

TOMASZ WARCZOK
Pedagogical University of Cracow

HANNA DEBSKA
Pedagogical University of Cracow

Sacred Law and Profane Politics The Symbolic Construction of the Constitutional Tribunal

Abstract: The paper presents the symbolic dimension of the (re)production of Poland's Constitutional Tribunal, which is considered to be a model legal-political institution. Paying close attention to meaning, narrative, symbolic codes, and rituals, the authors object to a reductionist explanation, based on instrumental thinking and conscious and material interests, of the legal institutions of power. In accordance with neo-Durkheimian cultural sociology, the Tribunal is presented here as an institution created through binary symbolic codes (sacred/profane), and reproduced, in crisis situations, in performative acts constituting moments of ritual purification. The dominant narrative legitimizing the Tribunal counterpoises 'sacred' law with 'profane' politics in order to superimpose subsequent homological classifications (rational/irrational, pure/impure, universal/particular). The Tribunal's symbolic power is thus hidden within a thick web of meanings, which invisibly reinforce its authority.

Keywords: Constitutional Tribunal, neo-Durkheimian cultural sociology, meaning, ritual, legitimization, symbolic code

Introduction

In this article we would like to present the crucial, yet overlooked, symbolic dimension of Poland's Constitutional Tribunal (Constitutional Court). More broadly, our aim is to give an overview of the symbolic aspect inherent in social life, particularly in the context of law and its institutions, as this has been only partially noticed in numerous writings focusing on rational and instrumental questions.

We believe that in the field of legal studies, as in political sociology (viz. the neo-Weberian approach; for a critical review see [Alexander 2013](#)), there is a strong anti-cultural tendency to stress rational rules, clear interests, and objectives pursued by an informed choice of means, where the symbolic and cultural layers are only an addition (see [Kertzer 1988](#)). In this manner the symbolic and ritual features related to culture-determined emotions become mere epiphenomena of other elements, such as the social structure ([Alexander and Smith 2003](#)). When the 'cultural approach' is referenced directly (viz. cultural New Economic Sociology), the symbolic layer is rarely researched internally, with a detailed hermeneutic analysis of subsequent layers of meaning ([Alexander 2011](#)). However, a certain number of approaches have

recently emerged which prioritize symbolism and the related ritualism. Similar claims can be made thanks to the revival of classical approaches, and especially references to the last works of Émile Durkheim (2001), who stated very clearly that the modern world is not as 'disenchanted' as proponents of Enlightenment rationality might have expected. Thus neo-Durkheimian sociologists analyse symbolic dimensions and deep cultural meanings, codes, and narratives even in areas that seem to be dominated by conscious material interest, pure instrumental actions, and/or rational rules. This applies to the world of economy (Alexander 2011; Tognato 2012), politics (Alexander 2010), and war and punishment (Smith 2005, 2008).

These types of analysis, which object to materialist and instrumental reductionism, and thus enrich our understanding of the social world and human action, are only partially realized in the research field of law and legal institutions (see Skapska, Czapska, and Kozłowska 1989; Carlson and Hoff 2000; Alexander 2006). This paper intends to follow this line of enquiry. As will be shown on the basis of Poland's Constitutional Tribunal, the law is not as 'rational' and 'disenchanted' as is commonly assumed, and the legitimization of legal institutions is not driven solely by formal procedures, heuristic models, ideal types, or by culture (perceived as static, instrumental, or functional). Legal institutions are based on almost mythical thinking, developed in subsequent legitimizing narratives, and supported, particularly in crisis situations, by rituals. This does not mean, however, as representatives of neo-Durkheimian cultural sociology might want, that power, interests, and culture can be separated (see Alexander and Smith 2003). Following the advice of Pierre Bourdieu (but having in mind the material reductionism of his field theory, see Lahire 2012), it will be shown in the concluding part of the paper that these dimensions subtly overlap, allowing legal institutions to realize power covertly and thus very effectively.

