Access to national court by citizens in environmental matters – Poland

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Abbreviations:

CAP – the Code of Administrative Proceedings`

JLRP – the Journal of Laws of the Republic of Poland

SAC – the Supreme Administrative Court

EPL – the Act on Environmental Protection Law

CCP – the Code of Civil Proceedings

CC – the Civil Code

Annex:

1. **The Act on Supreme Administrative Court** 11, May 1995, later amended; Selected text; Translation: Barbara Iwanska ;

English texts of Polish law, applying to the concerned issue:

- The Constitution of the Republic of Poland, 2 April 1997; can be found in: http://www.prezydent.pl/dflt/en_index.php3

- Code of Administrative Procedure; June 14, 1960, as later amended; selected text can be found in: Administrative Justice in the new European Democracies. Case studies of administrative law and process in Bulgaria, Estonia, Hungary, Poland and Ukraine, Edited by Denis J. Galligan, Richard H. Langan II, Constance S. Nicandrou, Oxford 1998, p.619-626. The Polish Contribution: S. Biernat, E. Kosinski, J. Stencel, W. Taras.

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The following study consists of three main parts[1]. In the first part, constitutional aspects of environmental protection as well as access to justice have been discussed.

The second part presents current Polish regulations related to access to national court for citizens in the matters of environmental protection. Here, the focus is firstly on the issue of access to national court for citizens in administrative proceedings and the possibility to challenge decisions. Secondly, it focuses on public participation in enforcing compliance with environmental law, especially through the civil legal as well as administrative legal instruments. Also in this part, current rules related to economic aspects of court cases, both civil and administrative, are discussed.

[1] Preparing this paper I have taken into account questions included in the outline prepared by Ludwig Krämer. The systematic of the paper is influenced by the article 9 of Aarhus Convention and the elaboration which concern the discussed subject: IMPEL Network, *Complaint procedures and access to justice for citizens and NGOs in the field of the environment within the European Union*. Final Report, 2000, s. 13-22; Reasearch team: Jonathan Verschuuren, Kees Bastmeijer, Judit van Lanen http://eurpa.eu.int/commenvironment/impel/access_to_justice.

The issues of Polish law in the light of rules determined in article 9 of the Aarhus Convention are subject of the third part.

Part I

Constitutional aspects of environmental protection and access to justice

1. *The Polish Constitution and the protection of the environment*
2. *The issues of access to national court in environmental matters from the point of view of the hierarchy of the sources of Polish law*

1. The Polish Constitution and the protection of the environment

The Polish Constitution explicitly recognises environmental interests. Provision 5 of the Polish Constitution has an essential meaning:

> *The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principle of sustainable development.*

Thanks to this provision, the environmental protection is on a par with such values in the constitutional hierarchy as *independence and integrity of its territory, freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage.*

Further constitutional regulations related to the environmental protection are included in Chapter II *The Freedoms, Rights and Obligations of Persons and Citizens.* On the one hand, they impose certain environmental protection responsibilities upon the government authorities (a), and on every person on the other (b), to finally formulate public law right related to environmental issues (c):

a) The obligation of public authorities in the environmental area is to *combat epidemic illnesses and prevent negative health consequences of the degradation of the environment* (Article 68 Sec. 4); *to pursue policies ensuring the ecological security of current and future generations and to protect the environment* (Article 74 Sec. 1 and 2); *to support the activities of citizens to protect and improve the quality of the environment* (Article 74 Sec. 4).

b) Under Article 86 of the Polish Constitution *Everyone is obligated to take care for the quality of the environment and shall be held responsible for causing its degradation. The principles of such a responsibility shall be specified by statute.*

c) From the point of view of the problems discussed, Article 74 Sec. 3 of the Polish Constitution deserves special attention as it formulates the right to the access to information on the environment. *Everybody has a right to information on environment.* The article does not have direct legal effect for citizens; the limits of this right one can find in a statutory act[2].

d) Finally, according to Article 31 Sec.3 of the Polish Constitution the protection of the environment is a value that justifies limits upon the exercising constitutional freedoms and rights.

[2] Article 81 of the Polish Constitution.

2. The issues of access to national court in environmental matters from the point of view of the hierarchy of the sources of Polish law are the subject of:

a) the Polish Constitution itself due to the constitutional aspects of rights and freedoms of persons and citizens and the protection of public goods. Constitutional regulations in this area are subject of Chapter II of the Polish Constitution, which includes a catalogue of rights, freedoms and obligations of persons and citizens isolated on the basis of a subject criterion[3]. The Constitution is not limited to only declarations of rights and freedoms but at the same time it introduces guaranties of their protection in the form of the determined in the Constitution right to justice[4], constitutional right to appeal to the Constitutional Tribunal[5], right to apply to the Commissioner for Citizens' Rights[6], the right for compensation for any harm caused by any action of an organ of public authority contrary to the law [7], the principle of two-instance court and administrative proceedings[8];

b) regulations of the civil, administrative and criminal law and by special regulation concerning environmental problems - the environmental protection regulations,

c) the ratified by the Republic of Poland Aarhus Convention (Act on Ratification of Aarhus Convention, 21 June, 2001) Yet, it must be kept in mind that:

   - according to the primacy of the Constitution, both statutes and ratified international agreements must be compatible with the Constitution[9],
   - the relation between a statute and a ratified international agreement is not uniform and it depends on the way international agreement is ratified. The Constitution provides for two ways of ratification of an international agreement. The first, the ratification by the President on the petition by Prime Minister[10]and the other by the President upon prior consent granted by a statute[11]. The other way of the ratification is reserved for international agreements which are related to rights, freedoms and obligations of citizens and matters regulated in statutes, among others. The Aarhus Convention has been ratified in such a manner. The constitutional legislator has unambiguously determined that *an international agreement ratified upon prior consent granted by a statute shall have precedence over statutes if such an agreement*

[3] Personal freedoms and rights, political freedoms and rights, economic, social and cultural freedoms and rights.
[4] Article 77 Sec. 2 of the Polish Constitution: *Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.*
[5] Article 79 of the Polish Constitution*: In accordance with principles specified by statute, 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.*
[6] Article 80 of the Polish Constitution: *In accordance with principles specified by statute, everyone shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority.*
[7] Article 77 Sec. 1 of the Polish Constitution: *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.*
[8] Article 78 of the Polish Constitution: *Each party shall have the right to appeal against judgements and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute.*
[9] Article 8 of the Polish Constitution: *The Constitution shall be the supreme law of the Republic of Poland*. See also: Article 87 Sec. 1, Article 188 pt. 1, Article 133 Sec. 2 of the Polish Constitution.
[10] Article 133 Sec. 1 pt. 1 in relation to Article 89 Sec. 2 of the Polish Constitution.
[11] Article 133 Sec. 1 in relation with Article 89 Sec. 1 of the Polish Constitution.

cannot be reconciled with the provisions of such statute[12]. The necessary formal condition for an international agreement to become effective in the Polish legal system is its promulgation in *the Journal of Laws of the Republic of Poland* (further referred to as *JLPR;* Pol.: *Dziennik Ustaw*[13]). Only then the Convention as an international agreement ratified upon prior consent granted by a statute shall have, in the hierarchy of the sources of the law, a precedence over statutes, if the statutes cannot be reconciled with the agreement.

