Rights-based climate change litigation in the polish courts: key challenges

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Abstract

This article provides an overview of the Polish climate change law/policy. Additionally, it identifies the main challenges related to rights-based climate change litigation in the Polish courts. The plaintiffs are asking the court to order that Polish civil law encompasses the right to a healthy environment which includes the right to live in climatic conditions that are safe and stable and that can be legally enforced. The plaintiffs' argument is that the Polish government's failure to act violates their personal and human rights in the context in discuss issues. The analysis indicates that due to the lack of direct inclusion of the right to a healthy environment in Polish legislation, it is also difficult to enforce the authorities to actively protect this right. Polish law lacks regulations that would directly enable citizens to demand from the authorities to introduce general environmental protection measures and consequently impose sanctions on the authorities for inaction in this respect. In the light of the scrutiny, it is unlikely that the claims made by the plaintiffs in the context of reducing greenhouse gas emissions will be met. Nevertheless, it is possible that the court will find a violation of human rights by state action.

Keywords: climate change law, strategic litigation, human rights, Poland

1. Introduction

The Paris Agreement, which was adopted in 2015, is the first global climate treaty that explicitly addresses human rights. It recognizes climate change as a shared problem of humanity (Sushyk, Shompol,2019). The preamble of this act indicates that "parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children". The implementation of the Paris Agreement and the link between climate change and human rights (Resolution 48/13, Human Rights Council, 2021) has risen across Europe as a rights-based litigation on climate change. Moreover, it has been recognized that the impacts of negative human rights may also result from EU Member States' implementation of specific GHG reduction activities (Woerdman, Roggenkamp, Holwerda, 2021). Over 80% of rights-based climate cases aimed at pressuring governments to

do more to mitigate climate change, for example, through challenging emission reduction plans (Rodríguez-Garavito, 2021). Such actions against governments are referred to as "strategic litigation." Strategic litigation is the practice of deliberately initiating a legal case in court with the aim of achieving broader social changes beyond the specific case. These initiatives aim to bring about more comprehensive modifications in public climate policy, with a focus on the actions or inactions of governments that have resulted in increased greenhouse gas emissions, insufficient reduction in emissions, or a lack of adaptation to climate change (Pouikli, 2022). Recent judgments emanate from the different EU Member States such as the Netherlands (Urgenda v de Staat der Nederlanden), France (Commune de Grande-Synthe v France), Ireland (Friends of the Irish Environment v Ireland) Belgium (VZW Klimaatzaak v. Kingdom of Belgium), Spain, Germany (Neubauer et al. v. Germany), and Italy. Claimants who cite human rights as a basis for demanding that states reduce emissions argue that lowering emissions to the minimum possible level constitutes a standard of reasonable care in fulfilling human rights obligations related to climate change (Yoshida, Setzer, 2020). "Climate change" means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is, in addition to natural climate variability, observed over comparable time periods. Edwin Woerdman describes a distinction between mitigation law and adaptation law showing that "the former focuses on the reduction of greenhouse gas emissions to limit global warming, while the latter is concerned with society's adaptation to the effects of global warming. Mitigation law therefore addresses the causes of climate change, for example by pricing carbon emissions and requiring a greater share of renewable energy. Climate change adaptation law fights the effects of climate change, for example by building more flood defenses" (Woerdman et al.,2021,p.2).

This article aims to identify the main challenges related to rights-based climate change litigation in the Polish courts. The first part of the article characterizes the Polish legal order and policy in relation to climate change law. The second part analyzes common grounds of pending cases brought to the district courts, in which the plaintiffs demand that the government take decisive measures to protect the climate, including achieving climate neutrality by 2043 and reducing greenhouse gas emissions by at least 60 percent by 2030. The third part will demonstrate the key challenges of rights-based climate change litigation in the Polish courts.

2. Climate change litigation in Poland

The Republic of Poland (Poland) is one of the European's largest and most populous country. Bordering Germany on the west, Russia on the north, Lithuania, Belarus, and Ukraine in the east, and the Czech Republic and Slovakia on the south, it occupies a geographically and politically important part of Europe.

Poland is a member of several international organizations, including the EU, UN, NATO, OSCE, WTO, OECD, and the Council of Europe. It ratified the European Convention on Human Rights in 1993. Poland is also a signatory to the United Nations Framework Convention on Climate Change, having signed it in 1992 and ratified it in 1994. The country also signed the Kyoto Protocol in 1998 and ratified it in 2002. Despite being a party to these agreements, Poland was known to be resistant to stronger action on climate policy within the EU (Karski,2012, p.239).

