

A LEGAL MODEL OF AIR PROTECTION IN POLAND – SELECTED ISSUES / Ewa Radecka

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Abstract: *This article attempts to discuss selected elements of a legal model of air protection in Poland synthetically in order to provide Slovak readers with some overview of the same, which may, subsequently, become the starting point for an international scientific discussion in this field. The author firstly describes the background of the present poor quality of air in Poland, and afterwards presents a brief analysis of reasons why the air should be understood as a common good subject of state protection. Eventually, the author classifies air protection instruments in Poland and discusses the selected ones.*

Key words: *Polish environmental law; air protection; energy policy; low emissions*

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1. INTRODUCTION

The importance of air protection, especially in the context of the underscoring climate change in a global perspective, is undisputed. This issue is even more important from the research perspective, taking into account that there are legal instruments in Poland (every year greater and greater) intended for such protection, however, they seem to be completely ineffective, which has been pointed out in various reports and datasets.¹

¹ Various sources should be listed here:

1) the WHO compilation, which shows that the list of 50 most polluted cities in Europe starts with two Bulgarian cities (Vidin and Dimitrovgrad), although as many as 36 cities out of 50 included in this dataset are in Poland (see Myllyvirta & Howard, 2018);

2) the decision of the Court of Justice of the European Union (CJEU, judgment of 22 February 2018, European Commission v Republic of Poland, C-336/16, ECLI:EU:C:2018:94 concerning air protection in Poland) states a failure of a Member State to fulfil its obligations;

3) Environmental Implementation Review 2019, Country Report - Poland specifying that "there has been no progress on improving air quality. Limit values for particular matter, benzo(a)pyrene and nitrogen oxides continue to be exceeded" (see *The EU Environmental Implementation Review 2019, Country Report - POLAND*, 2019);

4) the report of the Supreme Audit Office, which shows that a) the scale of pollution proves the ineffectiveness in fulfilling the obligations incumbent on public authorities; b) public authorities are not sufficiently active in fighting for clean air (see Supreme Audit Office, 2018);

5) the report of the Polish National Health Fund, which shows that "a likely cause of increased mortality in 2017 is an abrupt deterioration of air quality, which may result in rapid health consequences in particularly vulnerable people, including cardiovascular system problems" (see Polish National Health Fund, n.d.);

It should also be remembered that the current poor quality of air in Poland is the result of numerous circumstances that are strongly intercorrelated. A number of various factors contribute to such quality of air in Poland and they include, for example a significant dependence² on the national economy on fossil fuels,³ low use of energy from renewable sources⁴ (in particular wind energy),⁵ the so-called low emission⁶ (sometimes strongly associated with energy poverty)⁷ as well as low use of e-mobility.⁸

However, going back to the topic of the wide range of legal instruments that theoretically serve air protection, the most critical instruments will be presented below, while considerations regarding the Polish definition of environmental and air protection will represent the starting point.

2. AIR AS A COMMON GOOD

Air, which is a part of the environment,⁹ is subject to protection, which is understood as taking or abandoning actions enabling preservation or restoration of natural balance and consists in particular of:

- a) reasonable shaping of the environment and environmental resources management in accordance with the principle of sustainable development,

⁶ Air quality in Europe – 2020 report - the greatest impact on premature deaths, which is attributed to PM 2.5, is recorded, among others, in Poland. Moreover, underestimation in concentrations in 2009 is noticed (see e.g. footnote 62 of report of the European Environment Agency, 2020).

² According to the Energy Policy of Poland until 2040 (Notice of the Minister of Climate and Environment of March 2, 2021, Monitor Polski of 2021, item 264; hereinafter: EPP 2040) the share of coal in the generation of electricity from 2030 should be no more than 56%.

³ Decarbonisation – also in the context of air protection – should an important long-term goal. The decarbonisation process, in particular for the Upper Silesia region (currently the largest mining centre in Europe), will have to imply a very profound energy, economic and social transformation which must be based on deliberate and comprehensive “just transition” plan agreed with the society.

⁴ Poland was obliged to achieve in 2020 at least 15% share of energy from renewable sources in the gross final consumption, including at least 10% share of renewable energy used in transport [see Article 3 of Directive 2009/28/EC of April 23, 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, pp. 16–62)]. According to data of the Central Statistical Office, the share of renewable energy in 2019 reached 12.18% in gross final energy consumption (see Główny Urząd Statystyczny, 2020).

⁵ For more detailed information see Radecka & Nawrot (2019).