Part II

Access to national court for citizens and social/ecological organisations (further NGOs') in the field of the environment within Polish law

1. Public participation in administrative proceedings in the field of environmental matters and the possibility of challenging administrative decisions

1.1. Public participation in the decision-making process and public participation in the are of preparing plans, programs and policies

a) regular administrative proceedings

b) proceedings with the participation of the public

1.2. The possibility of challenging administrative decisions

a) appeal in administrative proceedings

b) complaint to the administrative court

c) special rules of challenging land use plans

2. Public participation in the enforcement of the environmental law

2.1. Civil legal instruments

a) civil legal instruments regulated in the Civil Code (traditional damage); the question of causal link

b) civil legal instruments regulated by environmental protection regulations (traditional damage and environmental damage)

c) costs of civil proceedings

2.2 Administrative legal instruments

a) kinds of administrative legal instruments

b) possibility to force the administrative authority to take enforcement measures

c) legal protection in the case of administrative omissions (passive administration)

d) costs of administrative court proceedings

1. Public participation in administrative proceedings in the field of environmental matters and the possibility of challenging administrative decisions[14]

1.1. Public participation in the decision-making process and public participation in the area of preparing plans, programs and policies

[12] Article 91 Sec. 2 of the Polish Constitution.
[13] Article 91 Sec. 1 of the Polish Constitution.
[14] See: Project on the co-oparation between the Ministry for the Environmental Protection, Natural Resources and Forestry (MEPNRF) and ecological NGOs. Final report. Team leader: J. Jendroœka, Wroc³aw 1997; Part I , Chapter 3. III.3. Dostêpne: http://www.mos.gov.pl/poe/materialy/wspolpraca/eng/index.html; IMPEL Network, as above, p. 13-22.

a) regular administrative proceedings

b) *proceedings with the participation of the public*

The Polish environmental protection law provides for different ways of controlling the use of the environment. Undertaking a project or the use of an installation which may pose threats to the environment require, in the cases provided by law, an individual decision, such as development authorizations (e.g., building permission) and pollution permits (air, noise, waste, water, electromagnetic fields)[15].

The proceedings related to the above permits cases can be: (a) *regular administrative proceedings* or (b) *proceedings with participation of the public* (public participation proceedings).

a) *regular administrative proceedings*

The participants of a *regular proceedings* are parties (everybody having legal interest[16] - applicants and in some cases also neighbours affected[17]). Apart from the parties, the participation of other actors is possible. It concerns the participation of the *subjects within the party's right* – public prosecutor, Commissioner for Citizens' Rights, social organisations[18]. According to the CAP, social organisations are such organisations as: *a trade union, self-governing, co-operative and other social organisations*[19].

Under Article 31 §1 of the CAP, *a* ***social organisation****, in a case concerning other subject's right or duties, can demand (...) to be allowed to participate in the proceedings, if it is justified by its statutory objectives and when the social interest supports it*. Admitting to administrative proceedings a social organisation, which has no own legal interest is possible in the situation where the following circumstances are jointly met:

- firstly, the case concerns rights or duties of another person, and not rights or duties of a social organisation; in the latter case it could act as a party,
- secondly, the case has a direct relationship with statutory objectives of the social organisation,
- thirdly, the public interest justifies the participation of the social organisation.

Admitting a social organisation to participate in proceedings requires approval by the competent body conducting the proceedings, which is in the form of a decision on admitting or refusal to admit the social organisation to participate in the proceedings. Negative decisions are subject to an appeal (administrative review

[15] See: Project on the co-oparation, as above, part I, chapter 3 pt III.3.1.2; J. Jendrocka (w:) *Ustawa – Prawo Ochrony Œrodowiska. Komentarz*., pod. Red J. Jendrocki, Wroc³aw 2001, s. 272-273; On the matter of licenses for emission in the new Environmental Protection law, see: M. Górski (w:) *Ustawa – Prawo Ochrony*, as above, s. 471 and further. On the topic of controlling factory effluent into rivers see: S. Biernat, *Imposing Burdens: controlling factory effluent into rivers*, (in :) *Administrative Justice in the new European Democracies. Case studies of administrative law and process in Bulgaria, Estonia, Hungary, Poland and Ukraine*, Edited by Denis J. Galligan, Richard H. Langan II, Constance S. Nicandrou, Oxford 1998, p. 158- 168.

[16] *A party is anyone whose legal interest or duty is affected by the proceedings or who demands activities of authority because of this legal interest or duty*. Article 28 of the CAP.

[17] Judgement of the SAC, 11 October 1999, OPS 11/99, ONSA 2000/1/6.

[18] Article 31 and Articles 182 – 189 of the CAP; art. 14 pt 6 Act on Commissioner of Citizens' Rights (1987).

[19] Article 5 § 1 pt 5 of the CAP. According to the judgement of the SAC social organizations are those who has corporative character. So, the foundation can not be treated as a social organization in the meaning of this article.

procedure)[20] and then it could be subject to a complaint to the Supreme Administrative Court[21] (SAC).

A social organisation acts as a *subject within the party's right*, thus it has a right to undertake proceeding activities, but it cannot exercise rights of a material character which are the subject of proceedings in another person's case (the rule of disposal).

The duty of a competent body to inform a social organisation about initiating the proceedings[22] plays an important role from the point of view of the participation of the social organisation. This duty exists when the competent body decides that the organisation can be interested in participating in the proceedings and when public interest justifies it.

b) proceedings with participation of the public (public participation proceedings).

The other kind of proceedings, the so called *public participation proceedings* is focused on the fact that all subjects have a right to submit comments and recommendations prior to granting of decision[23]. The participation of the public is realised by[24] notifying the public about initiating the proceedings, by the possibility of getting acquainted with the case documentation (such as application and environmental impact report), by making it possible to file comments and recommendations, by considering the submitted comments and recommendations, and by informing the public about the decision. Moreover, the grounds for the decision, in addition to meeting the general requirements pursuant to the provisions of the CAP, shall include information on the way in which comments and recommendations have been taken into account[25].

According to the Article 33 Sec. 1 of EPL in all proceedings that require participation of the public, **ecological organisations**[26] which refer to the place of their activities and inform a competent body of their wish to take part in the proceedings shall participate therein with the right of a party (*subject within the party's right*). The right is protected by the possibility of lodging an appeal against a refusal and then a complaint to the administrative court. The provision of Article 33 Sec. 1 of EPL *in fine* exclude the applying of the provision of Article 31 § 4 of the CAP . It means that, firstly, other parts of Article 31 of the CAP are still in force, which means that the participation of ecological organisation must be justified by their statutory objectives and by public interest. Secondly, it means that ecological organisation are not individually informed about starting the public participation proceedings, only by general rule of public notification[27].

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[20] Article 31 § 2 of the CAP.
[21] Article 16 Sec. 1 pt 2 of the SAC.
[22] Article 31 § 4 of the CAP: *State administration authorities, when initiating proceedings concerning another person, shall inform the social organisation of this fact where they decide that this organisation may be interested in participating in the proceedings due to its statutory objectives and where the public interest requires it.*
[23] The regulations concerning public participation in environmental matter are subject to EPL.
[24] Article 31 –39 of the EPL.
[25] Article 46 Sec. 10 of EPL.
[26] The term of ecological organization is defined in Article 3 pt 16 of the EPL: *Ecological organization is a social organization, whose statutory objective is the protection of the environment.*
[27] J. Jendroœka wrote, it causes a strange situation, the notifying institution exist in every kind of administrative proceedings except the proceedings with public participation. See: J. Jendroœka, *Udzia³ spo³eczeñstwa w ustawach o dostêpie do*

The proceedings conducted with the participation of the public concerns the proceedings in the following cases:

- granting a decision concerning a project which may have significant impact on the environment and because of this requires an environmental impact assessment procedure -EIA (a decision on conditions for development and land use; building permits; concession provided in geological and mining law; some kind of decisions granted pursuant to the provisions of water law; decisions granting authorisation for a project for reconstructing of rural land holding; a decision consenting to change a forest into agriculture land; a decision granting authorisation to the location of a motorway / expressway[28]).
- granting a special kind of environmental pollution permit – an integrated permit[29],
- granting of decisions provided in the Act on Genetically Modified Organisms[30] (such as: permit for a controlled use of GMOs, deliberate release of GMOs to the environment for purposes other than their placing on the market – non-commercial use, placing on the market GMO products),
- the proceedings with participation of the public also include those administrative activities which are connected with the preparation of **strategic documents**[31], which requires the EIA (the EIA procedure relating to the implementation of plans and programs). The Act on EPL mentions two categories of documents[32]: 1) national land use policy, land use plans, and regional development strategies, 2) policies, strategies, plans or programs in the fields of industry, energy, transport, telecommunication, water and waste management, forestry, agriculture, fisheries, tourism, and land use, where their preparation by the national or voivodship, public administration authorities is provided for by law. Participation of the public is realised by[33] the possibility to get acquainted with the draft of the document and its environmental impact prognosis, a possibility to file comments and recommendations, as well as an obligation to take into account submitted comments and recommendations at the time of working out the document. To guarantee the latter, the authorities have a duty to enclose to the document being worked on the information on the submitted comments and recommendations and on the way they have been taken into account.
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1.2. The possibility of challenging administrative decisions

a) appeal in administrative proceedings

b) complaint to the administrative court

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informacji i w prawie ochrony œrodowiska. Charkater prawny, zakres zastosowania i rozwi¹zania szczegó³owe, PiCE 2001/2(26), s. 86.