Legitimization as a Symbolic Process

The concept of legitimization is a reasonable starting point for discussing the functioning and social construction of the Constitutional Tribunal as the model of a legal and political institution. It is widely known that every institution of power, with the Constitutional Tribunal being a classic example, requires adequate forms of legitimization. Following Weber's reasoning (1978, ch. X), the Constitutional Tribunal (CT) should be, in theory, legally legitimized, just as other modern institutions are. However, the CT does not belong to the category of common courts of justice. Although it shares some of its features with the common courts of justice, it is a separate kind of state institution, as is the State Tribunal (Garlicki 2011). In reality, it is situated at the junction of the legal and the political. The CT deals with the interpretation and, partially, the creation of law by ruling on the compatibility of specific legislation with the constitution. However, the judges constituting the CT are elected, as experts, by parliament, hence the problem of the court's legitimization. As has been pointed out by legal theoreticians, the CT cannot be democratically legitimized (as judges are not appointed through a general election), so a non-democratic or even an anti-demo-

cratic legitimization is required (Gromski 2009: 14). It is based on the constitutional limitation on majority rule. The goal is to be achieved by the judges' high level of knowledge, the objective contents of the constitution, and/or by treating the CT as a rational institution of control logically juxtaposing the contents of the constitution with lower order norms (Sulikowski 2008).

It should be highlighted that all these methods of legitimization (regardless of internal differences) are 'Weberian' in nature in the sense that they all define legitimization statically, in terms of 'ideal types'. This is supported by thinking in terms of formal procedures and rational argumentation—it is enough to quote a typical legal-theoretic definition of the legitimization of a legal institution: 'When writing about the legitimization of a legal institution I am concerned with the use of a specific set of *arguments* serving to ground or justify the creation and formation of an institution and its rules of operating' (Gromski 2009: 12) (emphasis W.D.). In turn, this would require assuming the perspective of an actor who acts purposefully and rationally, making informed choices of means to achieve set objectives. Thus viewed, legitimization would be 'a free act of lucid consciousness' (Bourdieu 2000: 177) of agents. It should be added that the epistemological perspective and assumptions that are similarly explained (though not always explicit) in relation to the ontology of social life are common to a vast majority of legal theoreticians, political scientists, economists, and even some sociologists. Such an approach leads to different 'rational choice theories', which assume that the subject is fully aware of its interests. Nevertheless, this perspective is not only reductionist, it is also unrealistic. In other words, it constitutes a certain 'social fiction' resulting from the 'scholastic fallacy' as defined by Pierre Bourdieu (1998: 130). In fact, intellectuals and social scientists are relatively removed from the necessities of daily life (especially economic ones), and they perceive 'common' social actors from the perspective of their own intellectual and reflective position, as is demonstrated in their treatment of their subject matter. However, the 'real' world is not a scholarly seminar, and not everything that exists in this world is subject to reflection and calculation according to intellectual rules of rationality.

An empirical approach, showing the perception of the CT against the background of other institutions of power, is an interesting departure from the aforementioned, quite unrealistic, assumptions. In an interesting study by Grażyna Skąpska and Grzegorz Bryda (2013), the CT, much like the Supreme Court, is located in close proximity to science and education on the 'mental maps' of Polish people, while being remote from typically political institutions like the Senate or government. This means that the CT is perceived as apolitical. It is important to note that this analysis, in contrast to theoretical-legal works, refers (*implicite*) to the non-rational, extra-discursive symbolic sphere—to emotionally charged categories and valuations which are usually subconscious. However, it necessarily fails to view the legitimization of the CT as a process; it does not show how the phenomenon of legitimization really works. Therefore, it is necessary to find the internal mechanisms of the CT's legitimization by describing the dynamic cultural structure on which subsequent collections of meanings, transferred in the form of a narrative, are built. It also needs to be shown how

these structures are reproduced in public rituals, which, as will be displayed below, are particularly visible in crisis situations.

Thus, following Durkheim, we argue that both ‘traditional’ and ‘modern’ reality is filled with symbolism, structured according to the dichotomous sacred vs. profane formula which goes far beyond religion. As shown by Jeffrey Alexander, modern civil society in its entirety not only represents a network of institutions, but is also a

[...] realm of structured, socially established consciousness, a network of understandings that operates beneath and above explicit institutions and the self-conscious interests of elites. To study this subjective dimension of civil society we must recognize and focus on the distinctive symbolic codes that are critically important in constituting the very sense of society for those who are within and without it. [...] The codes supply the structured categories of pure and impure into which every member, or potential member, of civil society is made to fit. [...] Pollution is a threat to any allocative system, its source must either be kept at bay or transformed by communicative actions like rituals and social movements, into a pure form (Alexander and Smith 1992: 290).

