 70s the courts adopted the view (with the landmark verdict of the Supreme Court 1976 – IV CR 380/76) for the causal link between the damage and the activity of the plant releasing harmful substances to be established it would be enough to prove that injured person has been exposed to harmful emmissions.

civil liability for permitted emmission

The courts in series of verdicts (with the landmark verdict of the Supreme Court of 1970 – III CZP 17/70) made it also clear that compliance with environmental standards does not exclude civil liability for environmental damage. The EPA 1980 (in Article 80) gave statutory backing for this view, and now EPLA 2001 (in Article 325) even more clearly reiterates it.

access to information

Following the Lugano Convention, EPLA 2001 provides for (Article 327) that persons who are entitled to submit a claim under the EPLA 2001 may, together with filing a lawsuit, demand that the court obligates the defendant to provide information necessary to establish the scope of the liability. The costs of providing such information shall be borne by the defendant, unless the claim has been found groundless.

security of potential claims scheme

Following the Lugano convention, EPLA 2001 provides for (Article 187) that a deposit, bank guarantee or insurance policy may be required in some environmental permits to secure potential claims in relation to negative environmental consequences of the permitted activity.

costs

The general rule in civil procedure is that the winning party is paid its costs (court fees, attorney fees etc.). Only in especially justified circumstances the court may release the loosing party from this obligation.

Court fees are basically related to the values at stake (in civil proceedings from 5% to 8%) and only in certain matters the fees are fixed (the same fee irrespectively of the value at stake). Unless the court release from this obligation the court fee has to be paid in advance: if the value at stake is not indicated in the claim it is estimated. Since in environmental cases there is usually quite a substantial value at stake, the requirement to lay down the court fee deterred many potential plaintiffs. This has changed recently because since 1991 also for the lawsuits related to environmental protection the fee is fixed and rather modest (currently 100 PLN - about 33 ECU).

Environmental cases are adjudicated usually by civil courts designated to deal with economic matters. These courts are overloaded with works, therefore it takes 3-5 years on average to get a case finally solved. Moreover, there is a huge enforcement deficit and it is a long and costly process to get the court verdict enforced.

4. Challenging administrative actions

a) the court

Poland since 1980 has had a separate branch of judiciary to provide independent judicial review over administrative actions. The Main Administrative Court (NSA) has a status of high court and only one tier (central - with 9 chapters in the biggest cities). It consists of career-judges. NSA has principally only cassation functions, adjudicates only on legality of a decision, and is not entitled to issue a verdict adjudicating a case on merit. Official inaction may also be challenged. The administrative court may either annul the decision, or rule it invalid, or rule it to be against the law.

The Act on the Supreme Administrative Court of May 1995 (in force since November 1995) extends significantly the powers of NSA and makes even easier access to it. NSA in certain cases is now entitled to adjudicate a case in merit. In addition to administrative decisions and resolutions (by-laws) of local authorities, subject to NSA review are now all kind of individual acts of public administration, and also legal acts of provincial administration. In case of resolutions (by-laws) of local authorities a kind of class action is possible, whereby a person can file a lawsuit on behalf on residents who authorised this person for doing so. Moreover, recent court verdicts seem to be showing that while before associations, in order to be able to challenge a decision, had to participate in the procedings (NSA verdict of 21 April 1992 – IV SA 1243/91) - now they may file a lawsuit to NSA without having been participating in the administrative procedure “with the party’s rights” - but simply by showing that the case falls within their statutory goals.

Worth mentioning here is however a landmark case involving an extraordinary appelation from the administrative court verdict which refused granting a standing to a nationvide NGO involved in bird protection (OTOP). The verdict was of a precedential nature because it was one of the first after new provisions concerning standing of NGOs were introduced by the Administrative Court Act of 1995. The new provisions, commonly understood to broaden already liberal standing

provisions, were unexpectedly interpreted by the court in a very restrictive way. This interpretation, if followed, would have prevented efectively any NGOs (not only environmental ones) from taking any public interest legal action to challenge governmental decisions. Fortunately the Supreme Court in its verdict of 8 October 1998 (III RN 58/98) did not share this interpretation and overturned the verdict of the administrative court.

b) standing

Principally, the right to challenge administrative action at the administrative court is meant to provide a remedy for the party in the proceedings. According to Article 28 of the KPA 1960 a party in the administrative procedure is "everyone whose legal interest or duty the proceedings concern as well as everyone who demands the authority's action because of his interest or duty". In administrative proceedings related to environmental issues this is usually polluter who is the party in the proceedings, because either he applies for a permit, licence etc. or he is subject to inspection or enforcement actions of the agency. Only in case of certain development control and permitting procedures substantive laws are designed in such a way that NSA considers also third persons likely to be affected (immediate neighbours) to have individual legal interests at stake and therefore to be parties to the proceedings. This opens possibility of challenging the decision to NSA, but access to "green justice" is limited here only to immediate neighbours and only to certain proceedings.

Separate account has to be given to challenging decisions to refuse information. Here those who request information are 'parties". The Access to Public Information Act of 2001 provides here special deadlines for courts to adjudicate the case (15 days for the adminsitration to reply to a challenge and addiutional 30 days for court to make a verdict).

c) procedural rights of associations

In order to strenghten the protection of public interest in administrative proceedings the KPA 1960 provides for special participation rights of civic associations. They have a right to initiate proceedings concerning other subject's rights or duties, right to be notified, and right to participate in such proceedings "with the party's rights", provided they prove the case is in the ambit of their statutory goals and public interest requires their participation. An association which participates "with the party's rights" has exactly the same procedural rights as the party itself, including the right to challenge the final decision to NSA, even if it is in favour of the party (Article 31).

