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Counterpublics of Polish Constitutionalism Illustrated with the Example of Women’s Rights²

Abstract

The article discusses the issue of the place and presence of women in the public sphere, and tries to answer the question of how these matters are impacted by the institution of the Constitutional Tribunal. Applying the method of discourse analysis, I have examined the Polish Constitutional Tribunal’s decisions and looked into the media discussion, with both revealing dominant trends regarding women’s rights in Polish constitutionalism. Using the category of counterpublics, I also cover emancipation movements important on account of women’s rights and their presence in the public domain. I also address the common myths concerning the Constitutional Tribunal. There are also mentions of room for the materialisation of emancipation processes in Polish constitutionalism.

Keywords: Women’s rights, counterpublics, constitutionalism, Constitutional Court, discourse analysis, feminism

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100 years of women's rights in Poland

In Poland the year 2018 marked not only 100 years of the country's regained independence but also 100 years of women's suffrage. It has been a century since Polish women could first exercise the right to vote, but it is much more common to hear that this right was "granted" or "received", but not "gained". There were suffragettes, i.e. female activists campaigning for women's right to vote, active in Poland,³ but their activity did not involve acts of violence – unlike that of the suffragettes from other countries, e.g. Great Britain. This could have been caused by the lack of a sovereign state since it was also the time of struggles for the country's independence, with women also being actively involved in those struggles. So, they did not treat men fighting side by side with them as enemies. Also, in the period of the Partitions of Poland, the authority they could target their actions at was significantly dispersed. The political situation justified turning to non-violent measures of battle, which was commenced close to the end of the 19th century. Underground meetings of women's congress had been taking place since 1891, bringing together women from all of the annexed territories, which made it possible to undertake joint actions,⁴ involving e.g. signing petitions, series of lectures, establishing women's unions, or the attempt of making Maria Dulębianka stand as a candidate in the elections.⁵ The active involvement of men who supported the suffrage movement in the public domain could have been a factor as well. One such case is that of e.g. Leon Petrażycki, a sociologist of law, who argued in the Russian duma in 1906 that granting equal rights to women was necessary because it was grounded in the principle of equality and justice, and those who did not understand that needed schooling, not evidence.⁶

It is important to stress that the battle for women's right to vote was part of an emancipation movement that also demanded e.g. granting women access to education and career opportunities. Women were given access to tertiary education only

³ Encyklopedia PWN, entry: sufrażystki [suffragettes], <http://encyklopedia.pwn.pl/haslo/sufrazystki;3981120.html>

⁴ M. Fuszara, *Walka Polek o prawa wyborcze*, [in:] W. Pawlik, E. Zakrzewska-Manterys (eds.), *O społeczeństwie, moralności i nauce. Miscellanea*, Warszawa 2008, pp. 53–71.

⁵ Ibidem.

⁶ L. Petrażycki, *O prawa dla kobiet*, Lwów 1919.

in 1897, which, as Małgorzata Fuszara argues, had an impact on gaining suffrage because of the fact that emancipation movements were initiated by educated women, meaning partially present in the public domain. They were aware of the significance of the exclusion of women from the public sphere. Granting suffrage to women alone did not contribute to the equality of women and men in politics, though. Although women took part in elections much more often than men, they were not elected as often as men. In the period from 1919 to 1939, women made up only 1.9% of MPs and 3.8% of senators in the Polish parliament. This was because they were listed at the end of electoral registers, constituting only 2% of all candidates.⁷ This means that a change of law alone does not make the public domain automatically more accessible. It is also necessary to change the legal and political cultures, which are both governed by informal rules determining who can run for a political office and on what conditions. This is why it is necessary for marginalised groups to constantly take diversified measures so that emancipation processes can earn them the demanded rights and opportunities. In order for such processes to continue, it is important to analyse and – most importantly – remember them. Fuszara proves that the earliest analyses of women’s struggle for suffrage appeared only a few years ago,⁸ which means that both Polish emancipationists and the fact of women gaining suffrage did not make a strong mark in the collective memory.

Ewa Majewska sees women being marginalised in public discourse as well, arguing that in Poland, the theories of the public sphere bear almost no trace of women at the level of both theoretical discussion and research.⁹ According to the researcher, this is fully in line with the liberal approach to the public sphere and with the division thereof into a public sphere and a private sphere, according to which women belong to the latter.¹⁰ Based on the example of women’s gaining suffrage, we can see that attaining the power of agency is possible. The entities who are excluded from political agency can be referred to, after Gayatri Spivak, as subaltern.¹¹ Majewska calls the movements of subaltern counterpublics, after Oskar Negt and Alexander Kluge.¹² The researcher argues that: “unlike the public sphere, which is by default exclusive, bourgeois, men-dominated, and based on the privilege

⁷ M. Fuszara, op. cit.

⁸ Ibidem.

⁹ E. Majewska, *Kontrpubliczności ludowe i feministyczne. Wczesna “Solidarność” i czarne protesty*, Warszawa 2018, p. 11.

¹⁰ Ibidem.

¹¹ See: G. Spivak, *Czy podporządkowani inni mogą przemówić*, Warszawa 2010.

¹² See: A. Kluge, O. Negt, *Public Sphere and Experience. Toward an Analysis of the Bourgeois and Proletarian Public Sphere*, London–New York 2016.

of freedom from the need to sustain oneself, a counterpublic is the form of political agency that turns against the existing authority, especially its institutional face, but sometimes also against the most general rules of a given culture as well as against the liberal elites – as we would call them – shaping the public sphere. This dual resistance, typical of counterpublics, is reinforced by their number and by their nature, which is more popular than elite.”¹³

The term was first used by Nancy Fraser in the early 1990s. In her definition she argues that counterpublics are discursive arenas that develop in parallel to the official public spheres, where one’s own interpretations of identities, interests, and needs are formulated. They emerge because of their exclusion from the public sphere. She also addresses Habermas’ concept of the public sphere, claiming that it does not take excluded groups, meaning counterpublics, into account.¹⁴ Michael Warner goes a step further in his discussion, proving that counterpublics are created as a result of a conflict with norms and contexts of their cultural environments. This context of dominance seems to distort publics and manifest itself in e.g. some groups (counterpublics) experiencing harder access to the public sphere.¹⁵ According to Warner, keeping up appearances of homogeneity (uniformity) of a society is linked to ideology. Appearances are created through imposing a certain language, interpreting legal acts as neutral, through institutions acting to the benefit of values attributed to a society, through deciding on what is private and what is public, meaning through symbolic violence. In such circumstances, some groups will be keener on defending the *status quo* than those who are dominated by the acts of representatives of a “homogeneous society”.¹⁶

What also defines counterpublics is their emancipatory potential, the disagreement with the *status quo*, and the will to change it. The case of women marginalised for many years in the public sphere but eventually gaining suffrage shows that their persistent efforts led to a very important political decisions being made. What is more, we can accept that granting women suffrage was a milestone in the formation of a system of women’s rights in Poland and of a constitutional identity in the area of women’s rights – each next constitution included provisions on women’s suffrage and extended the set of rights essential to women.