The bottom-up approach of the Paris Agreement makes the applicability and material relevance of the climate goals of the Paris Agreement dependent on national legislation (Saiger, 2020) leads to the next section of the article, where the author characterises Polish climate change legislation.

2.1 Climate change law and policy

The supreme legal act in Poland is the Constitution (Journal of Laws of the Republic of Poland, 483, April 2, 1997). In its content, it does not refer directly to climate change. However, three articles can be identified as indirectly linked to the subject under discussion. Firstly, Article 5 of the Constitution stipulates that the state, guided by the principle of sustainable development, shall ensure environmental protection. This provision can be understood as evidence of a comprehensive approach to regulating climate change concerns (Karski, 2012) through both primary and secondary legislation. Secondly, Article 74 of the Constitution states that public authorities shall pursue policies ensuring ecological security for present and future generations, and environmental protection is a duty of public authorities. Finally, on the basis of undoubted link between climate change and the impact on human life, it is important to point to Article 68 of the Constitution, which provides for the obligation to protect human life and health.

At the statutory level, climate change law in Polish legislation concerns issues related to environmental, economic, administrative and financial law. Therefore, it is no longer possible to argue that climate change law has attained the status of an independent branch of normative law. There is no single legal act that exhaustively covers all aspects of this issue in the meaning of regulations that reach the goal of preventing anthropological climate change (Adamczuk-Retecka M., 2019, p. 223). However, there is no doubts law of climate change derives primarily from the environmental law.

In the contemporary system of Polish domestic law, environmental issues are addressed at the statutory level in at least a dozen, if not several dozen acts, one of which (the Environmental Protection Law,2001) was, and partly still is, of a slightly different nature than the others, first of all due to its content (Korzeniowski P.,2015). A certain set of regulations, which were assumed to be common for the whole environmental protection issues regulated by law, was introduced to this Act. These are, first of all, the definitions of basic terms,

provisions in the nature of general principles, provisions setting out the objectives of protection of the environment and its particular components, provisions that construct specific protective obligations, or provisions that set out the principles of liability for failure to implement them or for causing environmental damage. The Act was conceived as a starting point and a basis for the whole set of regulations on environmental protection, which should be constructed and applied in a manner enabling them to achieve objectives common to all of them. Due to the fact that at the time of its creation it was conceived as a basic formula for transposing into domestic law the requirements of the Community law in force at that time (Korzeniowski.P. 2015).

As mentioned above, climate change law can be divided into adoption law and mitigation law. The former consists of a number of regulations that have been functioning in Poland for a long time, but they are not interrelated enough to be classified as a single field of law. It refers mainly to regulations contained in the agricultural law, natural disasters prevention law or water law. As an example, the regulations concerning water management included in The Act of 18 July 2001 Water Law (Journal of Laws of the Republic of Poland, 1566, July 20, 2017) can be pointed out. The law prescribes the management of water in accordance with the principle of sustainable development, with a specific focus on shaping and safeguarding water resources, utilizing water, and administering water resources. Of particular importance for the protection of the land and water environment is the guideline contained in paragraph 4, Article 1 of the Act. Karski (2012, p.240) points out that "water management shall be carried out in such a way as to prevent, acting in accordance with the public interest, the avoidable deterioration of the ecological functions of water and the deterioration of terrestrial and wetland ecosystems which are directly dependent on groundwater."

Within mitigation climate change law, a distinction can be made between regulations on reducing greenhouse gas emissions, which can be called the law of emission reductions, and regulations on the absorption of greenhouse gases, which is called the law of absorption. The issues discussed are differentiated in Poland in terms of the instruments of climate protection. Horizontal instruments pertain to all fields of activity that impact the environment to some extent, and are included within environmental law (Boć, J., Nowacki, K. 2006). On the other hand, sectoral instruments apply to activity in a specific area. In Poland, instruments placed in the energy law play a dominant role. In the Polish legal system, the law on emission reduction overlaps with the law on air protection (Karski, 2012).

Air protection issues are comprehensively regulated in Articles 85-96a of the Environmental Protection Act described above. These provisions are related to the systemic regulation of air quality protection as well as comprehensive regulation in emissions reduction law contained in the Act on the Protection of air from Pollution (Journal of Laws of the Republic of Poland, 87, April 21, 1966). Moreover, the content of the act implies the obligation to protect against emissions, which consists in preventing or limiting the

introduction of substances or energy into the environment. It creates the instrument of a "permit to emit gases or dust into the air," which is intended to implement the principle of protecting the air against pollution (Ciechanowicz-McLean. J.2016). In this context by "air" means only the air in the troposphere, excluding air inside buildings and workplaces. The latter issues are regulated by a separate legal act, i.e. the Act on Substances that Deplete the Ozone Layer and Certain Fluorinated Greenhouse Gases (Journal of Laws of the Republic of Poland, 881, May 15, 2015).