⁶ Understood as emission of combustion products of solid, liquid and gaseous fuels to the atmosphere from emission sources (emitters) located at a height of not more than 40 m. There are different types of emission: transport emission, emission resulting from heat production for central heating and domestic hot water as well as industrial emission. Combustion products contributing to the occurrence of low emission include, among others, the following gases: carbon dioxide CO₂, carbon oxide CO, sulphur dioxide SO₂, nitrogen oxides NO_x, polycyclic aromatic hydrocarbons, e.g. benzo(a)pyrene and dioxins as well as heavy metals (lead, arsenic, nickel, cadmium) and suspended particulate matter PM10, PM2.5. (Kaczmarczyk et al., 2015, p. 144).

⁷ Energy poverty consists of incineration of waste, sludge and flotation concentrates, usually in buildings with a low energy performance.

⁸ In one of the versions of the EPP 2040 (as of January 29, 2020), greatly ambitious goals were assumed, i.e. reaching 1 million electric vehicles in 2025. Unfortunately, the starting point for the preparation of the then version of EPP 2040 (data from August 2019) was 6672 electric passenger cars (see PSPA, 2019). The mentioned 1 million of vehicles results from the Electromobility Development Plan, to which the final version of EPP 2040 refers (see Ministerstwo Energii, n.d.).

⁹ According to Article 3(39) of the Environmental Protection Law Act of April 27, 2001 (uniform text, Journal of Laws of 2020, item 1219 as amended; hereinafter EPL), “environment” shall mean the totality of natural elements, including those transformed as a result of man’s activity, in particular the land surface, minerals, waters, air, animals, plants and climate as well as interactions between such elements.

- b) counteracting the pollution,¹⁰
- c) restoration of natural elements to their proper status (see Article 3 (39) of the EPL).

Undoubtedly, environmental protection is the responsibility of the state. In this respect, we should refer at least to Article 5 or Article 74 of the Constitution of the Republic of Poland of April 2, 1997.¹¹

According to Article 74(1) of the RP Constitution, the objective of public authorities with regard to environmental protection is to ensure ecological safety, understood in the doctrine as *"the state of stable and undisturbed coexistence of a human being and the environment, related to the fulfilment of basic life needs and it guarantees respect for the subjective rights resulting from the right to the environment"* (Korzeniowski, 2012, p. 67). It is a state in which *"the levels of a nuisance to the environment (especially in the form of pollution), as specified in legal regulations, will not be exceeded during the ordinary exploitation of environmental resources"* (Korzeniowski, 2017, p. 256).

The second of the abovementioned provisions, i.e. Article 5 of the RP Constitution specifies that 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 principles of sustainable development. The definition of the later term is specified in Article 3(50) of the EPL, according to which "sustainable development" shall mean *"a socio-economic development which integrates political, economic and social actions, while preserving the natural equilibrium and the sustainability of basic natural processes, with the aim of guaranteeing the ability of individual communities or citizens, of both the present and future generations, to satisfy their basic needs"*. This development, as it results from the above-mentioned definition, is the key concept relating to the economic and social development (from the global to local level) and which symptomatically does not only refer to environmental issues, but it also takes into account the social and economic concerns. In this context, the idea of intergeneration of justice or the integration of policy, economy and social activities with the basic environmental requirements are equally important (see e.g. Bukowski, 2009). Moreover, it is necessary to underline the significance of sustainable development within the whole air protection idea, while emphasizing that sustainable development constitutes an arc ensuring compatibility of actions taken in the field of air protection.

The above-specified legal framework provides the basis for treating the environment, including air, which is a part of the environment, as a protected good, and its protection as one of the basic values that should be guaranteed by the legal system.

3. SELECTED INSTRUMENTS OF AIR PROTECTION IN POLAND

Generally, the instruments of air protection in Poland can be divided as follows:

- a) regulatory, including subgroups of instruments of the following nature:
 - individual (e.g. a permit for releasing pollutants into the air¹² or a greenhouse gas emission permit),¹³

¹⁰ According to Article 3(49) of the EPL, "pollution" shall mean emissions, which may have harmful effects on human health or the quality of the environment, result in damage to material property, impair the aesthetic values of the environment or interfere with other legitimate uses of the environment.

¹¹ Journal of Laws No. 78, item 473 as amended; hereinafter: RP Constitution.

¹² Cf. Article 187 et seq. of the EPL.

¹³ Cf. Article 53 et seq. of the Act on the management system of emission of greenhouse gas and other substances (uniform text Journal of Laws Of 2020, item 1077 as amended).

