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The Women's Complaint: sociolegal mobilization against authoritarian backsliding following the 2020 abortion law in Poland

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ABSTRACT



The decision of the Constitutional Tribunal in October 2020 has severely curtailed women's reproductive rights in Poland. Mass protests ensued. This article focuses on the untold story of a productive rupture that channelled the protesters' efforts into a mass legal mobilization against the tribunal's judgement to the European Court of Human Rights. These applications, known as the "Women's Complaint," were filed by over one thousand Polish women. Triangulating between analysis of interviews with human rights lawyers and feminist activists, and the legal reasoning of the petition, this article's original contribution traces the evolution of the Women's Complaint from a reproductive rights dispute to a challenge to the government's authoritarian backsliding to better understand the relationship between social conflicts and legal mobilization. Reproductive rights and democratic values are inextricable; threats to one reinforce threats to the other. The Women's Complaint is about women standing up for their reproductive rights and – in effect – spearheading a much broader rights-based litigation against authoritarianism.

KEYWORDS

Reproductive rights; Poland; European Court of Human Rights; legal mobilization

Introduction

In the immediate aftermath of revoking *Roe v Wade* in June 2022, many commentators feared a negative backlash for women's reproductive rights globally. From the perspective of Eastern Europe, and Poland in particular, where governments are backsliding on their commitment to democracy – this backlash was already happening. In October 2020, in the middle of the COVID-19 pandemic, the politically controlled Constitutional Tribunal (CT) – "a reliable aide of the government and parliamentary majority" (Sadurski 2020, 69) – struck down as unconstitutional the right to terminate pregnancy on account of severe and irreversible foetal impairments. This decision of the CT, effectively banning women's reproductive rights in Poland, has undergone thorough critical legal and jurisprudential scrutiny (Bucholc 2022; Gliszczyńska-Grabias and Sadurski 2021; Kapelańska-Pręgowska 2021; Tykwińska-Rutkowska 2021). Various authors pointed to the considerable defects in the legal argumentation that "cast a big

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dark shadow upon the formal and procedural correctness of the judgement” (Gliszczyńska-Grabias and Sadurski 2021, 138) and “the closing of jurisprudential horizon,” that is “the reduction of the role of international human rights debates as a reference in Polish constitutional jurisprudence” (Bucholc 2022, 73; Ploszka 2022). According to CBOS (a leading Polish national polling agency) in November 2020, the vast majority of respondents (75%) were against the recent CT decision and agreed that the law should allow for termination of pregnancy in a situation when “prenatal tests indicate that the foetus is burdened with an incurable disease leading to death” (CBOS 2020, 2). No new polls published since then have contradicted this trend, meaning these figures remain stable. Furthermore, 8% of the Polish adult population took to the streets to publicly object to the CT decision, while 63% declared their support for the protests. This means that in the first weeks following the judgement, about two and a half million adult Poles protested across the country (CBOS 2020, 2)¹ and research among the protesters demonstrated anger and dismay over this decision (Nawojski and Kowalska 2022) also among women who declared themselves as Catholic (Kosciańska, Kosiorowska, and Pomian 2021).

With this article I focus on the untold story of the Polish abortion crisis, a productive rupture that channelled the protesters efforts into a mass legal mobilization against the CT judgement to the European Court of Human Rights (ECtHR). These applications, known as “Skarga Kobiet” (Eng. and hereafter: the Women’s Complaint) were filed by over one thousand Polish women aided by human rights lawyers and feminist activists. The core of the complaint relies on articles 8 and 3 (right to respect for private and family life, prohibition of inhuman and degrading treatment) of the European Convention of Human Rights (ECHR). The applicants complained that they were potential victims of a violation of their rights as, if pregnant, they would have been obliged to carry their pregnancy to term regardless of whether their foetus had severe and irreversible genetic abnormalities. The first twelve cases (three groups of four cases each) were communicated by the ECtHR at lightning speed, exactly six months from filing the complaint (8 July 2021).² The cases were given priority under rule 41 of the Rules of the Court. The press release accompanying the communication suggested that other cases might follow (ECtHR Registrar of the Court 2021). Indeed, a year later, on 13 June 2022, the ECtHR communicated another five cases of women who were pregnant at the time of the CT’s decision and who due to severe genetic foetal defects (cerebellar hypoplasia, Trisomy 18, 20 and 21) could not perform abortion in Poland and had to seek termination of their pregnancies abroad.

At a theoretical level, I use the Women’s Complaint to engage with some of the core debates in law and society scholarship around legal mobilization under increasing authoritarianism (Chua 2019). Reproductive rights and democratic values are inextricably linked; threats to one reinforce threats to the other. Polish women of reproductive age have become the first socially visible group “victim” of the deformed legal system under the illiberal rule of the Law and Justice Party.³ But Polish women are fighting back: the Women’s Complaint sets an important precedent of legal mobilization against illiberalism in Poland. The empirical analysis of interviews with activists vis-à-vis the legal reasoning of the complaint brings out the malleable and nuanced processes of legal translation (Paris 2010), that is, transformation of reproductive rights grievances into plausible human rights claims to be pursued before the ECtHR.