Emissions management occupies a prominent place in mitigation law. Its framework is set out in the Act of 17 July 2009 on the system for managing emissions of greenhouse gases and other substances. This law is "the first of a package of three laws on climate and air protection. It laid the foundations for a system that includes projectives on general issues, the management of international emission units, the EU Emissions Trading Scheme and a national trading scheme that covers So2 and Nox" (Karski, 2012, p.241). System of the trading on the GHG is regulated in The Act on the System of Trading in Greenhouse Gas Emission Allowances (Journal of Laws of the Republic of Poland, 695, April 28, 2011).

Poland's climate change policy is closely tied to its regulatory framework. Since becoming a signatory to the Kyoto Protocol in 2002 Poland has been bound by two legally binding commitments to reduce greenhouse gas emissions. The first commitment was to reduce emissions by 6% between 2008 and 2012 compared to 1998 levels, while the second commitment was to reduce emissions by 20% between 2013 and 2020 as an EU Member State (Skoczkowski, Bielecki, Węglarz, Włodarczak, Gutowski, 2018). Poland has made progress towards meeting its greenhouse gas reduction targets, but it still remains one of the most energy-intensive economies in the European Union (Asadnabizadeh, 2019). In 2018, over 80% of the electricity produced in Poland came from coal-fired power plants (ibid). In that context national Energy and Climate Plan for 2021-2030 document of Poland's climate policy should be pointed out In the context of the subject under discussion.

The document was prepared using national development strategies that were approved at the government level, such as the Strategy for Sustainable Development of Transport until 2030, the State Environmental Policy 2030, the Strategy for Sustainable Development of Rural Areas, Agriculture and Fisheries 2030, and the draft Energy Policy of Poland until 2040. The aim of this document is to reduce greenhouse gas emissions by approximately 30% (compared to 1990). The National Energy and Climate Plan 2021-2030 includes the following targets for climate and energy by 2030: a 7% reduction of GHG emissions in non-ETS sectors compared to 2005 levels, and a 21-23% share of renewable energy sources (RES) in gross final energy consumption (the 23% target will be achievable with additional EU funding, including for a just transition). This takes into account a 14% share of RES in transport, an annual increase of 1.1 percentage points in the share of RES in heating and cooling, a 23% increase in energy efficiency compared to PRIMES2007 forecasts, and a reduction to a 56-

60% share of coal in electricity production. The NAPE includes three parts - strategic and two analytical annexes - and was developed based on national development strategies approved by the government.

2.2 Rights-based climate change litigation

In Poland, lawsuits related to climate protection began to be filed only several years ago. They were filed by foundations related to environmental protection, which did not sue the state but rather companies or large corporations. For example, in 2018, the ClientEarth foundation filed a lawsuit against the company Enea, which planned to expand a coal-fired power plant in Ostrołęka. The plaintiff stated that the implementation of a large and environmentally disadvantageous investment was unprofitable and unjustified due to the regulatory and legal environment aimed at climate protection.The foundation won the case - in June 2020, the investment was withdrawn and the partially built installations were dismantled. In another case a district court in Łódź agreed that it was necessity to fight the climate crisies and proposed a settlement. As of the time of writing, five lawsuits (ClientEarth v Poland on behalf of plaintiffs) has been registered in Polish district courts alleging violations of personal and human rights due to the state's failure to comply with the Paris Agreement.

The plaintiff alleges violations of the right to the enjoyment of environmental values, including the right to live in stable and safe climatic conditions, health, respect for the place of residence, the right to privacy and respect for family life, and identifies as the defendant the State Treasury represented by the relevant ministers. The plaintiff is to be represented before the court by the organisation ClientEarh, which has standing under Article 61 § 1(2) of the Code of Civil Procedure (Journal of Laws of the Republic of Poland, 296, November 17, 1964). The claimant argues that the actions of the public authorities leading to excessive emissions of greenhouse gases violate his personal interests referred to in Article 23 of the Polish Civil Code (Journal of Laws of the Republic of Poland, 93, April 23, 1964), and thus involve unlawful action as referred to in Article 24 of the Civil Code, i.e.: “One whose personal interests are endangered by another's action may demand that such action be abandoned”. He cites, among others, heavy rainfall, prolonged droughts and extreme weather phenomena such as thunderstorms, fires, gusty winds, which cause sandstorms and are harmful to human health, as effects of negative climate change that infringe his personal interests.

