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TAKING WOMEN'S RIGHTS SERIOUSLY: WOMEN'S STRUGGLE FOR A NEW "SOCIAL CONTRACT" IN POLAND

Abstract: *The article traces the trajectory of the struggle for woman's rights in Poland from 1989 to the present. It argues that the democratic transition successfully shaped the foundations of a liberal regime, but was accompanied from the outset by an agreement between the government and the Catholic Church that limited reproductive rights and led to a re-traditionalization of gender roles. This context is crucial to understanding the Constitutional Tribunal's interpretation of the constitution, which reinforced a kind of sexual contract, seeking to domesticate women. The change of government in 2015 significantly weakened guarantees of the rule of law and further curtailed reproductive rights, prompting mass protests and the mobilization of democratic opposition. This article posits that the overthrow of the illiberal regime in the recent parliamentary elections marks the beginning of a new social contract in Poland, in which woman's rights are taken seriously.*

Key words: Democratization, Democratic backsliding, Poland, Constitutional Tribunal, Women's right, Abortion, Reproductive rights, Social contract.

1. INTRODUCTION

This article explores the relationship of women's rights, including reproductive rights such as access to legal abortion, in Polish democratic transition. It begins with the period preceding the fall of communism in 1989, and continues through the stages of democratic consolidation in the

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1990s and 2000s, the illiberal populist regime in 2015–2023, and analyzes the current early stages of the restoration of the rule of law.

Central to this discussion is the hypothesis that regulations on reproductive rights, particularly abortion, indicate the degree of a state's adherence to the principles of liberal constitutionalism. Liberal abortion laws reflect the state's acknowledgment of its obligation to safeguard women's rights, including the rights to privacy and self-determination.

The article posits that the democratic transition is an ongoing process with no particular end. Achieving the consolidation stage should not lead to complacency. There are forces that seek to take over and undermine democratic institutions. Additionally, there is a risk of these forces misappropriating the language and mechanisms of human rights¹ to counteract the progress made in equality. The project of liberal democracy will always require adjustments. In post-authoritarian, relatively young democracies, collective memory retains practices and attitudes that can lead to the resurgence of authoritarian tendencies.² Moreover, these democracies are not immune to the allure of contemporary manifestations of authoritarian populism. Such has been the case with Poland, the case study subject in this article.

The scholarship on democratic transition demonstrates that in the past decades in Latin America³ and Central and Eastern Europe⁴ this process has often been accompanied by reinforcement of traditional gender roles and backlash against feminism and women's emancipation. Also, the literature on contemporary democratic backsliding highlights the instrumentalization of women's rights and the emphasis on traditional gender roles, which often leads to the introducing of direct restrictions (Poland), obstacles to or to questioning (Hungary⁵) of access to legal abortion. However, since reproductive rights, especially abortion, have been politicized and instrumentally used as a societal cleavage to divide societies in many

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- 1 Búrca, G. de, Young, K. G., 2023, The (Mis)appropriation of Human Rights by the New Global Right: An Introduction to the Symposium, *International Journal of Constitutional Law*, Vol. 21, No. 1, pp. 205–223.
 - 2 Halmai, G., 2023, Rule of Law Backsliding and Memory Politics in Hungary, *European Constitutional Law Review*, Vol. 19, No. 4, pp. 602–622.
 - 3 Elgar, R., 2014, Women's Rights in Transition: The Collision of Feminist Interest Groups, Religion and non-Governmental Organizations in Three Latin American Countries. *Journal of Public Affairs*, Vol. 14, Nos. 3–4, pp. 359–368.
 - 4 Zielińska, K., Gender Democracy in Poland: An Empty Shell?, in: Galligan, Y., (ed.), 2015, *States of Democracy*, London, New York, Routledge, pp. 119–136.
 - 5 Pető, A., Svégel, F., 2024, Nationalism, Pronatalism, and the Guild of Gynecology: The Complex Legacy of Abortion Regulation in Hungary, *Central European History*, pp. 1–18.

established democracies, in recent years we have seen some spectacular examples of restricting legal abortion, notably in the United States.⁶

The struggle for women's rights, including reproductive rights, has been ongoing in Poland during the entire period since 1989. Women's movements have also taken active part in the democratization process.⁷ However, women's rights, especially reproductive rights, have been routinely instrumentalized for political ends. The past decade, marked by democratic backsliding⁸ under the right-wing anti-liberal government, resulted in the restriction of reproductive rights⁹ and decline in LGBT rights.¹⁰ However, it has also revealed important shifts in societal attitudes regarding women's¹¹ and sexual minority rights,¹² as well as expectations of political authorities, which define the basis of their democratic legitimacy. While the recent removal of the right-wing government in the 2023 parliamentary elections was propelled by electoral mobilization among young women,¹³ the realization of their demands has been delayed. In addition to objective political constraints, such as the President's veto, the liberalization of the abortion law has not been achieved due to a lack of support within the ruling coalition which includes liberal, center-right, and leftist parties.

The article argues that the transformations within Polish society signal a demand for a new social contract, which seriously addresses women's rights, including reproductive rights such as access to legal abortion. In this

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- 6 Ziegler, M., 2023, Dobbs and the Jurisprudence of Exclusion, *Polity*, Vol. 55, No. 2, pp. 419–426.
 - 7 Fuszara, M., 2013, Women's Movements in Poland, in: Scott, J. W., Kaplan, C., Keates, D. (eds.), 2013, *Transitions Environments Translations. Feminism in International Politics*, New York, London, Routledge, pp. 128–142.
 - 8 Pech, L., Scheppele, K. L., 2017, Illiberalism Within: Rule of Law Backsliding, *Cambridge Yearbook of European Legal Studies*, Vol. 19, pp. 3–47.
 - 9 Bucholc, M., 2022, Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon, *Hague Journal on the Rule of Law*, Vol. 14, No. 2, pp. 73–99.
 - 10 Grabowska-Moroz, B., Wójcik, A., 2021, Reframing LGBT Rights Advocacy in the Context of the Rule of Law Backsliding: The Case of Poland, *Intersections. East European Journal of Society and Politics*, Vol. 7, No. 4, pp. 85–103.
 - 11 Makowska, M., Boguszewski, R., Sacharczuk, K., 2022, A Study of Opinions about the Polish Constitutional Tribunal's Judgement Strengthening Polish Abortion Laws, *The European Journal of Contraception & Reproductive Health Care*, Vol. 27, No. 1, pp. 39–44.
 - 12 Godzisz, P., The Journey and Horizon: Reflecting on the Progress and Prospects of Anti-LGBT Hate Crime Governance in Poland and Beyond, in: Godzisz, P., (ed.) 2024, *State Responses to Anti-LGBT Violence: Poland in a European Context*, London, Springer Nature, pp. 291–304.
 - 13 Markowski, R., 2024, The Polish Election of 2023: Mobilisation in Defence of Liberal Democracy, *West European Politics*, pp. 1–16.

new social contract, the legitimacy of the government hinges on its commitment to safeguarding women's rights. Departing from classical notions of the social contract by Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, the article adopts a broader definition, framing it as a pact between government and society, renewed in each election.¹⁴ The current demand for the new social contract signifies a paradigm shift in Polish constitutionalism, which recognizes the role of the government in the private sphere in the protection of individual autonomy. It adds a layer of positive constitutionalism to classical liberal theory, emphasizing the positive duty of the state in establishing legal frameworks for the realization of women's rights.

In its remainder, this article proceeds as follows. The second section provides an overview of the position of women's rights in Polish modern history, prior to 1989. The third section scrutinizes the impact of the transition to democracy, which entailed limitations on women's personal autonomy through the imposition of new restrictions on legal abortion. The article examines the political circumstances that led to the criminalization of abortion in 1993. Additionally, it underscores the emergence and evolution of civil society organizations that have campaigned for the liberalization of abortion law. The article also examines the first ruling of the Constitutional Tribunal on abortion in 1997. In the fourth section, the article discusses how, in the consolidated liberal democracy, the political clout of the Catholic Church influenced Poland's process of joining the EU and regulations on abortion. It also explores the social movements advocating for the legalization of abortion that have grown in prominence. This section further examines the role of the Constitutional Tribunal case law in cases related to gender equality, including the case law that maintained privileges for women to compensate for their parental responsibilities. The fifth section examines the actions of the new government, which was elected in 2023, after six months in office, concerning women's rights, including reproductive and social rights. The final part provides the conclusion.

2. THE STRUGGLE FOR WOMEN'S RIGHTS IN POLISH HISTORY

In the modern history of Poland, the pursuit of women's rights has always yielded to the national struggle for independence. The Polish women's emancipation movement emerged in the 1830s, but gave way to the struggle for Poland's liberation from Austrian, Prussian and Russian rule

14 This perspective more adequately explains Poland's democratic transformation, which lacked a significant constitutional moment. Instead, significant constitutional changes often followed parliamentary elections.

following the partitions. However, in the dominant historical narrative, Polish women did not seek emancipation, but rather the preservation of family, national traditions, language, and culture, while men fought in national uprisings.¹⁵

Poland regained statehood in 1918, and women acquired active and passive voting rights.¹⁶ However, women did not enjoy equal rights with men in other areas, especially in marriage and civil law, access to education, and public offices.¹⁷

Legal recognition of the equal status of men and women was an achievement of the post-World War II period of state socialism, which promoted economic activation of women. The equality provisions of the 1952 Constitution¹⁸ embodied the idea of socialist feminism, and guaranteed equal rights to work and pay, the right to rest, social security, education, dignity and honors, access to public functions, as well as maternal and child care, protection for pregnant women, paid leave before and after childbirth, and institutionalized child care.¹⁹ However, socialist feminism did not shake the traditional gender roles, but rather placed the burden of dual domestic and professional responsibilities on women.²⁰ While women's participation in the labor market had significantly increased in post-war Poland, there was a clear divide between female and male industries. Moreover, female-dominated industries featured exploitation, low wages, and three-shift working. As a result, with the introduction of the three-year paid maternity leave, many women left the workforce.²¹ After 1956, when parliament passed the law permitting abortion under certain circumstances, women gained the right to seek abortion in cases of challenging living conditions. The subsequent relaxation of restrictions in 1959, which allowed abortion on demand, marked a significant milestone in granting women greater autonomy over their reproductive choices.²²

15 Walczewska, S., 1999, *Damy, rycerze i feministki*, Kraków, Wydawnictwo eFKa.

16 Fuszara, M., Polish Women's Fight for Suffrage, in: Rodríguez-Ruiz, B., Rubio-Marín, R. (eds.), 2012, *The Struggle for Female Suffrage in Europe: Voting to Become Citizens*, Leiden, Boston, Brill, p. 143.

