

Stowarzyszenie Pracownia na rzecz Wszystkich Istot - Association Workshop for All Beings
represented by Magdalena Bar, attorney-at-law

2 April 2024

Ms. Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division

Re: case ACCC/C/2018/158 (Poland) - answers by the Communicant to the Committee's questions

Dear Ms. Marshall,

In response to your letter of 19 February 2024, I present below answers by the Communicant to the Committee's questions in case ACCC/C/2018/158.

5. Please clarify what, if any, barriers exist for individuals or non-governmental organizations (NGOs) to have access to justice to challenge plans contained in regulations before the Constitutional Court. Please explain why, in your view, these barriers do not meet the requirements of article 9 (3) of the Convention

1. Regulations adopted by Ministers may be challenged before the Constitutional Tribunal by way of a constitutional complaint.

2. However, the **conditions to lodge such complaint are strict** which means that the **circle of persons entitled to the complaint is very limited**.

3. According to Article 79 para 1 of the Constitution:

*"Anyone **whose constitutional freedoms or rights have been violated** has the right, under the principles laid down in Act¹, to lodge a complaint with the Constitutional Tribunal concerning the*

¹ This part refers to an Act precisising the rules of proceedings before the Constitutional Tribunal, i.e. the Act of 30 November 2016 on the organisation and procedure before the Constitutional Tribunal; cons. text: Journal of Laws 2019, item 2393 (Ustawa z dnia 30 listopada 2016 r. o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym; t.j. Dz. U. z 2019 r. poz. 2393).

*compliance with the Constitution of an Act or other **normative act on the basis of which a court or public administration body has made a final decision on his/her freedoms or rights or on his/her obligations set out in the Constitution**".*

4. According to Article 77 of the Act of 30 November 2016 on the organisation and procedure before the Constitutional Tribunal:

1. A constitutional complaint may be lodged after exhausting the legal procedure, insofar as such procedure is provided for, within 3 months from the date of delivery to the complainant of a final judgment, final decision or other final decision.

2. A constitutional complaint shall be examined by the Tribunal on the principles and in the manner provided for the examination of requests concerning the compliance of normative acts with the Constitution, ratified international agreements or Acts.

NGOs

5. The condition to demonstrate a violation of one's "constitutional freedoms or rights" (as set by Article 79 of the Constitution) means that **an NGO is never entitled to lodge a constitutional complaint** as it acts in a public interest and not exercises or enforces its own rights. Consequently an NGO cannot prove that its own 'rights' or 'freedoms' are violated.

There are no specific provisions granting NGOs a right to lodge the complaint.

Private persons

6. The conditions set by Article 79 of the Constitution:

(a) to demonstrate a violation of one's "constitutional freedoms or rights" and

(b) to prove that a final decisions / verdict on one's rights or freedoms was made on the basis of a normative act (i.e. a Regulation) subject to the complaint

mean that in order to lodge a constitutional a person concerned has to:

- obtain a final verdict or a final administrative decision deciding on this person's constitutional rights or freedoms,
- the verdict or decision has to be based on a normative act (Minister's Regulation) subject to complaint;
- the constitutional complaint shall concern the compliance of that normative act with the Constitution.

7. Although the plans adopted by the way of ministerial Regulations subject to the current proceeding before the Committee may influence individual administrative decisions, it seems unlikely that any such decision or court's verdict deciding on someone's rights or freedoms may be regarded "issued on the basis" of a given plan.

8. This means that **it is impossible to identify any situation in which a private person would be entitled to lodge a constitutional complaint.**

6. Please provide your comments on the Party concerned position that each of the following plans are acts of generally applicable law, falling within article 8 of the Convention, and are not acts by public authorities under article 9 (3) of the Convention:

- (a) Noise management action plans;**
- (b) River basin management plans;**
- (c) Flood risk management plans;**
- (d) Drought management plans;**
- (e) Natura 2000 area protection plans;**
- (f) National park protection plans.**

Plans (b)-(f)

(re plan (a) - see below)

9. The plans listed above in subpoints (b)-(f) are to be adopted in a form of Regulations by relevant Ministers (the Minister responsible for water management or the Minister responsible for environment, respectively).