The activities described above contributed to the establishment of women’s suffrage by means of a decree on the statute of elections to the Legislative Sejm,

¹³ E. Majewska, op. cit.

¹⁴ N. Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, “Social Text” 1990, 25/26, pp. 56–80.

¹⁵ M. Warner, *Publics and Counterpublics*, New York 2005, p. 63.

¹⁶ *Ibidem*, p. 117.

adopted on 28 November 1918. But this set of rights was included in the constitution 3 years later – they appear in Article 12 of the March Constitution of 1921. The very inclusion of those rights into the constitution is significant because of the rank of the constitution, which should impact the entire legal framework. Also, empowering women in the field of law and politics contributed to the establishment of additional guarantees – for instance, equality of the sexes appeared in the April Constitution of 1935. According to its Article 7, “The rights of a citizen to influence public affairs will be estimated according to the value of his efforts and services for the common good. These rights cannot be restricted by origin, religion, sex, or nationality.” Women’s rights were also addressed by the Constitution of the Polish People’s Republic, whose Article 66 granted women and men equal rights in all spheres of public, political, economic, social, and cultural life. It also determined the nature of such equality, stating that it should be guaranteed by e.g. equal pay for equal work, right to education, to hold public appointments, to social insurance, protection of expectant mothers, development of a network of crèches, nursery schools or maternity homes. A guarantee of equality before the law is also included in the current constitution of 1997, in Article 32. The next article speaks of equal rights of women and men in family, political, social, economic, and professional life (Article 33), but those rights are not enumerated like in the case of the PPR Constitution. The long presence of women’s rights in constitutions should prove that there is a solid constitutional identity in the field of women’s rights and that the status of these rights is unquestionable. Meanwhile, both Fuszara and Majewska emphasise the weakening of women’s position in the public sphere, which is coherent with the social reality,¹⁷ which still fails to be up to the discussed regulations. We can therefore say that there is still room for emancipation processes to support women’s rights.

Application of the constitution

Problems concerning the functioning of constitutional values and different sorts of violations can become apparent mainly through examination of interpretations and practical application of the constitution, using e.g. sociological methods. This is why it is this very area – not the text of the legal act – that should be subject to research, with the latter being a standard practice among Polish constitutionalists.

¹⁷ European Institute for Gender Equality, *Gender Equality Index 2017: Measuring gender equality in the European Union 2005–2015 – Report*, <https://eige.europa.eu/rdc/eige-publications/gender-equality-index-2017-measuring-gender-equality-european-union-2005-2015-report> (access: 10.01.2019).

Researchers from departments of constitutional law tend to focus rather on the constitutional law dogma instead of on constitutionalism or constitutional sociology.¹⁸ Milena Korycka-Zirk stresses that the text of the constitution can be treated as an element of legal culture, which gains significance only in the process of interpretation when the provisions of the constitution are infused with certain content.¹⁹ This is why constitutionalism should be understood mainly as materialised social practices, and not only as a set of legal norms.²⁰ So what does the interpretation of the constitution look like? The 1997 Constitution instituted a principle of the direct application of its provisions, but this leads to the problem of the correct interpretation thereof. The meaning depends on the interpreter – which means on any authority applying the constitution.²¹ But it is said that the most important interpretations are the decisions of the Constitutional Tribunal, considered of special value because they balance between the making and the application of law.²² We could hazard a claim that one decision of the CT has the impact of several decisions of common courts, if only for the interest of the media and the law-making nature of each such decision – the CT’s decisions affect the legal framework in the area demarcated by a given legal norm controlled by the Tribunal.²³

The view that the constitutional judiciary is not apolitical, although considered controversial in the past, can now be regarded present in the doctrine as it is shared by many researchers. This is likely so because of an increased interest in constitution-related matters among researchers exploring the fields of the theory, sociology or philosophy of law, which involve studies beyond the very text of the constitution. As emphasised by Czarnota, Paździora, and Stambulski, it is particular cases – not the text – that appear as symptoms where current social and political conflicts are manifested.²⁴ And so, CT judges do not only adjudicate on whether provisions are in accordance with the constitution or not, but give priority to some values over others under the appearance (legal language) of neutrality and apoliticity. It is also interesting to notice that according to the Constitution of the Republic of

¹⁸ A. Bator, P. Kaczmarek, *Kim ma być wychowanek akademii prawniczej? O perspektywach budowania edukacji prawniczej wokół konstytucji*, “Krytyka Prawa” 2018, 10(2), pp. 9–40.

¹⁹ M. Korycka-Zirk, *Konstytucyjność prawa jako podstawa demokratycznej kultury prawnej*, “Filozofia Publiczna i Edukacja Demokratyczna” 2013, 2(2), pp. 93–103.

²⁰ A. Czarnota, M. Paździora, M. Stambulski, *Konstytucjonalizm a sfera publiczna*, 2019, not published. Article accessed upon the authors’ approval.

²¹ M. Korycka-Zirk, *op. cit.*

²² M. Safjan, *Skutki prawne orzeczeń Trybunału Konstytucyjnego*, <http://trybunal.gov.pl/informacja-publiczna-media/archiwum/wystapienia-bylych-prezesow-tk/marek-safjan-2/> (access: 10.01.2019).

²³ *Ibidem.*

²⁴ A. Czarnota, M. Paździora, M. Stambulski, *op. cit.*

Poland, constitutional judges are nominated based on outstanding legal knowledge, which usually goes with extensive professional experience. Whether a potential judge fulfils the criterion of 'outstanding legal knowledge' is decided by the political parties having majority in the Sejm because it is the Sejm who nominates constitutional judges. Although constitutional judges are said not to reveal their world views, their past may actually be quite telling in terms of their political sympathies. It can be assumed that parties will choose candidates with a similar outlook on the world, which questions the view of the CT's apoliticality. Hanna Dębska, who performed a detailed analysis of the biographies of judges of the CT from the period of 1985–2015, stresses that about half of those judges had a political capital acquired through e.g. sitting in the parliament, participation in parliament-related initiatives (advisory role) or holding government-affiliated functions,²⁵ which makes the thesis on the apoliticality of CT's even more questionable. Also, it is impossible to deny that many controversial decisions made by the CT have an impact on the shape of the political community, which is proven by the publicity accompanying some cases. In addition to that, the Constitutional Tribunal can be considered an institution whose activity encompasses both politics and the judiciary – judges decide on abstract conflicts of values, but without the people's legitimisation. The CT's *modus operandi* is similar to the practices followed in common courts, but the decisions of the former have an impact on many more entities. So who are constitutional judges then? Dębska shows that most judges were academic teachers before their nomination, and some had also managerial experience.²⁶ Moreover, the vast majority of CT's judges have always been men.²⁷ Since the establishment of the Constitutional Tribunal in 1985, a total of 70 judges had been appointed by 2018. Throughout that entire period there were only 13 women judges, making up 18.5% of the CT's composition. The present –15-person – Constitutional Tribunal includes 3 women, which is 20% of its composition.²⁸ But the most important aspect here is the impact of the composition of the bench on the made decisions – since decisions have the significance of political decisions, it would be reasonable to comply with the demands of substantive representation in authorities – as in the case of politicians, not of judges of common courts. Dębska argues that the continued overrepresentation

²⁵ H. Dębska, *Władza, symbol, prawo. Społeczne tworzenie Trybunału Konstytucyjnego*, Warszawa 2015, pp. 213–214.