EPLA 2001 reinforces KPA 1960 by granting special rights to environmental associations (ie. those which have environmental protection as their main statutory goal). Environmental associations do not need to prove that "public interest requires their participation" since under Article 33 of EPLA 2001 all they need in order to participate "with the party's rights" is to show that environmental protection is their

main statutory goal and that they are relevant bearing in mind the area of their activity.

Various NGOs (including many ecological associations) make very often use of these provisions and there is a number of appeals and lawsuits to NSA filed by associations participating in various administrative proceedings "with the party's rights". NSA is quite generous usually in granting standing for NGOs (see verdict of 17 November 1989 - IV Sa 855/88, publ. ONSA 1990) and recently grants standing not only to registered associations but also to so called "ordinary associations" (see verdict of 26 November 1997). Foundations, however, still do not enjoy such rights (verdict of of 12 January 1993 – I SA 1762/92).

d) practicalities

Challenging administrative actions to NSA is the most preferred and very often used instrument of "green access to justice", in particular as far as preventive actions are concerned. It is prefered to civil lawsuits because although the court fee in environmental matters at NSA is exactly the same as in civil proceedings (100 PLN - about 33 ECU) but as opposed to the latter, in the proceedings at NSA there are particular rules regarding costs: if the authorities lose the case they have to pay the winner his costs, but if authorities win - they are not entitled to claim their costs. Moreover, the procedure at NSA is relatively simpler and faster (still quite slow though – up to 1 year to get a verdict) than civil procedure and does not require usually barristers to be involved.

Ecological NGOs have taken extensive advantage of the existing rights. There are hundreds of cases yearly and there is virtually no single decisions concerning a project of potential significant impact on the environment that would not be challenged by NGOs or neighbours and subjected to court review.

In majority of cases the court finds some inadequacies in the decision-making and adjudicates in favour of plaintifs. However the liberal rules encourage also some frivolous actions. Even woth is that some NGOs are being accused of "corruption" i.e. for seeking financial gain for not challenging a decision at court. And developers quite often pay it. Only in Spring 2001 media videly reported a case where an NGO famous for vigorously oppossing any development project in Warsaw was proven to have accepted almost a 1 milion USD "donation" from a French developer willing to build a hipermarket in Warsaw.

Such cases, whatever sporadic they are, result in creating unfavourable climat for public participation and ecological NGOs in particular, and prompted the developers to push for changes in the law that would seriously limit possibilities of challenging development consents.

5. Sanctions

a) criminal sanctions

Criminal violations of environmental laws can take a form of petty offences (an act punishable by a fine or custody of up to three months) or offences (an act punishable by a fine and imprisonnment of up to 15 years). Only individuals, not legal persons, may be held criminally liable.

The procedures regarding offences and petty offences differ. In relation to environmental cases only the latter one provides for citizens' enforcement.

Since the majority of "environmental" petty offences are being sanctioned to protect public interests, citizens cannot usually act in these cases as injured persons. As a prosecutor acts in these cases only public prosecutor (basically the police). The Petty Offences Procedure Code of 1971 authorises however some associations, also ecological ones (for example: the Animals Protection Association) to act as public prosecutor in these proceedings.

The procedure is modelled on the criminal court procedure. The associations have all the rights of public prosecutor, including the right to appeal to the criminal court. The fines for petty offences may also be imposed in ticket procedure by the police or some other governmental officers (like for example officers of the National Park Service or Forest Service).

The biggest loss to "green" acsess to justice in Poland was a decision of the Parliament to cease the existence of the Nature Protection Guard. This organization was established by the Njature Protection Act of 1949. Its aim was to monitor compliance with nature conservation laws, and its members had some of the police powers similar to forest rangers (to escort suspects to the nearest police station, to arrest tools used, to require identification card). Authorised members of the Nature Protection Guard had the right to enforce directly nature conservation laws by using the ticket procedure i.e. imposing fines for petty offences.

In practice the enforcement of nature conservation legislation heavily depended on activity of rangers from the Nature Protection Guards (for example: in 1992 they had 113 800 interventions, which include imposing 7468 fines in ticket procedure and 650 proceedings in which they appeared at the mentioned above quasi-judicial bodies as public prosecutors).

After a long debate the the aforementioned statutory rights of the Nature Protection Guard were found unconstitutional and therefore revoked, and the organization ceased to exist.

b) administrative sanctions

Administrative sanctions may be treated as a kind of equivalent of criminal liability of legal persons, because they do not apply to individuals. They are the most commonly used means of enforcement of environmental laws. There are two forms of administrative sanctions:

- prohibiting or stopping harmful activity
- non-compliance fines.

The sanctions are being imposed by the State Environmental Inspectorate according to the procedural rules of the "general administrative procedure" provided in the KPA 1960. Since the party in these enforcement proceedings is only a polluter, individual citizens cannot "sue" him by instituting proceedings. Neither they can legally force agencies to institute enforcement proceedings when they fail to do it (however, in fact, the majority of enforcement proceedings result from complaints of citizens).

Only ecological associations have the right to force agencies to enforce the law. According to Article 31 of the KPA 1960 EPA associations have the right to institute proceedings, including enforcement proceedings. If an agency denies to institute proceedings, the association may challenge such decision at NSA. Also the final decision, if the association is not satisfied with the enforcement sanctions having been imposed, may be challenged at NSA.

6. Conclusions

"Green access to justice" in Poland has the following characteristic features:

- preference for administrative remedies in relation to preventive actions,
- existence of legal possibilities for genuinely public interest legal actions,
- relatively important and increasing role of legal actions taken by ecological NGOs,
- inefficient judiciary, not the costs, is the biggest problem.