[28] Article 46 in relation with Article 51 of the EPL.

[29] Article 218 of EPL.

[30] Art. 29 of Act on Genetically Modified Organisms (2001).

[31] Article 40 of EPL. Public participation is also provided in proceedings when preparing *the outside rescue plan* in the case of serious break down/catastrophe, Article 265 Sec. 6 of the EPL.

[32] Article 40 of the EPL.

[33] Articles 31-39 and 41, 44 of EPL.

c) special rules of challenging land use plans

a) appeal in administrative proceedings

Prior to filing a complaint to the administrative court, there is an obligation to follow an administrative review procedure[34]. There is a rule of two instances established in The Code of Administrative Proceedings. The granted decision is subject to verification by a body of a higher instance. However, one cannot appeal to the higher administrative body a the decision issued at the first instance by Minister or by Self-Governing Board of Appeals, but when dissatisfied with the decision one can turn to this body with a petition to reconsider the case. The appeal can be filed by:

- a party regardless of its participation in the proceedings at the first instance;
- subjects participating within the parties' right[35] – public prosecutor, Commissioner for Citizens' Rights, social organisations; although it must be pointed out that a social organisation can appeal only when it participated in the first instance administrative proceedings;
- subjects specified in special regulation, for instance Voivodeship Inspectorate for Environmental Protection[36].

After the verification of the decision the body of appeals grants a decision in which[37]:

1) maintains in force the appealed decision,
2) reverses part or the whole of the decision and in this scope decides as regards to the merits,
3) annuls the decision and discontinues the proceedings,
4) discontinues the proceedings
5) annul the decision in its entirety and remand the case for renewed consideration by the body of first instance.

The body of appeals acts mainly in respect of the merits of the case, only in some cases by cassation.

b) complaint to the administrative court

Secondly, under the principle of court control of the legality of public administration acts, final administrative decisions can be appealed at the administrative court due to their disagreement with the law. This principle is a realisation of a constitutional guaranty of the right to court and judicial control of public administration[38]. The rules and the course of challenging the decision at the administrative court are determined in the Act on the Supreme Administrative Court dated 11th May 1995.

[34] Article 127-140 of CAP.
[35] Article 31§ 3 and 188 of the CAP.
[36] Article 19 of the Act on The Inspectorate for the Environmental Protection (1991).
[37] Article 138 of CAP.
[38] Article 45 Sec. 1, Article 77 Sec. 2, Article 175 Sec. 1 and Article 184 of the Polish Constitution.

The court acts in Warsaw and in non-local centres of the Court established for one or a number of voivodeships and is a one-instance court system[39]. The administrative court controls the legality of the performance of public administration[40], including the control of administrative decisions also discretional ones[41]. Decisions of administrative court are valid and binding. The extraordinary review to Supreme Court in exceptional cases is possible[42]. An administrative court acts according to the complaint principle, which means that the initiative of court proceedings needs a complaint from a legitimate subject and vice versa: the administrative court does not act *ex officio.* The administrative courts' judgements are mainly cassation: in the case of stating unlawfulness of an act, the court either annuls/overrules it or states its invalidity or unlawfulness[43]. Filing a complaint with the administrative court requires prior exhausting of the measures of appeal, if they served the appellant, in the administrative proceedings[44]. Otherwise, appellant has to petition for his case to be reconsidered by a competent body that had the original decision.

The following have standing to file a complaint: anyone who has legal interest, public prosecutor, Commissioner for Citizens' Rights, and a social organisation[45]. The social organisation can file a complaint regardless of its prior participation in the administrative proceedings. The legal standing of social organisations to file a complaint to the administrative court is evaluated when considering the disposition of Article 31 § 1 of the CAP[46]. This means that *the social organisation has standing to file a complaint in matters concerning legal interests of other persons when it is justified by their statutory objectives and if the public interest supports it, thus when the violation of the law concerns also the public interest, not in the case when only an individual legal interest has been violated.*

c) special rules of challenging land use plans

Special rules apply to challenging local land use plans. The local land use plans prepared by a commune are local law. The Act on Spatial Planning (1994) provides two different forms of challenging settlements in the draft of land use plans: a protest and an objection. The protest can be filed in writing by everyone who disputes the settlements made in the draft of land use plans. The person does not have to have legal interest. It is sufficient for him to have factual interest – the will of the person to file a protest. The Council of the Commune decides on considering or rejecting the protest by way of resolution. The objection can be filed by everyone whose legal interest or right has been violated by the settlements in draft of the plan. The Council of the Commune decides on considering or rejecting the objection by way of

[39] Article 2 of the SAC. It will change shortly due to the constitutional rule of two-instance procedure (Article 176 Sec. 1 of the Polish Constitution). The statutes in this subject have to be decided prior to 17 October 2002. Article 236 Sec. 2 of the Polish Constitution.
[40] Article 1 of the SAC.
[41] E. Ochendowski, *Prawo administracyjne. Czêœæ ogólna.* Toruñ 2001, p. 438.
[42] Article 57 Sec. 2 of the SAC. The justification for it is flagrantly infringement of the law or the vital interest of the state. Such an extraordinary review can be lodged by enumerated subjects such as Minister of Justice, the General Public Prosecutor, The First Chairman of Supreme Court and The Chairman of Supreme Administrative Court, Commissioner for Citizens' Rights.
[43] Article 22 of the SAC. For the exemptions see: Articles 25, 31 Sec. 2 and 39 sec. 1 of the SAC.
[44] Article 34 of the SAC. It does not consider public prosecutor and Commissioner for Citizens' Rights.
[45] Article 33 of SAC.
[46] Judgement of the Supreme Court, 8 October 1998, III RN 58/98, OSN 1998/444.

resolution that includes factual and legal grounds. The resolution to reject the objection can be challenged at the administrative court.

2. Public participation in the enforcement of the environmental law

One of the aspects of access to national court in cases concerning environmental matters is ensuring that the public has access to administrative or court proceedings which ensure challenging actions or omissions of private persons or public authorities violate environmental law (Article 9.3 of Aarhus Convention). Polish law provides three major kinds of instruments that directly or indirectly ensure enforcement of environmental law: civil, administrative and criminal legal instruments[47].

2.1. Civil legal instruments[48]

a) civil legal instruments regulated in the Civil Code (traditional damage); the question of causal link

b) civil legal instruments regulated by environmental protection regulations (traditional damage and environmental damage)

c) costs of civil proceedings

a) civil legal instruments regulated in the Civil Code (traditional damage); the question of causal link

The Act on the Environmental Protection Law (EPL) introduces provision according to which the Civil Code applies to the liability for the damage caused by the impact on the environment unless the Act provides otherwise. Thus, in this context it is worth stressing the following rules provided for in the Civil Code:

- Torts liability according to fault-based liability:

  One by whose fault damage was caused to another is obligated to repair the damage[49].

  Fault base liability applies when a culpable action / omission of a person caused injury to person or property. The action caused by fault is when there is an objective unlawfulness and subjective fault (intention or negligence). The fault based liability requires a proof of capable action / omission, injury and causal link between capable action and injury. The obligated party to pay damage is liable only for regular consequences of action / omission resulting in injury[50]. *Regular consequences are typical expected consequences. They do not have to be predictable. Predictability is a category of fault, not the causal connection which is an objective circumstance[51].* It is the obligation of the injured to prove that the above mentioned circumstances are fulfilled[52].