17 Żarnowska, A., Szwarc, A. (eds.), 2000, *Równe Prawa i Nierówne Szanse: Kobiety w Polsce Międzywojennej*, Warsaw, Wydawnictwo DIG.

18 Constitution of the People's Republic, 1952.

19 *Ibid.*, Art. 66.

20 Penn, S., Massino, J., 2009, *Gender Politics and Everyday Life in State Socialist Eastern and Central Europe*, New York, Palgrave Macmillan.

21 Jarska, N., 2015, *Kobiety z Marmuru. Robotnice w Polsce w Latach 1945–1960*, Warsaw, Instytut Pamięci Narodowej.

22 Baranowska, M., Fiktus, P., 2022, Dyskurs polityczny i prawny o ustawie z 27 kwietnia 1956 r., *Czasopismo Prawno-Historyczne*, Vol. 74, No. 1, pp. 253–278.

In the declining phase of state socialism, many women were involved in the anti-communist opposition. They ran the underground press, sat in prisons and internment camps or worked to support their families while their husbands went on strike or were detained.²³ Yet, for decades, the dominant narrative once again downplayed the historical role of women in overthrowing the regime.²⁴ Until recently it was rarely mentioned, for example, that the historic Gdansk Shipyard Strike began in defense of a woman, Anna Walentynowicz, *i.e.*, against her dismissal. Walentynowicz was active in a then illegal labor union, fighting for worker's rights. The strike led to the August Agreements in 1980, which enabled the legalization of the Independent Self-Governing Trade Union "Solidarity", as well as a temporary relaxation of censorship.

After the regime change, however, the vast majority of women active in Solidarity disappeared from the political scene and it was mostly men who assumed positions of power. Although the overthrow of communism would not have happened without the sacrifice and commitment of women, women's rights were ultimately sacrificed on the altar of political victory over communism.

3. TRANSITIONING TO LIBERAL DEMOCRACY AND RESTRICTING ABORTION LAW

The transition to liberal democracy began already in the 1980s and was formative for future political elites. The initial phase of this transition saw the establishment of the Supreme Administrative Court, the Constitutional Tribunal and the Ombudsman in 1980, 1982, and 1986, respectively. Although their constitutional position was limited, they introduced formal and substantive rule of law standards into the Polish legal system and developed human rights standards.

Later stages of constitutional transformation included the amendment of the 1952 Constitution, the enactment of the 1992 "Small Constitution",²⁵ and the 1997 Constitution,²⁶ which strengthened the position of

23 Penn, S., 2005, *Solidarity's Secret: The Women Who Defeated Communism in Poland*, Ann Arbor, University of Michigan Press. See also Kondratowicz, E., 2001, *Szminka Na Sztandarze. Kobiety Solidarności 1980–1989: Rozmowy*, Warsaw, Wydawnictwo Dedal.

24 Dzido, M., Śliwowski, P., 2014, *Solidarność według kobiet* (documentary film).

25 Constitutional Act of 17 October 1992 on Mutual Relations Between the Legislative and Executive Powers of the Republic of Poland and on Local Self-Government, *Official Journal of Poland*, 1992, No. 84, item 426 ('Small Constitution').

26 Constitution of the Republic of Poland of 2 April 1997, *Official Journal of Poland*, 1997, No. 78, item 483.

the Constitutional Tribunal. Importantly, the introduction of constitutional review in Poland transpired without much discussion or controversy.²⁷

In its first ruling on equality between men and women, the Constitutional Tribunal overturned the 50–50 quotas for medical school admissions, which, if implemented, would have limited the number of women in medical professions.²⁸ The Tribunal agreed that gender quotas are permissible as long as they lead to equalization, not diminishment, of women’s opportunities.²⁹ The Tribunal noted that “under the Constitution it is not permissible to divide university applicants by gender if this leads to differentiation in the requirements for access to higher education.”³⁰ In this way, the Tribunal objected to the stereotypical assumption that women are unsuitable to work as surgeons. It also confirmed the constitutionality of compensatory privileges aimed to redress actual inequalities between men and women.

In subsequent case law, the Tribunal accepted that the notion of compensatory privileges is justified by the biological differences between men and women. It held that women should have preferential conditions for acquiring the special pension for miners and their families, because of their different ability to perform mining work, and the process of being “worn out” by such work.³¹ The Tribunal ruled that the requirement of 25 years of work in mining, when applied to both men and women, does not take into account the difference in the biological capacity of women’s bodies, compared to the physical capacity of employed men, hence it violates the principle of gender equality. In its *ratio decidendi*, however, the Tribunal explained that compensatory privileges can be justified by both the biological and social differences between sexes. Following this reasoning, it later found that the different retirement age for men and women constitutes a permissible compensatory privilege since it serves to protect the social role of women as mothers.³²

27 Sadurski, W., 2005, *Rights Before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*, Dordrecht, Springer, p. 128.

28 CT, Decision No. P 2/87 (3 March 1987). In this case, the CT struck down gender parity provisions introduced by a ministerial decree, without an explicit basis in the Higher Education Act, thus in violation of the hierarchy of legal acts.

29 The parity admission system at medical studies was officially justified by the special psychological requirements for certain medical specializations (e.g., surgeons) or contraindications due to maternity (for radiologists), as well as the need to work at night and to secure a sufficient number of male doctors in case some of them were mobilized into the army.

30 CT, Decision No. P 2/87, sec. IV. Translated by author.

31 CT, Decision No. K 6/89 (24 October 1989).

32 In Poland the retirement age for women had been 5 years lower since 1927. The 2013 pension reform introduced equal retirement ages for men and women (67), but in 2015, it was reverted to 60 years of age for women and 65 for men.

A clear turning point in Polish transitional constitutionalism was the Round Table Agreement,³³ which involved representatives of the Communist Party, the opposition (Solidarity) and the Catholic Church.³⁴ The conciliatory role of the Church in these talks contributed to the peaceful transition of power to the opposition.³⁵ However, Solidarity's leaders believed that they owed a debt of gratitude to the Church for its help in overthrowing of the socialist regime. In particular, they wished to recognize the historical role of Catholicism in the nation's identity building and to continue the legacy of Pope John Paul II.³⁶ To this end, they agreed to restore religious education in schools,³⁷ and introduce more restrictive abortion laws.³⁸

The transition to democracy was therefore accompanied by restrictions on women's personal autonomy due to the new restrictions on access to legal abortion.³⁹ Women, however, gained political freedom and therefore began to organize, assemble and protest against the restriction of their reproductive rights. The first pro-choice demonstrations in Poland took place in May 1989, parallel to the ongoing election campaign. During this campaign, Solidarity reaffirmed its institutional and symbolic ties with the Church, and the Church openly supported candidates who were practicing Catholics. In 1992, the issue of abortion came to the fore

33 The Round Table Talks took place between 6 February 1989 and 5 April 1989, and ended in an agreement that gave rise to the change of the political system in Poland.

34 Of the 60 participants of the plenary Round Table Talks, only two were women: one representing the government and the other the opposition. While a total of 146 people worked in the thematic groups, only eight of them were women.

35 Huntington, S., 1991, *The Third Wave: Democratization in the Late Twentieth Century*, Norman, University of Oklahoma Press, p. 85.

36 In 1981, the Social Legislative Council, established within Solidarity, adopted a draft amendment to the Penal Code banning abortion, except in cases threatening the health or life of the woman, coauthored by Andrzej Zoll, later the president of the Constitutional Tribunal and judge-reporter on the first abortion decision.

37 The Catholic Church gained many privileges in the package of "religious laws" adopted on 17 May 1989.

38 Already in March 1989 the deputies representing the Polish Catholic Social Union submitted a bill on the legal protection of the fetus, which was prepared in collaboration with the Polish Episcopate. Between 1990 and 1991, two bills restricting abortion were pending in Parliament, ultimately failing to pass, but which radicalized the language of the abortion debates.

39 In 1990, the Minister of Health introduced a "conscience clause" for doctors and the Senate passed a resolution on the legal protection of the fetus. In 1992, the new Code of Medical Ethics defined the performance of abortion for "social" reasons as a violation of medical ethics. At the request of the Ombudsman to review the compatibility of the Code of Medical Ethics with the Constitution and the Medical Profession Act, the Tribunal found that deontological principles are not of a normative nature, and are thus beyond its jurisdiction. CT, Decision No. U 1/92 (7 October 1992).

in street protests, but the government, in consultation with the Church, rejected the demands for an abortion referendum, claiming that moral issues could not be subject to a popular vote. Also, Lech Wałęsa, the first democratically elected President, believed that the 1956 abortion law was “Stalinist”, and opposed it in act of repudiation of the entire socialist system.⁴⁰ At that time, the office of the Prime Minister was held by a woman, Hanna Suchocka, a conservative.

