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AGNIESZKA BIELSKA-BRODZIAK,[a]
MARLENA DRAPALSKA-GROCHOWICZ,[b] MAREK SUSKA[c]

ON WHY THE COURT DID NOT WANT TO FIGHT SMOG, OR SEVERAL COMMENTS ON THE RESOLUTION OF THE POLISH SUPREME COURT ON THE RIGHT TO LIVE IN A CLEAN ENVIRONMENT1

DLACZEGO SĄD ZE SMOGIEM WALCZYĆ NIE CHCIAŁ ALBO KILKA UWAG O UCHWALE POLSKIEGO SĄDU NAJWYŻSZEGO W PRZEDMIOCIE PRAWA DO ŻYCIA W CZYSTYM ŚRODOWISKU

The authors analyse the 2021 ruling by the Polish Supreme Court, which refused to acknowledge the right to live in a clean environment as a personal interest. The purpose of the paper is not only to evaluate the quality of the Supreme Court's argumentation, but also to highlight the implicit premises that were missing from the grounds of the decision. Based on these findings, the authors draw broader conclusions about the circumstances that increase the likelihood of pro-environmental (including pro-climate) court decisions and breakthroughs in interpretation. The authors use the latter term to describe the situation of challenging the previous, widely accepted interpretation of certain legal provisions, favouring a different interpretation that considers societal changes in values and beliefs. The authors evaluate the Supreme Court's arguments and put forward the thesis that the construction of personal interests was not the primary reason for rejecting the recognition of the right to live in a clean environment as a new personal interest. The authors used two methods to search for the hidden premises of the Supreme Court's resolution: (i) they examined the discourse supporting the rejection of the right to live in a clean environment as a personal interest, and (ii) they placed the resolution in its socio-political context. The authors identify four conditions that increase the likelihood of pro-environmental (and pro-climate) court judgments: (i) the condition of costs' expediency, (ii) the condition of individualization of responsibility, (iii) the condition of respect for the judiciary and (iv) the condition of public support. The last two conditions apply to interpretative breakthroughs in general, regardless of the subject matter.

Keywords: right to live in a clean environment; personal interests; strategic litigation; climate change litigation; breakthrough in interpretation

[a] University of Silesia in Katowice, Poland / Uniwersytet Śląski w Katowicach, Polska
agnieszka.bielska-brodziak@us.edu.pl, https://orcid.org/0000-0002-9926-6436
[b] University of Silesia in Katowice, Poland / Uniwersytet Śląski w Katowicach, Polska
marlena.drapalska-grochowicz@us.edu.pl, https://orcid.org/0000-0002-8602-2918
[c] University of Silesia in Katowice, Poland / Uniwersytet Śląski w Katowicach, Polska
marek.suska@us.edu.pl, https://orcid.org/0000-0002-0950-5588

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W opracowaniu autorzy analizują uchwałę polskiego Sądu Najwyższego z 2021 r. odmawiającą uznania prawa do życia w czystym środowisku za dobro osobiste. Celem artykułu jest nie tylko ocena jakości argumentacji SN, lecz przede wszystkim zwrócenie uwagi na to, czego w uzasadnieniu uchwały wprost nie wyrażono. Na tej bazie autorzy wyprowadzają szersze wnioski na temat okoliczności zwiększających prawdopodobieństwo prośrodowiskowych (jak również proklimatycznych) rozstrzygnięć sądowych, a także dokonywania przełomów interpretacyjnych w ogóle. Tą ostatnią nazwą autorzy określają odrzucenie dotychczasowego, niekwestionowanego szerzej rozumienia wybranych przepisów prawa na rzecz innego, uwzględniającego na przykład przemiany w aksjologii społeczeństwa. Autorzy poddają argumentację SN ocenie i stawiają tezę, że to nie jurydyczna konstrukcja dóbr osobistych była najważniejszą przesłanką odmowy zatwierdzenia prawa do życia w czystym środowisku jako dobra osobistego. Metodą poszukiwania niejawnych przesłanek uchwały SN z 2021 r. jest (1) sięgnięcie do dyskursu wspierającego odrzucenie prawa do życia w czystym środowisku jako dobra osobistego, (2) osadzenie uchwały SN w społeczno-politycznym kontekście, w jakim zapadła. W wyniku analizy autorzy formułują cztery warunki, których wystąpienie ułatwia sądom podejmowanie prośrodowiskowych (w tym proklimatycznych) orzeczeń, którymi są (1) warunek celowości kosztów, (2) warunek indywidualizacji odpowiedzialności, (3) warunek poszanowania sądownictwa oraz (4) warunek poparcia społecznego. Dwa ostatnie z nich mają ponadto zastosowanie do przełomów interpretacyjnych w ogóle, niezależnie od ich przedmiotu.