²⁶ Ibidem.

²⁷ Eadem, *Płeć i władza. Kobiety w Trybunale Konstytucyjnym*, „Studia Podlaskie” 2014, 22.

²⁸ Constitutional Tribunal, *Public information*, 1) <http://trybunal.gov.pl/informacja-publiczna-media/archiwum/czlonkowie-tk-w-latach-1985-1997/>, 2) <http://trybunal.gov.pl/informacja-publiczna-media/archiwum/sedziowie-tk-w-stanie-spoczynku/>, 3) <http://trybunal.gov.pl/o-trybunale/sedziowie-trybunalu/> (access: 10.01.2019).

of men in the CT does not guarantee that women's interests or points of view are taken into consideration.²⁹ On the other hand, the capital owned by judges does not guarantee it either. Most CT judges were professors of law,³⁰ which should not be too surprising given the requirement of possessing outstanding legal knowledge. Assuming that the Constitutional Tribunal is neutral and apolitical, the requirement seems to be sufficient. But if we assume that CT judges are not apolitical and that their decisions address matters concerning the world view, the legal capital is too modest then. This is proven by e.g. the legal education offered in Poland, where the *curriculum* rarely features elements of sociology, psychology or other social sciences. In addition to that, legal studies are not aimed at developing empathy, meaning learning the other point of view, but at dealing with legal content.³¹ A person who remains in the academic environment does not have contact with so-called social outcasts or people of a very low economic status, which is the everyday reality of e.g. people working at NGOs or social workers, who acquire social capital through their activity. But this does not mean that judges are not able to have such capital – looking at opinions dissenting from the cases discussed below, we can see that the difference between these dissenting opinions and the content of the issued decisions involved looking at cases from a different perspective than one's own and – in particular – a good analysis of the social context. But the system does not require CT judges to have such capital.

Discourse analysis

Above we outlined the profile of the CT judges and we considered also the matter of the political nature of their actions. Below, we will look into the decisions and their justifications as formulated by the Constitutional Tribunal. Jakub Królikowski shows that CT's justifications of the decisions, make it possible to gain insight into the motivation and line of thought of CT judges.³² Discourse analysis seems to be the perfect tool to examine it. This method, popular in recent years, focuses on contextual analyses, on the extra-linguistic content of texts, which affect their

²⁹ H. Dębska, T. Warczok, *The Social Construction of Femininity in the Discourse of the Polish Constitutional Court*, [in:] R. Mańko, C. Cercel, A. Sulikowski (eds.), *Law and Critique in Central Europe. Questioning the Past, Resisting the Present*, Oxford 2016.

³⁰ *Ibidem*.

³¹ See: A. Czarnota, *Kryzys nauki prawa a edukacja prawnicza. O niekonieczności produkowania „użytecznych idiotów”*, „Prawo i Więź” 2013, 2(4).

³² J. Królikowski, *Uzasadnienia orzeczeń Trybunału Konstytucyjnego*, [in:] I. Rzucidło-Grochowska, M. Grochowski (eds.), *Uzasadnienia decyzji stosowania prawa*, Warszawa 2015, p. 429.

meanings.³³ It can therefore be assumed that a word does not function outside of its context – it needs to refer to some extra-linguistic reality, so the analysis of a given text needs to take the social context into account. Discourse is therefore always entangled in the institutions that generate it and features a system of knowledge, values, aspirations, and beliefs of some particular community and also has the ability to create meaning.³⁴ Its key elements are statements constituting discourses and their qualities such as: recurrence, seriality, and regularity. This is why given an accumulation of statements, it is possible to see the relationship between such statements and their structure. Also, the message of a given text (a decision in our case) can be brought to light by analysing its relationship with the texts (decisions) featured in the same discourse. Plus, it is possible to determine the recurring linguistic phenomena or patterns in the supra-textual discourse, which enables the analyst to identify the dominant **pattern of thinking**, typical of a given part of the society (CT judges in our case).³⁵ As Michel Foucault, a philosopher considered one of the popularisers of the concept of discourse, put it: “Whenever one can describe, between a number of statements, such a system of dispersion, whenever, between objects, types of statement, concepts, or thematic choices, one can define a regularity (an order, correlations, positions and functionings, transformations), we will say, for the sake of convenience, that we are dealing with a discursive formation”.³⁶ Discourses can be thus treated as activities grounded in theory and as frameworks or spheres of such activities. Along with the advancement of research on discourse came the methods of discourse analysis, requiring researchers to adopt an interdisciplinary approach, considering the relationships between text, speech, social cognition, **power**, society, and culture.³⁷ Teun van Dijk, a Dutch linguist, offers a similar perspective, claiming that discourse analysis may not focus only on linguistic structures.³⁸ Looking into social issues, it is important to concentrate on their contexts because this is where the **process of creation of meaning** occurs, based on the relationship between the linguistic and extra-linguistic elements of the analysed

³³ A. Synowiec, *W stronę analizy tekstu, wprowadzenie do teorii dyskursu*, “Zeszyty Naukowe Politechniki Śląskiej, Organizacja i Zarządzanie” 2013, 65.

³⁴ Ibidem.

³⁵ C. Spieß, *Lingwistyczna analiza dyskursu jako analiza wielopoziomowa: przyczynek do problematyki wielowymiarowego opisu dyskursów z perspektywy praktyczno-naukowej*, “Text and Discourse = Text und Diskurs” 2010, 3, pp. 199–220.

³⁶ M. Foucault, *Archeologia wiedzy*, Warszawa 1977, p. 64

³⁷ B. Jabłońska, *Krytyczna analiza dyskursu: refleksje teoretyczno-metodologiczne*, “QSR – Edycja Polska Przegląd Socjologii Jakościowej” 2006, 2(1).