To account for this nuanced translation process, I rely on the dynamic framework of a dispute transformation developed by Lynn Mather and Barbara Yngvesson (1980). Their conceptual model focuses on the strategic dialectic processes of dispute narrowing and expansion as the different participants and audiences negotiate “particular case outcomes [...] order maintenance and change” (Mather & Yngvesson 1980, 782, see also Santos 1977). A dispute narrows when participants rely on “established categories for classifying events [...] defining the subject matter of a dispute in ways which make it amenable to conventional management procedures” (Mather and Yngvesson 1980, 778, 783). Expansion, in turn, refers to challenging these categories “by linking subjects or issues typically separated, thus ‘stretching’ or changing frameworks for organizing reality” (Mather and Yngvesson 1980, 779). While the narrowing of the Women’s Complaint had repercussions for the specific human rights claims that were to be mobilized through this application and limited the actors who could submit their petition to the ECtHR, due to the strategic expansion of the dispute, the text of the complaint became a case in point about the crisis of the rule of law and the hostile takeover of the CT by the political majority. The social construction of disputes is not “neutral” but reflects “the interests and dispositions of the parties” (Mather and Yngvesson 2015, 562). The careful navigation between narrowing and expanding the dispute has ultimately transformed the Women’s Complaint into rights-based litigation against authoritarian backsliding in Poland. This article’s original contribution traces the evolution of the Women’s Complaint from its origins as a reproductive rights dispute to its development into a dispute about the quality of the rule of law in Poland to better understand the relationship between social conflicts and legal mobilization. Polish women standing up for their reproductive rights are – in effect – standing up for the constitutional freedoms of all Polish citizens.

This article proceeds in five parts. After explaining the methodology, in part one I trace the recent developments of legal mobilization against authoritarian backsliding in Poland to set the context for the subsequent analysis. Part two introduces the conceptual and theoretical framework for this study: the dispute transformation model put forward by Lynn Mather and Barbara Yngvesson (1980). Part three presents the Women’s Complaint in terms of strategic narrowing. Part four analyses the dynamics of dispute expansion, whereby the translators of reproductive grievances to human rights claims became tactically reliant on the rule of law argumentation. The final part demonstrates how this petition – as a window on Polish society – provides unique glimpses into 1) deep conflict within that society, 2) where the rule of law is in crisis, and 3) exposes government’s “ruling by cheating” tactics (Sajó 2021). This perspective ultimately helps us view the Women’s Complaint as more than an issue of reproductive rights: as a broad rights-based litigation against authoritarian backsliding.

Materials and methods

This article is a product of a larger project that aimed to examine the everyday experiences of cases from Poland before the ECtHR. Between 2021 and 2022 I spent five months in Warsaw and Kraków interviewing human rights lawyers, feminist and social activists, judges, legal experts, and individuals who filed cases to the ECtHR. This is how I come across women who prepared and signed the petition known as the Women’s Complaint. The human rights lawyers who authored the legal petition put me in touch with the group

of women who were the driving force behind this complaint and curated it on popular social media platforms to reach the largest number of potential women victims in Poland. These women came from different walks of life – they were working professionals and social media experts largely with no previous activist experience. Some of them had taken part in the Black Protests of 2016 when Law and Justice initially (and unsuccessfully) attempted to curtail women’s reproductive rights (Król and Pustułka 2018; Płatek 2018). I interviewed them to understand the meanings, motivations, hopes and ideas connected with the Women’s Complaint as a social fact.

Altogether I conducted 40 formal interviews and had several shorter conversations alongside conferences and events I attended during my fieldwork. The legal professionals I interviewed hailed from variety of backgrounds: they were general barristers (advocates) or legal counsels practicing in different regions, in-house jurists connected with particular human rights NGOs, and lawyers specializing in non-discrimination cases who pursued strategic litigation before the Polish domestic courts and the ECtHR. The interviews lasted between 30 minutes and three hours. I interviewed some respondents twice (the second time usually over the phone), when there were new legal developments I wanted to find out their opinion on. All interviews were conducted in Polish and recorded, whenever I received participants’ consent.

The interviews were transcribed and analysed following the thematic analysis approach, as a theoretically flexible technique of analysing qualitative data (Braun and Clarke 2006). Rather than centring on finding “themes” in the data, this method allows the researcher to acknowledge their decisions about what they want to know “and recognize them *as decisions*” (Braun and Clarke 2006, 80, my emphasis). Aware of my epistemological positionality as a Polish, cisgender woman and a sociologist who has lived many years abroad, this approach allowed me to be open about the extent to which I selected, co-constructed, and grouped certain themes together. Epistemologically therefore, this article follows feminist constructivism, which “challenges our usual understanding of objectivity as opposed to partiality and situatedness, that is, to the supposedly subjective features that detract from the general validity of knowledge claims” (Hunter 2013; Lennon 1997, 354; Prins 1995) and treats this unprecedented legal mobilization around the Women’s Complaint as a window into society that can be used to study broader social developments.

The context: legal mobilization against authoritarianism

In Eastern Europe, the huge volatility of positive law during the transition period since 1989 (Ajani 1995), popular legal alienation caused by formal legalism (Kurkchiyan 2009), and the ambiguous results of the mass-scale legal transplant experiment (Skąpska 2002), combined with the overall popularity of getting things done away from the law or through informal practices (Galligan et al. 2003; Ledeneva 2006) made people question when and how the law is actually mobilized. However, the recent turn towards authoritarianism in the region and in Poland (Sadurski 2018; Wyrzykowski 2019; Scheppele 2018; Laurent and Scheppele 2017; Kovács and; Scheppele 2018; Pech, Wachowiec, and Mazur 2021; Sanders and von Danwitz 2018) sparked prominent sections of the legal profession to defend the rule of law, often with dire consequences for their professional careers (Mrowicki 2022). Around three hundred applications against the Polish government

currently pending before the ECtHR have been lodged by legal professionals – barristers, judges, and prosecutors, acting as applicants – that concern the human rights dimensions of the political changes within the justice system between 2015 and 2022.⁴ Poland has become the first EU member state to be “simultaneously subject to the special monitoring procedure of the Council of Europe and the EU’s exceptional Article 7(1) procedure of the Treaty of the European Union” (Mechlinska 2021).