Słowa kluczowe: prawo do życia w czystym środowisku; dobra osobiste; *strategic litigation*; *climate change litigation*; przełom interpretacyjny

I. INTRODUCTION

In a democratic state implementing the principle of the tripartite government, the position of the judiciary is particularly high, equal to the legislative and executive branches. The last two powers are closely intertwined in many political systems – such as in Poland, where it is parliament that selects the government. Therefore, the judiciary is the only competing centre of power to which those whose interests do not find understanding from the legislative and executive branches can turn.

Courts are established to apply the law, something given not by the judiciary, but by the other two branches. Therefore, 'the rules of the game' are not set by judges; judges are only responsible for supervising their observance. However, this is a rather oversimplified picture which hides the true extent of the judiciary's influence on the legal system. Legal culture has developed a number of tools that, in practice, give courts the opportunity to not only implement state policies, but also participate in setting them. Examples include judicial discretion, dynamic and adaptive interpretation, principles based only on the *sense of appropriateness* or 'arising' from the principle of the democratic state of law. All these tools allow citizens to hope that the courts will be inclined to make a breakthrough in interpretation, that is, to reject the previous consensual understanding of selected laws in favour of a different understanding that takes into account, for example, changes in the axiology of the society. The axiology should be articulated primarily by the legislator; however, if the legislator, for various reasons, is passive, it is

not excluded to make a breakthrough in interpretation precisely in favour of these new values.

The climate crisis has prompted many entities to seek the involvement of courts in various countries around the world. These attempts are made by some citizens, including activists, dissatisfied with the slowness and caution of the legislative and executive branches of government.[1] The legislative and executive branches are often paralysed by the short-term interest of having to submit their policies relatively frequently to evaluation by voters.[2] These, in turn, often prefer to avoid making sacrifices in order to counter a distant threat that is hard to imagine, especially when they are unsure of the solidarity attitude of other communities. This is all too evident in the Polish discourse around climate issues, in which one of the most popular arguments against reducing greenhouse gas emissions is China's plans to invest in coal-fired power generation, without seeing their broader context.[3] However, the problem of binding political elites to the will of members of the public, mentioned here, is obviously not a challenge only in liberal democracy states. It manifests itself most clearly here due to the subjective treatment of citizens, but the social legitimacy of authority remains an important issue in any political system.

Citizens use strategic litigation in efforts to influence state policies with the help of courts, in other words, cases are initiated less to solve a specific individual problem and more to have broader political and social effects.[4] One of the areas in which strategic litigation is brought is environmental protection, including climate protection. Climate change litigation is no longer just an idea, but a method for effectively influencing reality.[5] One of the most well-known successes of using this tactic is a Dutch court committing Shell to reduce its greenhouse gas emissions by 45% by 2030.[6]

In Poland, the most popular examples so far of strategic litigation in the area of environmental protection have been cases involving pecuniary compensation for air pollution. While these are not examples of climate change litigation in the strict sense of the word, in our view they are very close, enough to make conclusions about the latter based on the former. Public interest in smog actions was fostered by the fact that they were brought by well-known public figures in Poland, such as Jerzy Stuhr, an actor, and Mariusz Szczygieł, a reporter.[7] From the jurisprudential perspective, the most significant problem of smog actions was related to the need to resolve whether the so-called

[1] Beldowicz (2021).

[2] See considerations by Kuh (2019): 749–751.

[3] See e.g. Wiech (2021).

[4] See Rumpf (2022): 443.