In this political context, in 1993 the newly elected Parliament adopted the so-called Fetus Protection Act. The bill stipulated that “[e]very human being has, from the moment of conception, the inherent right to life” and “the life and health of the child from the moment of conception shall be protected by law”.⁴¹ The law has been called an abortion compromise because, under its terms, only the person who performs the abortion, not the pregnant woman, could face criminal charges. Moreover, the law included three exceptions to the abortion ban, which had initially been designed to be total. It provided for termination of pregnancy in cases where: (a) the pregnancy is a threat to the life or health of the pregnant woman; (b) prenatal testing or other medical evidence indicates a substantial probability of severe and irreversible fetal impairment or an incurable life-threatening disease, and the fetus is not yet capable of independent life outside the woman’s body; (c) there is a reasonable suspicion that the pregnancy resulted from a prohibited act (this last exception only being available until the twelfth week of pregnancy).

As a result, Poland became the only post-socialist country to completely exclude the possibility of abortion on demand, or on social grounds, in the first weeks of pregnancy. This significant regression in women’s reproductive rights was the consequence of the public involvement of the Catholic Church and the public identification of office-holders as practicing Catholics. Moreover, the abortion issue became a dividing ideological line for political parties established in the early phase of democratic transition and led to the formation of the second wave of feminist movements in Poland.⁴²

In the 1990s, large women’s organizations, such as the Center for Women’s Rights, the Federation for Women and Family Planning, and the

40 Ingbrandt, R., “Gender restoration” and “masculinisation” of political life in Poland: The controversies over the abortion legislation after 1989, in: Gradskova, Y., Morell Asztalos, I. (eds.), 2018, *Gendering Postsocialism: Old Legacies and New Hierarchies*, Abingdon, New York, Routledge, p. 194.

41 Act of 7 January 1993 on Family Planning, Protection of the Human Fetus and Conditions for the Permissibility of Termination of Pregnancy (“Fetus Protection Act”), *Official Journal of Poland*, No. 17, item 78. Translated by author.

42 Fuszara, M., Will the Abortion Issue Give Birth to Feminism in Poland?, in: McLean, M., Groves, D., (eds.), 1991, *Women’s Issues in Social Policy*, New York, Routledge.

National Women's Information Center (OŚKA), emerged – mostly with the help of foreign grants. The Women's Parliamentary Circle began its activities in 1991, and became the Parliamentary Group of Women (PGW) in January 1992. Since then, it has been formed in every parliamentary term and has acted as Parliament's liaison with NGOs and academia, and later also with businesses. It proposed a number of important legislative initiatives on issues, including equal status for men and women, domestic violence prevention, and conscious parenthood.⁴³ One of them was a bill allowing abortion on social grounds, passed by the Parliament on 11 June 1994, but vetoed by President Wałęsa. In 1996, Parliament, with the votes of the Social-Democratic Party, again amended the abortion law to allow abortions in cases of severe life circumstances or personal hardship,⁴⁴ but the Constitutional Tribunal overturned this amendment in its first abortion ruling, in 1997.

In the decision from 1997, the Tribunal held that the constitutional protection of human life is granted from the moment of conception, and the stage of development is thus irrelevant.⁴⁵ The Tribunal based its argument on the principle of the democratic rule of law, since the constitutional provisions in force did not guarantee the right to life. For the majority of judges, the premises of “severe life conditions” or “personal hardship” were too vague and subjective to justify an exception from punishment for fetal homicide. The majority argued that restrictions on the legal protection of human life are not subject to the standard proportionality test because human life can only be sacrificed to save a constitutional good of equivalent value. Thus, the majority supported a deontological approach to the protection of life and refused to recognize the equivalent value of women's rights in the context of abortion.⁴⁶

Parallel to these developments, the National Assembly established a Constitutional Commission to draft a new constitution. Significantly, from 1993 to 1997, post-communist left-wing representatives had a majority in Parliament, and many parties with roots in the former anti-communist opposition (Solidarity) had no representation. The enactment of a new constitution required concessions, to gain support first in Parliament,

43 Marszał, K., 2005, *Lobby kobiet w polskim parlamencie 1989–2005*, Warsaw, Wydawnictwo Sejmowe.

44 Act of 30 August 1996 amending the Fetus Protection Act, *Official Journal of Poland*, No. 139, item 646.

45 CT, Decision No. K 26/96 (28 May 1997).

46 The Tribunal failed to note a clash between two constitutionally protected values – human life and the woman's autonomy or privacy. Instead, it opined that the vagueness of the term used by the legislator makes it impossible to indicate what rights and freedoms justify depriving the fetus of the legal protection of life.

and then in a nationwide referendum.⁴⁷ Obtaining a constitutional majority in Parliament was possible only after acceding to the demands of the conservative People's Party. In turn, ensuring a positive referendum outcome required consideration of the position of extra-parliamentary parties, trade unions, and the Catholic Church.⁴⁸

Women's organizations lobbied for a progressive formulation of freedom of choice in the new constitution, in the hope that such guarantees would permanently block future parliamentary majorities from tightening the abortion law. Referring to the Slovenian, Macedonian, Guatemalan and Paraguayan constitutions of the time, the Center for Women's Rights proposed the following article:

“The freedom to decide to have a child is a fundamental human right. For the realization of this freedom, the state creates conditions that allow free choice in the procreative sphere, including, in particular, guaranteeing the right to information and the unrestricted use of medical knowledge and means and methods of family planning.”⁴⁹

The Center also wanted a provision defining the state's obligation to prevent domestic violence, and violence against women in public and private life. It advocated for the establishment of an Equal Status Commissioner, who would be in charge of complaints about violations of rights by public authorities or private individuals. However, these and other demands by women's organizations were not included in the final version of the 1997 Constitution.⁵⁰

In contrast, the Church's demands regarding inalienable human dignity, the legal protection of human life, the definition of marriage as the union of a man and a woman, the principle of subsidiarity or reference to the Concordat of 1993 between the Republic of Poland and the Holy See as the foundation of state-church relations were incorporated into the 1997 Constitution. However, there was no consensus within the government coalition on issues like the primacy of natural law over state law, or the legal protection of human life from conception to natural

47 Zaleśny, J., 2017, Tworzenie Konstytucji z 1997 roku. Przejaw kooperacji czy rywalizacji elit politycznych?, *Przegląd Sejmowy*, Vol. 6, No. 146, pp. 177–206.

48 This was both a dilatory compromise, involving the deliberate elimination of controversial issues, and an inclusive compromise, involving the inclusion in the draft constitution of those issues that were supported by a representative parliamentary group, but not opposed by another parliamentary group.

49 Nowakowska, U., 1995, *Prawa kobiet w Konstytucji*, Warsaw, Centrum Praw Kobiet, p. 14. Translated by author.

50 In total, 79 persons, including 10 women, participated in the work of the Constitutional Commission.

death, which would be an expression of the Catholic faith.⁵¹ Therefore, later rulings of the Constitutional Tribunal that adopt this understanding contradict both the original intent of the drafters and a literal interpretation of the Constitution.

Notably, the Preamble expressly refers to male citizens and their male ancestors, and is followed by a definition of the Republic as “the common good of all male citizens”. Although the use of the masculine gender for common nouns in Polish was customary at the time of the drafting of the new constitution, its language builds a picture of a political community in which there are no women.⁵² Moreover, it uses terms that are by no means value-neutral. The constitutional provisions speak of “pregnant women and mothers”⁵³ or “parents”,⁵⁴ but omit men as fathers.⁵⁵ In contrast to the well-established civil law definition of a mother as “a woman who has given birth to a child”, the 1997 Constitution uses the term “mother before and after the birth of a child”.⁵⁶ This formulation suggests that a woman becomes a mother from the moment of conception. In fact, in its first abortion ruling, issued after the 1997 Constitution was enacted, but before it came into force, the Tribunal follows precisely this interpretation.⁵⁷ In that decision, the Tribunal emphasized that women and men have the freedom to decide whether or not to have children, but that this freedom ends at conception.⁵⁸

To conclude, the process of democratization in Poland came at the expense of limiting women’s reproductive rights, while concurrently fostering an illusion of freedom in other spheres.⁵⁹ Moreover, economic reforms deprived many women of employment, and limited the availability

51 The Constitutional Commission deliberately rejected a proposal to add the words “from the moment of conception,” by 30 out of 43 votes. Its chairman emphasized that the Constitution should not prejudice when the legal protection of human life begins, so as not to contradict any law permitting the termination of pregnancy. See *Bulletin of the Constitutional Committee of the National Assembly*, Vol. 45/1997. Kalita, T., 2016, Proces tworzenia konstytucyjnej formuły określającej zakres ochrony życia człowieka, *Przegląd Prawno-Ekonomiczny*, 36, p. 77.

52 Śledzińska-Simon, A., 2022, Kobiety i płeć w Konstytucji, *Państwo i Prawo*, 10, pp. 74–90.

53 Arts. 68(3) and 71(2).

54 Arts. 18, 48(1), 53(3) and 70(3).

55 Art. 18.

56 Art. 71(2).

57 CT, Decision No. K 26/96.

58 *Ibid.*, Sec. 4.3 (“the right to have a child can only be interpreted in positive terms, and not as a right to annihilate a developing human fetus”). Translated by author.

59 Matynia, E., 1994, Women after Communism: A Bitter Freedom, *Social Research*, Vol. 61, No. 2, pp. 351–377.

of preschool and medical care.⁶⁰ Therefore, one could argue that the economic reforms relegated many women to the confines of the private sphere. Women formally enjoyed equal access to the public sphere. However, women's rights were marginalized in political discourse, and all mainstream political parties treated the demands of women's movements instrumentally.⁶¹ As a result, many women could have felt deceived by the promise of freedom and equality in a liberal democracy.