Assuming the above, the universalism of both rationality and formal legitimization should be rejected and Bourdieu’s claim that any effective authority should be founded on charisma should be reiterated. Having questioned instrumentalism and narrowly defined rationalism, Bourdieu focuses on the extra-rational and emotional aspects. At the same time, it becomes apparent that charisma is not only a momentary eruption breaking the formal and instrumental legitimization, but is also, under contemporary circumstances, not subject to routinization. According to Bourdieu, charisma is rather a ‘[...] dimension of all power, that is another name for legitimacy, a product of recognition, misrecognition, the belief by virtue of which persons exercising authority are endowed with prestige’ (Bourdieu 1990b: 141).

It should be noted though, that despite its unquestionable potential, Weber’s concept of charisma was explained using terms which seem excessively socio-psychological and static in nature. The missing element, which is also crucial for the social legitimization of the Constitutional Tribunal, is the broad cultural structure whose symbolism is interpreted according to Durkheim’s theory, i.e., based on the binary cultural code. This code represents not only a simple classification separating the sacred (elevated and deserving respect) from the profane (minor, less significant), but also continues to serve as a foundation for particular legitimizing processes: more specifically, narratives. Whether we think of Adolf Hitler, Martin Luther King, or Winston Churchill, their charisma is reinforced by a common narrative: transition from collapse, condemnation, and other social evil, to salvation of a group, nation, or other community following the charismatic leader (Smith 2000: 105ff). Undoubtedly, this structure basically derives from religion, since many religious systems clearly differentiate between the saved and the condemned (Weber 1993). Supported by such a narrative, a person’s charisma is likely to be established effectively. At the same time, if the conditions enabling the narrative disappear, the charisma itself is likely to perish (e.g., Churchill’s failure in the post-war elections). This example clearly illustrates that charisma is a symbolic social construct rather than an individual feature. Nevertheless, following Edward Shils (1975), we need to stress that all societies have their sacred places, and while such places are objectivised, they remain the result

of social actions—primarily cyclically performed rituals (see Collins 2005). Contact with the sacred in terms of its ‘contagiousness’ (Durkheim 2001) is also partially sanctifying (it gives power, charisma, etc.). Meanwhile, the primal sanctification of a given object (a place, person, thing)—its transformation into a truly ‘sacred object’—is usually the result of a struggle between different groups, and as such is arbitrary in nature (Collins 2005). This arbitrariness, however, is familiarised through intensive ritualistic, discursive, or non-discursive practices. Sacredness is silently accepted as obvious and unquestionable; it is replicated by maintaining the boundary with what is profane. There are many sacred places and objects in modern democratic societies. The Constitution, however, is an unquestionable, even totem-like, sacred entity (see Bellah 1967, Kartzner 1988).

Thus, for the Polish constitutional court, the religion-based structure of its narrative, i.e., transition from evil (profane) to good (sacred), provides the initial context for the legitimation of this institution. State socialism is considered the profane, a sphere of ‘social evil’, whereas the democratic system introduced in Poland after 1989, based on constitutional law, represents the sacred. The fact that the Constitutional Tribunal commenced its activities in 1986, that is, under the communist regime, facilitates presenting this institution as a specific ‘carrier’ (interpreted as Weber’s *Träger* [Weber 1978: 468ff]) of democracy. Therefore, it not only constitutes a link between two opposite systems, but is also an active entity engaged in establishing a new order in a state under the rule of law. This claim was explicitly made by the Constitutional Tribunal’s judges, who stated that the Tribunal played ‘a crucial role in transforming the Polish legal system, particularly after 1989’ (Safjan 2010: 25) and ‘dismantling the totalitarian system’ (Zoll 2010: 55), whereas later, in the era of transformation ‘[...] it became the interpreter and guardian of this rule of law, assuming its role as promoter of fundamental changes in the constitutionalization of the law and politics’ (Zdziennicki 2010: 41).

