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ARTICLE

Special Issue: Strategic Litigation in EU Law

Strategic Litigation in a Time of Populism: Poland's Experience

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Abstract

For strategic litigation, the existence of independent judicial institutions is a prerequisite. In this Article, based on the case of Poland, I analyze what happens when some domestic judicial institutions are weakened and how this affects the ability of different stakeholders to engage in strategic litigation. I argue that strategic litigation was an important tool used by civil society and crucial for countering democratic backsliding in Poland in 2015–2023. In addition to traditional actors involved in strategic litigation in Poland, new ones have joined—such as the Human Rights Commissioner (the "Ombudsman") or increased their involvement—such as corporate actors. Also, the prosecution office, controlled by the populist government, became active in litigation conducted by right-wing NGOs. Paradoxically, the rule of law crisis also resulted in the popularization of strategic litigation before the Court of Justice of the European Union and some domestic courts, which began to apply the Constitution directly.

Keywords: strategic litigation; civil society; judges; legal practice; Poland

A. Introduction

Strategic or public interest litigation is an important tool for human rights enforcement. Over the years, strategic litigation has led to numerous changes in law and practice of its application around the world. Therefore, it cannot be a surprise that this tool also gained popularity in Central and Eastern Europe after the collapse of communism. Crucial to the development of strategic litigation in this part of the world was, on the one hand, the knowledge, skills, and financial resources offered generously by donors from Western Europe and the United States of America. On the other hand, this was possible due to the creation—or restoration of independence—of judicial authorities to which cases could be brought. A special role was played here by the newly established Constitutional Courts[1] and—after ratification by the countries of the region European Convention on Human Rights—by the European Court of Human Rights ("ECtHR").[2]

The process of dynamic advancement of strategic litigation took place under conditions in which liberal democracy with its institutions was developing in Central and Eastern Europe.

[1]*See generally* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2014).

[2]For discussions of the development of strategic litigation in Central and Eastern Europe, see generally James A. Goldston, *Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges*, 28 HUM. RTS. Q. 492 (2006); Edwin Rekosh, *Constructing Public Interest Law: Transnational Collaboration and Exchange in Central and Eastern Europe*, 13 UCLA J. INT'L L. & FOREIGN AFFS. 55 (2008); Mihaela Şerban, *Stemming the Tide of Illiberalism? Legal Mobilization and Adversarial Legalism in Central and Eastern Europe*, 51 COMMUNIST & POST-COMMUNIST STUD. 177 (2018).

In recent years, however, populists have begun to rise to power, particularly in Poland and Hungary,[3] dismantling the domestic system of institutional guarantees to protect human rights.[4] This justifies the research question of how the process of dismantling democracy and departure from rule-of-law standards affected strategic litigation.

To answer this question, I will analyze the case of Poland. The choice of Poland as a case study is justified by the fact that during the period of populist rule in this country—between 2015 and 2023—and despite various actions aimed at weakening the judiciary's power, legal mobilization[5] played some role in counteracting the rule of law crisis. In this Article, based on an analysis of case law, literature, and participatory observation,[6] I seek to identify the key trends that can be observed in the strategic litigation of the populist period, or more specifically, public-interest litigation resulting from civil society and try to establish reasons why they occurred. In particular, I will investigate what kind of actors have been involved in strategic litigation during the populist period in Poland and what judicial venues they used.

The Article is structured as follows. First, in Section B, I will identify the main features of strategic litigation development in Poland until the rule of law crisis in 2015 to establish the "zero point" at which strategic litigation was when the rule of law crisis began. Then, in the second part (Sections C–E), I will identify the key changes in the strategic litigation carried out in the illiberal state (this is between 2015 and 2023). Here, I will focus, in particular, on the judicial venues employed in strategic litigation (Section D), as well as on the actors involved in strategic litigation (Section E). This Article concludes with a response to the research question and remarks regarding the foreseeable future of strategic litigation in Poland.

B. Birth and Growth of Strategic Litigation in Poland

The said analysis, however, should be preceded by some remarks on the conceptualization of the crucial concept for this Article: strategic litigation. Pola Cebulak, Marta Morvillo, and Stefan Salomon, in their article that frames this Special Issue, define strategic litigation broadly as: "[A] legal action initiated to achieve broader social, political, or economic ends" that can be used both in the private and public interest.[7] Bearing that in mind, a caveat should be made here. I focus my analysis on litigation before domestic and supranational courts in Polish cases, which were carried out predominantly in the public interest and in which an important role was played by non-governmenal organizations ("NGOs"). What characterizes this type of public interest litigation is that the coalitions—both at national and international levels—around ongoing cases usually occur, as well as that the judicial proceedings are communicated in the media and other advocacy

[3]*See generally* Wojciech Sadurski, A Pandemic of Populists (2022).

[4]*See generally* Tímea Drinóczi & Agnieszka Bień-Kacała, Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law (1st ed. 2022).

[5]By legal mobilization, for the purpose of this Article, I understand the use of the law to achieve broader social goals. Legal mobilization can play a crucial role in the context of the crisis of the rule of law, what was elaborated extensively by Handmaker and Taekema in their recent article on that subject. *See* Jeff Handmaker & Sanne Taekama, O Lungo Drom*: Legal Mobilization as Counterpower*, 15 J. Hum. Rts Prac. 6 (2023).

[6]I gathered these observations while working for the Helsinki Foundation for Human Rights from 2012 to 2017 and then practicing law in a law firm from 2017 to 2021. During Poland's rule of law crisis, I was involved, as defense counsel, in a number of legal proceedings brought against judges defending the rule of law litigated before national and supranational courts, in particular in the ECtHR's cases of *Grzęda v. Poland*, App. No. 43572/18, (Mar. 15, 2022), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-216400%22]}, as adviser, and *Żurek v. Poland*, App. No. 39650/18, (Oct. 10, 2022), https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-217705%22]}, as a member of the legal team. Participatory observation of the development of strategic litigation in Poland over the years enables me in particular to select the most impactful court cases for human rights protection, which exemplify certain trends.

[7]Pola Cebulak, Marta Morvillo and Stefan Salomon, *Strategic Litigation in EU Law: Who Does it Empower?*, 25(6) German L. J. 800 (2024) (in this Issue).

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activities are conducted that precede the launch of a court case or occur after the judgment has been delivered.[8]

As it was said, before moving on to an analysis of the phenomenon of strategic litigation in Poland during a time of populism, I will first provide a brief overview of how strategic litigation has been adapted in Poland before. Interestingly, Polish legal scholarship has not yet systematically analyzed the development of strategic litigation in Poland. Considering this, proposing some periodization of strategic litigation development in Poland seems reasonable.

I argue that three phases can be identified in the development of strategic litigation in Poland. The first one is marked by the period from the democratic breakthrough in the 1990s to the year 2004—when Poland acceded to the European Union. The second began in 2004 and lasted until the beginning of the rule of law crisis in 2015. The last period marks the time of the rule of law crisis. To set the stage, this section focuses on the first two periods identified.

The pre-2004 litigation can hardly be described as strategic or public interest litigation. In fact, Polish legal scholars did not even use the term "strategic litigation" to describe pending legal proceedings.[9] At that time, individuals began using the newly created legal opportunities, such as bringing applications to the ECtHR—which became possible after Poland ratified the European Convention on Human Rights ("ECHR") in 1993—or constitutional complaints to the Constitutional Tribunal—after the introduction of this mechanism into the Polish legal system by the 1997 Constitution. This period, however, marks the intensive development of the jurisprudence of the Constitutional Tribunal, shaping the understanding of key legal concepts, such as the rule of law or the limits of human rights.[10] Interestingly, when analyzing the key cases from that time that were litigated before these courts, it is difficult to discern NGO-driven public interest litigation, with all its characteristic elements mentioned above, such as coalition building, communicating ongoing cases in the media, or conducting other advocacy activities. What can be noticed by analyzing the case law of the time—especially the case law of the ECtHR—is the massiveness of the proceedings in similar, repetitive cases. This is particularly evident in the fact that the pilot judgment procedure[11] was established for the first time based on Polish cases before the ECtHR.[12]

The second period in the development of strategic litigation in Poland began in 2004, although this date is quite conventional. That year, the leading Human Rights NGO in Poland, the Helsinki Foundation for Human Rights ("HFHR"), established the Strategic Litigation Program [*Program Spraw Precedensowych*]. Within the framework of this program, several cases were carried out using the method of strategic litigation, thus contributing to the popularization of strategic

[8]The list of characteristics that define public interest litigation is, of course, not a clearly defined list. Nevertheless, the indicated features are quite commonly indicated in studies devoted to strategic litigation. *See generally* Richard J. Wilson & Jennifer Rasmussen, Promoting Justice: A Practical Guide to Strategic Human Rights Lawyering (2001); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 Fordham Urb. L.J. 603 (2009).