[5] See Burgers (2020): 56–57. However, it is important to keep in mind that similar tactics can be used against efforts to reduce the effects of the climate crisis – see Setzer, Bangalore (2017).

[6] See Spijkers (2022): 137–142. On the other types of climate change litigation, see Wilensky (2015): 136–142.

[7] Sąsiada (2019).

right to live in a clean environment constitutes one of the personal interests protected by Polish civil law.

However, despite the resolution in favour of the plaintiffs by some courts of the first instance, the most significant voice in the discussion of this problem became the negative resolution by the Supreme Court of 28 May 2021.[8] It will not be an exaggeration to say that it has temporarily closed the discussion of the new personal interest, which does not yet preclude other smog actions – as long as claimants demonstrate the violation of another personal interest, such as health.[9]

Before 28 May 2021, some courts had been inclined to make a breakthrough in interpretation in favour of the value of a clean environment, but the Supreme Court refused to 'approve' it. What is most surprising is not the substance of that ruling, but rather the low quality of the argumentation presented. The justification of the resolution is very laconic, and as a result it is difficult to believe that the Supreme Court met the challenge of issuing a ruling in which it would demonstrate appropriate care for the interests relevant to numerous social groups. However, we put forward the thesis that the Supreme Court judges provided the aforementioned justification not because of their carelessness, but because of their inability to publicly admit that they were also driven by other factors that made it difficult for them to accept the new personal interest. In this study we want:

1) to analyse the overt premises for the ruling of the Supreme Court and to uncover other arguments not expressed by the Supreme Court that also may have influenced the refusal to approve the breakthrough in interpretation;

2) to identify, on this basis, the circumstances that increase the likelihood of the courts becoming involved in shaping the environmental policy, including climate policy, and that increase the likelihood of making (approving) a breakthrough in interpretation in the existing understanding of the law.

Part II of the paper will be devoted to a brief characterization of the problem of 'finding' new personal interest. In part III, we will analyse the arguments presented by the Supreme Court and the glossators approving the said ruling. We will then evaluate the argumentation and display other premises that may have influenced the refusal to approve the breakthrough in interpretation (part IV). In part V, we will consider under what circumstances the courts may become more likely to become involved in environmental and climate policy-making, and more generally, to make a breakthrough in interpretation.

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[8] III CZP 27/20, published in [Legal Database] Lex no. 3180102.

[9] It is in this vein – of the violation of another personal interest – that one regional court accepted the smog action of actress Grażyna Wolszczak. See the ruling of the Regional Court in Warsaw of 10 September 2021, V Ca 1607/19. However, representatives of the public prosecutor's office have filed an extraordinary appeal against the ruling, which is now subject to review by the Supreme Court. See Mikowski (2022).

II. WHERE DO PERSONAL INTERESTS COME FROM?

As stated in Article 23 of the Civil Code[10]:

> The personal interests of a human being, such as in particular health, freedom, dignity, freedom of conscience, surname or pseudonym, image, confidentiality of correspondence, inviolability of home as well as scientific, artistic, inventive and reasoning activities shall be protected by the civil law regardless of the protection provided for by other provisions.

The above-mentioned provision, as is commonly believed in judicature and doctrine, includes a catalogue of personal interests that can be 'updated' by courts.

> The process of identifying certain values as personal interests is stretched over time; it follows, not always dynamically enough, the development of social relations and changes in the assessments prevalent in society at any given time.[11]

The provision of Article 23 of the Civil Code allows the 'distance between law and life' to be reduced. In addition to the personal interests explicitly indicated in Article 23 of the Civil Code, this catalogue includes the right to honour the deceased, or of belonging to a given sex.[12] These are widely accepted personal interests not named in the Civil Code; however, the legal system is also not lacking in court decisions whose legitimacy raises serious doubts,[13] such as the recognition as a personal interest of the parental bond[14] or the right to rest and peace.[15]

The process of distinguishing a new personal interest can be characterized as containing two stages. First, it is necessary to check whether we are dealing with an 'interest', and then whether it is of a 'personal' nature. The first stage assesses the interest from the perspective of its relevance to the individual, but this is insufficient in itself; for it must then be determined that the interest also deserves protection 'in light of generally accepted assessments'.[16] The second stage assesses whether such an 'interest' is 'closely related to the individual, as an interest that is essential for ensuring their physical and psychological development'. Among other things, interests that are interpersonal

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[10] The Civil Code of 23 April 1964, consolidated text: Journal of Laws of the Republic of Poland 2022, item 1360, as amended.