This is most vividly illustrated by the 1993 restriction of the abortion law and the rulings of the Constitutional Tribunal in 1997. Even though in 1992 more than a half of the surveyed individuals believed that the premise of allowing abortion due to the social situation of the pregnant person should be maintained,⁶² the parliament and president preferred to strike a "compromise" with the Catholic Church and remove this premise.

Liberal democracy traditionally demarcates the public and private spheres.⁶³ However, in its ruling on abortion, the Constitutional Tribunal, one of the pillars of Poland's liberal democracy, did not take into account the fundamental rights of pregnant individuals, such as the constitutionally protected right to privacy and self-determination. Instead, the Tribunal focused on the issue of protecting life, defining it as protection from the moment of conception. This interoperation is consistent with the moral teachings of the Catholic Church and a conservative worldview, which prioritizes the fetus over the rights and freedoms of the pregnant individual.

4. CONSOLIDATED LIBERAL DEMOCRACY, GENDER EQUALITY AND ABORTION

The consolidation of Polish democracy was ensured with the adoption of the 1997 Constitution and the country's accession to the European Union, both confirmed through nationwide referendums in 1997 and 2003, respectively. This phase lasted until the right-wing populist anti-liberal government took power in October 2015 and systematically dismantled the rule of law guarantees and took control over key democratic institutions.⁶⁴

60 Mishtal, J., 2010, Neoliberal Reforms and Privatisation of Reproductive Health Services in Post-Socialist Poland, *Reproductive Health Matters*, Vol. 18, No. 36, pp. 56–66.

61 Graff, A., 2001, *Świat Bez Kobiet. Płeć W Polskim Życiu Politycznym*, Warsaw, Wydawnictwo Marginesy.

62 Centrum Badań Opinii Społecznej, 1992, *Opinia społeczna o przerywaniu ciąży. Komunikat z badań*.

63 Pateman, C., 1988, *The Sexual Contract*, Cambridge, Polity Press.

64 Sadurski, W., 2019, *Poland's Constitutional Breakdown*, Oxford, Oxford University Press.

The consolidation of liberal democracy in Poland between 1997 and 2015 paved the way for a struggle between factions attempting to traditionalize the gender order, on the one hand, and those striving to establish formal and material conditions for the realization of gender equality, including through liberalization of abortion law, on the other. The Catholic Church continued to maintain its considerable political influence. It publicly supported the 1997 Constitution and the EU accession in both national referendums, but its endorsement came at the price of maintaining the restrictive abortion law.⁶⁵ However, non-governmental organizations, including women's rights groups, saw a rise in their visibility and prominence.

This shifting balance of social power led to the preservation of the status quo regarding abortion laws. All legislative efforts to amend the constitution to protect the life of the unborn,⁶⁶ and further restrict abortion rights, in line with the Catholic Church doctrine, proved unsuccessful.⁶⁷ On the other hand, groups advocating for the liberalization of existing laws failed to bring about any regulatory changes.

Public debate openly addressed the government's active pursuit of support from the Catholic Church on pivotal issues, often in exchange for refraining from liberalizing abortion regulations. In 2002, over 100 women and a dozen women's organizations sent an open letter to the European Parliament, condemning the unwritten, informal agreement between the then-governing Democratic Left Alliance and the Catholic Church. This agreement saw the Church exchanging its support for Poland's EU integration for the government's pledge to cease attempts to amend the abortion law.⁶⁸ The left-wing government, led by Prime Minister Leszek Miller, tried to avoid open confrontation with the Church. Therefore, it negotiated the adoption of an official declaration on public morality attached to the EU Accession Treaty in 2003.⁶⁹ This political decision was further reinforced by the Constitutional Tribunal's judgment of 2005,

65 Leszczyńska, K., *The Roman Catholic Church in Poland vis-à-vis Europe and the Processes of European Integration. Three Pictures of Europe*, in: Ramet, S., Borowik, I. (eds.), 2017, *Religion, Politics, and Values in Poland*, New York, Palgrave Macmillan, pp. 61–84.

66 In 2007, the Sejm rejected the bill introducing the protection of human life from the moment of conception to the Constitution.

67 In 2013, the Sejm rejected a citizens' bill banning abortion due to genetic defects of the fetus, and in 2015 another citizens' bill banning abortion entirely.

68 Later concessions in this area were made by all governments from both the right and left.

69 Declaration No. 39, recognizing Poland's right to regulate moral issues and those related to the protection of human life.

which held that the Accession Treaty was compatible with several provisions of the 1997 Constitution, including Article 38 on legal protection of human life.⁷⁰

Subsequently, in 2007, in the last weeks of the right-wing Eurosceptic PiS party government led by Jarosław Kaczyński, Poland joined Protocol No. 30 to the Charter of Fundamental Rights of the European Union.⁷¹ The step was supported by conservative civil society organizations. The Eurosceptic governing party threatened voters that without such an opt-out from the EU Charter, Western European standards of fundamental rights protection could lead to the legalization of abortion, euthanasia, same-sex partnerships and marriage, and property restitution in Poland. These claims were not substantiated, as the Charter covers areas that fall under EU competence, while, for instance, family law and abortion regulation are the Member States' competence. Merely joining the Charter would not result in changes in this area of Polish law.⁷² This has been demonstrated empirically by case studies of other EU Member States that joined the Union during the enlargement in 2004 and later. Many of these states voluntarily expanded legal protection to include, for example, LGBT rights, several years after the Charter became binding in their jurisdictions.⁷³ Nonetheless, Poland joining Protocol No. 30 paved the way to the Constitutional Tribunal's judgment confirming the constitutionality of the Lisbon Treaty, which incorporated the Charter of Fundamental Rights.⁷⁴

The Constitutional Tribunal played an important role in the political transformations, but it also reinforced the special status of the Catholic Church. First, the Tribunal helped the Catholic Church to maintain its privileged position over other faiths.⁷⁵ Second, the Tribunal recognized

70 CT, Judgment No. K 18/04 (11 May 2005).

71 Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, *Official Journal of Poland*, 115, 9 May 2008, pp. 313–314.

72 Barnard, C., The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?, in: Griller, S., Ziller, J. (eds.), 2008, *The Lisbon Treaty*, Vienna, Springer, pp. 257–283.

73 Roots, L., Law and Morality: Evolution of LGBT Rights in Estonia, Hungary and Poland: From Communist Past to Current Reality, in: Blidon, M., Brunn, S. D. (eds.), 2022, *Mapping LGBTQ Spaces and Places*, Cham, Springer, pp. 57–71.

74 CT, Judgment No. K 32/09 (24 November 2010).

75 Suchocka, H., Poland: The Case of Religious Freedom. National Case Studies: Concentrating on the Status Quo and Current Developments, in: Glendon, A. M., Zacher, H., (eds.), 2012, *Universal Rights in a World of Diversity: The Case of Religious Freedom*, Pontifical Academy of Social Sciences, Acta 17, pp. 637–647 (https://www.pass.va/content/dam/casinapiouv/pass/pdf-volumi/acta/acta_17/acta17-suchocka.pdf, 9. 6. 2024). See also CT decisions of 14 November 2007, Case No. K 20/05 and of 6

that freedom of conscience and religion have a higher rank than other rights,⁷⁶ despite the absence of such references in the constitutional text. In one of the key judgments of the consolidation phase, the Tribunal held that doctors' freedom of conscience could not be restricted in the name of protection of patients' rights when a patient's life or health is not at risk.⁷⁷ In this way, the Tribunal confirmed the right of doctors to refuse health services in non-urgent cases, and to refuse to provide information about the possibility of obtaining a specific health service from another doctor or medical facility. In practice, the ruling gave doctors the liberty to refuse abortions in cases where the pregnancy did not threaten the woman's life or health. In the argumentation, the Tribunal again assumed that the Constitution protects human life from the moment of conception, and did not take into account women's rights as an equivalent constitutional value. Although the moral convictions of the Tribunal's judges were not openly declared, the abovementioned decisions are manifestations of an ideological interpretation that is neither supported by the text of the Constitution nor by the constitutional doctrine.

At the same time, it emerged that access to constitutional justice was relatively limited for individuals, and of little use in the face of problems that arose from a lack of appropriate legislation, or in the course of application of existing laws. As a result, individual women had to pursue remedies for oppressive practices and the state's failures to fulfill its positive human rights obligations before the European Court of Human Rights (ECtHR). The ECtHR found, *inter alia*, that the lack of effective procedures to gain access to abortion violated the prohibition of inhuman treatment and the right to the protection of private life in reproductive cases.⁷⁸

Although the 1997 Constitution granted individuals the right to file a constitutional complaint, complaints were only allowed against legal provisions (statutory and sub-statutory), and not against the application

February 2007, Case No. K 16/06 (dismissing, on procedural grounds, constitutional challenges to the laws providing financing of the Papal Theological Faculty and the construction of the Temple of Divine Providence from the state budget).

76 CT, Judgment No. SK 54/13 (6 October 2015) (holding that the criminal prohibition of public insult to religious feelings does not violate freedom of speech). Further see judgment of the European Court of Human Rights of 15 September 2022, *Rabczewska v. Poland*, App. No. 8257/13.