- Torts liability according to strict liability (risk-based liability):

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[47] See: Project on the co-oparation, as above, Part I, chapter 3, pt .III 4; IMPEL Network, Complaint procedures, as above, p. 9, 22-25.
[48] On the issue of civil liability in environmental protection law see: P. Przybysz, *Cywilnoprawne ærodki ochrony ærodowiska w prawie polskim*, PiŒ 1999/2 (18).
[49] Article 415 of the Civil Code.
[50] Art. 361 § 1 of the CC.
[51] Judgement of the Supreme Court, 12 February, 1988, I CKU 111/97.
[52] Article 6 of the Civil Code.

An operator who runs, on his own account, an enterprise or a plant that is operated by forces of nature (steam, gas, electricity, liquid fuels, etc.) is responsible for damage to a person or property that has been caused to anyone by the operation of the enterprise or plant, unless the damage was caused by force majeure, or exclusively through the fault of the injured party or a third party, for whom the operator does not take responsibility[53].

According to strict liability it is necessary to prove the causal link between certain activity (the operation of a plant / an enterprise) and injury. The injured does not have to prove neither fault nor a specific cause resulting in the injury[54].

- Measures for the protection against direct and indirect emissions (so called neighbour law)[55]: on the basis of these claims the owner of a property is entitled to claim for restitution to the lawful state or for discontinuing of the violations (*actio negatoria*).
- Claim for warding off an imminent danger:

  One who, as a result of another person's behavior, especially in the case of the lack of adequate supervision over the operation of the managed by him enterprise or plant or over the condition of his building or other installation, is endangered by a direct injury may demand that the person should undertake measures necessary to ward off the imminent danger, and, if necessary, to provide proper security[56].

- Claims for the protection of personal rights[57].

In the area of torts liability, the main question concerns the problems of proving the causal link, and still another one is the question of unlawfulness[58]. In this context, it should be pointed out that, according to court jurisdiction, the damage liability is not dependent on compliance or non-compliance with environmental pollution norms[59]. Secondly, according to Article 325 of the EPL:

The liability for injury caused by the impact on the environment is not excluded by the circumstances that the activity being the cause of the injury is conducted on the basis of a decision and within its limits.

As regards the problem of causal link, it is obvious that the proof of causal link is not an easy one in environmental matters. This issue was subject of a court judgement in which one can find a *simplified conception of proving causal link*[60]. It concerns the situation when *the damage is a consequence of accumulating pollution from different sources*. In the judicial decision dated 6th June 1976, the Supreme Court stated that:

The causal link between the injured's specific illness and the operation of an enterprise or plant emitting harmful to health substances should be recognised already in the case of establishing that the injured was exposed to hazardous substances emitted by the plant whose normal after-effect could be the illness of the injured. For the liability (...) of the plant, according to Article 435 of the Civil Code, the fact that the damage could occur as a result of accumulation of hazardous substances from different plants is of no importance. Each plant which conducts its activities within an industrial area can and should take into

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[53] Article 435 of the Civil Code.
[54] M. Safjan (w:) *Kodeks cywilny. Komentarz*. Tom I, Warszawa 1997, s. 855.
[55] Article 140, 144 and 222 § 2 of the Civil Code.
[56] Article 439 of the Civil Code.
[57] Article 23, 24 of the Civil Code. Uncontaminated environment is not regarded as a personal right because of lack of the individual and concrete characteristics. But it should be pointed out that the violation of personal right is often caused by an environmentally unlawful action.
[58] W. Radecki, *Problemy prawne ochrony ærodowiska* (w:) K. Górka, B. Poskrobko, W. Radecki, *Ochrona ærodowiska. Problemy spo³eczne , ekonomiczne i prawne*, Warszawa 1995, s. 226-227. The author points out a third question concerning the way of repairing the damage.
[59] W. Radecki, *Problemy*, as above, together with the judgements presented by the author.
[60] W. Radecki, *Problemy*, as above, s. 226-227.

account that each additional source of harmful pollutants (...) worsens the health conditions in that area and, as a result of accumulation of different pollutants, could lead to specific injuries.

In its decision, the court substituted *a real causal link with a hypothetical one*. *Each plant whose emissions could cause injury to an individual is responsible towards him*[61], also in such circumstances when the emissions from just this one plant would not exceed acceptable concentration[62].

At the same time, the court confirmed that it was not the injured who was to prove that his illness had been caused by hazardous substances emitted **by this particular plant**, not by another. It was the defendant who had to prove that the emitted by his plant substances did not have any influence on the illness of the injured for specific reasons.

Exercising the above mentioned measures depends on proving the danger or violation of an individual right; thus, the protection is set directly towards the protection of an individual's right, not the public one, such as the environment. Although one cannot disregard the fact that, for one, the above mentioned measures, though directly serving the protection the individual right, at the same time can indirectly serve the protection of the environment. This happens especially when the court remedy is restitution of the lawful state or discontinuing further violations. Secondly, according to art. 8 of Code of Civil Proceedings *social organisations (...) can, in cases specified in the statute, initiate the civil proceedings and participate in the civil proceedings, to protect citizens rights*. The activity of the social organisation, whose statutory objective is environmental protection, in civil proceedings, in which the individual injured party files a suit[63] is realised by :

- accession by a social organisation involved in environmental protection to a case, subject to a condition of plaintiff's consent (to support the plaintiff)[64],
- presenting by a social organisation an opinion, without its participation in the case[65].

b) civil legal instruments regulated by environmental protection regulations (traditional damage and environmental damage)

The measures provided in the civil court are not the only ones. There are further measures provided in both horizontal and sectoral regulations of the environmental protection law. The importance of the provisions included therein is that they not only give for instance NGOs' further power of the protection of the environment but that they, first of all, make it possible to protect the environment as a public good by civil legal instruments.

The new Act on the Environmental Protection Law provides:

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[61] W. Radecki, *Problemy, as above, p. 226.*
[62] The judgement discussed.
[63] J. Jendroœka, W. Radecki, *Konwencja o dostêpie do informacji, udziale spo³eczeñstwa w podejmowaniu decyzji oraz o dostêpie do sprawiedliwoœci w sprawach dotycz¹cych ochrony œrodowiska*, Wroc³aw 1999, s. 104-105; W. Radecki, *Ustawa o ochronie i kszta³towaniu œrodowiska. Komentarz*, pod. Red. J. Sommera. Tom II, Wroc³aw 1999, s. 514-516.
[64] Article 61 of the Civil Code.
[65] Article 63 of the Civil Code.

- **firstly**, legal ground for filing suit for the protection of public good – the environment: Article 323.1 states that:

  Everyone who through unlawful impact on the environment is exposed to injury or upon whom the injury was inflicted may demand from the liable subject for this danger or violation restitution of the lawful state and undertaking preventive measures, especially through installing installations or equipment safeguarding against the danger or violation; in the case there it is impossible or excessively difficult, he may demand that the activity causing the danger or violation be discontinued (Sec. 1). *If the danger or violation concerns the environment as a public good, the State Treasury, territorial self-governing unit as well as an ecological organization can file the above mentioned claims* (Sec.2).

  This regulation:

  - not only broadens the subjective capacity of the entitled parties to file a suit in relation to the entitled subjects on the basis of Article 222 § 2 of the Civil Code (everyone, not only the owner),
  - but most of all, it makes it possible for the enumerated parties to file a claim with a civil court for the protection of public good – the environment;
  - ecological organisations, among others, have such standing;
  - filing a claim is acceptable both in the case of violation and the danger to the protected good;
  - the subject of the claim can be: restitution of lawful state; taking preventive measures; and discontinuation of the activity, if the other two claims are impossible or excessively difficult;
  - so, this provision does not entitle to claim compensation;

- **secondly**, a legal basis for regress claims. The provisions of Article 326 of the EPL states that *a subject who repairs an environmental damage caused by another party (*the polluter, B.I.*) is entitled to claim from the polluter reimbursement of the borne expenses for that aim; the amount of the claim is limited by a well grounded expenses of restoration of the lawful state.* So, everyone who repaired the damage for the polluter is entitled to file the claim, for example, public authority that is obligated to care for proper state of the environment or an ecological organisation.
- **thirdly**, the scope of strict based liability was broadened. This kind of liability could also be used when the injury was caused by a so called plant of a higher or high risk, regardless of whether the plant is operated by natural forces[66];
- **fourthly**, the legislator determined that *the liability for injury caused by the impact on the environment is not excluded by the circumstances that the activity being the cause of the injury is conducted on the basis of a decision and within its limits;*
- **finally**, the act also introduces the special right of access to information related to the above mentioned claims – every plaintiff can demand from the defendant the information necessary for establishing the scope of liability (applied technologies,

[66] Article 324 of the EPL.

protective measures, emitted pollutants, etc.); the defendant bears the costs of preparation of such documents unless the claim is unfounded[67].