[9]According to data from the largest Polish legal science bibliographic database maintained by the Polish Academy of Sciences [*Polska Bibliografia Prawnicza*], the first academic paper on strategic litigation in Polish language, a rather brief one, was not published until 2001. *See* Jacek Babiel, *Litygacja Strategiczna*, 29 Wspólnota (2001).

[10]*See generally* Agnieszka Klich, *Human Rights in Poland: The Role of the Constitutional Tribunal and the Commissioner for Citizens' Rights*, 1996 St. Louis-Warsaw Transatlantic L.J. 33 (1996); Irena Grudzinska-Gross, *Interview with Professor Andrzej Zoll, Chief Justice of the Polish Constitutional Tribunal*, 6 E. Eur. Const. Rev. 77 (1997); Leszek Garlicki, *The Principle of Equality and the Prohibition of Discrimination in the Jurisprudence of the Constitutional Tribunal of Poland*, 1999 St. Louis-Warsaw Transatlantic L.J. 1 (1999).

[11]*See generally* Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 German L.J. 1231 (2011) (offering more on this procedure).

[12]The first pilot judgment concerned so-called Bug River cases from Poland. *See* Broniowski v. Poland, App. No. 31443/96, (June 22, 2004), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61828%22]}. *See also* Hutten-Czapska v. Poland, App. No. 35014/97, (June 19, 2006), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-75882%22]} (the second pilot judgment).

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litigation in Polish legal society.[13] Following HFHR's lead, several other human rights organizations in Poland have increasingly begun to engage in strategic litigation. Among them, it is worth mentioning Panoptykon[14], which advocates for the right to privacy and protection of personal data, and Citizens Network Watchdog Poland[15], which aims to improve access to public information. To a large extent, strategic litigation has served those organizations as an advocacy tool alongside other forms of influencing government and parliament, such as participation in public consultations, lobbying parliament, or media activities.

The increasing popularity of strategic litigation in Polish society led to the situation in which non-governmental organizations that considered this method their essential, primary form of operation began to emerge. In this context, the Polish branch of the global organization Client Earth,[16] which was registered in 2010 and acts for the right to a clean and healthy environment, and the Ordo Iuris Institute for Legal Culture, which was registered in 2013 and promotes the conservative agenda.[17]

The strategic litigation of this period—in terms of judicial venues—focused mainly on the European Court of Human Rights and the Constitutional Tribunal. Interestingly, despite Poland's accession to the European Union and the opening of the possibility of litigation before the Court of Justice of the European Union ("CJEU")—by using the preliminary reference procedure—civil society organizations did not engage in this type of litigation. Although, it is worth mentioning that some preliminary reference requests from Poland were lodged to CJEU in corporate actors cases mainly related to taxation.[18]

To illustrate the strategic litigation of this period, it is worth mentioning some key cases related to individuals' status. I will focus here on those which concern the enjoyment of political rights and minority rights, mainly women's reproductive rights and the rights of same-sex couples—in other words, issues that resonated during the democratic backsliding period.

One of the first historical Polish strategically-litigated cases run by an NGO was the case that resulted in the landmark judgment of the European Court of Human Rights in the case of *Bączkowski v. Poland*.[19] This case concerned freedom of assembly. The applicants questioned before the ECtHR a ban on an equality parade they organized. The ban was issued by the authorities of the city of Warsaw with full knowledge that the court would not consider an appeal against it before the planned assembly date. The application to the ECtHR was filed on behalf of the applicants by the Polish legendary human rights lawyer Zbigniew Hołda, associated with the HFHR. The ECtHR, in its judgment, found a violation of Article 11 (freedom of assembly), Article 13 (right to an effective remedy), and Article 14 (prohibition of discrimination) of the European Convention on Human Rights. Thanks to this judgment and the HFHR advocacy efforts[20] on its

[13]For the experience of the Helsinki Foundation for Human Rights regarding the first years of strategic litigation see Adam Bodnar, *W poszukiwaniu precedensów–litygacja strategiczna w praktyce Helsińskiej Fundacji Praw Człowieka*, *in* PRECEDENS W POLSKIM SYSTEMIE PRAWA (Anna Śledzińska-Simon & Mirosław Wyrzykowski eds., 2010).

[14]*See* PANOPTYKON FOUND., https://en.panoptykon.org/ (last visited Sept. 5, 2024) (describing the strategic litigations conducted by the organization on the organization's website).

[15]*See* SIEĆ OBYWATELSKA WATCHDOG POLAND, https://siecobywatelska.pl/?lang=en (last visited Sept. 5, 2024) (describing Watchdog Poland's strategic litigation efforts).

[16]*Compare* CLIENT EARTH, https://www.clientearth.pl/ (last visited Sept. 5, 2024) (the organization's Polish website) *with* CLIENT EARTH, *Raporty Roczne i Sprawozdania Finansowe*, https://www.clientearth.pl/o-nas/raporty-roczne-i-sprawozdania-finansowe/ (last visited Sept. 5, 2024) (the organization's annual activity reports and financial statements).

[17]*Compare* ORDO IURIS INST. FOR LEGAL CULTURE, https://ordoiuris.pl/ (last visited Sept. 5, 2024) (the organization's website) *with* ORDO IURIS INST. FOR LEGAL CULTURE, *Dokumenty*, https://ordoiuris.pl/dokumenty (last visited Sept. 5, 2024) (collection of financial statements).

[18]*See, e.g.*, Case C-349/13, Minister Finansów v. Oil Trading Poland, ECLI:EU:C:2015:84, (Feb. 12, 2015); Case C-169/12, TNT Express Worldwide (Poland) v. Minister Finansów, ECLI:EU:C:2013:314, (May 16, 2013).

[19]Bączkowski v. Poland, App. No. 1543/06, (May 3, 2007), https://hudoc.echr.coe.int/eng?i=001-80464.

[20]*See, e.g.*, Adam Bodnar & Arthur Pietryka, *Constitutional Freedoms–Constant Limitations*, HUM. RTS. HOUSE FOUND. (Mar. 28, 2010), https://humanrightshouse.org/articles/a-bodnar-a-pietryka-constitutional-freedoms-constant-limitations/

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execution, the Parliament eventually amended the Law on Assemblies. The amended Law on Assemblies introduced a new notification procedure which allows the court to adjudicate any appeal against a decision to ban an assembly before its scheduled date.[21]

Strategic litigation at that time, even if completed with the judgment expected by the litigants, has not always been implemented by government and parliament, particularly on controversial social issues. This may be exemplified by another of ECtHR's landmark judgment in the case of *Tysiąc v. Poland*.[22] In this case, the HFHR acted as a third-party intervener—so-called *amicus curiae*—filed jointly with another NGO, the Polish Federation for Women and Family Planning. The ECtHR, in its judgment, found a violation of Article 8 of the European Convention of Human Rights (the right to respect for private life) by the lack of adequate legal remedies that would allow enforcement of the domestic right to terminate a pregnancy for health reasons in situation of refusal to perform this procedure by medical personnel. The ECtHR stressed that Alicja Tysiąc had no procedure available that would have allowed her to formally challenge the medical decision of refusing to perform an abortion and determine the actual prerequisites for the termination of pregnancy. Although some changes in the law after this judgment have been made, the goal of the strategic litigation of improving access to legal abortion has not been achieved.[23] Regardless, the judgment remains an important argument in advocacy activities for reproductive health organizations.

A special manifestation of the popularity of strategic litigation before ECtHR was the case launched at the threshold of the rule of law crisis in 2015. This case was litigated by Clients–Lawyers–NGO's coalition named Coalition for Civil Unions and Marriage Equality [*Koalicja na rzecz związków partnerskich i równości małżeńskiej*]. The momentum for the litigation was the ECtHR judgment in the case of *Oliari v. Italy*,[24] in which the Court found that the Italian Government had failed to fulfill its positive obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions and, therefore, violated Article 8 of the ECHR. The applicants in this case, after exhausting the domestic remedies, brought the case to the ECtHR. They communicated this appropriately and made model application lodged in the case available on a special webpage created for the purpose of enabling others to follow their path.[25] Their goal was clear—to obtain from the ECtHR a judgment similar to *Oliari* stating that Poland violates the ECHR by failing to recognize civil partnerships. Almost eight years after the litigation started—on December 12, 2023, the ECtHR finally delivered the judgment they fought for.[26]

In addition to the ECtHR, the Constitutional Tribunal was the key addressee of the litigation at the time. The Constitutional Tribunal issued several crucial human rights judgments in

(advocating for the Polish Supreme Court to "hear appeals against assembly bans"). Bodnar and Pietryka also published this op-ed in the Gazeta Wyborcza, a national Polish newspaper.