It is worth mentioning the use of the adjective ‘totalitarian’ to describe state socialism. Although the political nature of the People’s Republic of Poland is still arguable, and it is rather considered to have been an authoritarian regime, with ‘totalitarianism’ being applied to describe the Stalinist era (approximately 1948–1956), using such a strong term serves to show its extreme contrast to liberal democracy. Such an opposition in fact reflects the contrast between the sacred and the profane. Given such a legitimization of the Constitutional Tribunal, it should not be surprising that in the official biographies of the judges appointed to work for this institution, their membership in the Solidarity movement is emphasized (PCT 2014). The reason for this is to sanctify the Constitutional Tribunal through references to democracy and the rule of law as opposed to ‘the profane’ of communism or even its allegedly inherent totalitarianism.

Sacred Law versus Profane Politics

The above explanation itself refers to the typical dichotomous codes applied today in the Tribunal’s legitimation. The key issue is the juxtaposition of the law, especially the

Constitution (which, of course, is the natural domain of the Constitutional Tribunal), and politics. As in Durkheim's opposition of the sacred and the profane, there is a gap between the law and politics. When highlighting the disparity between state socialism and democracy, the former is presented as the sphere of total politicization. Ewa Łętowska, a former judge of the Constitutional Tribunal, describes the People's Republic of Poland thus: '[...] politics was embedded in the law and the entire social life. The "political" was deliberately not differentiated from the "legal"' (Łętowska 1995: 65–66). In her claim, Łętowska reasonably describes the separation of law and politics as 'natural', emphasizing that the rule of law needs to be applied independently of political circumstance (Łętowska 1995: 66). The law, and particularly the rule of law, is regarded as sacred, ultimate, and unquestionable in nature; the Constitutional Tribunal becomes sanctified as its guardian. The reason, Durkheim argues (2001: 168), is that sanctity itself is contagious and '[...] spreads from the totemic being to all its adherents, near or far'. The religious character of the rule of law is reinforced by other categories, especially the alleged 'ideological neutrality', which contradicts the ideological bias in politics. Furthermore, it is possible to identify a rich selection of codes, of overlapping and mutually complementing classifications, which represent a consistent system legitimizing the Constitutional Tribunal's position and prescribing public perception of this institution.

With a view to understanding such a symbolic structure more closely, we have conducted a preliminary analysis of the discourse both by and on the Constitutional Tribunal. The discourse referred to is mainly contained in reports published in the media. The analysis, performed for illustrative purposes only, covered all the reports available in 2005–2007 and 2010–2013 in online issues of daily Polish newspapers (*Gazeta Wyborcza*, *Rzeczpospolita*, *Dziennik Gazeta Prawna*) and the weekly magazine *Polityka* referring to the 'Constitutional Tribunal' (which was sought by entering the phrase into the sites' respective search engines). These selected newspapers and journals are naturally not representative of the entire Polish media field. However, it was not our goal to recreate an entire, detailed map of the public narrative regarding Poland's Constitutional Tribunal, with all the competing viewpoints in this regard. We wanted rather to show the prevailing, dominant discourse. In order to avoid an ideological bias we decided to contrast the liberal *Gazeta Wyborcza* with the more conservative *Rzeczpospolita*. A counterpoint to this opposition was *Dziennik Gazeta Prawna*, a rather neutral and niche publication concerned mostly with formal legal issues. The time periods were chosen due to the change of government—a change between the two major Polish political parties: 2005–2007 was a period of Law and Justice governance; 2010–2013 was a time of Civic Platform governance.

In general, following the neo-Durkheimian research procedure (see Alexander 2003; Smith 2005), we tried to find the set of classifications and categories by which the Tribunal is described and evaluated. We therefore coded and recoded the data according to a binary scheme, *building* step by step an entire network of classification comprising, as it turned out, strongly opposing descriptions, expressions, and concepts. These meanings were then subjected to connotation and denotation procedures, much as in classical semiotic research into myths (Barthes 2013).