In his statement of claim, the plaintiff further argues that the state actions in question contribute to a failure to comply with a standard under the Constitution of the Republic of Poland namely the duty to prevent the negative effects of environmental degradation on health

(Article 68(4) in conjunction with Article 68(1) and the duty to protect the environment and ensure environmental safety for contemporary and future generations (Article 74(1) and (2).

Moreover adverse climate change caused by high emissions significantly impairs the ability of individuals to exercise fundamental rights such as the right to life (Article 2 ECHR) and the right to respect for private and family life and home (Article 8 ECHR). In this context, the claimant has brought that Member States are obliged not only to refrain from violating these rights, but also to take measures to ensure that they are respected which is known as positive state obligations.

The plaintiff is requesting solutions for Poland based on a "fair share" evaluation. According to the plaintiff's assessment "in order to make a fair contribution towards achieving the Paris Agreement's 1.5oC target, the Polish government should: (i) decrease the country's greenhouse gas (GHG) emissions by 61% by 2030 (compared to 1990 levels); (ii) achieve a net zero emissions status by 2043; and (iii) not surpass the carbon budget allocated to Poland of 4.1 Gt CO2eq between 2020 and 2043".

2.3 Key challenges

Regarding national legal systems that share similarities with those encountered in environmental law cases - such as hindrances to obtaining justice or a legal culture lacking awareness of climate change (Pouikli, 2022) - four primary obstacles that plaintiffs may encounter can be distinguished from the case discussed above.

First, the Constitution itself lacks a provision that would explicitly state that "everyone has the right to a clean environment." In January 24, 2020 the District Court asked the Supreme Court the question: "Does the right to live in a clean environment, enabling one to breathe atmospheric air that meets the quality standards set out in generally applicable laws in places where a person stays for a longer period of time, in particular in the place of residence, constitute a personal good subject to protection under Article 23 in conjunction with Article 24 and Article 448 of the Civil Code?" The Supreme Court (Case No. III CZP 27/20) answered that is stated that the entitlement to reside in a clean environment, which includes the right to breathe air that meets quality criteria, is not an individual benefit that falls under the protection of the Civil Code. At the same time Court also stressed that the effects of environmental pollution may be combated by invoking such goods as the right to health, liberty or privacy[1].

[1] The District Court, which had raised the question before the Supreme Court (9 December 2021), granted the claim. While presenting oral reasons for the decision, the court indicated that in 2012-2015 (the period covered by the lawsuit) the negligence of the State Treasury, which resulted in the tragic air quality in Rybnik, led to violation of the plaintiff's personal rights. He mentioned in this context:

Since there is no explicit recognition of the right to a healthy environment in the Polish legal system, it is also difficult to enforce the authorities to actively protect this right. Polish law lacks regulations that would directly allow citizens to demand the authorities to introduce general environmental protection measures (e.g., local spatial development plans or air protection programs) and, consequently, impose sanctions on the authorities for their inactivity in this respect. This challenge is linked with the question of justiciability. Some human rights-based climate cases brought in the US have broken down over this issue. In Julian et al. v. the United States of America (2020), a case involving a rights-based challenge to the US government's inaction on climate change, the US Ninth Circuit Court of Appeals refused to order the government to formulate a comprehensive program to combat climate change on the grounds that doing so would require "a series of complex policy decisions that, for better or worse, must be entrusted to the wisdom of the legislature and the executive". On the other hand, it is possible that the civil claims may be supported in these cases by international law standards that Poland is in breach of. A failure to comply with Article 13(1) of the CAFO Directive, i.e. the Directive of 21 May 2008 on ambient air quality and cleaner air for Europe constitute an example of such breach. The Directive requires member states to ensure that specific levels of substances in the air (sulphur dioxide, particulate matter PM10, lead and carbon monoxide) are not exceeded. By judgment of 22 February 2018.C-336/16, the CJEU found Poland in breach of Article 13.1. Setzer and Byrnes (2020, p.19) states that "the judgment confirms that the passivity of public authorities in protecting the environment is unlawful".