- general (so-called anti-smog resolutions),¹⁴
- b) planning (i.e. at the national/ central: National Air Protection Programme,¹⁵ National air pollution control system¹⁶ or at the local/province level: short-term action plan);¹⁷
- c) economic (including fees for releasing gases and particulate matter into the air¹⁸ or administrative fines).¹⁹

An interesting issue, both for Polish and Slovak readers, could be the so-called anti-smog resolutions (general regulatory instrument) or planning instruments.

The first of the aforementioned instruments, i.e. anti-smog resolutions, are adopted by sejmiki (the regional councils) by way of a resolution in order to prevent a negative effect on human health or environment, implement restrictions or prohibitions in installations where fuel combustion takes place (Article 96(1) of the EPL).²⁰ The draft of the resolution prepared by the voivodship executive board (zarząd województwa) is subject to the procedure of issuing an opinion of the competent commune head (wójt), mayors (burmistrz) or presidents of cities (prezydent miasta) as well as staroste (starosta).

This resolution obligatory specifies:

- 1) boundaries of the area where restrictions or prohibitions are implemented,²¹
- 2) types of entities or installations for which restrictions or prohibitions are implemented;
- 3) types or quality of fuels approved for use, or fuels the use of which is prohibited in the area, or technical parameters or technical solutions or emission parameters of the fuel combustion installations, approved for use in this area.

Article 96(7) of the EPL also specifies optional elements of this resolution.²²

This act does not apply to installations for which an integrated permit, or a permit for releasing gases or dust into the air, or a notification is required.

¹⁴ See Article 96 of the EPL and e.g. resolution of the Sejmik [*Regional Council*] of Silesia Voivodship of April 7, 2017, no. V/36/1/2017 [online], available at: <https://powietrze.slaskie.pl/content/uchwala-sejmiku-nr-v3612017> (accessed on 04.05.2021).

¹⁵ See Article 91c of the EPL and the National Air Protection Programme [online], available at: <https://powietrze.gios.gov.pl/pjp/content/show/1000607> (accessed on 04.05.2021).

¹⁶ Resolution no. 34 of the Council of Ministers of April 29, 2019 Monitor Polski, item 572.

¹⁷ Cf. Article 92 of the EPL and the resolution of the Sejmik of Silesia Voivodship of December 18, 2017 r., no. V/47/5/2017111.

¹⁸ See Article 272 et seq. of the EPL.

¹⁹ See Article 298 et seq. of the EPL.

²⁰ It should be emphasized that the provision on anti-smog resolutions has recently evolved from a one-sentence regulation to an extensive formula in the present form. See in historical terms more in Olejarczyk (2015) and in Olejarczyk & Moźdzyn (2015).

²¹ These resolutions may cover the area of only one voivodship. Not all Polish voivodships requiring such type of legislative intervention have such acts of local law. A good example of the above is the Świętokrzyskie voivodship, where the permissible standards of the concentration of suspended particular matters PM 2.5 and PM 10 are exceeded many times a year. These levels are specified by the Regulation of the Minister of Environment of August 24, 2021 on the levels of certain substances in the air (Journal of Laws of 2012, item 1031 as amended).

²² Such as:

- 1) the manner or purpose of using fuels that is subject to the restrictions specified in the resolution;
- 2) period of validity of restrictions or prohibitions during a year;
- 3) obligations of entities subject to the resolution to the extent necessary to supervise over the implementation of the resolution.

It should also be emphasized that the Environmental Protection Law Act provides for criminal liability for failure to comply with the restrictions, orders or prohibitions specified in the said resolution of the sejmik. A person committing these types of acts is subject to a fine²³ that, according to the Code of Petty Offenses,²⁴ shall range between PLN 20 and PLN 5,000 (Article 24).

The practical application of the anti-smog resolutions in the fight for the appropriate quality of air is increasing every year,²⁵ and not only in the context of an increased number of adopted resolutions, but also the number of audits and inspections carried out by authorized bodies and also penalties imposed on this basis (see Sumara, 2018). As an example, the anti-smog resolution for the Silesia Voivodship can be mentioned, which from September 1, 2017 (in principle)²⁶ prohibits combustion of the following products in installations:²⁷

- lignite and fuels produced with its use (e.g. briquettes);
- sludge and floto-concentrates as well as mixtures produced with their use;
- coal fuels with a mass fraction of less than 3mm exceeding 15%,
- biomass with humidity in the working condition over 20%.

The types of installations for which the restrictions and prohibitions are implemented with regard to their operation include the installations in which solid fuels are burned, in particular a boiler, fireplace and stove, if:

1. they provide heat to the central heating system, or
2. they give off heat, or
3. they give off heat and transfer it to another medium.