³⁸ T. van Dijk, *Kontekstualizacja w dyskursie parlamentarnym*, [in:] A. Duszak, F. Fairclough (ed.), *Krytyczna analiza dyskursu. Interdyscyplinarne podejście do komunikacji społecznej*, Kraków 2008, p. 216.

fragment of the reality. Discourse analysis makes it possible to record and reconstruct the said relationships as well as to identify the social practice established in the discourse at issue.³⁹ Discourse is also linked to power – as argued by Jerzy Szacki, a professor of sociology from Poland: “every discourse is simultaneously a system of authority as it involves imposing some definition of truth and falsehood, good and evil, normality and pathology upon some number of people, which leads to a subjugation of those who would like to define these ideas in a different way.”⁴⁰ Foucault understands power as a dispersed set of social practices and cultural beliefs, or actually as the impact of culture and enslavement through functioning within the framework of a “regime of truth”. It is the authority that regulates the production of discourse, based on prejudices and legitimised tradition.⁴¹

We can assume that the authority of the Constitutional Tribunal is thus based not only on settling abstract conflicts of values but also on imparting meanings. In order to answer the question of how the CT views women’s rights and the role of women in the public sphere, selecting and looking into such decisions where the views of the CT may surface prove necessary. Such decisions can be those concerning abortion, the retirement age, and the conscience clause. These issues are of a paradigmatic nature because their analysis reveals the trends for women’s rights in Polish constitutionalism. They have also been chosen because of the **actual impact** they have had on women’s rights. What a woman can do with her body, what social role she holds, and how she is treated by various institutions has an influence on how she is treated in the public sphere. The decision-making process excluded the participation of its very stakeholders, because the power over their rights and bodies was entrusted to members of an elite public institution. By analysing the said decisions, meaning statements made on behalf of the institution in question, it is possible to verify the institution’s neutrality.

So far, the CT’s statements have been analysed by the already mentioned Hanna Dębska, who included her observations in her book entitled “Władza, symbol, prawo” [“Power, Symbol, Law”].⁴² The analysis of those statements is combined with an analysis of the biographies of CT judges, focusing mostly on the hidden and arbitrary authority of those judges. Although the analysis is highly insightful and helpful (especially in the quoted part concerning the *habitus* of judges), it does not give much consideration to factors independent of the Constitutional Tribunal, but which may affect its decisions. The analysis offered below also concentrates

³⁹ A. Synowiec, op. cit., p. 392.

⁴⁰ J. Szacki, *Historia myśli socjologicznej*, Warszawa 2005, p. 905.

⁴¹ Ibidem.

⁴² Cf. H. Dębska, op. cit.

on the political-social context that impacts the overall picture of the perception of and deciding on women's rights in Poland. The Constitutional Tribunal is treated as an important – but not the only – decision-maker in the area of women's issues.

The discussed issues aroused interest among Catholic media, which makes it possible to review the media debate that outlined the context in which the decisions in question were issued. An important thing is that the said decisions were issued in quite long intervals (1997, 2010, 2015). This means that no single party influenced the CT (if at all). This is so as firstly, no party remained in power for such a long time. And secondly, the judges responsible for those decisions were nominated by different parliaments – meaning by different political parties.

The abortion debate

One of the Constitutional Tribunal's decisions concerning women's rights commented on most often is certainly the decision on the principle of protection of human life as a constitutional value; on the non-compliance of the "anti-abortion" law with the Small Constitution, dated 28 May 1997. The Constitutional Tribunal found **the provisions permitting abortion for social reasons to be non-compliant with the constitution** (ref. no. K 26/96).⁴³ The case was examined by a full 12-person jury, with 11 judges being men. Judges treated pregnant women, meaning the entity the decision could impact, in a patronising manner in this case, like beings unable to think for themselves. This is not a new phenomenon, though. Such an approach was already discussed in 1792 by Mary Wollstonecraft, a precursor of feminism, who demanded that women be treated as rational beings, not as if they were in a state of perpetual childhood, unable to stand alone.⁴⁴ This approach is illustrated by the following fragments of the said judgement: "The right of a pregnant woman not to deteriorate her financial situation results from the constitutional protection of freedom of free development of one's living conditions and the related right of a woman to satisfy her own financial needs and those of her family. However, that protection **cannot be so far-reaching** as to lead to the violation of the fundamental interest, namely human life, as the conditions of existence are of a secondary nature and may vary" and "the limitation of rights and freedoms of a pregnant woman as resulting from the origination of new obligations **cannot, as such, justify taking the life of a conceived child.**" Moreover, the CT also criticised the provision that let women subjectively decide if their personal situation was difficult. Leszek

⁴³ Constitutional Tribunal's decision of 28 May 1997, ref. no. K 26/96.

⁴⁴ M. Wollstonecraft, *Wolanie o prawa kobiety*, Warszawa 2011.

Garlicki – a CT judge who had a dissenting opinion in the case in question – argued that according to the principle of dignity, women should not be expected to make sacrifices and devote themselves to obligations that would surely exceed the ordinary measure of obligations related to pregnancy, delivery, and later the upbringing of a child. He also claimed that women were treated like objects in the decision in question.⁴⁵ What makes this dissenting opinion differ from the quoted fragments of the analysed decision is the attempt to understand a decision motivated by a difficult personal situation – to assume the perspective of a pregnant woman considering the choice to be made.

It is interesting to look at the evaluative language layer of the decision. The decision features the word “embryo” used only 6 times (the Polish word “zarodek” used only once), the word “foetus” used 51 times (the Polish word “płód” used 47 times), and the word “**child**”, often combined with the adjective “conceived” – as many as 149 times (the Polish word “dziecko” used 150 times). In a case that concerns women directly, the word “woman” is used only 4 times (the Polish word “kobieta” is used 8 times). Instead, the expression “pregnant woman” is used 25 times (the Polish expression “kobieta ciężarna” – 29 times), and the word “**mother**” – 53 times (the Polish word “**matka**” – 42 times). The evaluative nature of the decision is also manifested in the following fragments: “The only grounds for banning abortion that generally (it will ensue from further deliberations) apply to pregnant women as such, must be the **recognition of the value of the life of a conceived human being**” and “No one but the mother can **sustain the life** of a conceived child at that stage.”⁴⁶ The Constitutional Tribunal did not reflect on the beginning of life in philosophical terms, but considered an embryo a child and regarded pregnant women almost as incubators expected to give birth sacrificing their liberty and dignity. The Constitutional Tribunal also mentioned that the basic function of the family is that of **procreation**. It also found it natural to replace medical language, allowing for a margin of interpretation, with a language expressing the judges’ views, thus imposing the only proper understanding of the issue of abortion. Interestingly enough, Ryszard Piotrowski mentions that the records of the work of the Constitutional Committee of the National Assembly prove that the originators of the 1997 Constitution did not intend to make the constitution officially hold that human life subject to protection starts with the moment of its conception, but the

⁴⁵ Dissenting opinion of L. Garlicki as regards the Constitutional Tribunal’s decision of 28 May 1997, ref. no. K 26/96.

⁴⁶ Ibidem.