Some suggest that this legal mobilization against authoritarianism is not a new phenomenon and could be traced to the legal opportunity structures of the 1990s, whereby the fall of Communism and new institutional landscape combined with Western resources, institutions, and expertise (financed by the EU, World Bank, and other state and private funders) created a solid legal infrastructure in Central and Eastern Europe focused on mobilization of supranational courts arguably able to stem the current “illiberal tide” (Şerban 2018). While the establishment of this “legal mobilization infrastructure” was on many occasions excruciatingly patronizing – in *Collision and Collusion*, Janine Wedel recalled a conversation with an American lawyer who assured her that “every attorney in Washington did a week or two stint in Eastern Europe to train the poor natives in constitutional law” (Wedel 2015, 4) – perhaps the groundwork for countering authoritarianism “has been laid out” (Şerban 2018, 177). Poland, since its accession to the ECHR and recognition of the ECtHR consistently ranks in the top five countries by number of petitions submitted to the court. Leading human rights NGOs in the region regularly bring or intervene in cases before both domestic and international courts (Şerban 2018, 186). The Polish Helsinki Foundation for Human Rights is among the top players in terms of bringing litigation and offering expertise (*amicus curie*) before the ECtHR (Cichowski 2011, 2016).

The Women’s Complaint cannot be understood in isolation from these broader processes and strategic litigation from Poland related to the rule of law (Kocemba and Stambulski 2022; see also Sundstrom 2014; Sundstrom, Sperling, and Sayoglu 2019 for Russia). This protest against the curtailment of women’s reproductive rights is equally about the authoritarian backsliding in Poland, given the procedural and constitutional irregularities surrounding the CT’s decision. The rule of law crisis in Poland has been studied in depth, but never in the context of the Women’s Complaint. This article provides a unique analytical avenue to establish a firm connection between these two important sociolegal phenomena.

Dispute transformation models: theoretically framing the emergence of the Women’s Complaint

The most popular framework in law and society literature to account for the various processes of dispute transformation has been developed by Felstiner et al. (1980). It distinguished three phases of dispute evolution following a linear progression of “naming, blaming, and claiming.” Naming occurs when a wronged party conceptualizes the grievance in legal terms, “blaming takes place when the wronged party holds another party responsible for the injury,” and “claiming transpires when the wronged party turns to the blamed party and seeks some remedy” (see also Olesen and Hammerslev 2021, 295). This model was first published in “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming” in a *Law & Society Review* special issue entitled “Dispute Processing

and Civil Litigation.” It has since been celebrated as “truly seminal research” in the field given its “analytical impact on countless studies dealing with dispute transformation” (it is among the five most cited articles from the *Law & Society Review*, Olesen and Hammerslev 2021, 296). The article, however, has been equally criticized multiple times as presenting an overly simplistic and linear conceptual model of dispute evolution (Albiston, Edelman, and Milligan 2014; He and Feng 2016; Merry 1990) that does not take into account the dynamic, “oscillating and iterative” nature of dispute transformation (Olesen and Hammerslev 2022, 17), and for being too US-focused, that is, inadvertently positioning dispute transformation in an American legal culture infused with adversarial legalism (Kagan 2019; Mack and Anleu 2007). Finally, although Felstiner, Abel, and Sarat derived the “naming, blaming, and claiming” model from a Civil Litigation Research Project, in an interview 40 years after the publication of their article they admitted that their dispute transformation framework was not empirically informed (Olesen and Hammerslev 2021, 303).⁵

The same 1980 special issue of *Law & Society Review* included another article on dispute transformation by Lynn Mather and Barbara Yngvesson, which received much less scholarly attention – inversely proportional to the article’s theoretical potential. In “Language, Audience, and the Transformation of Disputes,” Mather and Yngvesson assert that dispute transformation is shaped by three important variables: language, participants, and audience, whose dynamic interplay narrows and expands the dispute by imposing “established categories for classifying events” or “stretching the frameworks for organizing reality with new normative orientations” (Mather and Yngvesson 1980, 778, 783, 779, 818).

The main contribution of Mather and Yngvesson’s article is its focus on the dynamics of “narrowing” and “expanding” the dispute that may happen consecutively, in parallel, or in different configurations depending on the agency of participants and the dispute’s various audiences “since transformation processes are extremely complex” (Mather and Yngvesson 1980, 782). The authors conceptualize narrowing by referring to the participants’ use of “established categories to organize the events and issues in dispute [...] defining the subject matter of a dispute in ways which make it amenable to conventional management procedures” (Mather and Yngvesson 1980, 778). Disputes are narrowed through both general discourse (e.g. converting complex disputes over personal injuries into more straightforward financial claims), and a specialist legal discourse, whereby “alternative frameworks available for defining events and relationships in the dispute become restricted” (Mather and Yngvesson 1980, 784–789). Expansion, in turn, occurs when “new normative orientations are imposed on the events and relationships encompassed by the dispute” (Mather and Yngvesson 1980, 797, 818), which can embroil the dispute in the broader process of legal or political change (Mather and Yngvesson 1980, 797–8, 818).

The framework proposed by Mather and Yngvesson has two major advantages over the Felstiner et al. (1980) model. First, it allows more flexibility in analytically capturing the dynamic and iterative empirical processes that escape any narrow linear progression of dispute transformation (see also Olesen and Hammerslev 2022). Second, it is more cross-culturally sensitive as based on anthropological and political science studies of “lawyers and the mobilization of law, of trial courts and the judicial process, and of mediation, gossip, and other mechanisms [...] in diverse sociocultural settings, both western and non-western” (Mather and Yngvesson 1980, 790).