In sectoral regulations, one can also find measures that enable protection of the environment in civil proceedings. A good example is the Act on Genetically Modified Organisms (GMOs')[68]. The act introduced a severe liability on the user of GMOs' – strict liability for damages on a person, property and the environment being a result of activity regulated by this Act (such as controlled use of GMOs' or deliberate release of GMOs'). The liability is not excluded by the circumstances that the activities are conducted on the basis of and within the limits of the granted decision. Each subject that incurred individual or property injury may claim damages (compensation). If the damage concerns the environment as a public good, then the State Treasury, a territorial self-governing unit as well as an ecological organisation may demand compensation. Due to the granted claims, the Act also provides the above mentioned special right to access the information, which allows to prove the liability of polluters.

c) rules for bearing costs in civil proceedings

The rules for bearing costs are basically regulated in the Code of Civil Proceedings[69] and in the Act on Court Costs in Civil Cases. The costs include:

- court costs, i.e. court fees and refund of expenses (experts fees and witnesses fees);
- and further proceedings costs incurred by a party: a) acting in person or through a representative, or b) costs incurred by the party represented by an attorney (fees and expenses of one attorney).

The rules for incurring costs in a civil law suit are based on the following basic principles:

- firstly, on the principle of liability for the outcome of the proceedings according to which the losing party is obligated to reimburse the opponent (*the winner*), at his demand, the incurred by him costs[70];
- secondly, on the principle of essential and well-grounded costs (refund of those costs which were necessary for purposeful asserting rights and purposeful defense).

As regard the possible exemption of bearing the cost the following provisions should be presented:

Art. 7 of the CCP

> *The public prosecutor can demand to initiate the proceeding in each case and participate in a case already initiated, when, according to his opinion, it is justified by protection law and order, right of citizens and public interest (...)*

Art. 8 of the CCP

[67] Article 327 of the EPL
[68] Act dated 22 June 2001 on Genetically Modified Organisms (GMOs).
[69] Article 98 – 124 of the CCP.
[70] The Civil Code provides some exceptions to this rules, such as the compensation principle, the rightness principles. H. Ciep³a, *Kodeks Postêpowania Cywilnego.Komentarz.* Tom 1, pod red. K. Piaseckiego, Warszawa 1996, s. 389 and further.

Social organisations (...) can, in cases specified in the statute, initiate the proceedings and participate in the proceedings, to protect citizens rights.

Art. 61 of the CCP

§ 1 In cases concerning (...) the protection of consumers, social organisation (...) can fail a claim for the benefit of citizens (...).

§2 (...)

§3 Social organisation, whose statutory objective is environmental protection, can (...) access to a case, subject to a condition of plaintiff's consent (...).

Art. 62 of the CCP:

For social organisations who file a claims for the benefit of citizens and who participate in a case to protect citizens right, provisions concerning public prosecutor are being applied appropriately.

Art. 106 of CCP:

The participation of a public prosecutor in a case does not justify awarding reimbursement of the cost neither to the benefit of nor from the State Treasury.

Art. 111 § 1 of the CCP

The following subject do not have the obligation to discharge of court costs: (...)

4. public prosecutor (...).

Art. 113 § 1 of the CCP, states that both natural and legal person can request for the exemption of the court cost when their financial situation supports it.

As far as the issue of exemption from the court cost is regarded it can be stated that the current regulations provide for a statutory exemption or an exemption on the basis of a court's decision. The first one is justified by the character of the case or as in the case of public prosecutor, by the fact that public prosecutor acts for protection of public interest, law and order or citizens rights. The second one depend on financial situation of the petitioner.

The interpretation of this provisions is different, especially when NGOs' would file a suit to protect environment. For ones the appropriately applying of provisions concerning public prosecutor to social organisation (art. 62) do not refer to rule of cost regulation. For other it does. The consequences are different. If we accept the first one the only way for NGOs not to pay court cost is file a motion for cost exemption on the base of Article 113 § 2 of the CCP. The acceptation of the second view means that articles 111 § 1 pt 4 and 106 are appropriately applied[71].

Both the party exempted from court costs or exercising a statutory exemption may lodge a motion for the appointment of a legal adviser under Article 117 of the CCP.

2.2 Administrative legal instruments

a) kinds of administrative legal instruments

b) possibility to force the administrative authority to take enforcement measures

c) legal protection in the case of administrative omissions (passive administration)

[71] See: J. Jendroœka, W, Radecki, *Konwencja o dostêpie do informacji, udziale spo³eczeñstwa w podejmowaniu decyzji oraz dostêpu do sprawiedliwoœci w sprawach dotycz¹cych ochrony œrodowiska,* Wroc³aw 1999, s. 106.

d) costs of administrative court proceedings

a) kinds of administrative legal instruments

Administrative legal instruments enable a competent authority to interfere in the activities carried out by a subject in the situations determined by law, especially when the subjects violate the environmental requirements determined in general or individual acts. The essential measures of the administrative legal protection is the possibility to grant a decision in which an authority can:

- impose an obligation on a subject to limit the negative impact on the environment,
- impose an obligation on a subject to restore the lawful state,
- impose an obligation on a subject to discontinue carrying the activity,
- impose an administrative fine,
- withdraw or limit the awarded license.

The Act on Environmental Protection Law provides also for compensation institutions in the situation where there is no possibility to remove the causes of the negative impact on the environment or to restore the lawful state. The compensation is paid to the benefit of environmental protection funds.

The issue of ensuring that the public has access to administrative and court proceedings that allows to challenge the activities or omissions of private persons or public authorities that violate the environmental requirements in the area of administrative law can be considered in the scope of:

- firstly, the legal possibilities to enforce the administrative authority to take enforcement measures,
- secondly, the legal protection in the case of administrative omission/idleness (passive administration).

b) possibility to force the administrative authority to take enforcement measures

The administrative proceedings in the subject of the aforementioned measures is fundamentally initiated *ex officio*. This means that[72]:

- in the situation when there are circumstances for granting such a decision, an administrative body should be fundamentally the initiator of the proceedings,
- however, the initiation of the proceedings can also occur as a result of a demand imposed by the subject acting within the party's right – public prosecutor, Commissioner for Citizens Right, a social organisation, among others.

  Under the already mentioned Article 31 of the CAP, *a social organisation may demand initiating proceedings in the case concerning another person's interest, if it is justified by its statutory objectives and public interest*. The demand to initiate the

[72] B. Adamiak, J. Borkowski, *Polskie postêpowanie administracyjne i s¹dowo administracyjne*, Warszawa 2001, s. 137-138.

proceedings is not binding for the body. Recognising the demand justified, the body issues a decision to start the proceedings *ex officio*. In the case of refusal to start the proceedings, the rights of the social organisation are protected by the possibility to appeal with a higher administrative body and then to file a complaint with the administrative court; considering the organisation's demand and starting the proceedings will result in granting of a decision. When unsatisfied with the decision, the social organisation is entitled to appeal the decision and file a complaint with the administrative court;

- lastly, starting the proceedings may be a result of equally accessible to all (*actio popularis*) lodging complaints and requests. According to Article 221 § 1 of the CAP, citizens and social organisations shall have a right guaranteed by the Constitution of the Republic of Poland, to lodge complaints and requests to state authorities and self-government authorities. Both complaints and requests may be lodged in one's own interest, in the interest of another person, or in the interest of the society. The subject of the complaint can be, in particular, negligence or inappropriate realisation of administrative activities, violation of the law and order or applicant's interest as well as bureaucratic handling of the matters[73]. But it must be pointed out that the complaint in an individual case, which has not been and still is not the subject of administrative proceedings, if it comes from a person other than the party, could cause initiating the proceedings. It means that there is no guarantee that the proceedings will be started *ex officio*[74]. At the same time, the weakness of this public initiative is a result of the fact that fundamentally the complaint proceedings are one-instance[75] and the proceedings in complaints and requests are not subject to the administrative court control.