The second type of the instruments includes planning instruments. It is impossible to describe all of them, even in synthetic terms. Nevertheless, it is worth mentioning that recently, also in this scope and as a result of the necessity to adapt to the EU requirements, the catalogue of instruments has been extended, at least in terms of improving the quality of air (i.e. the National Air Pollution Control System).²⁸

It would seem that these are immensely significant solutions with a system feature, which could result, for instance, from the principle of planning and programming which is the basis of Article 8 of the EPL (according to which, it is required to take into

²³ Additionally, it should be mentioned that this provision has only recently found its practical application. Previously, there was a problem with specifying which authorities are entitled to impose fines for this "environmental" offense.

²⁴ The Code of Petty Offenses Act of May 20, 1971 (uniform text Journal of Laws of 2019, item 821 as amended).

²⁵ In 2014 there were only two resolutions adopted (for Małopolskie and Silesia Voivodships). At present, the following resolutions can be listed:

- of the Sejmik of Małopolskie Voivodship of January 23, 2017, no XXXII/452/17,
- of the Sejmik of Silesia Voivodship of April 7, 2017, no V/36/1/2017,
- of the Sejmik of Mazowieckie Voivodship of October 24, 2017, no 162/17,
- of the Sejmik of Wielkopolskie Voivodship of December 18, 2017, XXXIX/941/17,
- of the Sejmik of Lower Silesia Voivodship of November 30, 2017:
 - XLI/1405/17 for the Wrocław Commune,
 - XLI/1406/17 for health resorts in Lower Silesia,
 - XLI/1407/17 for the remaining part of the voivodship.

²⁶ A number of exceptions as to the validity period of the resolution have been implemented under Article 8(2).

²⁷ There is no definition of "installation" in the resolution, thus it refers to the legal meaning of this concept resulting from the Environmental Protection Law Act, i.e. "installation" shall mean a stationary unit, a set of stationary technical units (...), building structure which is not a technical unit (or a set of technical units).

²⁸ Adopted to transpose Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC (OJ L 344, 17.12.2016; hereinafter referred to as NEC).

account the principles of environmental protection and sustainable development in policies, strategies, plans and programmes). Unfortunately, nothing could be further from the truth. An in-depth analysis often leads to a conclusion that various types of documents/acts concerning air protection are not consistent with each other, some solutions are random and that the state's ability to achieve its goals is overestimated (see Radecka, 2020). The inability to draw conclusions from the mistakes made is also visible. A clear example of which is the fact that the National Air Pollution Control Programme does not enjoy the status the features of generally applicable law. This, in turn, means that such documents can only have an impact on the internal level. Pursuant to Article 93(1) of the RP Constitution, resolutions of the Council of Ministers (in this form the National Air Pollution Control Programme was adopted – note made by ER) shall be of an internal character and shall bind only organizational units subordinate to the organ which issues such acts.²⁹ It is also noticeable that the obligations and responsibilities related to air protection have been clearly assigned from the central level to the voivodship level, for example, the abovementioned anti-smog resolutions and short-term actions plans. Such a bold statement - about shifting the burden of responsibility for air quality to the local level - could be made, taking into consideration the issues already raised above. It is also not indifferent that the government program „Clean Air”³⁰ is ineffective.³¹

4. CONCLUSION

Protection of air, which is a common good, should be guaranteed by the legal system. However, it cannot be a fictitious protection based only on numerous regulations without any sanctions. An effective and successful air protection should not only consist of implementation of new legal regulations – we have enough of these in Poland already. It should be based on the development of efficient regulations applicable in specific social and economic realities, assuming extensive/strong integration and cooperation of actions taken between the authorities (mutual merging of planning within that scope). It would be worth considering an amendment to the existing legislative solutions so that the adopted regulations could become a real weapon in the fight for good air quality.

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²⁹ See Article 111 of the Nature Conservation Act of April 16, 2004 (uniform text Journal of Laws of 2020, item 55 as amended) and the program for the conservation and sustainable use of biological diversity (approved under the resolution of the Council of Ministers).

³⁰ The aim of the “Clean Air” programme is to reduce the emission of harmful substances (from heating single-family houses with the use of obsolete sources and low-quality fuel) into the atmosphere. This program offers co-financing for the replacement of old and ineffective solid fuel heating appliances with modern heat sources that meet the highest standards as well as for the accompanying building thermomodernization works (see more in ‘Program Czyste Powietrze’, 2021).

³¹ This state of facts illustrates, for instance, a small percentage of beneficiaries participating in the programme, problems with obtaining a loan to finance the project as well as the remarks raised by the European Committee (cf. Radecka, 2020).

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