[11] Resolution of the Supreme Court (7) of 27 March 2018, III CZP 60/17, published in [Legal Database] Lex no. 2463496. See also Skorupska (2022): 116–118.

[12] Janiszewska (2021).

[13] Janiszewska (2021).

[14] Judgment of the Administrative Court in Gdańsk of 15 July 2015, I ACa 202/15, published in [Legal Database] Lex no. 1770654.

[15] Judgment of the Administrative Court in Katowice of 18 June 2014, I ACa 213/14, published in [Legal Database] Lex no.1498911.

[16] This is an expression of the so-called objective concept of personal interest. On this subject, see for example the judgment of the Supreme Court of 23 February 2022, II CSKP 232/22, published in [Legal Database] Lex no. 3347178.

(their existence depends on the will of another person as well, e.g. interpersonal bonding) or 'common, general, public'[17] interests, cannot be considered personal.

III. ARGUMENTS AGAINST A NEW PERSONAL INTEREST

The Supreme Court passed a resolution on the right to live in a clean environment in response to a legal query from a district court. The plaintiff was a resident of a city where, for many years, regular levels of pollutants in the air significantly exceeded the accepted standards. This condition, however, could not be attributed to the acts of a specific entity, so the plaintiff directed a claim for pecuniary compensation under Article 448 of the Civil Code against the State Treasury – the Minister of Climate and the Minister of State Assets – on account of their omissions, as a result of which the plaintiff's personal interest was allegedly violated. However, the regional court dismissed the claim, finding that

> Article 448 of the Civil Code is not a basis for compensating for unspecified health discomfort that does not involve bodily injury or health impairment. The right to live in a clean environment is not a personal interest to which protection would be granted under Articles 24 and 448 of the Civil Code.

The ruling was challenged on appeal by the plaintiff, joined by the Ombudsman. The district court did not share the categorical conviction of the court of the first instance that the right to live in a clean environment is not a personal interest – among other reasons because 'in Polish society there has been, and is growing, the awareness of the quality of air and its fundamental importance for the daily functioning of people'. Taking this into account, the regional court decided to ask the Supreme Court whether the right to live in a clean environment constitutes a personal interest.[18]

The Supreme Court gave a negative answer, noting that:

> Although personal interests have always accompanied people, as values closely related to them and their dignity as human beings, the perception of whether they have been violated is significantly influenced by circumstances related to the time and place of assessment.

Thus, the Court recognized that air quality and environmental quality are of significantly greater public concern today than they were a dozen years ago. Thus, the Supreme Court held that the 'right to live in a clean environment' is indeed an 'interest' in the sense described above. At the same time, however, it stated that under civil law, it is not a personal interest, but a common good. And this classification would not change, in the Court's view, even

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[17] Janiszewska (2021).

[18] Critically on the question asked by regional court – cf. Zwierzchowski (2022): 134–136.

by the simultaneous statement that the right to live in a clean environment is a human right.

This is virtually the only identifiable argument of the Supreme Court against recognizing the right to live in a clean environment as a personal interest. Interestingly, a very similar argumentation was presented by the Supreme Court 46 years earlier regarding the recognition as a personal interest of the so-called right to enjoy the beauty of the landscape.[19] Thus, the social changes that have taken place over a period of almost half a century still do not, in the Court's opinion, justify accepting such interests as personal interests. The Court stipulated, however, that the plaintiff's claim may be justified if, by allowing violations of air quality standards, other personal interests of the plaintiff, such as health, freedom or privacy, were threatened or violated. In view of the superficiality of the Supreme Court's argumentation, it is also worth presenting the premises justifying such a decision, already cited exclusively by the glossators of this resolution.