[21]According to the 2015 Law on Assemblies, the organizer of the assembly has to notify the municipal authorities about the planned assembly no sooner than 30 days and no later than 6 days in advance of the date. Municipal authorities are obliged to issue a decision 96 hours before the planned date of the assembly. Until 24 hours after the publication of a banning decision on authorities' website appeals can be lodged to the Regional Court, which has to decide on it within 24 hours. The Regional Court's order can be appealed to the Court of Appeal within 24 hours. The final order of the Court of Appeal has to be executed immediately. *See* 2015 Law on Assemblies, arts. 7, 14–16.

[22]Tysiąc v. Poland, App. No. 5410/03, (Mar. 20, 2007), https://hudoc.echr.coe.int/eng?i=001-79812.

[23]This judgment, as well as others on abortion, has still not been recognized as executed by the Committee of Ministers of the Council of Europe. Compare the latest resolution in this regard: Committee of Ministers of the Council of Europe, Supervision of the Execution of the European Court's Judgments, 1492/H46-25 of Dec. 2024. CM/Del/(Dec. 2024)1492/H46-25 adopted on 1492nd meeting, on Mar. 12–14, 2024 https://search.coe.int/cm?i=0900001680aec213.

[24]Oliari v. Italy, App. Nos. 18766 & 36030/11 (July 21, 2015), https://hudoc.echr.coe.int/eng?i=002-10668.

[25]*See* Koalicja Na Rzecz: Związków Partnerskich i Równości Małżeńskiej, *Razem Ku Petni Praw*, https://www.dostrasburga.pl/ (last visited Sept. 4, 2024) (describing Koalicja Na Rzecz's efforts to support same-sex unions in Poland).

[26]Przybyszewska v. Poland, App. No. 11454/17, (Dec. 12, 2023), https://hudoc.echr.coe.int/fre?i=001-229391.

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strategically-litigated cases, although its rulings have not always been met with approbation.[27] Among key judgments was, to provide an example, the case of discrimination in access to public service by HIV-positive individuals. In that case, the Tribunal was confronted with the question of whether the automatic recognition that any HIV-positive person is completely incapable of serving in the police force in any position, as stipulated by the law in effect at the time, regardless of his or her health status, is incompatible with the Polish Constitution. The Constitutional Tribunal ruled that the challenged provisions constitute a disproportionate restriction on the right of access to public service in the police. Although the legislature has the right to minimize the risk of HIV transmission, it can use other, more proportionate tools than dismissal, such as transferring a police officer to another official position, like working in police administration, education, analytical divisions, or police laboratories.[28]

C. Rule of Law Crisis as a Catalyst for the Transformation of the Strategic Litigation in Poland

The third phase of strategic litigation development in Poland began at the end of 2015 when the rule of law crisis occurred. Strategic litigation gained importance during the crisis period because other methods of human rights activism, especially lobbying, advocacy, and organizing public assemblies, lost their effectiveness. At that time the Polish Government and Parliament were working to limit the space for civil society, or at least its large liberal part,[29] and to limit dialogue in parliamentary proceedings.[30] Thus, strategic litigation, previously a complementary tool to these methods, became a key tool of human rights activism.

The strategic litigation of the crisis period has changed. The change concerned, on the one hand, the judicial avenues used by actors to pursue their public interest-related goals, that is, the structure of strategic litigation. The Constitutional Tribunal has ceased to be a crucial addressee of strategic litigation. Instead, the Court of Justice of the European Union became popular, as did the independent domestic judicial bodies—the Supreme Court, its independent Chambers, and other ordinary courts. Those began to apply the Constitution directly. These structural changes required the Polish legal community to acquire new expertise—especially regarding the application of European law and the direct application of the Constitution. On the other hand, the change related to strategic litigation of the populist times concerned the actors involved in strategic litigation. In addition to the NGOs involved so far, new NGOs and other actors have become active, both public and corporate. I will explore these two aspects in more detail in the following sections.

Before diving into the details, however, it is worth noting that the strategic litigation of the rule of law crisis period largely centered on the judiciary as populists attacked the judiciary seeking to limit their independence. For this reason, there have been and continue to be many cases strategically litigated before courts—especially supranational courts—in which litigants are challenging violations of the right to a fair trial and other rights related to the status of judges.[31]

[27]Adam Bodnar, Barbara Grabowska and Paweł Osik, *Opinie Przyjaciela Sądu (amicus curiae), w postępowaniu przed Trybunałem Konstytucyjnym w praktyce Helsińskiej Fundacji Praw Człowieka*, *in* Księga XXV-lecia Trybunału Konstytucyjnego: ewolucja funkcji i zadań Trybunału Konstytucyjnego - założenia a ich praktyczna realizacja, (Krzysztof Budziło ed., 2010).

[28]Wyrok Trybunału Konstytucyjnego z dn 23.11.2009 [Judgment of the Constitutional Tribunal of Nov. 23, 2009], P. 61/08, (Poland).

[29]*See also* Adam Ploszka, *Shrinking Space for Civil Society: A Case Study of Poland*, 26 Eur. Pub. L. 941 (2020).

[30]For the Batory Foundation report on the work of the Parliament and the marginalization of the importance of public consultations, see Ustawa w 2 godziny 20 minut: XIII Komunikat Obywatelskiego Forum Legislacji podsumowujący aktywność legislacyjną rządów Zjednoczonej Prawicy, Sejmu VIII kadencji i Senatu IX kadencji (2015–2019), Fundacja im Stefana Batorego: forumIdei (2019).

[31]*See* Meijers Comm., *Rule of Law Cases – Poland: Polish Cases on the Rule of Law at the CJEU*, https://euruleoflaw.eu/rule-of-law/rule-of-law-dashboard-overview/polish-cases-cjeu-ecthr/ (last visited Sept. 5, 2024) (concerning proceedings before supranational courts).

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One of the most important developments in this context was the ECtHR, once again issuing a pilot judgment against Poland in a symbolic case because it concerns Poland's first democratically-elected president, Lech Wałęsa. This judgment, which is the latest in a series of judgments on the rule of law crisis to which the ECtHR referred in judgment, concludes the systemic nature of human rights violations related to changes in the judiciary introduced after 2015.[32]

D. Structural Change of Strategic Litigation in Times of Populism

As it was already mentioned, before the rule of law crisis, the Constitutional Tribunal, alongside the ECtHR, had been a key judicial venue used for the purpose of strategic litigation due to the position of these courts in the legal system and the importance of their judgments. However, after 2015, as a result of a series of legislative and executive actions undertaken by the Law and Justice Party, the independence of the Constitutional Tribunal was effectively undermined.[33] The noticeable effect of weakening the independence of the Constitutional Tribunal was the pro-government reorientation of its jurisprudence in a number of cases.[34] Particularly, with regard to European law, the Tribunal departed from its earlier pro-European interpretation of the Constitution, finding that both the European Convention on Human Rights and the EU Treaties violate the Polish Constitution.[35] This, in turn, led to a collapse of confidence of the Polish legal community in the Constitutional Tribunal. Consequently, we can observe a reduction in litigation before the Tribunal. The chart below (see Figure 1) illustrates the number of cases that have been lodged to the Constitutional Tribunal over the last 10 years.[36] It can be seen that after 2015, both the courts through preliminary questions,[37] individuals through a constitutional

[32]Wałęsa v. Poland, App. No. 50849/21, (Nov. 23, 2023), https://hudoc.echr.coe.int/eng?i=002-14247.