Constitutional Tribunal decided to modify this intention.⁴⁷ This modification most certainly comes from the Catholic understanding of femininity and has to do with Catholic values. Joanna Petry-Mroczkowska, a Catholic feminist, points to femininity being idealised (mainly by priests) through the cult of maternity, and to maternal instincts being attributed to women by default.⁴⁸ She stresses that in the Catholic discourse, women – unlike men – are “prisoners of their bodies” and that motherhood is their destiny, something they should devote themselves to completely. In addition, priests and feature writers affiliated with the Catholic Church tend to focus only on women of child-bearing age and concentrate on issues concerning maternity, contraception, abortion or sexual morality.⁴⁹

It is no coincidence that the decision in question refers to Catholic values. It is important to bear in mind that the Act of 27 April 1956 on the Conditions of the Permissibility of Abortion permitted abortion on the grounds of a difficult financial situation of the pregnant woman. This right was restricted only in 1993 by the Family Planning Act, referred to as a so-called abortion compromise. Although the decision analysed herein dates back to 1997, the discussion on abortion actually already started in 1989, when a group of MPs from the Polish Catholic-Social Union [Polski Związek Katolicko-Społeczny] submitted a bill on the legal protection of a conceived child, which was developed in consultation mainly with experts from the Polish Episcopate. After a wave of protests against toughening the abortion ban, clashing with the pressure exerted by the church, a moderated version of the act was passed in 1993, permitting abortion in three situations (rape, the mother’s life or health being in danger, and incurable deformity of the foetus). After the government changed in 1996, the possibility to terminate pregnancy for social reasons was added, but it was revoked by means of the CT’s decision discussed herein.⁵⁰ It is important to add that most of the adjudicating judges were selected by a parliament that made the ban on abortion stricter through the said “abortion compromise”. The pressure of the Catholic Church to impose a complete ban on abortion has continued till this day. Taking this into consideration, it is hard not to admit that the Constitutional Tribunal of the time gave in to this pressure. Moreover, it failed to take the arguments of the other side of the dispute over abortion into account. What legal environments found most disturbing was the Constitutional Tribunal’s

⁴⁷ R. Piotrowski, *Zakaz przerywania ciąży. Orzeczenie z dnia 28 maja 1997 r., K 26/96*, [in:] L. Garlicki, M. Derlatka, M. Wiącek (eds.), *Na straży państwa prawa. Trzydzieści lat orzecznictwa Trybunału Konstytucyjnego*, Warszawa 2016.

⁴⁸ J. Petry-Mroczkowska, *Feminizm – antyfeminizm. Kobieta w Kościele*, Kraków 2012, pp. 169–178.

⁴⁹ Ibidem.

⁵⁰ I. Desperak, *Antykoncepcja, aborcja i... eutanazja. O upolitycznieniu praw reprodukcyjnych w Polsce*, „Acta Universitatis Lodzianensis, Folia Sociologica” 2003, 30.

application of the category of the democratic state of law to restrict the right to abortion. This also shows the limits to the interpretation of the constitution (or the lack thereof): “The fundamental provision from which the constitutional protection of human life should be inferred is article 1 of the constitutional provisions that have been upheld and, in particular, the **democratic rule of law**. Such a state can only exist as a commonwealth of people and only people can be recognized as the actual carriers of rights and obligations laid down by the State concerned. Life is the fundamental attribute of a human being. When that life is taken away, a human being is at the same time annihilated as the holder of rights and obligations. If the essence of a rule of law is a set of fundamental directives inferred from the sense of law proclaimed through democratic procedures, providing for the minimum level of fairness thereof, therefore, the first such directive must be the rule of law’s respect for the value, i.e. **human life from its outset**, as its absence excludes the recognition of a person before the law. The supreme value of a state under the democratic rule of law shall be a human being and his/her interests of the utmost value. Life is such an interest and, in a state under the democratic rule of law, it must be covered by constitutional protection at every stage of development. The value of legal interest covered by constitutional protection, such as human life, including life at the prenatal stage of development, cannot be subject to any differentiation. There are no sufficiently precise and justifiable criteria allowing for such a differentiation with respect to the stage of development of human life. Therefore, human life becomes a value protected under the Constitution from its outset. The same applies to the prenatal stage.”

In the statement of reasons for the decision, the Constitutional Tribunal does not make references to Christian values because such an act would be against the principle of state secularism. Instead, Christian metaphysics was implanted into the domain of values of the state of law. Abstract categories became infused with a Christian outlook. Hence, the interpretation made by the Constitutional Tribunal is taken advantage of by Christian and right-wing environments who campaign for extending the ban on abortion, quoting the principle of the democratic rule of law.⁵¹ Furthermore, an embryo being recognised as a child in the decision was highly approved by the said environments, which was reflected in the legal opinions on the unconstitutionality of the grounds for abortion because of abnormality of the foetus. To make their point, they quote the above fragment of decision K 26/96. But that is not all. To struggle for a stricter anti-abortion law, they reach for the

⁵¹ Ordo Iuris, *Opinia dotycząca projektu ustawy o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży*, <https://ordoiuris.pl/rodzina-i-malzenstwo/opinia-dotyczaca-projektu-ustawy-o-zmianie-ustawy-o-planowaniu-rodziny> (access: 10.01.2019).

constitutional principle of equality – “Maintaining the law permitting abortion will lead to a greater discrimination of children deprived of the legal protection of life, against the principle of equality before the law expressed in Art. 32 of the Constitution of the Republic of Poland.”⁵² The demands turned into actions and a bill banning abortion made it to the parliament. Then, in September 2016, after the first reading, the bill was submitted for further committee analyses and adjustments. The society’s (mainly women’s) reaction to the attempts to toughen the anti-abortion law and to punish women for having an abortion was a series of protests under the name of “**Black Protest**” [“Czarny Protest” in Polish], organised in almost all cities in Poland. Another wave of protests occurred in March 2018 in reaction to the outcome of a parliamentary committee’s session being a positive opinion on a bill removing the possibility to have an abortion on the grounds of discovered irreversible damage to the foetus. It is estimated that those protests were one of the largest mass movements since the time of Solidarity. The events drew a solid line between the Polish women and the Polish Episcopate, between the liberal-left-wing and the right-wing environments. Representatives of the Catholic Church often called for changing the law and exerted pressure on MPs. They were highly critical of the Black Protest movement, as proven by the following statements: “The constitution needs to be changed in a way to make it reflect **Christian values** more clearly”,⁵³ “A manifestation of a civilisation of death, they don’t know the limits of **insolence**”,⁵⁴ “The right to abortion is one of the most horrible instances of the legacy of Stalinism”,⁵⁵ “We can see intentions to preach the **anti-Gospel**, you could say a ‘black Gospel’ (...) what is going on, those black protests, are a terrifying contemporary manifestation of a civilisation of **death**”,⁵⁶ “The current compromise

⁵² Ordo Iuris, *Równa ochrona prawna dla każdego dziecka zarówno przed, jak i po urodzeniu*, https://www.ordoiuris.pl/sites/default/files/pliki/OI%20broszura%20Stop%20aborcji_final_rozkladowki.pdf (access: 10.01.2019).

⁵³ P. Celej, *Apb. Hoser: “Trzeba zmienić konstytucję tak, aby bardziej odzwierciedlała chrześcijańskie wartości”*, <https://natemat.pl/167719,apb-hoser-trzeba-zmienic-konstytucje-tak-aby-bardziej-odzwierciedlala-chrzescijanskie-wartosci> (access: 10.01.2019).

⁵⁴ P. Kalisz, *W kościołach nagonka biskupów na Polki. “Manifestacja cywilizacji śmierci, nie znają granic bezczelności”*, <https://natemat.pl/191419,na-ulicach-czarny-protest-a-w-koosciolach-krzyczaco-czarnych-mszach-i-bezczelnosci-kobiet-episkopat-oburzony-strajkiem> (access: 10.01.2019).