The conceptual categories of “narrowing” and “expanding” the dispute have important implications for understanding the transformations of the Women’s Complaint in Poland. To transform the emotional affect, anger, and great sense of injustice (as expressed by the grassroots activists) into a Women’s Complaint before the ECtHR required strategical narrowing of the reproductive rights dispute in terms of plausible and achievable human rights claims (Lakhani 2014; Merry 2009). Subsequently, when translating activists’ grievances into a claim that the ECtHR would accept (and not dismiss as ill-founded), the lawyers had to clearly define the individual victims of the newly introduced abortion law. This narrowing was done to ascertain the individual applicants’ right to petition the ECtHR. Concurrently with narrowing the dispute, the lawyers epistemically expanded it when they strategically translated the restriction of women’s reproductive rights into the language of the rule of law and authoritarian backsliding. They did this in the written complaint by invoking the various procedural defects in the composition of the CT which issued the abortion law and the conflict of interest among certain judges on the case who in effect used the politicized tribunal as a substitute for a legislature by the Law and Justice parliamentary majority. As pointed out by Mather & Yngvesson: “expansion does not necessarily imply the increase or magnification of issues in a dispute (although this may occur); it refers to change or development in the normative framework used to interpret the dispute” (1980, 779).

By anchoring the Women’s Complaint firmly within the rule of law paradigm, the lawyers strategically expanded its scope to use the anticipated ECtHR judgement to instigate a political and systemic change in Poland. In the following two sections I employ the concepts developed by Mather and Yngvesson (1980) to empirically trace how strategic manoeuvring between narrowing and expansion has ultimately transformed the Women’s Complaint from a reproductive rights dispute to strategic litigation against authoritarian backsliding.

Narrowing the dispute: a two-way translation process

In the days following the announcement of the judgement in October 2020 a small group of women from different walks of life met online to discuss whether there was any way they could respond, express their dissent, and ultimately stop the new abortion law:

This complaint arose out of gigantic anger and a gigantic “no way!” This is how it started. The women met in anger, in despair, and decided that we couldn’t leave it like that, we had to say “stop” and do something about it. It was anger, we felt cheated (activist, 2021).⁶

These women started a grassroots movement and a social media group entitled “Women’s Complaint” alongside taking part in street protests in their towns and cities. The point of the group was to popularize the idea of taking legal action against the CT decision, but at that time without any concrete details or legal options. Overnight, despite this being a closed group, more than 20,000 people joined, and within a week there were 54,000 members:

Given this overwhelming response, less than 24 hours since we started, we knew we had to do it, you just don’t shake off or leave things like that. It awoke us enormously then, and it became obvious: we’ll just do it!. (Activist, 2021)

Having amassed overwhelming social support online, the women felt encouraged but also pressured to act and concretize their plans:

The idea arose that we would legally challenge [the decision] and look for lawyers who would help us pro bono, because neither of us was a lawyer. Back then, we didn't know what the legal options were. Many of us just wanted to sue the Polish government! (Activist, 2021.)

The women needed a critical ally who was proficient in the knowledge of legal routes, procedures, and options for appeal. In Lisa Vanhala's terms, these women needed strategy entrepreneurs: "agents who may play a role in introducing new tactics into an organization's repertoire and promote the use of particular strategies, such as legal mobilization" (Vanhala 2018, 398). This ally came from the second group of women – human rights lawyers – who were organizing in parallel via an encrypted group on a popular communication platform. All the human rights lawyers were women and had previous experience of the ECtHR; they had represented applicants before the court and were proficient in preparing and framing the text of a complaint, or application. These lawyers had worked in the ECtHR in professional capacity sometimes for many years. One of them was the absolute leader in terms of number of proceedings before the ECtHR (Bujalski 2021) and had represented applicants in the majority of previous reproductive rights cases from Poland. While the specific core group of human rights lawyers co-authored the complaint, in the process they relied on the pro bono support and expertise of a wider network of lawyers and attorneys, whose contribution they acknowledged. This would support Şerban (2018) to claim about a solid legal mobilization infrastructure and human rights professional network in Poland.

Once the initial contact was made, the work on the Women's Complaint proceeded along two parallel routes. The human rights lawyers prepared the text of the complaint, while the social activists were responsible for broader social media communication. The work on the legal reasoning primarily focused on narrowing the grievances raised by the activists into achievable human rights claims that would be recognized by the ECtHR. The human rights lawyers engaged in various "conceptual and rhetorical processes" through which they tactically narrowed the goals of the social activists by translating them into plausible legal claims and arguments (Paris 2010). As one of the lawyers explained:

If a woman knows that she will give birth to a child who will either die shortly after giving birth, or be incapable of independent existence, she suffers knowing that she is not able to do anything about it or she suffers having to put in an extra effort, leave the country, pay to terminate this pregnancy somewhere else. It is a clear violation of articles 3 and 8 ECHR. This exacerbates suffering beyond the minimal level of pain. This is beyond dispute; we know that this kind of suffering must not be left unattended to and that the state cannot generate it. (human rights lawyer, 2021)

Narrowing the complaint did not end there. Once ready, the text of the complaint was uploaded on the social media group for women to download, print out, and complete with their personal stories before posting it to the ECtHR Registrar in Strasbourg. The lawyers provided detailed guidelines, in collaboration with the activists, to ensure that women who ultimately completed the applications with their personal details and circumstances did so in a way that the petitions would be deemed admissible by the court. As a result, the pool of potential ECtHR applicants was narrowed down to "all women of reproductive age" who were the closest to the legal idea of a victim in human

rights law and the ECtHR jurisprudence (invoking the figure of a potential victim as in *SAS v France*, no. 43835/11, judgement of 1 July 2014) and women who were pregnant at the time of the CT decision, and thereby were denied access to abortion (and ultimately were forced to seek the termination of their pregnancies abroad). The nuanced processes of legal translation resulted therefore in quite detailed guidelines to curate the narrative style of these applications and ensure they passed the Registry's robust filter:

Every woman had to write her own story; we prepared guidelines on what to write. Of course, while each story is individual and personal, the lawyers had suggested that certain points should be included, so we made all that clear to eliminate grounds for formal rejections of these complaints (activist, 2021).⁷

Just as the lawyers were narrowing down the substance and the participants of the dispute, the activists were moderating the Women's Complaint group on social media, sending regular updates about its progress; they took turns in responding to messages, offers of help, questions but also criticisms that the application to the ECtHR was premature:

These two orders – legal and social media – we had to juggle between them. They follow different rules of the game, they require completely different modes of work, functioning. It is known that the legal order needs patience, analysis, long periods of time, and we all know that social media, the Internet, well if anything they are not patient. (activist, 2021)

The everyday work of the lawyers and the women activists relied on negotiating – or translating – between these two social realities. On the one hand, this meant that the activists took on the role of decoding professional legal concepts into everyday, simple language so that the text of the complaint could be understood by all the members of the social media group – the potential applicants before the ECtHR:

We knew that our messages should be understandable to someone who is 40 years old, has primary education and lives in Radom, and for a girl who has just completed her A levels. Just for everyone. (activist, 2021)

On the other hand, this also meant that the activists actively negotiated the shape of the complaint. While they left the legal text to the professionals, the final version of the petition could not be too long, as it would reduce the chances of it being completed. One activist remembers how the first version of the complaint was 300 pages long because of all the appendices attached as evidence. This was a watershed moment:

It nearly broke me! We could not expect that women in Poland would be willing to pay 50 PLN [£10] for the postage to Strasburg! (Activist, 2021.)

While the actual complaint was 12–15 pages long, these practical considerations resulted in redrafting of the attachments, changing some to URLs, so that the final complaint ended up at approximately 60 pages. This demonstrates that the sociolegal mobilization surrounding the Women's Complaint depended on a two-way nuanced processes of narrowing the dispute. First, as is standard in legal mobilization cases, the lawyers narrowed the activists' anger and grievances down into achievable human rights claims and put limits on who could petition the ECtHR. Second, the activists themselves had to narrow the complex and expansive legally privileged form of the text of the complaint down into a clear message that could mobilize the women who were to ultimately file

these petitions under their names. This form of legal narrowing (from a professional to lay language) is often side-lined in mainstream legal mobilization scholarship, but burgeoning research evidence from South Africa and Colombia demonstrates that “societal actors help to construct understandings of existing problems as both objectionable and claimable in the legal sphere” and ultimately, they inspire citizens “to view specific realities through the lens of the law” (Taylor 2020, 1349).

The sociolegal mobilization behind the Women’s Complaint shows that these complex two-way dispute narrowing processes yielded positive results at the domestic level. The text of the complaint was downloaded over 8,000 times (Federacja na rzecz Kobiet i Planowania Rodziny 2021). Women were to send their petitions individually, but some treated the act of posting as an active form and extension of the earlier protests – they took pictures of themselves queuing at the post offices with the complaint and uploaded them on social media and to the group. In Gliwice, a medium-size city in Silesia, a group of women came to the post office with a huge envelope clearly addressed to the ECtHR Registry. This sent a clear message to the lawyers and the social activists that this petition has penetrated different corners of Poland and was not limited to the women in the largest cities of Warsaw, Kraków, or Poznań. Several left-wing women MPs also took part in this campaign: they opened their offices to print the text of the petition free of charge; they also completed the petition and posted pictures of themselves. This further raised awareness of this campaign and the ECtHR in particular:

I think we have all learned a lot in the process about what the ECtHR can potentially do. I think many of us have felt incredibly empowered. We felt there was some legal body that could help, throw the lifebuoy... I think it was of great importance for the identification of this institution. (activist, 2021)

The ECtHR stated that more than 1,000 complaints were submitted to the court (ECtHR Registrar of the Court 2021). This was the first ever complaint in the history of the Strasbourg court concerning one specific issue that was submitted in such great numbers by a grassroots movement coordinated via a social media platform acting in partnership with human rights lawyers.⁸

Expanding the dispute: incorporating the rule of law argumentation

The core of the Women’s Complaint focuses on the rule of law and on the procedural deficits of the abortion law to make an argument that the right to private and family life (Art. 8 ECHR) was interfered with in a way that was not accordance with the law, was not necessary in a democratic society, and breached the state’s positive obligations. The remainder of the complaint concerns consequences for the women under Article 3 ECHR on account of having been forced to carry to term a pregnancy with severe foetal abnormalities, including giving birth to a child which might die during or immediately after birth.

The incorporation of arguments concerning rule of law irregularities of the CT decision illustrates the strategic expansion of the reproductive rights dispute before the ECtHR. Mather and Yngvesson rightly see expansion as a political process, whereby new labels attributed to persons and perceptions act as “catalyst in the shaping of perception”

(Edelman 1971, 68, quoted in; Mather and Yngvesson 1980, 799). In this case of expansion, the rule of law argumentation of the Women's Complaint rested on three pillars.