(c) passive administration - legal protection in the case of administrative idleness.

The idleness of the administrative bodies is a subject of control by the administrative court. Under Article 17 of the Act on the Supreme Administrative Court, *the court examines complaints on omission of the public administration in the cases determined in Article 16 par. 1 pts. 1-4* (administrative decisions; resolutions issued in administrative proceedings, which may be appealed against, which terminate proceedings or which resolve the essence of the case; resolutions issued in execution proceedings or proceedings to secure claims which may be appealed against; acts or activities of public administration other than those mentioned above which concern granting, asserting or acknowledging right of duty stemming from the law). The administration's omission consists in a lack of authority's activity[76] or in the refusal to undertake the activity[77] (the body does not handle the case in the form expected, e.g. evades issuing a decision).

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[73] Article 227 of the CAP.

[74] Article 233 Of the CAP. If the complaint concerns an individual case and comes from the party, then it causes initiating of the proceedings on demand of the party. It concern the proceedings which can be initiated by party motion.

[75] Article 239 of the CAP. When the complaint is considered groundless there is a possibility to lodge it again; however, if the complaint does not include new circumstances, then the body, in response to the complaint, can sustain its previous decision. See: B. Adamiak, J. Borkowski *Polskie postêpowanie*, as above, s.479-480.

[76] It takes place when the body hadn't undertaken activity by a legal deadline as a result of which it failed to grant a decision in time or, although it conducted the proceedings, it still failed to close the proceedings by a legal deadline. Judgement of the SAC, 27, April, 1998, IV SAB 66/87; Judgement of the SAC, 12, January 1998, IV SAB 121/97.

[77] Judgement of the SAC. 22 July 1998, IV SAB 35/98.

The court proceedings on omission could be initiated by anyone who has legal interest, public prosecutor, Ombudsman, social organisation[78].

Lodging a complaint on omission is not limited by a deadline[79], the only condition being an exhaustion of the appeal measures[80]. *If a legitimate subject thinks that a body does not handle the case within the prescribed time limits, he may at any time (...) lodge a complaint*[81]. When considering the complaint on omission, the court obligates the body to issue an act or perform and action[82]. If the complaint concerns the omission of granting a decision, the court obligates the authority to issue the decision although without indicating of the manner of its settling[83]. Therefore, fundamentally the administrative court does not take over the competence of the body and does not settle a case as regards the merits[84].

The execution of the administrative court decision is under control[85]. If the court states that the body whose activity or **omission** was a subject of a court judgement failed to execute the judgement in part or in its entirety, it may rule that the organ pay a fine. The conditions of inflicting the fine are[86]:

- establishing that the appellant turned to the body with a written demand to execute a decision prior to lodging a complaint with the administrative court,
- stating that the body failed to execute the decision,
- and considering the complaint.

d) costs of administrative court proceedings

The principles of bearing proceeding costs are partly regulated in the Act on the SAC (Article 36 and 55 of the Act), and in the remaining part regulations of the CCP are applied appropriately (the costs of civil proceedings are a subject of regulations in Articles 98-124 of the CCP). The costs of proceedings in front of the administrative court include:

- court costs (fees and reimbursement of expenses)
- and further proceedings costs incurred by a party: a/ acting in person or through a representative, or b/ the costs of the party represented by an attorney (fees and expenses of one attorney).

Due to the specificity of proceedings in front of the administrative court, the principle of bearing costs differs in some respects from those in the civil proceedings:

- **first**, in the proceedings in front of the SAC, the principle of liability for the outcome of the case, in which the losing party is obligated to refund the opponent

[78] Article 33 of the SAC.
[79] Judgement of the SAC, 15, September 1998, II SAB/Gd/4/98
[80] If the statute does not provide means of appeal, one should turn to the body with a demand to remove the violation.
[81] Judgement of the SAC, 15, September 1998, II SAB/Gd/4/98.
[82] Article 26 of the SAC.
[83] Judgement of the SAC , 13, February 1998, I SAB 125/97.
[84] See: the exceptions on Articles 31 Sec. 2 of the SAC.
[85] Article 56 in connection with Article 31 of the SAC.
[86] Judgement of the SAC 9, September 1998, IV S.A. 809/97.

the proceedings costs he incurred, does not apply[87]; when the court accounts for the complaint, it decides about the reimbursement of the costs to the benefit of the appellant from the opponent, and that is the administrative authority[88]. In the situation, however, when the complaint was not considered in favour of complaint party, the court does not adjudge the reimbursement of the costs from the appellant to the benefit of the authority. Justification for this principle is *an assumption that the appellant should not bear the risk of refunding costs to the authority*[89]; it follows from the fact that *the court control of actions and activities of public administration has the aim of not only the protection of individual rights of the appellant but it also serves to ensure a lawful activity of public administration*[90]. It should be also added that, although the persons whose legal interest concerns the outcome of the proceedings may participate in the proceedings with the party's right, their participation does not justify adjudging from the appellant to their benefit the incurred by them costs (for example, representation by an attorney)[91],

- **secondly**, the principle of necessary and well-grounded costs applies[92]; the expression of the principle is the fact that the administrative court is entitled to moderate the costs of representation in proceedings depending on the character of the case and representative's input[93];
- **thirdly**, it should be kept in mind that, in the proceedings in front of the administrative court, the costs including expenses (witnesses, expert costs) are limited as the court adjudges basically on the basis of the case files; to produce supplementary proof is acceptable as an exception[94];
- **fourthly**, as the issue of the exemption from court cost is concerned the starting point must be the content of Article 59 of SAC. It states that:

  > *To the matters not regulated by the present Act for the proceedings before the Court Articles (....) of the Code of Administrative Procedure shall apply respectively, and to other matters relevant provisions of the Code of Civil Procedure shall apply.*

  So, there should be applied Articles 62, 111 § 1 pt 4, 113 and Article 117 of CCP. Due to the content of Article 55 Sec. of the SAC and the specificity of proceedings in front of the SAC Article 106 of CCP does not apply. About the rules of exemption from court cost and doubt concerning the interpretation of the above mentioned provision see part II. 2.1. c of this paper – cost of civil proceedings.

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[87] A. Skoczylas, *Odes³ania w postêpowaniu s¹dowoadministracyjnym,* Warszawa 2001, s. 170; Orz. NSA 1982.04.21, S.A./PO 665/81, ONSA 1982/1/35; cyt. za: E Smoktunowicz, D. Kijowski, J. Mieszkowski, *Postêpowanie administracyjne, podatkowe i administracyjnos¹dowe*, Warszawa 2001, s. 886-887.
[88] Article 55 Sec. 1 of the SAC.
[89] A. Skoczylas, *Odes³ania, as above*, s. 170.
[90] Judgement of the SAC 12, September 1996, FPS 4/96. Cyt za: A. Skoczylas *Odes³ania*, as above, p.170-171.
[91] Article 41 Sec. 2 and the Judgement of the SAC 21 April 1982, S.A./PO 665/81, ONSA 1982/1/35; See: E. Smoktunowicz, D. Kijowski J. Mieszkowski, *Postêpowanie administracyjne, podatkowe i administracyjnos¹dowe*, Warszawa 2001, p. 887.
[92] A. Skoczylas, *Odes³ania*, as above, s. 17
[93] Article 55 Sec. 3 of the SAC.
[94] Article 52 of the SAC.

Part III

The Aarhus Convention in the area of access to justice and Polish law[95]

The issue of access to justice is the subject of Article 9 of the Aarhus Convention. The analysis of actual Polish regulations in the area allows to state that fundamentally the Polish provisions are compatible with the rules of Article 9 of the Aarhus Convention.

This part will include several comments regarding the current law in the light of Article 9 of the Aarhus Convention and at the same time it will be a kind of a summary of the previous part.