⁵⁵ Ł. Woźnicki, *Biskupi w “czarny piątek”: “Pasterze Kościoła i narodu muszą wolać: nie zabijaj!”*, <http://wyborcza.pl/7,75398,23183366,biskupi-na-czarny-piatek-pasterze-kosciola-i-narodu-musza.html> (access: 10.01.2019).

⁵⁶ Tok FM, *Episkopat oburzony strajkiem kobiet. Abp Jędraszewski o “czarnej Ewangelii”, abp Hoser o “niemym krzyku”*, <http://www.tokfm.pl/Tokfm/7,103085,20785020,episkopat-oburzony-strajkiem-kobiet-abp-jedraszewski-o-czarnej.html> (access: 10.01.2019).

on abortion is not a sufficient solution”,⁵⁷ “A lie knows no limits to **impudence**. And all this in the name of “my body, my choice, save women”,⁵⁸ bishops “appeal to each and every Member of Parliament to protect the life of all yet unborn children. They put a special emphasis on the need to keep the promise made in such a fundamental matter as that of the protection of the right to live”,⁵⁹ “Can you hear that, Polish politicians? A state that consciously lets its own children be **killed** is a state with no future. We need to admire the heart already today. (...) Dear Polish politicians, look not towards the world far away, which is balancing at the edge of madness. Be righteously reasonable and free. And have heart”.⁶⁰ The calling of the representatives of the Catholic Church had an impact on politicians because even though the law was not passed (perhaps for fear of another wave of protests), a group of conservatively-oriented MPs addressed the Constitutional Tribunal with a request for a decision acknowledging that the provisions permitting abortion in the event of a high probability of a severe and irreversible foetal defect or incurable illness that threatens the foetus’ life violated the Constitution of the Republic of Poland. Although the Constitutional Tribunal is, in theory, an apolitical institution, the said MPs pressured it by sending a letter with a request for an immediate scheduling of a session regarding abortion motivated by foetal defects, which gained much recognition among the Catholic media, who published the said letter.⁶¹ These media had expressed their impatience with the lack of the CT’s reaction even earlier – the inquiry about the case was sent to the CT by the Polish Catholic Information Agency. There were instances of soft pressure too – e.g. around 20 thousand nuns organising prayers for politicians and CT judges to change the abortion law, which was published across Catholic news sites.⁶² There were even cases of threats – one bishop

⁵⁷ NTO, *Episkopat: Nie można poprzestać na obecnym kompromisie ws. aborcji*, <https://nto.pl/episkopatnie-mozna-poprzestac-na-obecnym-kompromisie-ws-aborcji/ar/9822240> (access: 10.01.2019).

⁵⁸ P. Ogórek, *Za nami ingres nowego metropolity – Marka Jędraszewskiego*, https://polskatimes.pl/kim-jest-nowy-metropolita-krakowski-abp-marek-jedraszewski-cytaty/ga/11555283/zd/21848113?url_powrotu=https%3A%2F%2Fpolskatimes.pl%2Fza-nami-ingres-nowego-metropolity-marka-jedraszewskiego%2Far%2F11737302%3Fnajstarsze (access: 10.01.2019).

⁵⁹ Conference of the Polish Episcopate, *Rzecznik Episkopatu: apel do parlamentarzystów o ochronę życia dzieci przed urodzeniem*, <https://episkopat.pl/rzecznik-episkopatu-apel-do-parlamentarzystow-o-ochrone-zycia-dzieci-przed-urodzeniem/> (access: 10.01.2019).

⁶⁰ Radio Maryja, *Ks. abp A. Dzięga: Naród, który zabija dzieci, jest bez przyszłości. Słyszycie to, politycy polscy?*, <http://www.radiomaryja.pl/informacje/tylko-u-nas-ks-abp-a-dziega-narod-ktory-zabija-dzieci-jest-bez-przyszlosci-slyszycie-to-politycy-polscy/> (access: 10.01.2019).

⁶¹ PCh24.pl, *Posłowie żądają, aby Trybunał zajął się aborcją eugeniczną. Co zrobi Julia Przyłębska*, <https://www.pch24.pl/poslowie-zadaja-aby-trybunal-zajal-sie-aborcja-eugeniczna-co-zrobi-julia-przylebska-,64385,i.html> (access: 10.01.2019).

⁶² A. Stelmasiak, *Siostry modlą się za Trybunał Konstytucyjny ws. aborcji*, <http://www.niedziela.pl/artykul/39714/Siostry-modla-sie-za-Trybunal> (access: 10.01.2019).

announced during a mass that if the ruling party does not adopt a ban on abortion, “there will be no blessing from God, and the **authority will fall**, just like the previous governments did”.⁶³ By examining the statements made by representatives of the Catholic Church we can see that this organisation makes attempts to use the Constitutional Tribunal as a tool to translate the Christian dogma into the language of law.

Retirement age difference

Another case concerning the sexes looked into by the CT was the case of the different retirement ages for women and men (ref. no. K 63/07).⁶⁴ The Polish Ombudsman submitted a request to examine the compliance of the difference between the retirement ages for women and men with the constitution. The Ombudsman justified his request with the discrimination of women in the social security system, which led to lower pension amounts with the average age higher than in the case of men, which made the economic situation of women worse. But the Constitutional Tribunal found that the difference in the retirement ages for women and men was in accordance with the constitution. What is more, it was decided that this was not discrimination but a privilege because of **women’s role as mothers and child rearers**, which made them burdened not only with professional but also family duties. The Constitutional Tribunal also emphasised the **differences between the sexes** in both biological and social terms, which were said to be of significance to the age of finishing one’s professional activity. It was decided that the lower earnings of women were not the subject of the case. The judgement was passed by a bench of 12, with 4 judges being women. Interestingly enough, Teresa Liszcz, Ewa Łętowska, and Sławomira Wronkowska-Jaśkiewicz, meaning three out of four female judges, had dissenting opinions. This was a special situation because dissenting opinions were expressed only by women, who still made up the minority of the CT’s composition. However, the outcome of the case in question was determined by male judges. We can only surmise that if there had been any parity, the judgement could have been different – taking the dissenting opinions of the female judges into consideration. All three female judges found that the decision was motivated by **encumbering women with family and household obligations**. In her opinion, Ewa Łętowska argues that women

⁶³ M. Chrzczonowicz, *Biskup szantazuje PiS aborcją: “bo nie będzie błogosławieństwa Bożego. I ta władza upadnie”*. https://oko.press/biskup-szantazuje-pis-aborcja-bo-nie-bedzie-blogoslawienstwa-bozego-i-ta-wladza-upadnie/?fb_comment_id=1980345055352974_1980365935350886 (access: 10.01.2019).