First, the CT reached its decision after months of systemic dismantling of the legal system in Poland (Bodnar 2018; Krygier 2019; Sadurski 2018, 2019; Wyrzykowski 2019). As a result, the text of the complaint stipulated that the decision was issued by a tribunal which – in the eyes of the law – was not a legitimate court. The composition of the tribunal included three judges who were not supposed to be on the bench. In other words, they were sitting in place of judges already elected by the Polish Parliament in its previous term, but who the President had never sworn in. A political conflict is at play here, which leads to legal dualism in Poland. Law and Justice used their parliamentary majority to gain political control over the CT, thereby violating the separation of powers between the judiciary, the legislature, and the executive, making the tribunal a “mere enabler” of the government.⁹ The validity of this argumentation was later confirmed in a case *Xero Flor w Polsce sp. z o.o. v Poland* (no. 4907/18, 2021), where the ECtHR stated that the appointment of judges to the CT was characterized by “grave irregularities” rendering the bench unlawful and “not a court according to the law” (§§ 243–291).

Second, the text of the complaint highlighted potential conflict of interest concerning one judge on the bench (K.P.), who co-authored the majority decision. Back in 2017 this judge was still an MP and, with a group of over 100 conservative MPs, filed a motion to the CT to review whether access to abortion for foetal abnormalities was in accordance with the Polish Constitution. As the CT then had discretion on whether and when proceed with the case, this motion was discontinued. A nearly identical motion filed by MPs in 2019, however, resulted in the notorious 2020 abortion law, this time with K.P. on the bench as a CT judge. K.P. was therefore deciding on a case they had originally brought to the CT. All this was summarized in the text of the complaint:

Staffing the CT with judges supported by Law and Justice was aimed at creating a façade of an institution that would guard the protection of rights and freedoms. The tribunal in such a composition would not issue a judgement contrary to the political line presented by the ruling party. (Women's Complaint, p. 7, on file with the author)

Third, the human rights lawyers raised the argument that deferring the issue of reproductive rights to the CT demonstrated that Law and Justice wanted to avoid the responsibility for this thorny issue and “solve it” through the back door of a politically controlled tribunal, which did not have the social and political legitimacy to address it in the first place. A matter of such grave importance as abortion rights should have been debated before the Parliament and more widely in Polish society. Instead, the roles of important state institutions were reversed: by limiting women's reproductive rights, the CT had effectively acted as a substitution for the legislature. The CT decision could be seen as an abuse of law that bypassed the legislative process to resolve a case that was firmly within the competence of the legislator. This argument was raised in several expert opinions attached to the Women's Complaint. For example, the Polish Ombudsman highlighted that:

Decisions on such an important issue as the availability of legal abortion should be taken by the Parliament [...] after a comprehensive debate and consultations, detailed analyses of the consequences of the proposed legal changes, and after going through all stages of the legislative process. (Women's Complaint, Attachments, on file with the author)

It is not surprising therefore that the rule of law argumentation took over 75% of the text of the petition, as the primary justification for a violation of Art. 8 ECHR. The majority of the Women's Complaint thus made a case against authoritarian backsliding in Poland and the takeover of the CT by judges subservient to Law and Justice. The lawyers consciously exploited these developments in framing and structuring the arguments pertaining to interference in private and family life.

The remainder of the complaint (25% of the text) was devoted to Art. 3 ECHR, and the inhuman, degrading treatment that a woman might be exposed to when forced to carry the pregnancy to full term, especially when the foetus was likely to die during or immediately after the birth. The application states that "forcing [a woman] to give birth to a stillborn or sick child is unbearable for her." Prior to the CT decision – at least in the letter of the law – Polish women had a right to abortion in circumstances of "severe and irreversible foetal impairment," by virtue of the so-called Abortion Compromise law of 1993. All four cases from Poland that reached the ECtHR in relation to reproductive rights (*Tysic v Poland* no. 5410/03, 2007; *R. v Poland* no. 27617/04, 2011; *P. and S. v Poland* no. 57375/08, 2012, and *BB v Poland* no. 67171/17), demonstrated however that this law was difficult to enforce and urged different Polish governments to ensure that there were specific procedures put in place to allow for legal abortions as specified in the legislation. The nearly full ban on abortion, which defines the legal order post-2020 in Poland:

is fundamental to [woman's] personal autonomy as it reaches the most intimate, bodily sphere of life. It deprives her of the possibility to decide on the most important matter from the point of view of the course of her personal life. (Women's Complaint, p. 9, on file with the author)

The strategic expansion of the Women's Complaint supports my central argument that the case has ultimately become part of strategic litigation against the politicization of the CT and the broader attacks on the independence of the Polish justice system. The empirical analysis demonstrates that the Women's Complaint did not emerge in a vacuum but was embedded within the broader human rights mobilization to counter authoritarian backsliding. By strategically embracing rule of law arguments, the sociolegal mobilization behind the Women's Complaint can be viewed as an intricate translation process "in which the object of the dispute, and the normative framework to be applied, are negotiated as the dispute proceeds" (Mather and Yngvesson 1980, 818).

Discussion: the Women's Complaint as a window on society

Analysing the claims that Polish women submitted to the ECtHR "takes us deep inside the social fabric" (Kurkchian 2013, 517) and allows for more nuanced sociological observations about the current condition Polish society. Analysis of the sociolegal mobilization behind the Women's Complaint contributes to sociolegal research in foundational ways, due to authoritarianism's ubiquitous nature (Chua 2019, 357), and provides three specific insights into the interplay between the law and society in contemporary Poland. First, it shows a society in deep ideological conflict over the interpretation of human rights. Second, by revealing the degree of decline in the rule of law, the complaint has become a prime example of legal mobilization against authoritarian backsliding. Third, it exposes the government's practices of "ruling by cheating" (Saj 2021), whereby politically subservient institutions, such as the CT, have been used as a substitute for the legislature.

Reproductive rights as human rights?