[33]The causes, course, and consequences of the constitutional crisis—that is, the successful attempt to limit the independence of the Constitutional Tribunal—has gained the particular interest of legal scholarship. *See generally* Wojciech Sadurski, Poland's Constitutional Breakdown (2019); Mirosław Wyrzykowski, *Antigone in Warsaw*, *in* Human Rights in Contemporary World: Essays in Honor of Professor Leszek Garlicki (Marek Zubik ed., 2017); Leszek Garlicki & Małgorzata Derlatka, *Constitutional Court of Poland: 1996–2018*, *in* Development of Constitutional Law Through Constitutional Justice: Landmark Decisions and Their Impact on Constitutional Culture—XXth International Congress of European and Comparative Constitutional Law (Rainer Arnold, Anna Rytel-Warzocha and Andrzej Szmyt eds., 2019).

[34]*See* Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, 11 Hague J. on Rule L. 63, 63–84 (2019). *See also* Adam Ploszka, *It Never Rains But It Pours: The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, 15 Hague J. on Rule L. 51, 51–74 (2023).

[35]*See* Wyrok Trybunału Konstytucyjnego z dn 24.11.2021 [Judgment of the Constitutional Tribunal of Nov. 24, 2021], K. 6/21 (Poland); Wyrok Trybunału Konstytucyjnego z dn 10.3.2022 [Judgment of the Constitutional Tribunal of Mar. 10, 2022], K. 7/21 (Poland). In these cases, the Constitutional Tribunal stated that Article 6 of the ECHR, as interpreted by the ECtHR, is contrary to the Polish Constitution. In another case, Wyrok Trybunału Konstytucyjnego z dn 14.7.2021 [Judgment of the Constitutional Tribunal of July 14, 2021], P. 7/20 (Poland), the Tribunal found that Article 4(3), second sentence, of the Treaty on European Union in conjunction with Article 279 of the Treaty on the Functioning of the European Union violates several provisions of the Polish Constitution, insofar as the CJEU imposes, *ultra vires*, obligations on the Republic of Poland as an EU Member State, by prescribing interim measures pertaining to the organizational structure and functioning of Polish courts and to the mode of proceedings before those courts. The judgment in case P. 7/20 resulted in the European Commission bringing an action against the Republic of Poland in the CJEU. *See* Case C-448/23, Comm'n v. Poland, 2023/C 304/20 (July 17, 2023).

[36]The year 2022 is the last year for which the annual information on the Tribunal's activity has been prepared by the Constitutional Tribunal. The annual information for 2023 has not yet been prepared. Adopting a ten-year period makes it possible to capture the change in the statistics of the flow of cases to the Constitutional Tribunal before and during the crisis began in 2016.

[37]*See* Konstytucja Rzeczypospolitej Polskiej [Constitution of the Republic of Poland], art. 193. ("Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.").

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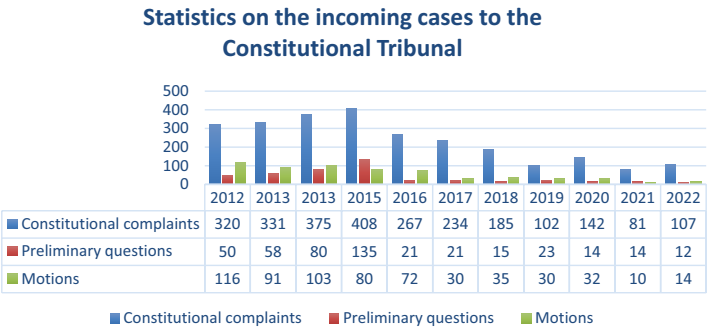
complaint,[38] and other specifically legitimate entities, like the Human Rights Commissioner through motions,[39] have reduced the number of cases lodged to the Constitutional Tribunal.



	2012	2013	2013	2015	2016	2017	2018	2019	2020	2021	2022
Constitutional complaints	320	331	375	408	267	234	185	102	142	81	107
Preliminary questions	50	58	80	135	21	21	15	23	14	14	12
Motions	116	91	103	80	72	30	35	30	32	10	14

Figure 1. The chart was compiled based on annual information on the Tribunal's activity published by the Constitutional Tribunal[40]

This has resulted in the redirection of strategic litigation to other domestic and supranational courts, including the ordinary courts [*sądy powszechne*], the independent chambers of the Supreme Court [*Sąd Najwyższy*], who increasingly begun to apply the Constitution directly, and the Court of Justice of the European Union, which litigants have accessed by way of the CJEU's preliminary reference procedure.

The direct application of the Constitution by domestic courts initially posed a challenge in the first years after the hostile takeover[41] of the Constitutional Tribunal. This was because it required challenging the existing and firmly-established paradigm under which the Constitutional Tribunal was the only court authorized to adjudicate on the constitutionality of laws. Under this paradigm, referred to as concentrated control of the constitutionality of the law, the common courts, as well as the Supreme Court, were obliged to refer preliminary questions to the Tribunal if doubts arose as to the constitutionality of certain legal provisions constituting the basis for adjudication in an individual case. In connection with the weakening of the independence of the Tribunal, legal scholarship has reformulated this paradigm, pointing out that from the principle of direct application of the Constitution (Article 8) stems the court's competence to refuse to apply a legal norm contrary to the Constitution.[42] This, in turn, made it possible for the courts to apply the Constitution directly and to disregard unconstitutional laws in adjudicating individual cases.

[38]*See id.* at art. 79.1 ("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 judgment 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.").

[39]Through motions, institutions specified in the Constitution are entitled to challenge, in the abstract way in isolation from specific cases, the constitutionality of certain laws. *See id.* at arts. 191, 192 (setting out the list of entities with the legitimacy to refer motions to the Constitutional Tribunal).

[40]Trybunał Konstytucyjny [Const. Tribunal], https://trybunal.gov.pl/publikacje/informacje-o-problemach-wynikajacych-z-dzialalnosci-i-orzecznictwa-tk/od-2003/ (last visited Sept. 5, 2024) (providing the Constitutional Tribunal's annual information).

[41]Miroslaw Wyrzykowski, *Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland*, 11 Hague J. on Rule L. 417, 417–22 (2019) (The term "hostile takeover," a well-known legal construction of commercial law, was used by Wyrzykowski, as an analogy for the takeover of the Constitutional Tribunal in Poland during the rule of law crisis).

[42]*See* Leszek Garlicki, *Sądy a Konstytucja Rzeczypospolitej Polskiej*, 9 Przegląd Sądowy 7, 7–25 (2016). This article, authored by a former judge of the Constitutional Tribunal and the European Court of Human Rights, was foundational for the development of the jurisprudence of Polish courts on the direct application of the Constitution.

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Several cases concerning further reductions in pensions of people who worked in the state security apparatus of the People's Republic of Poland provide a very good illustration of this paradigm shift. After enacting the so-called "repressive law" [*ustawa represyjna*][43], which reduced pensions, the affected individuals began to question those reductions to the common courts. Again, the NGO—'the Uniformed Services Association [*Federacja Stowarzyszeń Służb Mundurowych Rzeczypospolitej Polskiej*]—played a key role in organizing strategic litigation around this law. The Uniformed Services Association commissioned legal opinions on the repressive law's unconstitutionality in question and prepared model forms for appeals to the courts and other pleadings, including a model application to the ECtHR.[44]

In one such case in 2018, the Regional Court in Warsaw submitted a request for a preliminary ruling to the Constitutional Tribunal, questioning the constitutionality of said legislation. The problem in the case was the introduction of collective responsibility, where the pensions of all those who worked for the state security apparatus before 1989 were reduced, regardless of whether or not these individuals contributed to the suppression of democratic opposition under communism regime. The Constitutional Tribunal, in this case, case ref. P 4/18, has not been able to issue a judgment to date. The hearing dates were set and cancelled and the composition of the bench appointed to hear the case was changed several times. Two of these changes concerned judges acting as rapporteurs.[45] The paralysis of the Constitutional Tribunal had the effect that courts that had previously suspended cases pending the Tribunal's consideration of this legal question began to adjudicate the cases. Eventually, some of these cases reached the Supreme Court, which, guided by the new paradigm, called diffuse constitutional review, adopted a resolution in which, by applying the Constitution directly, rejected the concept of collective responsibility. The Supreme Court pointed out that the decision to reduce a pension should be evaluated individually by courts based on all the case circumstances, including individual acts, and their review for violation of fundamental human rights and freedoms.[46]

The second structural element that characterized the strategic litigation of the populist period was the greater opening of Polish courts to litigation before the Court of Justice of the European Union. As it was already mentioned, before the crisis began, Polish courts had some, although limited, practice in requesting for a preliminary rulings to the CJEU. These requests concerned cases related to tax issues, customs, or state aid. However, the practice was not quite extensive. Since accession to the EU until the end of 2023, Polish courts have referred 359 requests for preliminary rulings. Approximately one quarter of them, eighty-nine, were referred before 2016.[47] This is well illustrated in the chart below (see: Figure 2).