Another significant difficulty is climate attribution - that is, obtaining credible evidence to establish a robust causal relationship between past and future greenhouse gas emissions, increasing surface temperatures, and the resulting extreme weather events. This evidence could assist litigants in establishing a stronger causal link in such cases. (Setzer, Byrnes, 2020). In climate-related legal cases, it is essential to demonstrate a causal relationship between a factor that impacts the climate system's energy balance (such as heightened CO2 concentrations) and a measurable aspect, such as global mean surface temperature. To do so, it is initially necessary to detect a statistically significant alteration in that aspect beyond its natural variability and subsequently establish that the factor in question had a causal impact on these parameters (Weller, Nasse, J.-M., Nasse, L, 2021). Given that scientific finding cannot always be translated and applied to concrete cases, the exercise of aligning scientific research methods with evidentiary requirements in legal settings remains a challenge for both scientists and lawyers (Pouikli, 2020). In this context, it also remains a challenge to determine

health, freedom, inviolability of dwelling. According to the court, the plaintiff proved that as a result of the infringement of his personal goods, he suffered harm of considerable proportions. This results, inter alia, from the fact that he is actively working to protect air quality and is undertaking numerous pro-ecological activities (https://bip.brpo.gov.pl/pl/content/rpo-proces-obywatel-smog-skarb-panstwa-wygrana).

how the science of climate attribution affects the legal admissibility of evidence based on climate models. Although evidence must be legally admissible in order to be considered at trial, it must be reliable in order for the court to reach a legally correct conclusion. Because parties to a trial have an incentive to present evidence favorable to their case, the admissibility requirements and the reliability of the evidence presented are intertwined (Pfrommer, T., Goeschl, T., Proelss, A. et al. 2019).

Causality was raised by the Dutch government in the Urgenda case as part of its argument that Articles 2 and 8 ECHR do not impose an obligation on the state to protect against the risk of climate change. In that case the court relied on the UNFCCC, stating that although the problem is global, each state has a duty to do its part, a standard that parties to the UNFCCC, including the Netherlands, have acknowledged. This criterion was established on the growing belief that, given climate change and human rights responsibilities, governing states must provide their equitable contribution to global mitigation, along with the principle of "do no harm." This principle imposes an obligation on states to prevent actions within their jurisdiction that result in transboundary environmental damage. (Setzer, Byrnes, 2020). In the Polish cases discussed above, the plaintiffs also invoked the “fair share” principal analysis for Poland. Perhaps the court will apply a similar interpretation here as well.

Climate change law is inherently reactive, making it challenging to establish the human rights consequences of climate change since it may take a considerable amount of time after an environmental breach for its effects to materialize. Claims of human rights infringements are typically established promptly after actual harm has transpired. In environmental law, however, the precautionary principle takes into account possible future harm (Yoshida, Setzer, 2020). In the aforementioned cases, the plaintiffs contend that they are already experiencing the consequences of climate change, which are affecting their place of habitation.

3. Conclusion

In the light of the analysis presented above, it should be pointed out that the law on climate change does not constitute a separate branch of normative law in the Polish legal system, but rather manifests the features of an interdisciplinary issue, which derives its foundations from environmental law and international agreements. Mitigation of climate change takes place primarily through emissions management, and the law of emissions reduction overlaps with the law on air protection.

As a result of polish climate policy, 5 separate lawsuits were filed in 2021 in the Polish district courts, in which the plaintiffs seek to establish the state's liability resulting from the public authorities allowing more than a “fair share” of greenhouse gas (GHG) emissions from Polish territory. The plaintiffs contend that the actions of the defendants have resulted in a

violation of their right to enjoy environmental values, which includes the right to reside in stable and safe climatic conditions, good health, respect for their place of habitation, the right to privacy, and respect for family life.

Rights-based climate change litigation in Polish court will face challenges that are similar to those encountered in environmental law cases in general - like barriers to access to justice or the legal culture to deal with these issues. In addition, Polish legislation lacks a provision that explicitly states that "everyone has the right to a clean environment". Due to the lack of direct inclusion of the right to a healthy environment in Polish legislation, it is also difficult to enforce the authorities to actively protect this right. Polish law lacks regulations that would directly enable citizens to demand that the authorities introduce general environmental protection measures and consequently impose sanctions on the authorities for inaction in this respect. Another key challenge is the attribution of climate responsibility to the state, and the precautionary principle applied in environmental law, which takes into account potential future damage, rather than, as in the case of human rights violations, claims being brought immediately after actual damage has occurred.

An analysis of the state of Polish climate change law and policy in the context of strategic challenges and rights-based climate change litigation indicates that it is unlikely that the claims made by the plaintiffs in the context of reducing greenhouse gas emissions will be met. Nevertheless, it is possible for the court to find a violation of human rights by state action.

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