77 CT, Judgment No. K 12/14 (7 October 2015).

78 ECtHR judgments of 20 May 2007, *Tysic v. Poland*, App. No. 5410/03 of 26 May 2011, *R. R. v. Poland*, App. No. 27617/04 of 30 October 2012, and *P. and S. v. Poland*, App. No. 57375/08. The Polish government has not yet introduced general measures implementing these judgments.

of laws by courts.⁷⁹ In addition, the Constitutional Tribunal established its own admissibility criteria regarding constitutional complaints, and rejected complaints brought on the basis of the principle of equality, or programmatic social rights provisions. Furthermore, the Tribunal refused to decide cases concerning the legislative failure to act (*zaniechania ustawodawcze*) or to order individual remedies for those affected by unconstitutional laws.⁸⁰ Cases concerning gender equality were most often initiated at the request of the Ombudsman, while the most politically contentious cases, such as those concerning the conscience clause or the retirement age, were initiated by groups of deputies, trade unions, or bodies of professional self-government. Although ordinary and administrative courts have the power to raise legal questions about the constitutionality of laws in pending cases,⁸¹ they proved to be the least active of all entities authorized to initiate constitutional review.⁸²

Simultaneously, accession to the European Union in 2004 introduced not only the implementation of EU equality law, but also the strengthening of the gender equality agenda.⁸³ As a candidate and then a member state, Poland implemented the Equality Directives,⁸⁴ mandating equal treatment of women and men in employment and labor relations, social security, as well as in access to goods and services.⁸⁵ However, the implementation of EU equality law involved copying its provisions mechanically, without genuine interest in addressing the sources of inequality or remedying their consequences. As a result, Polish equality law offers piecemeal protection against discrimination, which mirrors the hierarchy of protected grounds existing in the EU and leaves gaps in

79 Art. 79.

80 Radziejewicz, P., 2019, Constitutional Reviews of Incomplete Regulations in Poland, *Utrecht Law Review*, Vol. 15, No. 1, pp. 38–49.

81 Art. 193.

82 Art. 191.

83 Velutti, S., 2020, Gender Regimes and Gender Equality Measures in Central Eastern European Countries Post-Accession: The Case of Hungary and Poland, *Journal of International and Comparative Social Policy*, Vol. 30, No. 1, pp. 79–91.

84 Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ* 2004 L 373, p. 37 and Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ* 2006 L 204, p. 23.

85 Act of 26 January 1974 – Labor Code, *Official Journal of Poland*, 2022, item 1510, and Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union on Equal Treatment (Equal Treatment Law), *Official Journal of Poland*, 2010, No. 254, item 1700.

areas that are not within the EU's competence, and are therefore outside the scope of the directives.⁸⁶

The Constitutional Tribunal did not adopt the definitions of direct and indirect discrimination, which are an integral part of EU equality law. Instead, the Tribunal developed its own gender equality case law, relying on the general principle of equality, the prohibition of discrimination, and the specific guarantees of equal rights for men and women enshrined in Articles 32 and 33 of the 1997 Constitution.⁸⁷ Ultimately, in gender equality cases, the Tribunal adopted the perspective of both formal and substantive equality: first (and foremost) eliminating obvious differences in economic and social rights between men and women, while maintaining special privileges for women on the grounds of maternity and their weaker social position. Only recently did it acknowledge that gender as a legal category is losing its importance due to changes concerning women's and men's life choices and the family model.

The first line of gender equality cases involved public service laws concerning teachers, pharmacy managers, civil servants in state and local government offices, and employees of the Supreme Audit Office.⁸⁸ The impugned provisions mandated that persons who acquired the right to a pension obtain permission for continued employment, or that there is employment terminated. Hence, these laws put women at a disadvantage compared to men due to a lower retirement age. The Tribunal found that such a differentiation of the legal situation of women and men is discriminatory and thus unconstitutional.

In a similar vein, the Tribunal reviewed the provision that granted the right to an early pension only to women who had reached the age of 55 and a contributory and non-contributory period of at least 30 years.⁸⁹ The Tribunal held that insofar as the law did not provide the right to early retirement to a man who has reached the age of 60 and has at least 35 years of contributory and non-contributory insurance, it constitutes an unjustified legislative omission with discriminatory effect. The Tribunal stressed that no legitimate arguments could justify such an omission. In

86 This problem was pointed out by the Ombudsman, who requested the review of the Equal Treatment Law, but withdrew this request after the political takeover of the Constitutional Tribunal.

87 Ziółkowski, M., 2016, *Zasada równości kobiet i mężczyzn – analiza orzecznictwa Trybunału Konstytucyjnego*, *Państwo i Prawo*, 2, p. 96–111.

88 CT, judgments No. K 27/99 (28 March 2000); No. K 15/99 (13 June 2000); K 35/99 (15 December 2000); No. K 33/07 (11 December 2008). See also CT, Decisions No. Kw 5/91 (24 September 1991) and No. 15/97 (27 September 1997).

89 CT, Judgment No. 10/07 (24 October 2007).

particular, the failure to provide men with an equivalent right to early retirement could not be justified by biological or social differences between the sexes. On this ground, the Tribunal ruled that the impugned provision violated the principle of equal treatment and gender equality.

In another case, the Tribunal invalidated provisions under which fathers could acquire rights to early retirement, as employees caring for children who demand constant care, only if the child's mother is deceased or deprived of parental authority (incapacitated).⁹⁰ In this case, the Tribunal challenged the legislative assumption that fathers do not typically take care of their children if the mother is alive. The Tribunal found that the law under review violated the principle of equal treatment, because it adopted a stereotypical approach to men and women as caregivers.

The key decision, however, was the 2010 judgment in which the Tribunal upheld the lower retirement age for women as a legitimate compensatory preference.⁹¹ Nevertheless, three women on the adjudicating panel delivered their dissenting opinions. Judge Ewa Łętowska noted that public opinion supported the maintenance of a statutory lower retirement age for women. However, presenting this legislative choice as a “privilege” for women, while remaining silent about the inevitable, very drastic, systemic consequences that reduce the amount of pension funds provided to each woman, was, in her view, “a reprehensible abuse of public trust”.⁹² Similarly, Judge Sławomira Wronkowska-Jaśkiewicz argued that a woman at the age of 60, who has a contribution period and contribution amount that entitles her to a pension, is in a worse legal position than a man who retires at 65 and who contributes the same amount, but for 5 years longer. Moreover, in practice, a woman who reaches the age of 60 has much more limited chances of remaining in full-time employment than a man of the same age.⁹³ In a similar vein, Judge Teresa Liszcz asserted that lower retirement for women was not a compensatory privilege, but discrimination.⁹⁴

A few years later, the Tribunal eventually recognized that “[w]ith the ongoing changes in the situation of women in the family and society, the change of the family model to a partnership, the increase in the number of single women without material support in the family, and

90 CT, Judgment No. P 8/98 (6 July 1999).

91 CT, Judgment No. K 63/07 (15 July 2010). In parallel, the CT issued a signaling decision in which it recognized the need to gradually equalize the retirement age between men and women. CT, Decision No. S 2/10 (15 July 2010).

92 *Ibid.* (Łętowska, J., dissenting).

93 *Ibid.* (Wronkowska-Jaśkiewicz, J., dissenting).

94 *Ibid.* (Liszczy, T., dissenting).

the number of women interested in a longer working life, the legislator has an obligation to withdraw compensatory preference.”⁹⁵ In this way, the Tribunal confirmed that the Constitution does not preclude a withdrawal from compensatory privileges if social changes so require. Moreover, in this judgment, the Tribunal questioned “gender as a criterion for differentiating the retirement age and, consequently, the acquisition of pension rights.” The Tribunal observed that gender is a debatable differential criterion in this context, because women do not perform equal social roles (for example, not all are burdened with the responsibilities of parenthood and motherhood).⁹⁶

Against the backdrop of these cases, which merely corrected obvious legislative failures, it became clear that more robust change was needed to improve the actual situation of women. Women's rights organizations realized that mainstream parties instrumentalize their demands concerning reproductive rights, insufficient care infrastructure, protection from domestic violence, as well as pay gap and other forms of discrimination against women in the labor market. Women also felt marginalized in public life.⁹⁷ The balance of these fiascoes led to the emergence of a new women's movement. They gathered at the first Women's Congress in June 2009 to discuss the situation of women 20 years after the transition and demanded a greater presence of women in politics.⁹⁸

The First Women's Congress advocated gender electoral parity and gained enough public support to submit a citizen's bill on the issue to the Parliament. Their campaign coincided with the presidential campaign, due to the extraordinary political circumstances following the April 2010 plane crash that killed dozens of active politicians, including the president. Presidential candidate Bronisław Komorowski officially endorsed the electoral parity bill. Ultimately, the law passed in the Parliament as the gender electoral quota act that requires electoral lists to include 30% candidates of one gender in order to be officially registered for elections to the lower house of parliament, the European Parliament and local councils.⁹⁹ Importantly, the gender electoral quota law has never been challenged before

95 CT, Judgment No. K 43/12 (7 May 2014). Translated by author.

96 CT, Judgment No. K 43/12.

97 For example, women from the former communist opposition were not invited to official state ceremonies commemorating the anniversary of the overthrow of communism.

98 Śledzińska-Simon, A., Gender Quotas and Women's Solidarity as a Challenge to the Gender Regime in Poland, in: Lépinard, É., Rubio-Marín, R., (eds.), 2018, *Transforming Gender Citizenship: The Irresistible Rise of Gender Quotas in Europe*, Cambridge, Cambridge University Press, pp. 245–276.

99 Act of 5 January 2011 – Electoral Code, *Official Journal of Poland*, 2022, item 1277.

the Constitutional Tribunal, while Parliament vigorously opposed the EU gender quota directive in the debate over its subsidiarity.¹⁰⁰ Although the gender electoral quota law gradually changed the proportion of women in parliament, it only materialized in the parliamentary terms with a populist majority.¹⁰¹ Nevertheless, the increased representation of women in Polish politics has not prevented the political backlash to women's rights and the re-traditionalization of the gender regime in Poland.