First of all, it is necessary to emphasize the obvious. Smog is a mass phenomenon, affecting a huge part of Poland's population. The plaintiffs are seeking 'pecuniary compensation for, as it were, the very fact of living in a large metropolitan area, where air is poisoned by traffic or outdated heating systems.'[20] The mass character of the problem makes one wonder whether

> granting each person the right to seek redress from the State would not be a counter-effective solution. The cost of paying large pecuniary compensation could cripple public finances and consequently make it impossible to perform many essential state tasks.[21]

Second, smog is a 'doubly non-individualized' phenomenon – both on the part of 'perpetrators' and 'victims'. In most situations, this phenomenon cannot be linked to one specific entity responsible for it. The owner of a house heated with hard coal burned in a low-grade boiler will not manage to generate smog in their neighbourhood; smog is a phenomenon that requires the simultaneous activity of many entities that do not cooperate in any way. Therefore, the plaintiff in the case under review directed their claims against public authorities, seeing their responsibility in that they were not taking sufficient measures to prevent smog. In addition, however, smog does not target any specific legal entity, any specific individual.[22] Air quality standards are not established in the interest of individuals: 'we are all disadvantaged by the lack of an adequate environment, not just individual persons. – If so, this is a general law, not a personal one.'[23]

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[19] Judgement of the Supreme Court of 10 July 1975, I CR 356/75, published in [Legal Database] Lex no. 344145.

[20] Szczepaniak (2022): 13.

[21] Szczepaniak (2022): 20.

[22] Nowakowski (2022): 14.

[23] Ciućkowska (2022): 34. 'If the impairment is experienced equally by all citizens or by a significant group of society, then there is no harm, but rather the public charge they are obliged to bear,' Szczepaniak (2022): 18.

Third, public authorities should be required not so much to achieve certain results (such as providing air of adequate quality), but to undertake measures for this purpose that are within their capabilities. These measures must take into account the fact that smog is also linked to the poverty of a significant part of the population and that it is not possible to immediately decarbonize the economy.[24] It is necessary here to resolve value conflicts and determine who is to bear the financial burden of air quality improvement measures and to what extent; it is also necessary to take into account the social and political costs.[25]

Fourth, it is questionable whether we can really see such a significant evolution in social attitudes that indicate living in a clean environment has already become a value in itself for society. According to Katarzyna Ciućkowska: 'so far it has been difficult to see such a clear relationship between people and the environment. The state of the environment raises more frequent concerns about the state of other human values, such as health, life or freedom'.[26]

IV. WHAT DID THE SUPREME COURT FAIL TO MENTION?

The summarized comments of the glossators extend the Supreme Court's reasoning in a direction that is generally consistent with its ruling. This means the readers of the resolution have to ask themselves why the argumentation presented in the resolution is so brief. In our view, this is not coincidental, but is due to a special combination of circumstances related to the difficult position of the Court deciding this type of strategic litigation in the area of environmental protection.

From the perspective of the existing theory of personal interests, the Supreme Court's ruling can be considered reasonable. Recall that assessing whether we can already speak of the formation of a new personal interest first requires determining whether we are dealing with a 'good' and then – whether it is a 'personal' good. The court focused on the latter element. A clean environment is indeed a common good rather than a personal interest, although of course it is possible that certain individuals will have a special relationship to the environment that deserves protection precisely as a personal interest. However, these are most likely rare cases, and difficult to demonstrate.

However, we will venture the thesis that it was not concern for jurisprudential purity of the concept of personal interests that determined the negative attitude of the Supreme Court towards recognizing the right to live in

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[24] Szczepaniak (2022): 19.

[25] Nowakowski (2022): 13, 15. See also comments in the judgment of the District Court in Łódź of 14 January 2021, I C 1368/19, published in [Legal Database] Lex no. 3169555.

[26] Ciućkowska (2022): 36. In this context, however, Skorpuska (2022): 118 rightly notes that health and life are also interrelated, yet they are considered separate personal interest. This allows each of these values (each of these interests) to be 'most fully and effectively protected'.

a clean environment as such an interest. What convinces us of this is, first of all, the acceptance – with all the disputes in this regard – expressed in the jurisprudence of the Supreme Court that family bonds can be recognized as personal interests.[27] In our opinion, it is much easier and more convincing to 'individualize' a clean environment than a family bond which – by definition – is between two people.