[43]Ustawa z dnia 16 grudnia 2016 r. o zmianie ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [Act of December 16, 2016 amending the Act on pension provision for officers of the Police, the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Prison Service, and their families], Dz.U. 2016 poz. 2270 (Poland).

[44]Ustawa Represyjna, https://www.warszawa.seirp.pl/ustawa-represyjna (last visited Sept. 5, 2024) (compiling all relevant documents).

[45]*See* Trybunał Konstytucyjny [Const. Tribunal], https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=P%204/18 (last visited Sept. 5, 2024) (providing the information available in case P. 4/18).

[46]Rezolucja Sądu Najwyższego z dn 16.9.2020 [Resolution of the Supreme Court of Sept. 16, 2020], III UZP 1/20 (Poland). *See also* Bielinski v. Poland, App. No. 48762/19, (July 21, 2022), https://hudoc.echr.coe.int/fre?i=001-218430. *Bielinski* is an example of a case that ended favorably for the individuals affected by this law; the individuals lodged applications to the ECtHR which found a violation of the European Convention on Human Rights.

[47]Eur. Ct. Justice, *Annual Report 2023: Statistics Concerning the Judicial Activity of the Court of Justice* (2023), https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/en_ra_2023_cour_stats_web_bat_22042024.pdf

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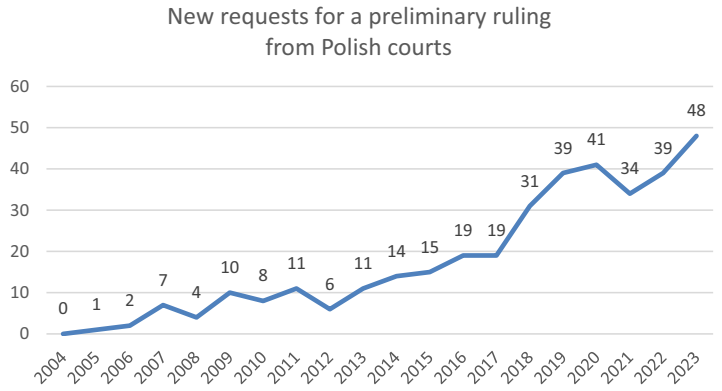

Figure 2. Chart compiled based on CJEU statistics[48]

A comprehensive explanation of the causes of "discovery" by Polish courts of the Court of Justice requires extensive research with the participation of judges.[49] However, it is possible to formulate some hypotheses to explain this trend. I believe three factors had a key influence on this "discovery". The first factor was the attack by the government and Parliament on judges. The second was the weakening of domestic judicial institutions, including the *de facto* exclusion of the possibility of litigation before the Constitutional Tribunal. The third was the delayed and reactive nature of proceedings before the ECtHR.

The first factor seems particularly crucial. The legislature and the government have targeted the courts and judges. The scale of the attacks was unprecedented and multifaceted.[50] This resulted in an unusual situation in which judges themselves began to seek legal protection from various types of harassment and disciplinary proceedings by reaching for strategic litigation.

In choosing a litigation strategy, the judges faced the necessity of choosing which court to direct their legal actions to. In the face of the hostile takeover of the Constitutional Tribunal, attacks, and the undermining of the independence of other national judicial institutions—including the Supreme Court in particular—it became clear that it must be an international court. Over the years, as mentioned before, the ECtHR was the classical direction of strategic litigation in Polish cases. This was also the case with the rule of law crisis. However, litigation before ECtHR requires prior exhaustion of domestic remedies. For this reason, and partly from the ECtHR's failure to properly prioritize cases, it was not until mid-2019 that the first complaints related to the rule of law crisis were communicated to the Polish Government.[51] The first judgment related to changes introduced in the Polish constitutional order after 2015 was issued as recently as 2021.[52]

[49]It is worth noting in this context some of the first studies of this type that have already been published. *See generally* Claudia-Y Matthes, *Judges as Activists: How Polish Judges Mobilise to Defend the Rule of Law*, 38 East Eur. Pol. 468 (2022); Leonardo Puleo & Ramona Coman, *Explaining Judges' Opposition When Judicial Independence is Undermined: Insights from Poland, Romania, and Hungary*, 31 Democratization 47 (2024).

[50]*See* Justice Under Pressure—Repressions as a Means of Attempting to Take Control Over the Judiciary and the Prosecution in Poland Years 2015–2019, Iusticia (Jakub Kościerzyński ed., 2020); Katarzyna Gajda-Roszczynialska & Krystian Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, 12 Hague J. on Rule L. 451, 451–83 (2020).

[51]Adam Ploszka, *(In)Efficiency of the European Court of Human Rights Priority Policy. The Case of Applications Related to the Polish Rule of Law Crisis*, *in* Περιμένοντας τους Βαρβάρους. Law in a Time of Constitutional Crisis 539–554 (Adam Bodnar & Jakub Urbanik eds., 2021) [hereinafter Law in a Time of Constitutional Crisis].

[52]Xero Flor w Polsce v. Poland, App. No. 4907/18, (May 5, 2021), https://hudoc.echr.coe.int/fre?i=001-210065.

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At this point, the CJEU has already issued some judgments on the rule of law crisis[53] also quickly gaining popularity with judges. To the "discovery" by Polish judges of the CJEU, moreover, the CJEU contributed itself by issuing, on the one hand, the judgment in the Portuguese judges case,[54] in which it stated that the independence of judges is protected by Article 19 TFEU, and, on the other hand, by issuing the judgment in the *Celmer* case.[55] The latter's significance was all the greater in that it provided Polish judges with a tangible example of what a preliminary ruling from a national court can mean, as the case resonated strongly in the Polish public debate. The very judge who referred the request was subject to smear campaign from the executive branch in Poland.[56]

The said "discovery," however, required that judges be trained to use the preliminary request procedure. NGOs, especially the Helsinki Foundation for Human Rights, provided judges—especially the Judges' Association Iustitia, which coordinated legal actions of a large group of judges in defense of the rule of law—with free training and materials.[57] The Ombudsman's Office also provided training in this area.[58] Judges, as well as the entire legal community in Poland, in their efforts to defend the rule of law, also received support from the experts in the field of EU law,[59] a particular expression of which was the activity of The Good Lobby Profs, an initiative of experts that consulted the Polish legal community.[60]

E. Actors in Strategic Litigation in Times of Populism

The second major change in strategic litigation that can be observed during the populist period in Poland relates to the actors involved in it. The key actors already involved in strategic litigation—NGOs—maintained their role in the strategic litigation. Alongside those NGOs already active in this field, new NGOs have emerged. In addition, public institutions such as the Ombudsman and the Office of the Prosecutor have begun to play increasingly important roles in strategic litigation alongside corporate actors. The strategic litigation of this period was rarely led by a single actor—often, these actors joined like-minded coalitions of varying sizes. I will discuss these changes in more detail below.

I. Non-Governmental Organizations—Defenders of the Rule of Law and Beyond

As the strategic litigation of the populist period largely centered on issues related to the judiciary, NGOs—in addition to judges—and victims of human rights violations also played important and multi-faceted roles in several judicial proceedings.

[53]*See, e.g.*, ECJ, Case C-216/18 PPU, Minister for Justice and Equality, ECLI:EU:C:2018:586 (July 25, 2018), https://curia.europa.eu/juris/liste.jsf?num=C-216/18PPU [hereinafter *Celmer*]; ECJ, Case C-619/18, Comm'n v. Poland, ECLI:EU:C:2019:615 (June 24, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-619/18; ECJ Case C-192/18, Comm'n v. Poland, ECLI:EU:C:2019:924 (Nov. 5, 2019), https://curia.europa.eu/juris/liste.jsf?language=EN&num=C-192/18. *See also* ECJ, Joined Cases C-585, C-624, & C-625/18, A.K. v. Krajowa Rada Sądownictwa, ECLI:EU:C:2019:982 (Nov. 19, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-585/18; ECJ, Case C-824/18, A.B. v. Krajowa Rada Sądownictwa, ECLI:EU:C:2021:153 (Mar. 2, 2021), https://curia.europa.eu/juris/liste.jsf?num=C-824/18.

[54]ECJ, Case C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, ECLI:EU:C:2018:117 (Feb. 27, 2018), https://curia.europa.eu/juris/liste.jsf?num=C-64/16.

[55]*See Celmer*, Case C-216/18.