The popularity of the Women's Complaint social campaign, together with the overall reception of the CT decision in nationwide opinion polls, demonstrate a society in deep conflict over the interpretation of reproductive rights as human rights:

Human rights, especially nowadays, in times of populism, when constitutional orders are really political orders . . . human rights can mean anything. Oh, I see very clearly the logical flips or cruelty of these arguments. (HR lawyer, 2021)

While the women applicants to the ECtHR saw the CT decision as a curtailment of their rights, the opposite was being claimed by the conservative MPs whose motion resulted in the abortion law. Their motion was to determine whether a right to terminate pregnancy due to severe and irreversible foetal abnormalities was a compliant with constitutionally enshrined rights to dignity (Art. 30), and protection of life (Art. 38) or resulted in "eugenic abortions" (Gliszczyńska-Grabias and Sadurski 2021, 139). In other words, the motion was arguably about more rather than less human rights. As Koralewska and Zielińska (2022) pointed out in their analysis of right-wing conservative media discourses in Poland, the main themes that dominated the debates around abortion were the "protection of the unborn," the "protection of women" and "preserving the culture and nation." This protectionist language reflected wider adaptations of anti-abortion discourse to reclaim human rights from its liberal origins (Graff and Korolczuk 2022). Rather than "abandoning the human rights language, illiberal regimes sometimes hijack it to serve their conservative, traditionalist and religious agenda" (Sajó 2021, 222). This was confirmed by Dziegielewska (2022) who looked at the judgements of the politically subservient CT and found them defined by mimicry of established concepts in international law – including human rights standards – to legitimize legal reforms of Poland's illiberal regime. This is often explained as a populist, cultural backlash against liberalism and human rights, whereby erstwhile adopters of the individual legal and constitutional rights – freedom of conscience, freedom of speech, gender equality, anti-discrimination – push back against "being regularly evaluated by foreign judges" allegedly bereft of "serious knowledge of one's country" (Krastev and Holmes 2019, 74). By focusing on the conservative MPs' motion through the conflict of interest of judge K.P., the Women's Complaint highlighted how human rights are often reinterpreted to "send a message of ideological commitment to the regime's conservative, authoritarian supporters" (Sajó 2021, 222). The Women's Complaint revealed how human rights are becoming a battlefield between conflicting ideologies and interpretations.

The Women's Complaint as resistance

The conflict that engulfs Polish society goes deeper than the interpretation of human rights and concerns many aspects of social and political life. The Women's Complaint illustrated the extent of the constitutional crisis and deterioration of the rule of law, but also the popular resistance against this illiberal turn in Poland. The fact that the vast majority of the petition dealt with the procedural and constitutional irregularities around the CT decision banning abortion speaks volumes. The human rights lawyers drafting the complaint traced the curtailment of women's

reproductive rights to the dismantling of the constitutional protections, checks, and balances in Poland ever since the Law and Justice had taken to power. These “reforms” embroiled the Polish government in a battle of values with the EU and the ECtHR in several disputes over the independence of courts, media freedoms, and human rights.

The ideas of conflict, dissent, and disagreement with government reforms aimed at dismantling the rule of law were at the forefront of the Women’s Complaint, and ubiquitous in its many narratives. The human rights lawyers expressed it as part of their profession:

This is the system, and we are pushing against it: to get more space, freedom, rights, security, respect, etc. This is a constant state of conflict. It is marked by endless losing until it eventually leads to some kind of win and systemic change. (HR lawyer, 2022)

The reforms of the CT were the first in a series of institutional changes concerned with the organization of the judiciary in Poland, the appointments of judges, and self-organization as a professional body. These were de facto constitutional changes introduced by a simple parliamentary majority (Wyrzykowski 2019, 419), which established new mechanisms for the executive to control the judiciary and ultimately undermined judicial independence – the cornerstone of a fair justice system based on a separation of powers. While there are many excellent works on how the judicial reforms amounted to backsliding on commitment to the rule of law (Mastracci 2020; Pech, Wachowiec, and Mazur 2021; Ploszka 2022; Sadurski 2018, 2020), the abortion law and the subsequent Women’s Complaint demonstrate that Polish women of reproductive age became the largest socially visible victim of this authoritarian backsliding:

In previous judgment [*Xero Flor*] the ECtHR stated that the tribunal is no longer an independent court in Poland, but a political body. This political body generated systemic suffering for women. (HR lawyer, 2022)

Women activists further highlighted how the Women’s Complaint cannot be separated from and builds on other protests in Polish society concerning the quality of the justice system:

With this action, we also wanted to show how important the rule of law is, how important the courts are, and how important it is to have access to those courts that are independent and free. (activist, 2022)

The institution of independent courts is crucial for our safety, for the safety of Katarzyna, a twenty-something from Skierniewice and Hanna, a mother of two from Szklarska Poręba. It was very important to us too, otherwise there wouldn’t have been so many of these complaints. (activist, 2021)

The legal mobilization around the Women’s Complaint exemplifies rights-based litigation against rising authoritarianism in Poland. The one thousand petitions of Polish women are therefore likely to become a cornerstone in the series of rule of law cases from Poland before the ECtHR.

Exposing “ruling by cheating”

Finally, the Women’s Complaint exposed the “ruling by cheating” strategies of the Polish government as conceptualized by András Sajó. In his book, *Ruling by Cheating: Governance in Illiberal Democracy* (2021), Sajó details the processes of advancing populism and authoritarian backsliding in Eastern Europe to arrive at “a theory of cheating” in constitutional law: “with illiberalism unleashed, populism in power turns its actions against constitutionalism,” whereby “democracies that emerge from populism are ruled by all efforts to conceal the truth in order to mislead” (Sajó 2021, 2–5). How does “ruling by cheating” translate into the present, Polish context? The Law and Justice-dominated Parliament invoked a motion to the CT to delegatize abortion through the “back door” of the politically controlled judiciary. What should have been a legislative decision preceded by popular, societal consultations around the consequences of delegatizing the most common avenue for abortion, became a judicial decision of a politically dependant tribunal. As Sajó explains, “illiberal regimes relying on systemic cheating” seem to follow specific rules of positive law strategically and selectively, and “pretend to satisfy the requirements of the rule of law” but they do so “in disregard of the relevant standards or principles” of the spirit of the law (Sajó 2021, 5). This is exactly what happened in Poland, as while motions to the CT are perfectly legitimate tools in themselves, they become a travesty if the said CT is “not a court according to the law” (*Xero Flor w Polsce sp. z o.o. v Poland*, no. 4907/18, 2021) and, ultimately, lacks independence.