Nevertheless, it is not impossible that it was the dispute over family bond – including two subsequent negative Supreme Court resolutions – that caused strong criticism[28] and temporary reluctance to further expand the catalogue of personal interests.

The concept of personal interests, however, is not so unmodifiable that it cannot evolve further. Yes, at this stage, a personal interest can be considered a petrified vague term,[29] that is, one whose meanings has already been agreed by the legal community. However, even in such cases, changes in the understanding of vague terms are not impossible, and the decision in this regard must be made by the same legal community. In turn, the Supreme Court is one of the most important actors in this community, one capable of exerting a strong influence on the content of legal language, including the understanding of 'personal interest'.

Perhaps the awareness of variability of interpretation was one of the factors prompting the Supreme Court to reduce its argumentation to the minimum necessary; so that in the future it will not be limited by its own declarations as to the reasons preventing acceptance of the right to live in a clean environment as a personal interest. In this way, the Supreme Court has left the door wider open to change its position in the future. So what did the justification not say that likely influenced the ruling?

First, the Supreme Court is completely silent on the problem of consequences of a positive ruling, quite unlike the quoted glossators. A different ruling by the Supreme Court would likely contribute to the massive filing of lawsuits for pecuniary compensation. The costs would be high, although it is difficult to estimate them – as it is not known how many entities would sue and what the amount of compensation would be.[30] Nor can it be ruled out that further violations of personal interests in this way could result in the awarding of further compensations to the same entities. All these expenses would be incurred not to improve air quality, but to compensate for past omissions. Thus, if the Supreme Court were to show favouritism towards the right to live

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[27] On this subject see, among others, resolution of the Supreme Court (7) of 27 March 2018, III CZP 36/17, published [Legal Database] Lex no. 2521621, and Nowakowski (2021).

[28] See dissenting opinion of Judge Jacek Gudowski to the resolution of the Supreme Court (7) of 27 March 2018, III CZP 36/17, published in [Legal Database] Lex no. 2521621.

[29] We are developing the concept of vague petrified terms and ones that are continuously updated in the forthcoming study *Petrification and updating: the evolution of vague terms in legal texts*.

[30] This problem would only be solved by the courts' unanimous acceptance that violation of the personal interest in the form of the right to live in a clean environment can only be compensated with a symbolic amount.

in a clean environment, this could even hinder its realization by limiting the available resources.[31]

Second, regardless of current political assessments, the panel of judges was also likely guided by the belief that it is not right to hold the central government (State Treasury) solely accountable for the problem of smog. Smog, as we have already pointed out, is most often not the result of the conduct of any single entity. Therefore, lawsuits justified by the right to live in a clean environment were directed against the State Treasury which was to be held accountable not so much for its activities, but for its omissions.

Third, it is uncertain whether a clean environment can be considered to be a value universally accepted in Polish society. This is evidenced, for example, by the interesting results of a CBOS survey;[32] in 2018, the concern about the state of the environment in the Polish country was demonstrated as 'very strong or strong' in as many as 68% respondents, but by 2020 this rate dropped to 53%. Air cleanliness in large cities (over 500,000 residents) was rated by respondents at an average of 2.77 on a scale of 1 (*very bad*) to 5 (*very good*). On the other hand, in another survey in 2021, 32% of respondents from such cities said they believed '*smog is a very serious problem*'.[33]

A clean environment also did not appear at all on the list of the most important values for Poles in 2019, despite the fact that respondents could name as many as three most important values. However, as many as 69% of respondents cited '*maintaining good health*'.[34] Likewise, a clean environment was not recognized by respondents in 2020, despite the fact that the answers about '*what is most important in life*' even included suggestions such as 'sports', 'business, keeping my business', or 'housing, building a house'.[35]

Moreover, the problem can be associated with the assessment of whether we are dealing with a 'good' (universally recognized) in the form of a clean environment at all; however, it is characteristic that the Supreme Court does not explicitly mention the problem of social acceptance of that good in the reasons for the resolution. Indeed, the situation is too ambiguous, as the survey results cited here show. However, there is a serious risk that the Supreme Court's 'anti-smog' ruling would meet with too little approval in society, especially if it resulted in the imposition of significant burdens on citizens.