[56]Derek Scally, *Polish Right-Wingers Focus Ire on 'Irish Lesbian Judge'*, Irish Times (Mar. 14, 2018), https://www.irishtimes.com/news/world/europe/polish-right-wingers-focus-ire-on-irish-lesbian-judge-1.3427114.

[57]*See* Iustitia, https://iustitia.pl/szkolenie-dotyczace-procedury-zadawania-pytan-prejudycjalnych-oraz-orzecznictwa-trybunalu-sprawiedliwosci-unii-europejskiej-w-obszarze-ochrony-praw-czlowieka/ (containing a press note from 2018 about a training on preliminary references procedure organized by the Helsinki Foundation for Human Rights).

[58]*See Pytania prejudycjalne–teoria i praktyka–szkolenie dla sędziów I praktyków w Biurze RPO*, Rzecznik Praw Obywatelskich (Sept. 19, 2019), https://bip.brpo.gov.pl/pl/content/pytania-prejudycjalne-teoria-i-praktyka (training for judges available on the Human Rights Commissioner website).

[59]*See also* Pola Cebulak, *Scholarly Activism for the Rule of Law in the EU*, 4 J. Illiberalism Stud. 45, 45–56 (2024).

[60]*See* The Good Lobby, https://www.thegoodlobby.eu/profs/ (last visited Sept. 6, 2024).

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First, different NGOs joined the court proceedings as third parties, including lawyers working for NGOs representing judges whose rights and freedoms were violated.[61] In addition to those organizations already experienced in strategic litigation, most notably HFHR, other NGOs began to engage in strategic litigation. The judges' associations, Iustitia, mentioned above, Themis, and the Free Courts Foundation [*Fundacja Wolne Sądy*] have played a particular role. The latter was established as a response to violations of the rule of law by a group of attorneys in 2020, based on an informal initiative active since 2017.[62]

Second, NGOs have also provided an important platform for dialogue. A key role was played here by the umbrella organization, Committee for the Defense of Justice [*Komitet Obrony Sprawiedliwości*], established during the rule of law crisis by thirteen different organizations representing judges and prosecutors and other NGOs working in the field of the rule of law and human rights. The Committee, which by its formula facilitated the process of seeking defense attorneys for repressed judges,[63] became particularly famous for holding press conferences before and after court hearings involving judges, at which details of the proceedings were explained to the public.[64] Lastly, the NGOs have also organized demonstrations in judges' defense, supporting ongoing litigations—such as the numerous demonstrations organized by an NGO called Democracy Action [*Akcja Demokracja*].

Notwithstanding the rule of law-related strategic litigation,[65] NGOs remained active in strategic litigation regarding the other human rights violations committed by the populists in Poland. Two cases brought to the European Court of Human Rights are particularly noteworthy in this regard.

The first is the case concerning the introduction by the Polish authorities of legislation enabling the use of surveillance on a massive scale.[66] In the case of this legislation, as it was with many other controversial laws, the critical opinions released by the civil society concerning the constitutionality of this regulation were by no means taken into account by Parliament.[67] This has again provoked litigation as the only measure that can counteract the negative effects of the adoption of this law. The applications to the ECtHR were filed personally in this case by representatives of NGOs, the HFHR and the Panoptykon Foundation, and by the dean of the Warsaw Bar Council in 2017 and 2018. They alleged that no remedy was available under domestic law, allowing persons who believe that they have been subjected to secret surveillance to complain about that fact. The applicants in this case were supported by the Ombudsman and other civil society organizations, including non-Polish organizations, who intervened in this case as third

[61]*See* Broda v. Poland, App. Nos. 26691 & 27367/18, (June 29, 2021), https://hudoc.echr.coe.int/eng?i=001-216120 (providing an example of a case handled before ECHR by NGO lawyers—mainly the Helsinki Foundation for Human Rights and the Free Courts Foundation). *See also* Dolińska-Ficek v. Poland, App. Nos. 49868 & 57511/19, (Nov. 8, 2021), https://hudoc.echr.coe.int/eng?i=002-13490; Juszczyszyn v. Poland, App. No. 35599/20, (Apr. 30, 2021), https://hudoc.echr.coe.int/fre?i=001-210094.

[62]*See Free Courts*, Wolne Sady, https://wolnesady.org/postepowania/ (last visited Sept. 6, 2024) (showing information about cases in which the Foundation has conducted strategic litigation).

[63]However, the support for repressed judges was not always institutionalized, in other words, with the involvement of NGOs. To some extent it also had a grassroots character, consisting of providing legal assistance by individual lawyers, attorneys, and legal advisers, often on a pro bono basis.

[64]*See* Łukasz Bojarski, *Civil Society Organizations for and with the Courts and Judges—Struggle for the Rule of Law and Judicial Independence: The Case of Poland, 1976–2020*, 22 German L.J. 1344, 1374 (2021).

[65]In this context, however, it is worth mentioning a case brought by the NGO Sieć Obywatelska Watchdog Poland, in which the ECtHR found a violation of the ECHR through Poland's refusal to provide access to the 2017 schedules of, among others, President of the Constitutional Court Julia Przyłębska, which allegedly document her meetings with members of the Government. *See* Sieć Obywatelska Watchdog Polska v. Poland, App. No. 10103/20, (Mar. 21, 2024), https://hudoc.echr.coe.int/fre?i=001-231616 [hereinafter *Watchdog Polska*].

[66]Pietrzak v. Poland, App. Nos. 72038/17 & 25237/18, (May 28, 2024), https://hudoc.echr.coe.int/eng?i=001-234175.

[67]*See Rządowy projekt ustawy o działaniach antyterrorystycznych oraz o zmianie niektórych innych ustaw, Druk nr 516 [Government Draft Act on Counter-Terrorism Activities and Amending Certain Other Acts, Print No. 516]*, SEJM: 8th Term Archives, https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=516 (last visited Sept. 6, 2024) (compiling legislative proceedings on the draft of this law).

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parties. The case also received considerable media coverage. The case was heard by the ECtHR, which found a violation of the ECHR.[68]

The second case, or rather, a whole group of cases, concerned the litigation after the Constitutional Tribunal's 2020 judgment on abortion. The judgment was issued at the request of members of the parliamentary majority—the Law and Justice members of the Parliament—who, fearing public reaction to a possible change in the abortion law, decided to use the Constitutional Tribunal instead. In that judgment, the Constitutional Tribunal declared unconstitutional one of the three grounds for permissible abortion.[69] Organizations working for women's rights, particularly Federa, decided to litigate and lodge applications directly to the ECtHR after this judgment. To this end, a model application form was developed for women to fill out, and they could file an application independently.[70] As a result of this action, nearly 1,000 applications were received by ECtHR.[71] The first ECtHR judgment finding a violation of the ECHR resulting from the Constitutional Tribunal judgment came in late 2023.[72] Interestingly, in this case both Polish organizations supporting reproductive rights—the HFHR—and those opposing them—Ordo Iuris Institute for Legal Culture and the Polish Ombudsman for Children—joined as interveners in this case.

II. The Human Rights Commissioner—Strategic Litigation Supporter

During the rule of law crisis, those engaged in strategic litigation, and more generally in the rule of law and human rights protection, gained strong support from the—almost last—independent national human rights institution, the Human Rights Commissioner (the "Ombudsman"). This office was led by Adam Bodnar, elected in 2015 just before Law and Justice came to power.[73]

Strategic litigation gained importance in the operation of the Ombudsman's office, which was symbolically demonstrated by the creation of a position within the institution—the Chief Coordinator of Strategic Litigation.[74] The Ombudsman's importance in strategic litigation during

[68]*See* Pietrzak v. Poland, App. Nos. 72038/17 & 25237/18, (May 28, 2024), https://hudoc.echr.coe.int/eng?i=001-234175.

[69]Until 2020, Polish legal order—through The Law on Family Planning, Protection of the Human Fetus and the Conditions for the Permissibility of Abortion of January 7, 1993—allowed abortions in three strictly defined situations: (1) The pregnancy poses a threat to the life or health of the pregnant woman, (2) prenatal tests or other medical indications point to a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life, (3) there is a reasonable suspicion that the pregnancy resulted from a criminal act. In 2020, the Polish Constitutional Tribunal found that the second situation was unconstitutional. *See* Wyrok Trybunału Konstytucyjnego z dn 22.10.2020 [Judgment of the Constitutional Tribunal of Oct. 22, 2020], K. 1/20 (Poland).