10. It is true that Regulations adopted by Ministers are acts of generally applicable law, as according to Article 87 of the Polish Constitution the sources of law in the Polish legal order are:

- a) the Constitution,
- b) Acts (this point refers to the Acts/Laws adopted by the Parliament),
- c) ratified international agreements
- d) **Regulations** (this point refers to the Regulations issued by the Ministers such as those discussed in this letter),
- e) Acts of local law (binding on the territory of activity of the authorities that established them)².

11. However, being ‘acts of generally applicable law’ does not exclude the Regulations from the scope of Article 9(3) of the Convention.

This was confirmed by the Committee in its findings in case ACCC/C/2011/58 (Bulgaria). In this case the Committee was deciding whether Article 9(3) covers local spatial plans, which, under Bulgarian law, were binding acts. The Committee decided that such plans were subject to Article 9(3) (findings in case ACCC/C/2011/58, para 64).

Also under Polish law, local spatial plans (adopted at the municipality level) are ‘Acts of local law’³ and as such are ‘acts of generally applicable law’ listed by Article 87 of the Constitution (see para 10(e)

² The full text of Article 87 of the Constitution reads:

1. *The sources of generally binding law of the Republic of Poland are: Constitution, Acts, ratified international agreements and Regulations.*

2. *The sources of generally binding law of the Republic of Poland are, in the area of activity of the authorities that established them, Acts of local law.*

³ Article 14(8) of the Act on Spatial Planning and Management of 27 March 2003 reads: “The local [spatial] plan is an Act of local law

above). Yet, the Party concerned did not raise analogical arguments against them being covered by Article 9(3).

12. As far as Article 8 of the Convention is concerned, **the Communicant's position is that these plans fall under Article 7 rather than Article 8 of the Convention.**

13. According to the case law of the Committee and according to the "Aarhus Convention: An Implementation Guide":

"a typical article 7 decision (plan or programme) has the legal nature of

(a) a general act (often adopted finally by a legislative branch),

(b) initiated by a public authority,

(c) which sets, often in a binding way, the framework for certain categories of specific activities (development projects), and

(d) which usually is not sufficient for any individual activity to be undertaken without an individual permitting decision".

(see findings in case ACCC/C/2013/88, Kazakhstan, para 125; findings in case ACCC/C/2014/105, Hungary, para 127 and Aarhus Convention: An Implementation Guide, p. 124).

14. The plans listed under (b)-(f) above fulfill all these conditions.

Fulfillment of conditions (a) and (b) is obvious. As it will be presented below, these plans fulfill also condition (c). Also, they are not sufficient for any individual activity to be undertaken which means that they fulfill condition (d).

15. According to Article 318(1)(22) of the Water Law Act, **river basin management plans** shall include i.a.:

"a list of projects and activities which may cause failure to achieve good water status or deterioration in good water status and which meet the conditions referred to in Article 68, together with a justification for meeting those conditions".

[this provision refers to the situation regulated by Article 4(7) of the Water Framework Directive, i.e. to the projects and activities authorised to be carried out despite their potential adverse impact on waters].

According to Article 318(4) of the Water Law Act, the list of the aforementioned projects and activities shall include: (1) names of the entities who will implement the projects or activities; (2) justification of the necessity to implement the project or activity, taking into account the expected effects of their implementation; (3) analysis of estimated costs and benefits of the planned project or activity.

The above cited provisions mean that the river basin management plans set framework for certain projects.

16. According to Article 172(4) of the Water Law Act, **flood risk management plans** shall include i.a.:

"a catalogue of measures to achieve the objectives of flood risk management, including the measures referred to in Article 165".

And Article 165(1) lists, among others, the following measures:

- “1) shaping the spatial development of river valleys or floodplains, in particular areas of special flood hazard;
- 2) rational retention of water and use of flood control structures, as well as control of water flows;
- 4) conservation, creation and restoration of water retention systems;
- 5) construction, reconstruction and maintenance of flood control structures”.