Air protection policies must assume restrictions on the freedoms of subjects of the law and often also impose significant burdens on them. If the Supreme Court recognized the right to live in a clean environment as a personal

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[31] See Szczepaniak (2020): 20. Budgetary balance has already become the explicit concern on the part of the judiciary in the judicial decisions of the Constitutional Tribunal – see, e.g. Granat (2017). Critically on that matter Hanusz (2015): 32.

[32] Ecological Awareness of Poles, CBOS Survey Report No. 163/2020, prepared by M. Omyla-Rudzka, https://www.cbos.pl/SPISKOM.POL/2020/K_163_20.PDF [accessed 20 March 2023].

[33] Smog and how to deal with it, CBOS Survey Report No. 41/2021, https://www.cbos.pl/SPISKOM.POL/2021/K_041_21.PDF [accessed 20 March 2023].

[34] Poles' value system in 2019, https://www.cbos.pl/PL/publikacje/news/2020/02/newsletter.php [accessed 20 March 2023].

[35] Values in the time of cholera, CBOS survey report 160/2020, prepared by B. Badora, https://www.cbos.pl/SPISKOM.POL/2020/K_160_20.PDF [accessed 20 March 2023].

interest, and then charging the State Treasury with having to pay substantial sums of money as compensation, would therefore force the legislative and executive branches of government to undertake specific activities, including those directed at individual citizens, their properties and their vehicles. In the best-case scenario, the legislative and executive authorities would use the Supreme Court's line of jurisprudence as a convenient excuse to remove their responsibility for making a political decision. In this way, they would direct citizens' discontent against the judiciary. There are, moreover, doubts that in this scope courts should take over responsibility from the legislative and executive branches of government, which have stronger democratic legitimacy and bear more political responsibility.[36]

Fourth, the Supreme Court may have been motivated by the fear that its ruling would not, however, become a 'convenient excuse', but rather a pretext for publicly stigmatizing 'irresponsible' courts that have waged a 'political war' on the legislative and executive branches without regard to the well-being of the state and citizens. The strong political polarization and conflict between the legislative and executive branches on the one hand and the judiciary on the other that we face in Poland can have an inhibitory effect on the judiciary. Courts may arguably be less inclined to 'open further fronts of contention' when they are already subject to an attack motivated by their 'political activity'.[37]

It is worth noting that the justification of the Supreme Court's resolution is also very restrained in terms of expression; the Supreme Court avoids any stigmatization of other public authorities for the air quality in Poland. As it seems, this would not be a major concession to pro-environmental activists;[38] such expressions of disapproval of past policies would have no legal effect, but would give activists additional arguments in the public discourse.[39] The Supreme Court, however, preferred not to get involved, and we believe this situation may have been influenced, among other things, by the hostility shown to the judiciary in the past few years by the legislative and executive branches.

In our view, the content of the Supreme Court's resolution was therefore determined not only by the aforementioned concern for the jurisprudential purity of the concept of personal interests. Equally important were, in all likelihood, the factors listed above which, for various reasons, the Court could not or would not explicitly mention in the justification for the resolution.

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[36] See Kuh (2019): 754–756, Setzer, Vanhala (2019): 7–8.

[37] On the concept of the 'chilling effect', see, e.g. Chybalski (2022).

[38] 'Even "losing" cases can have important flow-on effects through the ways in which they shape public dialogue, business attitudes and government action,' Peel, Osofsky (2018): 67.

[39] Court cases and rulings can be vehicles for a certain narrative, using rhetorical devices to achieve impact on the community: 'litigation serves an educational purpose that exceeds the immediate effects of a particular court decision. Ultimately narratives and storytelling function as argumentative tools that aim to persuade society and decision makers', Schramm (2022): 366. As Hilson (2019: 398) notes, 'Climate litigation … has begun to appeal much more to emotion.'

V. WHAT INCREASES THE CHANCES OF THE COURTS ADOPTING A PRO-ENVIRONMENTAL ATTITUDE AND MAKING A BREAKTHROUGH IN INTERPRETATION?