⁶⁴ Constitutional Tribunal’s judgement of 15 July 2010, ref. no. K 63/07.

are burdened with the duties to take care of their grandchildren and elder members of their families, which are duties the state has failed to handle. There is no consideration of men performing such functions, and the social discourse views this role of women as their cultural, moral, and volitional obligation.⁶⁵ It is not a privilege, as other judges argued, because “the age of retirement has a fundamental impact on the amount of pension”.⁶⁶ This means that a shorter working life translates into a lower pension amount, which is still lower because of the lower earnings of women and on account of maternity and child care leaves – taken by women much more often than men.⁶⁷ According to Łętowska, different retirement ages contribute to a systematic **worsening of women’s economic situation**, which is far from enviable anyway.⁶⁸ Another argument against the discussed differentiation as raised by female judges is the pressure exerted on women reaching the age of retirement to **leave their job**.⁶⁹ Although there is no statutory order to retire from work after reaching a certain age, women are pressed to quit their careers against their own will.⁷⁰ The decision was praised in the Catholic media, in turn.⁷¹ It is also in line with the Catholic vision of a woman, who should first and foremost take care of others – also after retiring.⁷² Clergymen believe that women are the ones responsible for their families – “**Family is a woman’s scope of activity**. The role of a carer”,⁷³ and women’s ambitions are not considered anything “feminine”.⁷⁴ We can clearly see that an apparently neutral decision enhances the paternalistic social structure. It also contributes to women being “pushed out” of the public sphere.

The conscience clause

Another case worth considering, one which apparently does not concern women’s rights, is the decision on healthcare professionals’ right to refuse to perform a medi-

⁶⁵ Dissenting opinion of E. Łętowska (ref. no. K 63/07).

⁶⁶ Dissenting opinion of T. Liszcz (ref. no. K 63/07).

⁶⁷ Ibidem.

⁶⁸ Dissenting opinion of E. Łętowska (ref. no. K 63/07).

⁶⁹ Dissenting opinion of S. Wronkowska-Jaśkiewicz (ref. no. K 63/07).

⁷⁰ Dissenting opinion of T. Liszcz (ref. no. K 63/07).

⁷¹ J.M. Jackowski, *Zrównanie wieku emerytalnego*, <http://niedziela.pl/artukul/92470/nd/Zrownanie-wieku-emerytalnego> (access: 10.01.2019).

⁷² J. Petry-Mroczkowska, op. cit., pp. 170–180.

⁷³ Ibidem.

⁷⁴ Ibidem.

cal service that may be against the dictates of their conscience, i.e. the so-called conscience clause – a legal regulation that allows doctors to refuse to perform medical services they find against their conscience.⁷⁵ In this decision, the Constitutional Tribunal accepted the primacy of religious freedom over the patient's right to healthcare. The CT referred to the principle of the democratic state of law again: "Freedom of conscience and religion in the world of today, and especially in Europe, is the fundamental principle – and a determinant – of a democratic state and society." According to the Constitutional Tribunal, a physician has the right to quote the conscience clause, which can be derived directly from the constitution but also from the Hippocratic Oath, cited by the CT: "I will neither give a **deadly drug** to anybody who asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy". This excerpt is so unanimous with the decision that it could actually act as its summary. But it is important to notice that the Constitutional Tribunal should adjudicate on the compliance of provisions with the constitution, not with the Hippocratic Oath. The decision at issue grants privilege to physicians, allowing them to refuse to perform their professional duties, which are in accordance with the law, which the Constitutional Tribunal declared to be the right to freedom. This right was considered superior to the constitutional right to the protection of health and the right to the protection of private life. But the CT did not consider the impact of the practical application of the conscience clause on women. This concerns e.g. no option to have a legal abortion performed. The conscience clause is also applied in practice in situations of prescribing standard and emergency contraceptives⁷⁶ or referring for prenatal examinations. The time of such medical services being performed is of the essence, which the Constitutional Tribunal did not take into consideration, as proven by the statement that the freedom of conscience involves not only a possibility to refrain from "**endangering a legally protected interest**" but also an option to withdraw from acts against an individual's conscience, leading to outcomes unacceptable to this individual. The outcome of refraining from providing medical aid when necessary was, however, not taken into consideration by the Constitutional Tribunal.

There were opinions dissenting from the judgement in question, expressed by the following judges: Stanisław Biernat, Teresa Liszcz, Sławomira Wronkowska, and Andrzej Wróbel, making up 1/4 of the bench. Judge Biernat found that the freedom of conscience was not confronted with other freedoms and rights granted by the

⁷⁵ Constitutional Tribunal's judgement of 7 October 2015, ref. no. K 12/14.

⁷⁶ A. Szczerbiak, *Lekarze sumienia*, <https://www.polityka.pl/tygodnikpolityka/spoleczenstwo/170-0152,1,nie-wszyscy-ginekologdy-chca-wypisywac-srodki-antykonieczne.read> (access: 10.01.2019).

constitution, with the freedoms of patients being ignored at the same time. He refers to the ECHR's argumentation and states that "a physician's possibility to quote the clause of conscience may not deprive patients of access to medical services they are legally entitled to".⁷⁷ If the law allows abortion in some instances, the state is then obliged to establish a procedural framework that grants women legitimate access to abortion and to complete and reliable information about the condition of the foetus.⁷⁸ Reliable information is also what judge Wronkowska refers to, criticising the Constitutional Tribunal's claim that "the information the physician is to give to the patient is cooperation in evil."⁷⁹ According to the judge, a physician who would give such information would not make their act of refusal come at the cost of the patient.⁸⁰ The decision was widely criticised in the liberal media and, unsurprisingly, much acclaimed in the Catholic media. For instance, before the judgement was passed, the Presidium of the Polish Episcopate issued a special statement regarding the clause of conscience, quoting the teachings of John Paul II. The arguments raised included the "absolute evil" of abortion, the obligation to consciously reject the vile civil law, and the imperative to follow the divine law.⁸¹ The statement made it clear that it was obligatory to popularise the conscience clause because it was a right guaranteed by the constitution, but one which Catholics could not take full advantage of.⁸² This was another case in which the Catholic Church called for changes in the law when an issue was looked into by the Constitutional Tribunal. We can see clear relationships between the statements made by representatives of the Catholic Church and the Constitutional Tribunal's theses, but we should not consider them immediately decisive. Again, there is an obvious conflict of values – one between the freedom of conscience and the patient's rights. There was one consideration of results of situations involving referring to the conscience clause in areas where access to medical care is limited. The Constitutional Tribunal decided that it was only necessary to prepare medical documentation to prove that when a patient was refused a given service, there was no risk of the

⁷⁷ Dissenting opinion of judge S. Biernat (ref. no. K 12/14).

⁷⁸ Ibidem.

⁷⁹ Dissenting opinion of judge S. Wronkowska (ref. no. K 12/14).

⁸⁰ Ibidem.

⁸¹ Polish Episcopate, *Presidium of the Episcopate: Jan Paweł II jednoznacznie bronił życia i był za klauzulą sumienia*, <https://episkopat.pl/prezydiium-episkopatu-jan-pawel-ii-jednoznacznie-bronil-zycia-i-byl-za-klauzula-sumienia/> (access: 10.01.2019).