The measures listed in Article 165 encompass “certain categories of specific activities (development projects)” as referred to in the Committee’s case law. Thus, by indicating what projects and where should be carried out the flood risk management plan sets framework for certain projects.

17. According to Article 183(2)(2) of the Water Law Act, **drought management plans** shall include i.a.:
“proposed construction or reconstruction of water facilities”.

Again, this means that these plans set framework for certain projects.

18. According to Article 29(8) of the Nature Protection Act, **Natura 2000 area protection plans** shall include i.a.:

3) conditions for the maintenance or restoration of the favourable conservation status of the Natura 2000 site, the maintenance of the integrity of the Natura 2000 site and the coherence of the Natura 2000 network, relating in particular to:

(...)

b) **spatial development**, including in particular **areas for the location of buildings** which can be built without harming the Natura 2000 area, **technical and communication infrastructure, tourist and educational infrastructure, as well as areas which should be afforested and areas which should be excluded from afforestation**,

c) the **development of maritime areas**,

(...)

f) inland flowing surface waters in which the migration of fish and other aquatic organisms should be preserved or restored;

4) **directions to the changes in the existing general spatial plans, local spatial plans, regional spatial plans and spatial plans of internal sea waters**, territorial sea and the exclusive economic zone concerning elimination or reduction of internal or external threats, if these changes are necessary to maintain or restore the proper condition of protection of natural habitats and plant and animal species for which the area of Natura 2000 was designated;

5) determination of **protective measures** for maintaining or restoring the proper condition of protection of the objects of protection of Natura 2000 area, indicating the entities responsible for their implementation;

(...).

According to Article 29(9) of the Nature Protection Act, the 'protective measures' mentioned above may encompass i.a.:

(...)

3) the **location of facilities** and equipment serving the conservation objectives of the Natura 2000 site;

(...)

6) **conditions for development of the areas** and their use, including, as appropriate, indication of:

a) areas designated for development,

b) location of technical and communication infrastructure

c) location of tourist and educational infrastructure.

The scope of the Natura 2000 area protection plans determines that these plans set framework for certain projects.

19. According to Article 20(3) of the Nature Protection Act, **national park protection plans** shall include i.a.:

(...)

6) indication of places where manufacturing, commercial and agricultural activities may be carried out;

7) indication of nature protection requirements necessary to be taken into account in the **general spatial plans, local spatial plans, regional spatial plans and spatial plans of internal sea waters, territorial sea and the exclusive economic zone** aimed at elimination or reduction of internal or external threats.

The scope of national park protection plans determines that these plans set framework for certain projects.

20. In addition to the above arguments it shall be emphasized that according to the Polish law the development of all the aforementioned plans requires public participation procedure regulated in line with Article 7 of the Convention.

21. According to Article 19(1a) and Article 29(6) of the Nature Protection Act, the authority drawing up the draft of the national park protection plan or the Natura 2000 area protection plan, respectively, shall ensure the possibility of public participation, according to the principles set by the EIA Act⁴, in the proceedings aimed at drawing up of the draft plan.

Chapter III of the EIA Act sets regulations on public participation: (a) regarding individual decisions (implementing Article 6 of the Convention) and (b) regarding documents (implementing Article 7 of the Convention and the SEA Directive.)

⁴ Act of 3 October 2008 on access to environmental information, public participation in environmental protection and environmental impact assessments, cons text: O.J. of 2023 item 1094 as amended (Ustawa z dnia 3 października 2008 r. o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko, t.j. Dz. U. z 2023 r. poz. 1094 z późn. zm.)

22. The Water Law Act also foresees developed public participation procedures in the course of drafting of the river basin management plans, flood risk management plans and drought management plans.