By listening to women explaining reasons for legal mobilization (“we felt cheated”) and studying the legal argumentation behind the ECtHR petition, the Women’s Complaint clearly demonstrated how the Law and Justice Party delegated the socially controversial issue of abortion rights to the politically subservient judiciary. The Women’s Complaint revealed how onetime adopters of the rule of law and liberal democratic ideals pretended “to observe a rule in order to depart from it, often reaping undeserved benefits from those cheated” (Green 2006, 15). The Women’s Complaint is a case in point to illustrate how Law and Justice, with the help of the CT, has effectively bypassed democratic decision-making and, in this process, has legally disenfranchised a significant proportion of Polish society – all women of reproductive age. In exposing this cheating, the Women’s Complaint became more than a reproductive rights case: it is a broad rights-based litigation against the rule of law crisis in Poland.

Conclusion

The Women’s Complaint tells the story of women standing up for their reproductive rights and – in effect – spearheading a much broader rights-based litigation against the authoritarian backsliding in Poland. This mass legal mobilization to the ECtHR following the abortion law revealed how women’s reproductive rights are intricately linked with the rule of law and constitutional concerns. The strategic interplay between narrowing and expanding the Women’s Complaint has ultimately transformed a dispute over reproductive rights into strategic litigation against authoritarian backsliding.

Studying the sociolegal mobilization behind the Women’s Complaint provides unique glimpses into the fabric of Polish society. The Women’s Complaint cuts right through a deep-seated conflict over constitutional and human rights and

their interpretation. It demonstrated a society and a government engulfed in crisis of the rule of law. Finally, it revealed the “ruling by cheating” tactics of the Polish government, which relegated a socially salient matter of abortion rights to a politically subservient judiciary. More than a thousand of women standing up for their reproductive rights has become a prime example of strategic litigation before an international court to uphold the rule of law. It is also a cautionary tale that authoritarian attacks on domestic independent courts are attacks on the entire Polish society.

Notes

1. This figure might be a significant underestimate as the CBOS study was conducted on a random and representative sample of adult Poles, while young people under 18 also actively (and in great numbers) participated in the street protests.
2. “Communication” is a formal term used by the ECtHR and denotes the notification of the application to the respondent Government.
3. The Law and Justice (PiS) Party has been in power in Poland since 2015 and has been described as authoritarian and populist by many scholars, for example: Heino Nyyssönen and Jussi Metsälä. 2020. “Highlights of National History? Constitutional Memory and the Preambles of Post-Communist Constitutions,” *European Politics and Society* 21(3): 323–340; Bojan Bugarcic and Alenka Kuhelj. 2018. “Varieties of Populism in Europe: Is the Rule of Law in Danger?” *Hague Journal on the Rule of Law* 10(1): 21–33; Radoslaw Markowski. 2019. “2019” *Hague Journal on the Rule of Law* 11 (1): 111–132.
4. See the cases of Grzęda v Poland (no. 43572/18), Dolińska-Ficek v Poland (no. 43447/19), Ozimek v Poland (no. 57511/19), Brodowiak and Dżus v Poland (nos. 28122/20 and 48,599/20), Biliński v Poland (no. 13278/20), Pionka v Poland (no. 26004/20), Juszczyszyn v Poland (no. 35599/20), Żurek v Poland (no. 39650/18), and Tuleya v Poland (no. 21181/19, and no. 51751/20), and the press releases in the judgements Xero Flor w Polsce sp. z o.o. v Poland (no. 4907/18) and Broda and Bojara v Poland (nos. 26691/18 and 27,367/18), Reczkowicz v Poland (no. 43447/19), Advance Pharma Sp. z o.o. v Poland (no. 1469/20).
5. “That little article we wrote didn’t have any empirical focus, it was not in any dramatic way theoretical, and I don’t think any of us initially thought it to be any kind of major piece of work. It was a nice idea from my point of view” (William Felstiner in Olesen and Hammerslev 2021, 303).
6. All quotes were translated from Polish are by the author.
7. The subsequent turn of the events before the ECtHR – known at the time of publication – has shown that the lawyers were right in limiting the pool of potential applicants to the ECtHR, as one group of cases from Women’s Complaint, known as *A.M. and Others v. Poland* (relying on the figure of the potential victim), was declared inadmissible. The Court observed that the consequences for the applicants of the 2020 Abortion law “were too remote and abstract” (ECtHR Registrar of the Court 2023) because the applicants “could not prove that they were themselves directly affected by the impugned legislation” (Katsoni 2023).
8. In the history of the ECtHR there was one more case which attracted such great numbers of individual applicants, *McHugh and Others v United Kingdom* (2015): 1,015 applicants. This litigation followed from *Hirst v the United Kingdom* (2005) and concerned prisoners’ voting rights. *McHugh and Others* was a strategic litigation spearheaded and designed by specific law firms in the UK.
9. The detailed description of the political conflict over the CT between Civic Platform and Law and Justice lies beyond the scope of this article. To understand the nitty gritty of the illegitimate election and appointment of judges see Sadurski (2019).

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