In our view, the above conclusions can be extended to other cases of strategic litigation in the scope of the environment, including climate change litigation. Based on these, it is possible to formulate some more general theses about the circumstances that increase the likelihood of the courts becoming involved in pro-environmental activities, and more generally, the likelihood of a breakthrough in interpretation.

As we have already indicated, a breakthrough in interpretation would be the rejection of the previous, mostly unchallenged understanding of selected legal provisions in favour of a understanding that, for example, takes into account changes in the axiology of the society. Given the natural tendency to favour the status quo, breakthroughs in interpretation are phenomena that require particularly favourable conditions. Using the example of smog litigation, it is also visible that the propensity for breakthroughs in interpretation is greater among judges who do not make final decisions, who are not authorized to 'approve' a breakthrough. It is understandable, moreover, that the Supreme Court has shown more restraint in this matter than at least some of the common courts.

All of the 'conditions' listed below should be understood as circumstances, the occurrence of which increases the likelihood that courts will join pro-environmental activities. However, the latter two – respect for courts and public support – are even more general, and in our view they are the circumstances that positively affect not only the tendency of courts to pro-environmental activity, but to make any breakthroughs in interpretation, regardless of the specific area of law.

The condition of costs' expediency. As we have already indicated, the potential financial impact of a favourable ruling may have been one of the most important factors determining the Supreme Court's final ruling. In our view, in addition to the fact that these costs were difficult to estimate, it was also important that they would be beyond the control of the legislative and executive authorities, and in addition – they would be directed at the past (to award pecuniary compensation as a result of past negligence), and not at improving air quality in the future. They could therefore even make it more difficult for the legislative and the executive branch to achieve the latter goal. Courts may be more willing to accept strategic litigation in the scope of the environment, including climate change litigation, if it is aimed directly at achieving the desired states of affairs, and leave the legislative and executive branches of government adequate leeway in determining the political agenda for their implementation.

The condition of the individualization of responsibility. We also hypothesize that there is a greater chance of a court issuing an environmentally favourable ruling when it is to apply to a specific entity that can be attributed clear responsibility for the given activities. In doing so, it is important to

clearly indicate the scope of responsibility: the entity's contribution to the adverse state of the environment. However, courts do not have the instruments to assess the environmental impact themselves, let alone the quality of state policies or public or private entities. Therefore, even non-binding standards can be valuable, as they allow the assessment, for example, of whether an out-of-class boiler on a neighbouring property is causing unlawful, excessive emissions.

The condition of respect for the judiciary. What can have a positive impact on pro-environmental judicial activism, is a higher degree of recognition of and respect for judicial authorities by the legislative and executive branches of government, as well as the public. The less turbulent the conditions for the functioning of the judiciary, the less political polarization around this branch of state authority, the more favourable the conditions are for extensive application of the power given to the judiciary. Thanks to such an attitude on the part of the legislative and executive branches, the judiciary – by its very nature the weakest of the authorities, if only because it has the weakest democratic legitimacy – would be able assume the position of a truly equal partner in the political system of the state.

The condition of public support. Ultimately, however, further efforts to transform public attitudes to more pro-environmental ones, including pro-climate stances, seem crucial. After all, if the court has the conviction that it is implementing universally recognized values, it will be more inclined to look for ways to solve other problems that strategic litigation in the area of environmental protection, including climate change litigation, entails.[40] However, this observation, while obvious, also undermines the sense of involving the judiciary in changing the status quo; for if the environment were universally recognized as an important value that would justify making other sacrifices, there would also be greater involvement of the legislative and executive branches in its protection. In turn, the role of precedent-setting rulings is precisely, among other things, to influence the attitudes of members of society in order to guide them in a pro-environmental direction. Therefore, in our view, courts should not feel absolved of responsibility for the state of the environment until the values associated with it gain widespread acceptance.

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[40] As Eskridge (1989): 1018 pointed out: 'Public values have a gravitational force…. The gravitational force will exercise a pull on other source of law, including statutes. … the gravitational force of a public value will have a decisive influence on the statutory orbit when the force is strong (for example, a constitutional value to which we are deeply committed) and the statutory language less clear.'

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