1. The first issue is the access to justice in the case of violating the right to information on the environment. In Polish law, the access to information is subject to constitutional provision. According to Article 74.3 of the Polish Constitution, *Everyone has access to information on environment.* As it was already said, this right may be asserted subject to limitation specified by a statue[96]. The right to information on the environment and its limits are fundamentally subject of the new Act on the Environmental Protection Law[97]. This regulation guaranties everybody access to information on the environment which is in possession of a public administrative body. The act ensures access to different kinds of listed documents (petitions, decisions, drafts of strategic documents, reports on the environmental impact assessment, etc.) on the one hand and access to information concerning the state of the environment on the other. The effective guaranties of the access to information on environment are those provisions of the statute which:

- issue an obligation that the public authorities make information available as soon as possible but not longer than within one month and in complicated cases two months (some documents are to be provided on the same day of filing the application);
- issue an obligation that the public authorities provide partial information;
- regulate fees rules, which are based on the principle of well-grounded fees (some information is free of charge);
- lists cases of justifying the grounds for the refusal of the information.

Apart from the above mentioned rules, the statute issues an obligation upon the public authorities that *a refusal of providing an information is made through issuing a decision.* It is an administrative decision so it must be issued in writing, thus it must involve legal and factual reasons also in writing as well as the information about its review possibilities. As each administrative decision this one also is subject of review. Although it was pointed out that, when refusing access to information, the

[95] See: J. Jednroœka., W. Radecki, *Konwencja o dostêpie do informacji*, as above, s. 98-107; The UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters. An implementation guide. Prepared by: S. Stec, S. Casey-Lefkowitz in collaboration with J. Jendroœka; (in:) IMPEL Network, as above, p. 135-153.
[96] Article 81 of Polish Constitution.
[97] Article 19-24 of the EPL.

regulation involved in the Act on Access to Public Information should also apply[98]. This regulation provides effective protective measures by issuing an obligation that the grounds for refusal of a decision should involve additional information, and by reducing the length of time both of administrative appeal proceedings (14 days) and court proceedings before the administrative court (30 days). Moreover, the regulation provides that a subject obligated to provide the public with information could face criminal liability when refusing the information.

2. As regards Article 9.2 of the Aarhus Convention, the analysis of the presented in Part II of this paper rules concerning public participation in the decision-making process and in the preparation of strategic documents as well as regarding one's standing to challenge the decisions in administrative review proceedings and in administrative courts allows to state the following:

- Polish law provides for two kinds of proceedings that lead to granting essential decisions from the ecological point of view, *i.e.* regular proceedings and proceedings with participation of the public;
- In both regular administrative proceedings and public participation proceedings, the realisation of access to justice is expressed by the possibility to verify the decision in front of the administrative court after exhausting the appealing measures in an administrative review procedure;
- Although the public participation proceedings make it possible for everyone to submit comments and recommendations prior to granting of the decision, it does not ensure that all those subjects who have such a possibility and who participate in the decision making process will also have access to justice with regards to the final decision;
- Only those who has legal interest on the one hand and subjects that participate *within the personal rights* on the other, as public prosecutor, Commissioner of Citizens' Rights and NGOs, have standing to challenge the decision. The latter, i.e. NGOs, having met the legal conditions which concern both the organisational form of NGOs'[99] and legal conditions of participation. This conditions were presented in Part II of this presentation.
- Other subjects, which can have factual interest only, are entitled to neither appealing nor filing complaints with the administrative court. There is no *actio popularis* in Poland.

3. The issue of access to justice in respect to Article 9.3 of the Aarhus Convention concerns enforcement measures accessible to the public when activity / omission of a private subject or public authority violates the environmental regulation.

The public administrative authority plays the main role in controlling the observance of environmental requirements. If the administration does not fulfil this role, there are some opportunities for the public. In the area of the protection of the

[98] See: J. Jendroœka (in:) *Ustawa – Prawo Ochrony Œrodowiska. Komentarz*, Wroc³aw 2001, pod red. J. Jendroœki, s. 177 - 180.
[99] The Act on Associations, dated 7, April, 1989.

environment as a public good (not as an individual interest), the following have a special meaning:

a) in administrative proceedings:

- the opportunity for a public prosecutor, Commissioner for Citizens' Right and especially social organisation to demand that administrative proceedings be initiated, in the case when the statute allows to initiate such proceedings only *ex officio.* For instance, such a way of initiating the proceedings is provided, for example, the Environmental Protection Law in the part where the issue of administrative liability is concerned.
- the right of social organisation to challenge the decision (refusal to initiate the proceedings) or the omission (not considering the demand at all or in deadline), including a complaint to the administrative court,
- the measures concerning imposing of a fine; this applies to the authority, whose actions or omissions were subject of the administrative court judgement, and who failed to carry out the judgement in full or in part; then the Court may decide that this authority be fined;
- the right of a social organisation, among others, to participate in administrative proceedings initiated *ex officio* and the right to challenge the decision of a body, including the right to complain to the administrative court; also the possibility to challenge the omission of the body – when the body does not handle with the matter in deadline.

b) in civil proceedings:

- the right of an ecological organisation that meets legal requirements to file a suit to protect the environment; the subject of the demand is mainly *restoration or preventive measures*, although provisions that allow to claim damages also exist; It is hard to say how this last possibility will be applied in practice; The doubts especially refer to the ways the damages are estimated.
- the right of a social organisation, that meets legal requirements to access the civil case, with plaintiff's consent; This participation is connected with such specific rights as receiving proceedings documents, receiving notices about deadlines, meetings, decisions, and possibilities of challenging the judgements;
- the right of everybody who has repaired the environmental damage to claim reimbursement of the borne expenses from the polluter; the amount of the claim is limited by well-grounded expenses;

4. As concerns adequate and effective remedies, some aspects of Articles 9.4 and 9.5 of the Aarhus Convention should be pointed out.

The issue of civil and administrative proceedings costs was presented in Part II of this presentation. Now it can be pointed out that the court costs of administrative proceedings do not create a barrier to justice. The fees are rather moderate (10 – 50 PLN, sometimes 100 PLN). However, the civil costs, especially the expenses in environmental matters, could be high.

As to the mandatory participation of a lawyer in a case, it must be stated that neither at the administrative court[100] nor at the civil court of the first and second instance such an obligation exists. In practice, the NGOs very often act before the SAC without lawyer's assistance.

The legal aid in civil and administrative court can be provided for by the party exempted from the court costs, if the court considers the legal aid is justified[101], like a complicated character of the case. The system of legal aid can be supplemented by a voluntary legal aid. At the Jagiellonian University, such a voluntary legal aid is available. The law students in the possible cases offer a free of charge legal aid under the supervision of their professors.

As far as the duration of the trial is concerned, it should be pointed out that in the administrative preliminary proceeding there is a rule that the appeal should be considered in one month. The duration of the court proceedings is certainly much longer. At the Code of Civil Proceedings there is postulate of the fast rate of proceedings – *The court should counteract the protraction of proceedings and aim at settling the case at the first court sitting, if possible avoiding any damaged to clarifying of the case.* The case must be properly clarified both in factual and legal aspect.

It is also worth saying a few words about an interim relief. At both the administrative and civil courts the interim relief is possible. There is no automatic suspension of the final administrative decision which is challenged at the administrative court. Lodging a complaint with the administrative court does not stop the performance of an act or the suspension of an action[102]. The Court, however, may, at the party's motion or *ex officio*, pass a decision to stop the performance of the act or to suspend the action, particularly when there is danger of causing a substantial damage to the complaining party or effects which are difficult to reverse[103]. The suspension of the performance of the appealed act or action takes place by virtue of the law, if the authority which issued the act or performed the action has not submitted to the Court its reply to the complaint together with individual files within the prescribed time limit[104].

In civil proceedings, there is also a possibility to secure a claim. The court can issue a temporary management if the claim is credible and a failure to secure the claim could deprive the creditor of the satisfaction[105].

Finally, at the administrative review proceeding, both non-judicial and judicial, withdrawal an appeal or a complaint has not a binding effect. It is possible when there is no threat that detriment to the protection of public interest.

[100] Article 42 of the SAC.
[101] Article 117 of CCP.
[102] Article 40 sec. 1 of SAC.
[103] As above.
[104] Article 40 sec 2 of SAC.
[105] Article 730 of CC.