In conclusion, the consolidation phase of Polish democracy has strengthened the gender equality agenda and struggle. On the one hand, the Constitutional Tribunal's judgments have contributed to many adjustments in social legislation, providing for equal treatment of women and men in the employment and social security systems. On the other hand, the Tribunal has maintained privileges dedicated to women to compensate for their parental responsibilities. In parallel, women's organizations won their struggle for gender quotas on electoral lists, which in the long term increased women's representation in representative bodies. At the same time, the increase in the number of women in parliament did not immediately translate into the strengthening of progressive legislation favoring gender equality, especially after the populist takeover in 2015.

5. ILLIBERAL DEMOCRACY AND A POPULIST SOCIAL CONTRACT

The populist, illiberal¹⁰² or non-liberal phase of Polish constitutionalism began with the United Right coalition, led by the Law and Justice (PiS) party, coming to power again in October 2015. This government quickly moved to dismantle the institutions of the liberal democratic state and the rule of law.¹⁰³ It first paralyzed and then packed the Constitutional

100 Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM/2012/0614 final.

101 In 2019, the percentage of women in the Sejm (28.7%) and in the Senate (24%) was the highest in the entire post-transformation history of Poland.

102 Halmai, G., The Making of "Illiberal Constitutionalism" with or without a New Constitution: The Case of Hungary and Poland, in: Landau, D. *et al.* (eds.), 2019, *Comparative Constitution Making*, Cheltenham, Edward Elgar Publishing, pp. 302–323.

103 In the literature the constitutional crisis has been given many names: Skąpska, G., The Decline of Liberal Constitutionalism in East Central Europe, in: Vihalemm, P. *et al.* (eds.), 2017, *Routledge International Handbook of European Social Transformations*, London, Routledge, pp. 130–146; Wyrzykowski, M., 2019, Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland, *Hague Journal on the Rule of Law*, 11, pp. 417–422; Sadurski, W., 2019, *Poland's Democratic Breakdown*, Oxford,

Tribunal,¹⁰⁴ and further abused it¹⁰⁵ in attempts to legitimize its domestic policies,¹⁰⁶ breaches of the Constitution, and opposition to EU law¹⁰⁷ and the European Convention of Human Rights.¹⁰⁸ It also removed statutory guarantees of judicial independence,¹⁰⁹ politicized the media regulators and public media,¹¹⁰ merged the offices of the Minister of Justice and the Prosecutor General, and subordinated the prosecutor's office to political power. These institutional changes took place without formal amendments to the 1997 Constitution, through ordinary laws, against the protests of the democratic opposition and much of civil society,¹¹¹ as well as criticism from international institutions and the EU. The populist government attacked the principles determining the functioning of liberal democracy, and in fact constituting a limitation of government. This process, a democratic backsliding, not only led to entrenchment of illiberal rule for two parliamentary terms, but also undermined the essence of democracy.¹¹²

In its strategy to gain and maintain power, the governing populists emphasized the role of the majority in democracy, or rather the political representation of that majority in parliament. However, having removed

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- Oxford University Press; Belov, M., 2021, *Populist Constitutionalism and Illiberal Democracies: Between Constitutional Imagination, Normative Entrenchment and Political Reality*, Cambridge, Intersentia; Drinóczi, T., Bień-Kacała, A., 2021, *Illiberal Constitutionalism in Hungary and Poland*, London, Routledge.
- 104 Sadurski, W., 2019, Polish Constitutional Tribunal under PiS: From an Activist Court, to a Paralyzed Tribunal, to a Governmental Enabler, *Hague Journal on the Rule of Law*, Vol. 11, No. 1, pp. 63–84.
- 105 Kustra-Rogatka, A., 2023, The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts, *European Constitutional Law Review*, Vol. 19, No. 1, pp. 25–58.
- 106 Rhein-Fischer, P., Wójcik, A., 2023, The Politicisation of Constitutional Review of Memory Laws, *European Constitutional Law Review*, Vol. 19, No. 4, pp. 664–689.
- 107 Gliszczynska-Grabias, A., Sadurski, W., 2023, Is It Poxit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland, *European Constitutional Law Review*, Vol. 19, No. 1, pp. 163–181.
- 108 Ploszka, A., 2023, It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional, *Hague Journal on the Rule of Law*, Vol. 15, No. 1, pp. 51–74.
- 109 Pech, L., Wachowiec, P., Mazur, D., 2021, Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (in) Action. *Hague Journal on the Rule of Law*, Vol. 13, No. 1, pp. 1–43.
- 110 Wójcik, A., 2023, Restoring Poland's Media Freedom. *Verfassungsblog*.
- 111 Bodnar, A., The Role of Polish Civil Society in Supporting EU Activities as Regards Protection of Judicial Independence and Other Elements of the Rule of Law, in: Meier, K., Lorenz, A., Wendel, M., (eds.), 2023, *Rule of Law and the Judiciary*, Baden-Baden, Nomos Verlagsgesellschaft mbH & Co. KG, pp. 167–180.
- 112 Pech, L., Scheppele, K. L., 2017; Laruelle, M., Illiberalism: A Conceptual Introduction, *East European Politics*, Vol. 38, No. 2, pp. 303–327.

almost all barriers to unrestricted rule, the United Right coalition invoked the same principles of democracy, the rule of law and human rights that it had been simultaneously rejecting. These concepts, however, have taken on a different meaning under the populist government. In populist rhetoric, democracy is about the sovereignty of the people and majority rule. In practice, however, majority rule is exercised by the executive, which in 2015–2023 in Poland was in practice subordinated to the leader of the PiS, Jarosław Kaczyński. The rhetoric of the rule of law was used to emphasize the supremacy of the constitution, especially in disputes with European Union institutions over the standard of judicial independence. The principle of rule of law was undermined by the government's practice of ruling by law.¹¹³ Laws were manipulated or selectively enforced to the benefit of the ruling party and its supporters. The law was also used in a discriminatory manner to smear the opposition and critics of the government policies.¹¹⁴ This particularly had a negative impact on the rights of minorities and socially vulnerable groups, including LGBT rights¹¹⁵ and women's reproductive rights. In populist regimes that reject previously established standards of liberal democracy, human rights are often redefined as the rights of the majority, while the rights of minorities are sidelined, disregarded, or not recognized altogether.

The explanation for the success of anti-liberal populists in Poland, as well as in other countries in Central and Eastern Europe, notably in Hungary,¹¹⁶ lies in a combination of political, economic, social and ideological (cultural) factors. These factors led to the establishment of a social pact wherein citizens tolerated the transgression of liberal democratic norms and institutions in exchange for a guarantee of economic stability.¹¹⁷ This pact also entailed halting progress in the social sphere, allegedly in the defense of the so-called traditional values and protecting a so-called traditional, *i.e.*, heterosexual, family and gender roles. In Poland, it was translated to political and legal backlash to LGBT¹¹⁸ and women's rights. The third pillar of the right-wing populist social pact involved fulfilling

113 Scheppele, K. L., 2018, Autocratic Legalism, *The University of Chicago Law Review*, Vol. 85, No. 2, pp. 545–584.

114 Bodnar, A., 2021, "For My Enemies: The Law". The Interpretation of the Law by the PiS Government in Poland, *Osteuropa*, 3, pp. 99–114.

115 Grabowska-Moroz, B., Wójcik, A., 2021.

116 Halmai, G., 2023.

117 Orenstein, M. A., Bugarič, B., 2022, Work, Family, Fatherland: The Political Economy of Populism in Central and Eastern Europe, *Journal of European Public Policy*, Vol. 29, No. 2, pp. 176–195.

118 Godzisz, P., The Journey and Horizon: Reflecting on the Progress and Prospects of Anti-LGBT Hate Crime Governance in Poland and Beyond, in: Godzisz, P., 2024,

citizens' identitarian needs, which included the implementation of memory laws¹¹⁹ and cultural policies. This pact came to be known as the "social contract of democratic backsliding" due to the popular support from which populists drew their political legitimacy, even for actions that violated democratic standards.¹²⁰

According to its ideological program, the PiS is a right-wing national-conservative party. However, its social program was based on direct universal cash transfers, which are especially important for lower-income groups.¹²¹ The PiS government's flagship program was a family benefits program, which included a 500 PLN monthly allowance for each child.¹²² Although the program did not achieve its main official goal of increasing the birth rate in Poland in the medium term, it reduced relative poverty among families with children. Its success is considered one of the reasons for Law and Justice's victory in the 2019 elections. Other social reforms pushed by the PiS government, such as lowering the retirement age for women and raising the school age, were aimed at strengthening the role of the family. However, for women burdened with caring responsibilities, these reforms further hindered their equal opportunities in the labor market.¹²³ At the same time, the government's social policies not only led to an increase in public debt, but also took resources away from public services, such as healthcare and education. As a result of the direct transfer policy, a so-called second wave of privatization of these sectors occurred.¹²⁴

However, the United Right government enjoyed popularity for a long time, until the Constitutional Tribunal's ruling of October 2020, restricting abortion law. The PiS has been popular among women, but it is evident that older women have been more supportive of the party, while it lacks popularity among younger women. In Poland, right-wing populism

State Responses to Anti-LGBT Violence: Poland in a European Context, London, Springer Nature, pp. 291–304.

119 Wójcik, A., 2023, Memory Laws, Rule of Law, and Democratic Backsliding: The Case of Poland, *Journal of Illiberalism Studies*, Vol. 3, No. 3, pp. 71–87.