⁸² K. Sikora, *Biskupi narzekają na państwo. Katolicy nie mogą w pełni wykorzystywać klauzuli sumienia*, <https://natemat.pl/119729,biskupi-narzekaja-na-panstwo-katolicy-nie-moga-w-pelni-wykorzystywac-klauzuli-sumienia> (access: 10.01.2019).

patient losing life or sustaining severe bodily injuries, or of the occurrence of a health disturbance.

It is necessary to stress that the conscience clause limits the right to healthcare provided especially to women on account of the type of medical services which physicians may refuse to perform. Even though women pay full amounts of the obligatory social insurance contributions, they have no full access to guaranteed services. 10 years earlier, the Constitutional Tribunal commented on the matter of insurance in the National Health Fund, emphasising the need to guarantee equal access to healthcare, quoting Article 68 of the Constitution of the Republic of Poland.⁸³ It seems that the argument was passed over in the decision at issue. It is hard not to see the Constitutional Tribunal's role in the institutional discrimination of women. A woman seeking medical assistance in very private matters, concerning her corporality, is institutionally **humiliated** – the very act of invoking the clause of conscience has a tinge of condemnation to it. Public institutions, established to serve citizens, turn to limiting women's access to the public sphere instead.

Dormant counterpublics

By examining the discussed decisions in terms of the Constitutional Tribunal's view of women's rights and of women's role in the public sphere we can draw the following conclusions: the decisions prove that the perspective of women whom these decisions may affect most have not been taken into consideration in the line of argument formed by the Constitutional Tribunal. Furthermore, none of the said decisions puts women's rights first above the quoted values, which only strengthens the archetype of a woman-martyr constantly sacrificing herself, ready to sacrifice her rights as well. We can also debunk the thesis on the Constitutional Tribunal's neutrality – this lack of neutrality was manifested in the selection of the vocabulary and the frequency of the use of particular words, or in attributing meanings marked with Catholic values to abstract categories. This was expressed in the arbitrary imposition of the vision of femininity, of the value of women's rights, and of the role of women in the public sphere.

Women were treated like objects in the CT's judgements – they had the freedom to decide on their life and body taken away from them in the matters at issue. The Constitutional Tribunal made an assumption that a woman is unable to make a rational decision on her own, which is why it decided to determine, or rather limit, the scope of the rights she could exercise. The decisions offer a clear picture of the

⁸³ See: Constitutional Tribunal's judgement of 7 January 2004, ref. no. K 14/03.

traditional role of women as drawn by the Constitutional Tribunal. The above acts as evidence to the marginalisation of women in the public sphere and to the CT's approval for systemic discrimination based on sex. We can also see a noticeable upset in the liberal division into the private sphere and the public sphere as the constitutional authority went on to decide not only on the private but in fact the intimate sphere of women's life.

The decisions display the immense authority of the Constitutional Tribunal. We can say that the function of a CT judge combines the advantages of being a politician (a possibility to decide in abstract conflicts of values) and a judge (a form of neutrality) without being accountable before the people while issuing decisions having an impact on the entire society. As Dębska argues, "The placing of law in opposition to politics does not, paradoxically, weaken it but actually strengthens it [the authority of the CT – note by K.K.]. Nothing has a more consecratory impact than an unidentified symbolic effect, hidden behind an apparent universality and neutrality."⁸⁴ Moreover, judges having the same legal habits as those that shape their views on social reality, a similar line of thought, or using a precise language makes up a consistent vision of the Constitutional Tribunal.⁸⁵ Such an image of the Constitutional Tribunal in the society favours arbitrary decision-making, but also makes it possible to discriminate certain groups, such as women. What could help change the attitudes of judges is transforming the model of education in law by putting a greater emphasis on social sensitivity – a factor indispensable in cases like those in question, which would hopefully change the common legal habitus for the better. It would also be necessary to change the requirements of judges, which should involve taking their "social" experience into consideration. The most troublesome aspect seems to be the fact that CT judges power is "not tempered" which means power with not a great supervision over it. As Martin Krygier stresses, such authority is the most dangerous.⁸⁶ What differentiates the Constitutional Tribunal from political bodies, though, is the veil of neutrality since the actions of the latter tend to be questioned, as shown by the said black protests. Although the crisis has weakened the position and legitimacy of the Constitutional Court, it has actually increased the extent of analysis of the institution itself and its decisions. Although the issue of the political nature of the CT has been taken up by legal theoreticians, the discourse of the constitutional law dogma has shown to be dominated by the affirmation of the CT's neutrality.

⁸⁴ H. Dębska, *op. cit.*, p. 104.

⁸⁵ *Ibidem*, pp. 171–172.

⁸⁶ M. Krygier, *Tempering power*, [in:] M. Adams, E.H. Ballin, A. Meuwese (eds.), *Bridging idealism and realism in constitutionalism and Rule of Law*, Cambridge 2016.

The appearing analyses can act as “watchdogs” to oversee the Constitutional Tribunal’s activity, but it is not academics who are discriminated – the quoted cases showed discrimination aimed against women, especially those of modest means, of rather low social status, from rural regions. The decision regarding the issue of abortion will not prevent the more well-off women from going abroad to have the procedure done. Better earning women will be able to afford to retire earlier. However, those in a worse financial situation will not be able to support themselves on a lower pension. If a woman living in Warsaw is refused to be prescribed birth control pills or to have abortion performed legally, she will quickly find another doctor who will have no trouble respecting her wish. But in the Subcarpathia Province, all gynaecologists make use of the conscience clause.⁸⁷

Black protests were aimed against the government’s acts. But the movement was a consequence of many years of women’s rights being ignored not only by the Constitutional Tribunal, but also by a major political actor in the form of the Catholic Church, which was clearly visible in the statements made by those speaking on its behalf. Without women attaining a strong position in the public sphere, such acts are likely to occur more and more often, which is why it seems to be necessary to object to the CT’s decisions and statements of the Catholic Church, in which the position of women in the public sphere is marginalised. This certainly paves the way for emancipation processes to benefit women’s rights. The example of suffragettes and black protesters shows that gaining or re-gaining political agency is possible, but only through diversified, mass, joint initiatives – including not only taking to the streets. So far there have been no street protests against the Constitutional Tribunal’s decisions as it has been treated as a court, not a political body.

The dominant constitutionalism is based on a male, elite, and Catholic perspective, making a large part of the public sphere and excluding women from it, which is illustrated by the decisions discussed herein. Empowering the subaltern and challenging the apoliticality of the Constitutional Tribunal may offer a chance to transform this system. If the Constitutional Tribunal issues a decision that an abortion motivated by foetal defects violates the constitution, which a large part of the society will not approve of, it will become a precedential case. Given the current transformation of the public sphere, in the near future, we can witness a revolutionary change taking place – exactly through the actions of women’s counterpublics – but if they will wake up.

⁸⁷ A. Gorczyca, *Legalna aborcja? Nie na Podkarpaciu*, <http://rzeszow.wyborcza.pl/rzeszow/1,34962,20050830,legalna-aborcja-nie-na-podkarpaciu.html> (access: 10.01.2019).