[70]*Skarga Kobiet: Złóż Skargę Do Strasburga Na "Wyrok TK!" [Women's Collective Complaint: Lodge an Application to the European Court of Human Rights in Strasburg Against the Ruling of the Constitutional Tribunal on Abortion]*, FEDERA (Jan. 4, 2021), https://federa.org.pl/skarga-kobiet/.

[71]*See* European Court of Human Rights Press Release ECHR 217 (2021) Notification of 12 Applications Concerning Abortion Rights in Poland (July 8, 2021), https://hudoc.echr.coe.int/app/conversion/pdf/%3Flibrary%3DECHR%26id%3D003-7074470-9562874%26filename%3DNotification%2520of%2520applications%2520concerning%2520abortion%2520rights%2520involving%2520Poland.pdf&ved=2ahUKEwim7piPlaeJAxXxU1UIHbNUKH0QFnoECBQQAQ&usg=AOvVaw17S2wARSEG4n0uzuEukPdM

[72]M.L. v. Poland, App. No. 40119/21, (Dec. 14, 2023), https://hudoc.echr.coe.int/eng?i=002-14264.

[73]Because of his work defending the rule of law and human rights, Adam Bodnar has been the target of a number of attacks from the government. Eventually, in 2021, he was removed from office by a judgment of the Constitutional Tribunal. *See* Wyrok Trybunału Konstytucyjnego z dn 15.4.2021 [Judgment of the Constitutional Tribunal of Apr. 15, 2021], K. 20/20 (Poland). In this judgment, the Tribunal found unconstitutional a provision allowing Omudsman to occupy his post at the end of his term until the next Ombudsman is elected. *Id. See also* ENNHRI, *Joint Statement by ENNHRI and GANHRI in Support of Adam Bodnar, the Polish Commissioner for Human Rights* (Feb. 20, 2019), http://ennhri.org/wp-content/uploads/2019/09/Joint-Statement-by-ENNHRI-and-GANHRI-in-Support-of-Adam-Bodnar-the-Polish-Commissioner-for-Human-Rights.pdf (detailing various attacks against Bodnar).

[74]*See* Press Release, Rzecznik Praw Obywatelskich, Zuzanna Rudzińska-Bluszcz: Główna koordynatorka sądowych postępowań strategicznych w Biurze RPO 2015–2021 [Zuzanna Rudzińska-Bluszcz: Chief Coordinator of Strategic Litigation in the Office of the Commissioner for Human Rights 2015–2021] (July 13, 2017) (announcing Zuzanna Rudzinska-Bluszcz as the first Coordinator of Strategic Litigation).

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the rule of law crisis was significant. He intervened as a third party in key cases pending before the ECtHR or the CJEU—having previously participated as a party in national proceedings based on which the question was referred—concerning the rule of law.[75] The Ombudsman also intervened in several cases at the domestic level.[76]

Of particular importance—looking back on it—were his interventions regarding the rights of LGBTI people, including, in particular, the challenge to the administrative courts of some local authorities' resolutions establishing so-called LGBT ideology-free zones. These resolutions were adopted by almost a hundred units of local government in Poland. The role of the Ombudsman in their eventual removal, in addition to pressure from the EU, was crucial. This is because the Ombudsman was one of the few actors possessing legal standing to challenge such laws before the administrative courts. The Ombudsman was the only public institution that sided with the LGBTI community when LGBTI rights were attacked in Poland.[77] Ultimately, the courts overturned all of the resolutions the Ombudsman challenged.[78]

III. Actors Pursuing a Right-Wing Agenda: Public Prosecution and NGOs

The Ombudsman's involvement in the strategic litigation to counteract Poland's retreat from democracy and human rights was particularly important as new actors in strategic litigation appeared. The change in the political environment in 2015 was conducive to the development of strategic litigation by right-wing organizations,[79] which received support from the Minister of Justice—the Prosecutor General, in the process of (mis)appropriating human rights.[80] It is worth emphasizing that in Poland, the Office of the Prosecutor General —who oversees the Prosecution Office—is combined with that of the Office of the Minister of Justice.[81]

The Prosecutor's Office support, due to its resources, capacity, and importance, was a breakthrough for right-wing organizations. How this support worked can be seen by analyzing the cases of anti-abortion activists. These activists, working to restrict access to abortion, reached out to present large-format posters in public spaces displaying bloody pictures of human fetuses. These activists claimed they used photos of fetuses subjected to abortions. As a result, initially,

[75]Adam Bodnar, *The Role of the Commissioner of Human Rights of the Republic of Poland in the Fight for Rule of Law in Poland*, *in* LAW IN A TIME OF CONSTITUTIONAL CRISIS, *supra* note 51, at 93–104 (summarizing the Ombudsman's involvement in strategic litigation on rule of law issues).

[76]*See* RZECZNIK PRAW OBYWATELSKICH, *Informacja Roczna [Annual Information]*, https://bip.brpo.gov.pl/pl/kategoria-prawna-i-organizacyjna/informacja-roczna (last visited Sept. 6, 2024) (giving the annual reports on the Ombudsman's activities). *See also* Zuzanna Rudzińska-Bluszcz, *Procesy które zmieniają świat*, YOUTUBE (2017) https://www.youtube.com/watch?v=DUnD7rhn4-w (delivering a speech at a TEDxKatowiceSalon called "Processes that Change the World").

[77]*See* Adam Ploszka, *From Human Rights to Human Wrongs: How Local Government Can Negatively Influence the Situation of an Individual. The Case of Polish LGBT Ideology-Free Zones*, 27 INT'L J. HUM. RTS. 359, 365 (2023).

[78]*See* Press Release, Rzecznik Praw Obywatelskich, Wszystkie uchwały samorządów dyskryminujące osoby LGBT zostały uchylone przez organy samorządu terytorialnego lub unieważnione przez sądy. WSA rozpoznał ostatnią skargę RPO [All local government resolutions discriminating against LGBT people were repealed by local government bodies or invalidated by courts. The Provincial Administrative Court considered the last complaint of the Commissioner for Human Rights] (Mar. 26, 2024).

[79]*See generally* Karolina Kocemba, *Right-Wing Legal Mobilization Against Abortion: The Case of Poland* (Eur. Univ. Inst., Max Weber Programme, Working Paper No. 2023/02, 2023).

[80]*See* Graínne De Búrca & Katharine G. Young, *The (Mis)Appropriation of Human Rights by the New Global Right: An Introduction to the Symposium*, 21 INT'L J. CONST. L. 205, 205–23 (2023) (using and defining the term "(mis)appropriation" in this context).

[81]The merger of the function of Prosecutor General, overseeing the Public Prosecutor's Office, with the political function of Minister of Justice, although controversial, has a long tradition in Poland. In 2010, after many discussions, it was separated. Shortly after the populists came to power in 2016, the office of Prosecutor General was again merged with the Minister of Justice. This merge was met with criticism from the Venice Commisison, among others. *See* European Commission for Democracy Through Law (Venice Commission), CDL-AD(2017)028-e Venice Commission Opinion on the Act on the Public Prosecutor's Office As Amended, Op. 892/2017 (Dec. 8–9 2017).

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they were facing charges for committing various petty offences. After the populists came to power and took over the Prosecutor's Office, the National Prosecutor's Office addressed the prosecutors to defend activists, ordering them to challenge unfavorable judgments for them in the courts.[82] Interestingly, in this address, the Prosecution Office claimed that displaying these banners was an exercise of freedom of speech.[83]

This support was visible in many other cases, including the aforementioned cases concerning local authorities' resolutions establishing LGBT ideology-free zones, in which prosecutors—sometimes independently of local authorities—defended the challenged resolutions before the administrative courts.[84] In the context of sexual minority rights, it is impossible not to mention criminal case brought against female grassroots activists for offending religious beliefs by distributing posters of the Virgin Mary with a rainbow halo, the colors of the LGBTI pride flag.[85] Activists' actions served to demonstrate resistance to the violation of rights and exclusion of LGBTI people. This case was an obvious display of force calculated to have a chilling effect. The police first detained the activists,[86] and then they were charged with offending religious beliefs—a type of blasphemy law. The court of first instance acquitted them of this charge, but the Prosecutor's Office, the victim—a local priest represented by right-wing NGOs—and pro-life activists appealed. After the second instance court upheld this verdict, the prosecution filed a cassation appeal to the Supreme Court. Due to the change of government as a result of the 2023 parliamentary elections, the cassation filed by the Prosecutor's Office was finally withdrawn, and the other cassations of the private prosecutors were dismissed.[87] Interestingly, the Helsinki Foundation for Human Rights also intervened in the case in favor of the activists.[88]