120 Adamski, D., 2019, The Social Contract of Democratic Backsliding in the "New EU" Countries, *Common Market Law Review*, Vol. 53, No. 3, pp. 628–629.

121 Krajewski, M., 2023, The Constitutional Quandary of Social Rights: Questions in Times of the Polish Illiberal Turn, *International Journal of Constitutional Law*, Vol. 21, No. 1, pp. 156–186.

122 Rakusa-Suszczewski, M., 2021, Children as an Object of the Right-Wing Populist Politics and Discourse in Poland, *Studia Europejskie-Studies in European Affairs*, Vol. 25, No. 2, pp. 67–91.

123 Szczerbiak, A., 2019, Why Is Poland's Law and Justice Party still so Popular, *LSE Blog*, (<https://blogs.lse.ac.uk/europpblog/2019/10/01/why-is-polands-law-and-justice-party-still-so-popular/>, 12. 4. 2024).

124 Pawłowski, Ł., 2020, *Druga fala prywatyzacji*, Warsaw, Fundacja Kultury Liberalnej.

offered women redistribution and recognition, primarily in relation to their role as mothers.¹²⁵ Concurrently, the PiS government officially adopted a strategy to combat so-called gender ideology and showed disdain for feminism, associating it with both the legacy of socialism and as a foreign product of Western culture, not compatible with the so-called Polish traditional values.¹²⁶ The government's announcement of its intention to withdraw from the Istanbul Convention, ratified by Poland in 2012 under the centrist liberal government, was a manifestation of this official contestation of gender ideology.¹²⁷ Moreover, in 2021, Prime Minister Mateusz Morawiecki filed a motion with the politically packed Constitutional Tribunal to examine the constitutionality of the Istanbul Convention.¹²⁸ The main objection against the Convention was the introduction of the socially constructed concept of gender, independent of biological sex. In addition, the government was critical about provisions mandating the elimination of gender stereotypes in cultural and educational settings as contrary to the principle of state neutrality and in breach of the constitutional right of parents to raise their children according to their worldview.

Simultaneously, the government opened another front in the gender war by refusing to recognize the rights of sexual minorities, as well as by denouncing their presence in public spaces. Despite a notable increase in the number of annual equality parades held in cities and towns in Poland during the period of the PiS government, their organizers often encountered impediments. While bans on these parades were eventually overturned in administrative courts, there were numerous instances of police brutality against demonstrators and even harassment of LGBT rights activists.¹²⁹ In the pursuit of combating gender ideology, many local governments, especially in the East-South of Poland, adopted non-binding, symbolic resolutions in defense of the family, but effectively discriminated against non-heterosexuals. Despite being deemed legally invalid by

125 On the genealogy of Polish populism see: Sowa, J., 2018, Populism or Capitalist De-Modernization at the Semi-periphery: The Case of Poland, *Non-Site*, No. 23, (<https://nonsite.org/populism-or-capitalist-de-modernization-at-the-semi-periphery/>, 12. 4. 2024).

126 Graff, A., Karolczuk, E., 2021, *Anti-Gender Politics in the Populist Moment*, London, Routledge.

127 CETS 210 (11. 5. 2011).

128 CT, Case No. K 11/20.

129 Amnesty International, 2022, They Treated us as Criminals. From Shrinking Space to Harassment of LGBTI Activities, (<https://www.amnesty.org.pl/wp-content/uploads/2022/07/THEY-TREATED-US-LIKE-CIMINALS-report-on-LGBTI-activists-in-Poland-Amnesty-International-EUR3758822022english.pdf>, 12. 4. 2024).

Polish courts, these resolutions had an unmistakable and enduring stigmatizing effect.¹³⁰

The war against gender ideology has also been waged by many notable Catholic Church hierarchs and some Catholic media, which, along with the public media, have become a propaganda mouthpiece for the ruling camp. Although the Catholic Church has experienced a significant decline in public trust,¹³¹ conservative organizations close to its doctrine (such as the Life and Family Foundation and the Ordo Iuris Institute, a legal think tank) have been thriving.¹³² While in the early period of democratic transition the Catholic Church as an institution acted as a guardian of the conservative social order, under the populist government after 2015 this role was also assumed by organizations defending Catholic values and moral doctrine. These organizations energetically engaged in preparing and garnering support for ideologically-oriented civic legislative projects, as well as legal opinions regarding bills processed in parliament. They also initiated and participated in court proceedings to defend traditional family values, Christian values, and the rights of Catholics. Their impressive efforts in legal mobilization resulted in the submission of civic legislative projects introducing a total ban on abortion¹³³ and a ban on the so-called homosexual propaganda.¹³⁴

Meanwhile, the women's movement in Poland also underwent a qualitative change, undoubtedly inspired by informal personal and online networks.¹³⁵ In addition to new organizations helping women seeking abortion (the *Dziewuchy Dziewuchom* initiative and the *Abortion Dream Team*), a new grassroots movement, the *All-Poland Women's Strike*,

130 Administrative courts overturned most resolutions, but some still remain in force. See Ploszka, A., 2022, From Human Rights to Human Wrongs. How Local Government Can Negatively Influence the Situation of an Individual. The Case of Polish LGBT Ideology-Free Zones, *International Journal of Human Rights*, Vol. 27, No. 2, pp. 359–379.

131 In 2020, public trust in the Catholic Church was the lowest since 1993. IBRiS, 2022, *Którym instytucjom Polacy ufają najbardziej*, Opinion Poll (Nov. 2020). See also Centrum Badań Opinii Społecznej, 2022, *Dlaczego Polacy odchodzą z Kościoła?*, *Komunikat z badań*, No. 105.

132 Suchanow, K., 2020, *To Jest Wojna: Kobiety, Fundamentalisci i nowe średniowiecze*, Warsaw, Wydawnictwo Agora.

133 The citizens' bill banning abortion in cases of fetus abnormality returned to the Sejm four times (in 2013, 2015, 2018 and 2020), but was not adopted.

134 A citizens' bill opposing associations and assemblies that challenge family values ("Stop LGBT" bill) was debated in the Sejm and referred for further legislative work in October 2021.

135 Rodak, L., 2020, Sisterhood and the 4th Wave of Feminism: An Analysis of Circles of Women in Poland, *Oñati Socio-Legal Series*, Vol. 10, No. 1S, pp. 1165–1345.

emerged. It arose in protest against the rejection of the “Save the Women” bill, which aimed to liberalize abortion laws, and the simultaneous referral of the “Stop Abortion” bill, which sought to introduce almost a total ban on abortion, to a parliamentary committee. On 3 October 2016, the Women’s Strike organized mass protests in 147 cities against the abortion law restrictions, which became known as Black Monday. The protest was so powerful that the government withdrew its support for the “Stop Abortion” bill.¹³⁶

The final blow to women’s reproductive rights in Poland was delivered in 2020 by the Constitutional Tribunal, which was politically subordinated to the ruling coalition.¹³⁷ The abortion judgment K 1/20 brought the relationship between reproductive rights and the rule of law in Poland into sharp focus.¹³⁸ In a case initiated by a group of PiS MPs, the Tribunal ruled that terminating pregnancy due to fetal abnormalities is unconstitutional. It was the second abortion-related ruling in the history of Poland’s Constitutional Tribunal, after the judgement of 1997. This time, however, the decision was made by a body composed of individuals illegally seated, lacking the attribute of independence, and failing to conduct an independent and impartial judicial review.¹³⁹ In the decision, the Tribunal recalled the constitutional rights of the fetus and emphasized that even a high probability of severe and irreversible fetal impairment or an incurable life-threatening disease does not automatically justify infringement of the pregnant woman’s rights. According to the majority of judges, the analyzed provision “lacked reference to tangible criteria for violating the mother’s well-being justifying abortion, *i.e.*, a situation in which she cannot legally be required to sacrifice the legal good in question.”¹⁴⁰ The Tribunal’s decision overturned the statutory permissibility of abortion in cases where there is a high probability of severe and irreversible fetal disability or an incurable life-threatening disease.¹⁴¹

136 Mishtal, J., 2019, Reproductive Governance and the (Re)Definition of Human Rights in Poland, *Medical Anthropology*, Vol. 38, No. 2, pp. 182–194.

137 CT, Judgment No. K 1/20 (10 October 2020).

138 See Gliszczyńska-Grabias, A., Sadurski, W., 2021, The Judgment that Wasn’t (But Which Nearly Brought Poland to a Standstill): ‘Judgment’ of the Polish Constitutional Tribunal of 22 October 2020, K 1/20, *European Constitutional Law Review*, Vol. 17, No. 1, pp. 130–153.; Krajewska, A., 2021, Connecting Reproductive Rights, Democracy, and the Rule of Law: Lessons from Poland in Times of COVID-19, *German Law Journal*, Vol. 22, No. 6, pp. 1072–1097; Bień-Kacała, A., 2022, Nieliberalny sąd konstytucyjny w Polsce na przykładzie wyroku Trybunału Konstytucyjnego w sprawie aborcyjnej, sygn. akt K 1/20. *Przegląd Prawa Konstytucyjnego*, No. 5(69), pp. 15–27.

139 See Gliszczyńska-Grabias, A., Sadurski, W., 2021.

140 CT, Judgment No. K 1/20, para. 168. Translated by author.

141 Bień-Kacała, A., Drinóczi, T., Abortion Law and Illiberal Courts: Spotlight on Poland and Hungary, in: Ziegler, M., (ed.), 2023, *Research Handbook on International Abortion Law*, Cheltenham, Edward Elgar Publishing, pp. 263–282.