23. Article 319(4)-(5) of the Water Law Act transposes Article 14 of the Water Framework Directive and states:

4. Ensuring the active participation of all interested parties in achieving environmental objectives (...) in particular in the development, review and update of the **river basin management plan**, the minister responsible for water management shall make public, under the rules and in the procedure set by the provisions of the [EIA Act], for comments:

1) a timetable and work programme for the preparation of the plan, including a list of measures to be introduced through consultation, at least 3 years before the start of the period to which the plan applies;

2) an overview of the significant water management issues identified for the river basin district at least 2 years before the start of the period to which the plan relates;

3) a draft river basin district management plan at least one year before the start of the period to which the plan relates.

5. Within 6 months from the date of public disclosure of the documents referred to in paragraph 4, the interested parties may submit written comments on the findings of these documents to the minister responsible for water management.

24. Article 173(6) and (8)-(9) of the Water Law Act transposes Article 10 of Directive 2007/60/WE on the assessment and management of flood risks and states:

6. The minister responsible for water management, ensuring the active participation of all interested parties in achieving the objectives of flood risk management, in particular in the preparation, review and updating of **flood risk management plans**, shall make available to the public, under the rules and in the procedure set by the provisions of the [EIA Act], for comments, the draft flood risk management plans at least one year before the beginning of the period to which the plans relate.

(...)

8. Within 6 months from the date of public disclosure of the draft flood risk management plans, interested parties may submit written comments on the findings of the drafts of these plans to the minister responsible for water management.

9. With regard to the draft flood risk management plans from the sea, including internal sea waters, the minister in charge of water management shall agree the manner and scope of taking into account the comments with the minister in charge of maritime economy.

25. Article 183(3) and (5) of the Water Law Act states:

3. The minister responsible for water management, ensuring the active participation of all interested parties in the preparation and updating of the **drought management plan**, shall make available to the public, under the rules and in the procedure set by the provisions of the [EIA Act], for comments:

1) the schedule and programme of works related to the preparation of the draft drought plan;

2) the draft drought plan at least one year before the beginning of the period to which the plan applies.

5. Within 6 months of the date on which the documents referred to in paragraph (3) are made public, the interested parties may submit to the minister responsible for water management their comments on the arrangements contained in those documents.

26. The above described provisions of Polish law mean that the Polish legislator decided to subject these plans to the requirements of Article 7 of the Convention.

27. Notwithstanding the position set out above, it must be stressed that **even if the plans in question fell under Article 8 (and not Article 7), this would still not mean that they were excluded from the scope of Article 9(3).**

No provision of the Convention stipulates that the acts covered by Article 8 are excluded from Article 9(3). The Party concerned does not indicate such a provision neither.

28. Moreover, it must be stressed that the choice of a given plan's legal form lays with a Party to the Convention.

Exempting the ministerial Regulations from the requirements of Article 9(3) could lead to the effectiveness of the Convention's provisions being jeopardised and to the Parties circumventing its requirements by choosing a Regulation as the legal form of a plan in order to avoid application of Article 9(3).

Thus, also from this point of view it is justified to consider these plans as subject to access to justice requirements of Article 9(3) of the Convention.

Plan (a)

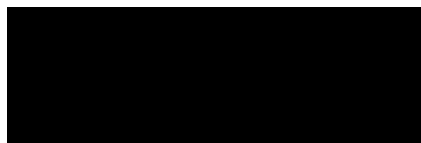
29. According to Article 119a(9) of the Environmental Protection Law Act (EPLA)⁵, **noise management action plans are to be adopted by way of a resolution of a voivodship council** (self-governmental authority on a regional level).

EPLA does not specify that these plans are 'acts of local law'. Thus, **they are not 'acts of generally applicable law'**.

30. According to Article 119a(5) of EPLA, noise management action plans are subject to public participation in line with Article 7 of the Convention. Thus, **they are not subject to Article 8.**

31. It is unclear why the Party concerned mentioned these plans next to the plans adopted by the way of Regulations by Ministers. One may guess it was a mistake.

Magdalena Bar



⁵ Act of 27 April 2001 - Environmental Protection Law; cons. text O.J. of 2024 item 54 (Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska; t.j. Dz. U. z 2024 r. poz. 54)