Another case in which one can see the cooperation between the Prosecutor's Office and right-wing NGOs—here Ordo Iuris Institute for Legal Culture—concerned an employee's dismissal by the IKEA company's Krakow branch. This employee, on the company's intranet, commented critically on IKEA's LGBT+ policy, describing homosexuality as a deviation and citing quotes from the Bible to support his views. The case, despite being a civil dispute, gained the support of the Prosecution Office, which brought charges against the store manager for the crime of religious discrimination under Article 194 of the Polish Criminal Code.[89] The dismissed employee, represented by the Ordo Iuris Institute, joined the prosecution. Interestingly, the Prosecutor's Office in this case appointed a person associated with the Ordo Iuris Institute to issue an expert opinion on the employee's comments. However, the court disregarded his opinion in sentencing, noting the obvious lack of objectivity of the expert. Ultimately, the court

[82]*See* Wyrok Naczelnego Sądu Administracyjnego z dn. 3.04.2024, sygn. III OSK 416/22 [Judgment of the Supreme Administrative Court of Poland of April 3, 2024, case ref. III OSK 416/22] (presenting the admission by the Supreme Administrative Court that said address constituted public information). This judgment ended the proceedings, which had been ongoing since 2021, in which I requested from the Prosecutor's Office this address as public information.

[83]Adam Ploszka, *Publiczne eksponowanie banerów antyaborcyjnych w kontekście granic swobody ekspresji*, 88 Studia Iuridica 325, 327 (2021).

[84]See Ploszka, supra note 77.

[85]Amnesty International, They Treated Us Like Criminals: From Shrinking Space to Harassment of LGBTI Activists 57 (2022) (describing the Virgin Mary case).

[86]Adam Easton, *LGBT Virgin Mary Triggers Polish Activist's Detention*, BBC News (May 14, 2019), https://www.bbc.com/news/world-europe-48257706.

[87]Postanowienie Sądu Najwyższego z dn 28.3.2024 [Decision of the Supreme Court of Mar. 28, 2024], V. K.K. 430/22 (Poland).

[88]Helsińska Fundacja Praw Człowieka (Jan. 13, 2022), https://hfhr.pl/aktualnosci/tecza-nie-obraza-wyrok-uniewinnienie.

[89]According to this provision, anyone who restricts another person from exercising their rights due to that person's affiliation with a certain faith, or due to their religious indifference, shall be liable to a fine, community service, or imprisonment for a maximum term of two years. *See* Kodeks karny art. 194 (Poland).

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acquitted the accused in the first[90] and second instances.[91] The case eventually ended before the Supreme Court, which dismissed cassation appeals[92] from Ordo Iuris Institute and the Prosecutor's Office.[93]

IV. Corporate Actors

Last but not least, the corporate actors played a role in the strategic litigation of the populist period, especially in rule of law cases. While defending their private interest in court proceedings, several corporate actors also raised claims and arguments related to the rule of law crisis, i.a. that the composition of the bench adjudicating in their cases was wrong. Their goal was primarily to protect their interests, as evidenced by their acting alone and failing to publicize these cases or build broader coalitions around them. Despite that, NGOs were joining their cases, especially before the ECtHR at the stage when the cases were made public after being communicated to the Polish Government.[94] Through this, they strengthened these cases by giving them strategic importance and later conducting advocacy work around these judgments, mainly at the international level. At the same time, NGOs benefited from corporate actor's involvement in strategic litigation because it took off the costs associated with conducting litigation that could reach the international level.

This observation can be exemplified by the cases already decided by the ECtHR: The well-known *Xero Flor* case,[95] the first decision delivered by ECtHR that relates to the rule of law crisis, where the Commissioner for Human Rights of the Republic of Poland and the HFHR intervened as a third party. In another case, *Advance Pharma v. Poland*, the Association "Lawyers for Poland," the Commissioner for Human Rights, the HFHR, and Iustitia intervened as third parties.[96]

F. Concluding Thoughts

The investment made at the beginning of strategic litigation development in Poland has paid off at the most important moment. NGOs, which have played a key role in initiating and coordinating strategic litigation in Poland since at least 2004, have adapted very quickly to the changes in the legal environment brought by the rise of populism. A concrete expression of this adaptation was the new opening to strategic litigation before the Court of Justice of the European Union, including training the judges how to do it, especially when the Constitutional Tribunal's independence was effectively undermined. Strategic litigation, as a bottom-up legal tool, proved to be a crucial tool for protecting human rights and the rule of law during the crisis.

In terms of efficiency, without any doubt, strategic litigation in the rule of law cases contributed to advocacy efforts carried out at the international level, particularly at the EU level. This was evident, for example, in making the disbursement of funds from the EU Recovery and Resilience

[90]Wyrok Sądu Rejonowego dla Krakowa-Krowodrzy w Krakowie z dn 4.2.2022 [Judgment of the District Court for Krakow-Krowodrza in Krakow of Feb. 4, 2022], No. II K. 896/20/K (unpublished).

[91]Wyrok Sądu Okręgowego w Krakowie z dn 6.12.2022 [Judgment of the Regional Court in Krakow of Dec. 6, 2022], No. IV Ka. 971/22 (unpublished).

[92]Postanowienie Sądu Najwyższego z dn 11.10.2023 [Decision of the Supreme Court of Oct. 11, 2023], III KK 249/23 (Poland).

[93]For more on discrimination against the LGBT community, *see* Barbara Grabowska-Moroz, & Anna Wójcik, *Reframing LGBT Rights Advocacy in the Context of the Rule of Law Backsliding: The Case of Poland*, 7 INTERSECTIONS E. EUR. J. SOC'Y POL. 85, 85–103 (2021).

[94]In this context, it is worth mentioning that there have also been cases of this type before the CJEU. *See, e.g.*, Case T-791/19, Sped-Pro S.A. v. Comm'n, ECLI:EU:T:2022:67 (Feb. 9, 2022), https://curia.europa.eu/juris/liste.jsf?num=T-791/19. However, due to the rules of procedure before the CJEU, NGOs, as a rule, could not get involved in them beyond advocacy activities at the international level.

[95]*Xero Flor*, App. No. 4907/18.

[96]Advance Pharma Sp. Z.O.O. v. Poland, App. No. 1469/20, (Mar. 5, 2022), https://hudoc.echr.coe.int/fre?i=001-215388.

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Facility conditional on meeting milestones arising from CJEU jurisprudence. At the same time, its importance domestically was much less meaningful. Therefore, the question remains whether the rule of law litigation, without this international dimension, could be characterized as strategic. Most probably not, because the fundamental goal of litigation—as defined by Cebulak, Salomon, and Morvillo, for example[97]—is to bring a change. Eventually, the change at the domestic level was reached, to which EU has strongly contributed.

A question that it is impossible to answer now, but worth returning to eventually, is whether the paradoxical changes brought by populism in the context of strategic litigation will persist? In particular, will the greater openness of the courts to apply the Constitution directly and to request a preliminary ruling from the CJEU become entrenched, or will their importance diminish as the rule of law is restored? In this context, it is impossible not to notice that in Poland, the litigation path before the CJEU has so far been used by judges, mainly in defense of judicial independence. Will the absence of a threat to judicial independence discourage judges from requesting preliminary rulings? Such risks clearly exist. Nevertheless, Polish lawyers' knowledge and skills in formulating motions for preliminary rulings have definitely increased. Therefore, one may assume that the pressure on courts to refer requests for preliminary rulings to the CJEU in cases other than the rule of law will be further present.[98] Similarly, even if the independence of the Constitutional Tribunal will be restored some day, it will be difficult to return to the point before the crisis and prohibit judges from applying the Constitution directly.

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[97]Cebulak et al., *supra* note 7.

[98]In this context, it is worth mentioning an interesting case proving openness of the courts to other human rights cases. *See* Case C-713/23, JC-T v. Wojewoda Mazowiecki, O.J. C. C/2024/2009 (Mar. 18, 2024), https://curia.europa.eu/juris/liste.jsf?num=C-713/23. The case concerned discrimination against same-sex families, so called rainbow families in Poland, through the failure of Polish law to recognize the legal consequences of their marriage legally concluded in another EU country. *Id.* In this case, at the end of 2023, the Supreme Administrative Court decided to request for a preliminary ruling. *Id.*

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