Notably, the decision of 2020 is closely aligned with the constitutional precedent established in the first abortion decision of 1997,¹⁴² which was reaffirmed in 2015 in the ruling on the doctors' conscience clause case.¹⁴³ Essentially, it was the third decision in the history of Poland's Constitutional Tribunal denying women the protection of their right to self-determination, refusing to recognize their capacity to make informed choices regarding childbirth and making them responsible for conceived life, regardless of its potential for development outside the woman's body. As a result of this ruling, legal abortion has become practically unattainable in Poland, with rare exceptions in cases of rape or incest.¹⁴⁴ Although legal scholars deemed the decision invalid due to the improper composition of the Tribunal's panel, it had a chilling effect and led to the cancellation of scheduled procedures for termination of pregnancy.

Following the Tribunal's decision, the biggest nationwide protests since 1989 erupted in Poland and lasted until February 2021. In an attempt to quell or weather the demonstrations, the government delayed the publication of the Tribunal's decision in the official government gazette until January 2021, thus preventing it from taking effect. People from all generations, including men, actively participated in the mass protests. The protests took place despite COVID-19 pandemic-related measures restricting assemblies.

For many observers, the mass protests represented not only an act of civil disobedience but also a decisive moment in the rejection of an illiberal government and rule of law backsliding by large social groups. The government's orchestration of the Tribunal's decision, effectively resulting in a *de facto* ban on abortion, crossed a critical line. In recent years there has been a significant increase in support for the liberalization of abortion laws, especially among younger groups. A substantial portion of Poles supported the regulations from 1993, with proponents of stricter laws belonging to a distinct minority. The actions of the authorities, which exploited the Constitutional Tribunal for abusive judicial review, revealed the cynicism of power and circumvention of legislative procedure to shift responsibility for unpopular changes in the law onto the Tribunal. The government answered the demands of religious organizations, and overlooked the broader social repercussions of restricting abortion law, which fueled unprecedented public outrage. The illiberal government entered into a pact only with a portion of the electorate, and its decision proved to be unpopular even among its own supporters.

142 CT, Decision No. K 26/97.

143 CT, Judgment No. K 1/20.

144 Bucholc, M., 2022.

6. RESTORING LIBERAL DEMOCRACY AND THE NEED FOR A NEW SOCIAL CONTRACT

It is widely believed that the populist backlash against reproductive rights was one of the factors mobilizing voters, including women and young people, to participate in the parliamentary elections in October 2023, resulting in a historic turnout of 74.38 percent. The opposition parties, from the center-right through liberals to the Left included policy proposals for reproductive rights and combating violence against women in their programs.¹⁴⁵

The new coalition government was created in December 2023, encompassing the Civic Platform, Poland 2050, PSL, and the Left. Despite the diverse ideological perspectives within the coalition parties, including varying stances on issues such as access to abortion and its decriminalization, their rise to power is rooted in the mandate of voters seeking tangible changes in how women in Poland are treated.

The implementation of electoral promises regarding reproductive rights faced political ramifications, notably the veto of President of Poland. President Andrzej Duda is a conservative politician and a supporter of the PiS party. He has been actively involved in undermining the rule of law in Poland since assuming the presidency in 2015. Moreover, there is also a lack of unanimity within the ruling coalition regarding specific changes concerning reproductive rights. Nonetheless, the ruling coalition managed to pass a law abolishing the prescription requirement for emergency birth control. However, President Duda vetoed the bill. Subsequently, the government issued a regulation allowing pharmacists to dispense emergency contraception without a prescription to individuals over the age of 15.¹⁴⁶ This example shows that the current government must engage in creative lawyering to pass its critical bills.

At the time of writing this article, the parties within the ruling coalition had submitted four draft bills concerning abortion to the Sejm: two were proposed by the Left, one by the Civic Coalition, and the last one is a proposal from Polska 2050 and the PSL. The Left submitted a bill on decriminalizing aiding in abortions. The criminalization of aiding in abortions was introduced in Poland in response to the underground

145 Sieradzka, M., Were Women Key to Voting out Poland's Ruling Conservatives?, *Deutsche Welle*, (<https://www.dw.com/en/were-women-key-to-voting-out-polands-ruling-conservatives/a-67214867>, 12. 4. 2024).

146 AP, 2024, Poland's president vetoes law on free access to morning-after pill for ages 15 and above, *AP*, (<https://apnews.com/article/poland-morning-after-pill-law-president-veto-fe41d1c97ea3e0151d67278e67c0512a>, 6. 6. 2024).

abortion services in the 1990s. However, under the PiS government, these provisions were abused to harass activists advocating for the liberalization of abortion laws and assisting people in Poland to access safe abortions, including through education about abortion pills.¹⁴⁷ Other projects aim to liberalize the strict abortion law as it stands following the Constitutional Tribunal ruling of 2020. The Poland 2050 and PSL parties' joint project proposes a return to the regulations from 1993, restoring the possibility of legal abortion as a medical service in cases of serious fetal defects. The other two projects propose the legalization of abortion up to the 12th week of pregnancy. None of these projects were passed in the first six months of the new government. President Andrzej Duda, whose term ends in mid-2025, is expected to veto any laws liberalizing abortion law. This situation gives the current government an excuse not to renew the social contract that would take women's reproductive rights seriously.

President Duda did not veto the "Active Parent" program, which introduces additional benefits for mothers returning to work after maternity leave. Initially, the government promoted this program as a benefit for grandmothers, which, despite its liberal aim of encouraging young women to re-enter the workforce, also, conservatively, emphasized the role of women as caregivers.

A new social contract, in which women's rights, including reproductive rights, are taken seriously, remains unfulfilled. In this proposed new paradigm, women's rights would be intrinsically tied to the principles of democracy, requiring no justification for their existence. Consequently, there would be widespread acknowledgment of the state's obligation to safeguard women's rights, including the right to privacy and self-determination, which, as the case law of the European Court of Human Rights in cases concerning Poland has long demonstrated,¹⁴⁸ are imperiled due to the lack of access to legal abortion. Moreover, in this new paradigm, the state would bear more responsibility for addressing and preventing domestic violence and abuse. To this end, the first steps have been taken. A Minister for Equality has been appointed, a position that was abolished by the previous government. Expert committees for the codification of criminal, civil, and family law have begun their work, tasked with developing directions for law reform. The current government has repeatedly stated that it recognizes European and

147 Bucholc, M., Gospodarczyk, M., *Feminist Mobilization, Abortion Law and Political Images of Womanhood: Feminists as "the Worst Minority"*, in: Bucholc, M., (ed.), 2024, *Established-Outsiders Relations in Poland: Reconfiguring Elias and Scotson*, Cham, Springer International Publishing, pp. 143–175.

148 Kapelańska-Pręgowska, J., 2021, *The Scales of the European Court of Human Rights: Abortion Restriction in Poland, the European Consensus, and the State's Margin of Appreciation*, *Health and Human Rights*, Vol. 23, No. 2, pp. 213–224.

international legal standards, which significantly distinguishes it from its predecessors. However, the process of rebuilding the rule of law and human rights protection standards is in an initial stage.

7. CONCLUSIONS

In conclusion, during the transition to democracy in Poland, many previous social privileges were eliminated, and women's reproductive rights were restricted as part of political bargaining with the powerful Catholic Church. Nonetheless, the transition brought both women and men significant gains in political and economic freedoms. Still, women were underrepresented in public debate and within democratic institutions, even though a woman, Hanna Suchocka, was the Prime Minister in 1992–1993. As democracy solidified, this arrangement persisted but allowed for adjustments in gender equality, particularly in employment and the social security system. Notably, women's pension privileges were maintained to offset their traditional family roles. The case law of the Constitutional Tribunal was critical in this regard. The shift towards populist right-wing illiberalism in 2015 ushered in a social contract of democratic backsliding, characterized by the redeeming of violations of democratic standards through expansive social programs and ideological culture wars. The Constitutional Tribunal's abusive judicial review resulted in tighter restrictions on legal abortion in Poland, sparking widespread protests. The opposition parties, ranging from the right, through liberals, to the left promised more robust reproductive rights such as liberalizing abortion law. It helped them to effectively mobilize women and young voters, which led to the opposition's victory in the 2023 parliamentary elections. However, the new coalition government, despite pledges of advancing women's rights, faces deadlock on abortion legislation due to disagreement within its ranks and the President's veto powers. As of now, Poland's pledge for a new social contract, one that acknowledges reproductive rights as integral to individual rights, such as life, health, self-determination, and privacy, remains unfulfilled.

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SHVATANJE ŽENSKIH PRAVA OZBILJNO: BORBA ŽENA ZA NOVI „DRUŠTVENI UGOVOR“ U POLJSKOJ

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APSTRAKT

Ovaj članak prati tok borbe za prava žena u Poljskoj od 1989. do danas. U njemu se tvrdi da je demokratska tranzicija uspešno oblikovala temelje liberalnog režima, ali da je od samog početka bila praćena sporazumom između vlade i Katoličke crkve koji je ograničio reproduktivna prava i doveo do vraćanja tradicionalnim rodnim ulogama. Ovaj kontekst je ključan za razumevanje tumačenja Ustavnog suda, koji je ojačao neku vrstu ugovora o rodu, nastojeći da primiri žene. Promena vlasti 2015. godine znatno je oslabila garancije vladavine prava i dodatno umanjila reproduktivna prava, što je izazvalo masovne proteste i mobilizaciju demokratske opozicije. U članku se tvrdi da svrgavanje neliberalnog režima na nedavnim parlamentarnim izborima označava početak novog društvenog ugovora u Poljskoj, u kojem se prava žena shvataju ozbiljno.

Ključne reči: demokratizacija, demokratsko nazadovanje, Poljska, Ustavni sud, žensko pravo, abortus, reproduktivna prava, društveni ugovor.

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