Annex I

The Act on Supreme Administrative Court

11, May 1995, later amended;

Selected text; Translation: Barbara Iwañska

Art. 2

The Court acts in Warsaw and in non-local centres of the Court established for one or a number of voivodeships.

Art. 16.1

The court shall settle complaints about:

1) administrative decisions;
2) resolutions issued in administrative proceedings, which may be appealed against, which terminate proceedings or which resolve the essence of the case;
3) resolutions issued in execution proceedings or proceedings to secure claims which may be appealed against;
4) acts or activities of public administration other than those mentioned above which concern granting, asserting or acknowledging right of duty stemming from the law
5) resolution of communes constituting regulations of communes and acts of local authorities of governmental administrations constituting a local law;
6) resolution of authorities of communes and unions therefore, others than those specified in point 5, adopted in cases within the scope of public administration;
7) acts of supervision and shall resort to measures specified in this regulation (...).

Art. 17

The Court examines complaints for omissions of authorities in cases specified in Art. 16 paragraph 1 items 1-4.

Art. 20

1. The Court is competent in the matters defined in Art. 16 and 17, when the complaint is lodged about the action or omissions of the authority being a public administrative body within the meaning of paragraph 2 (...).

Art. 21

Within its jurisdiction, the court shall exercise supervision of conformity of the law, unless the act provides otherwise.

Art. 22

1. The Court, taking account of the complaint about a decision or a resolution:

1) abolishes a decision or a resolution wholly or in part,

2) finds a decision or a resolution invalid,

3) finds a decision or a resolution noncompliant with the law:

2. A decision or a resolution is abolished when the Court finds:

1) infringement of substantive law, which had an impact on the result of the case,

2) infringement of law which gives bases for instituting administrative proceedings *de novo,*

3) other infringement of regulations concerning the proceedings if it may have had a substantial impact on the proceedings.

3. The Court finds a decision or a resolution invalid when there are causes specified in art. 156 of the Code of Administrative Proceedings or in other laws (...).

Art. 23

The Court, taking into account the complaint about an act or action, referred to in art. 16 paragraph 1 item 4, adjudicate the existence or non-existence of the obligation or right, and ascertaining the unlawfulness of the act of action, abolishes the appealed act or states the ineffectiveness of the action.

Art. 30

The legal assessment expressed in the Court judgment binds the Court or authorities whose action or idleness was the subject matter of the appeal.

Art. 31

1. In the case when the authority, to whose actions or omissions the Court judgment pertains, has not carried out the judgment in full or in part, the Court may decide that this authority be fined. The Court judgment concerning the fine is subject to execution without putting the enforcement clause in the judgment.

2. Moreover, the Court, in the case referred to in paragraph 1, may adjudicate the existence or non-existence of right or obligation if the character of the case or non-contentious circumstances of facts of the case or its legal status allow it.

3. The Court applies the provisions of paragraph 1 and 2 in the case when the complaint lodged by an empowered entity which previously applied to the relevant authority with a written call to carry out the Court judgment is admitted.

4. The person who has suffered damage due to the non-performance of the Court judgment is entitled to claim damages under the provisions laid down in Civil Code, to the exclusion of Art. 418 of the Code.

5. The damages referred to in Art. 4, is due from the authority which has failed to carry out the Court judgment. The authority decides about the damages by way of issuing a decision within 3 months from the day the petition for damages was filed; the party which has not

received any decision or finds the damages granted to it unsatisfactory, may bring an action at law at the common court of law within 30 days from the day the authority was in arrears or from the day of serving it a decision concerning this matter.

6. The fine referred to in paragraph 1 is imposed in the amount equivalent of up to ten average monthly remunerations in the industrial sector for the last month of the quarter preceding the day of issuing the judgment about fining, announced by the Chairman of the Main Statistical Office on the basis of separate regulations.

Art. 33.

1. The court initiate the proceedings on the complaint lodged by a legitimate subject.

2. Legitimate to lodge a complaint is everybody, having legal interest, Public prosecutor, Commissioner for Citizens Right, social organisation within its statutory objectives, in case concerning other subject's legal interest (...).

Art. 34

1. The complaint may be lodged after having used all measures of appeal if they served the complaining party in the proceedings before the relevant authority in this matter, unless the complaint is lodged by the public prosecutor or Commissioner for Citizens Right,

2. By the depletion of measures of appeal one understands a situation when the party is not entitled to any appeal provided for in the Act.

3. If the Act does not provide for measures of appeal in a matter which is the object of complaint, one must apply to the relevant authority with a call do remove the infringement. A complaint may be lodged after the expiration of a period of 30 days from the day of serving the call.

Art. 35

1. A complaint is lodged directly to the Court within 30 days from the day of serving the complaining party the decision settling the matter, and in other cases within 30 days from the day on which the complaining party learned or could learn about performing of an act or undertaking an action by the authority which justifies the lodging of the complaint.

2. The public prosecutor or the Ombudsman may lodge a complaint within 6 months from the day of serving the party a decision in an individual matter, and in other cases within 6 months from the day of the act coming into force or undertaking of an action which justifies the lodging of the complaint.

2a. The public prosecutor of the Ombudsman may lodge a complaint about an act or resolution which constitute the regulations of local law also after the expiration of the time limit referred to in paragraph 2(...).

Art. 36

1. A fee is collected for filing a complaint (...).

Art. 39

1. In the case of the authority's failure to send a reply to the complaint and individual files within the time limit laid down in Art. 38 paragraph 1, the Court may make judgment in the matter on the basis of the state of facts and the legal status presented in the complaint, when they do not arouse well-grounded doubts in the light of findings of the Court in the course of cognizance (...).

Art. 40

1. Lodging a complaint to the Court does not stop the performance of an act or the suspension of an action. The Court, however, may on the party's motion or ex officio pass a decision to stop the performance of an act or to suspend an action, particularly when there is danger of causing a substantial damage to the complaining party or effects which are difficult to reverse.

2. The stay of the performance of the appealed act or action takes place by virtue of the law if the authority which issued the act or performed the action has not submitted to the Court its reply to the complaint together with individual files within the time limit referred to in art. 39 paragraph 1.

Art. 42

1. Natural persons may act in person or through their plenipotentiaries.

2. Legal persons and other organizational entities which do not have legal personality may act through bodies entitled to act in their names or through plenipotentiaries.

Art. 46

1. The complaining party may withdraw a complaint. The withdrawal of a complaint does not bind the Court unless the examination of the case has become groundless or when the passing of judgment has become needless due to other reasons (...).

Art. 52

1. The court passes a judgment on the basis of the individual files unless other circumstances, referred to in Art. 39 paragraph 1, occur.

2. The Court may ex officio or on the motion of a participant in the proceeding establish supplementary evidence from the documents if this proves indispensable to explain substantial doubts and does not cause excessive prolongation of the proceeding in the case.; otherwise it shall abolish the appealed act or action and return the files to the authority whose action was appealed indicating in its judgment the scope of evidence which the authority is to supplement.

Art. 55

1.The judgment should include also the decision concerning the costs related to the proceeding. In the judgment accounting for the complaint the Court shall decide the

reimbursement of the costs for the benefit of the complaining party by the authority which passed the appealed act or took the appealed action or was guilty of ommissions.

2.The Court may in justified cases adjudge that the authority reimburses only a part of the costs if the complaint was admitted in such a part which was exorbitant as compared to the value of the subject matter of litigation, as was established on the occasion of collecting the fee.

3. The court may define the costs of replacement of the participant in the proceeding by an attorney at law or a legal counsellor depending on the nature of the case and the plenipotentiary's contribution to its explaining and deciding (...).

Art. 59

To the matters not regulated by the present Act for the proceedings before the Court Art. (....) of the Code of Administrative Procedure shall apply respectively, and to other matters relevant provisions of the Code of Civil Procedure shall apply.

Art. 60

In the case when the Court in its judgment:

1) reverses the appealed decision and the authority examining the case again discontinues the proceedings,

2) finds out that the act is invalid or ascertains that there is a legal impediment to declaring the act invalid, the party, who suffered damage is entitled to damages from the authority which passed the decision. Art. 160 of the Code of Administrative Procedure is applied appropriately.