Thus our analysis shows that legitimizing the Constitutional Tribunal involves strengthening its symbolic boundary and separating it from the world of politics, which is presented as the source of all defilement. The following excerpt of an opinion about an aspiring judge of the Constitutional Tribunal clearly illustrates the above considerations: ‘Professor Kieres, while managing the IPN [Institute of National Remembrance], has proved that his acts have *not been politically motivated*. He has never been accused of *politicisation*, and the *impartiality* of a judge is his most important recommendation for the Constitutional Tribunal. An additional recommendation is the fact that while he has been notably present *in politics*, *it has been as someone not driven by political views*’ (*SLD popiera... 2012*) (emphasis, W.D.).

The result of this separation is the necessary temporal gap between one’s term in a quasi-political body and being a judge, so that the transition from the profane political sphere to the sacred Tribunal does not happen immediately. One commentator makes the following observation: ‘*There should be a certain grace period. However, in the case of Professor Kieres it has been only eight months since he left the Senate*. Besides, the problem remains of a judge disassociating himself from cases he had been hearing earlier, in a political procedure’ (*Siedlecka 2012*) (emphasis, W.D.).

However, the problem involves not only instrumental issues (to have the same person who created the law later assessing its compliance with the Constitution). What is critical here is the symbolic aspect. Durkheim claims that

[...] this contact [between the sacred and the profane] is always in itself a delicate operation that requires precautions and a more or less complicated initiation, but it is not even possible unless the profane loses its specific features and becomes sacred to some extent. The two genera cannot be brought together and still maintain their separate natures (*Durkheim 2001: 39*).

Hence, not surprisingly, the time necessary to move from the profane to the sacred is a period of specific ritual purification. The rule here remains the same as that applicable to a priest who must remain pure to be able to approach the divinity.

Time seems to be an important category in the social representations of the Constitutional Tribunal by its representatives themselves. Simultaneously, it overlaps with the main opposition of ‘sacred law vs. profane politics’. Bohdan Zdziennicki, a former judge of the Tribunal, states: ‘It should be remembered that a hasty ruling is always very dangerous for the law’; ‘The need for change is different from the perspective of the Constitutional Tribunal than from the perspective of current politics. Political rivalry sees everything in the light of new elections’ (*Zdziennicki 2008*). The Tribunal is therefore expected to operate in the long term, which provides the necessary time for reflection. The functioning of politics, on the contrary, is considered from a short-time perspective, and is associated with urgency and lack of reflection. Thus understood, the functioning of the Constitutional Tribunal implies reflection, as opposed to a hastiness implying thoughtlessness. In other instances, it is translated into an opposition of rationality vs. irrationality. These in turn connote the categories of objectivism and universalism (the universalism of law), which represent a rigid opposition to political particularism (especially party politics), which runs the risk of being affected by an irrationalism resulting from ideological bias.

Table 1

Symbolic Classification System Legitimizing the Constitutional Tribunal

Sacred <i>The Constitutional Tribunal</i>	Profane
Law (legal science, professionalism)	Politics (party)
Universal (common interest)	Particular (political, ideological)
Rule of law	Democracy (populism)
Long time (reflexiveness)	Short time (thoughtlessness)
Rationality	Irrationality
Impartiality	Political engagement
Formality (objectivity)	Informality (subjectivity)

The mutually complementary categories, symbolic forms, and contrasting classifications presented imply that, being the main stake in the legitimization of the Constitutional Tribunal, the game of de-politicization is intrinsically political. As Bourdieu proves, mental categories, the patterns by which reality is arranged, are not solely communication tools. In fact, their nature is also political (Bourdieu 1985: 727ff). Hence, the stake is power itself. The imposed set of meanings—categories describing the Tribunal as an apolitical, objective, and rational institution representing the general interest (thus ‘disinterested’)—is effected by what Bourdieu calls ‘symbolic power’. As he states, this is the type of power ‘[...] that can be exercised only if it is *recognized*, that is, *misrecognized*, as arbitrary’ (Bourdieu 1991: 170). In other words, the symbolic forms are imposed unnoticed, to activate in individuals the schematic perception of the world which is developed during the socialization process and which is also dichotomous (male/female, high/low, but particularly the world of politics/the world of law). Hence, they are accepted as obvious, natural, and indisputable. Consequently, power, and more specifically the power of the Constitutional Tribunal, becomes a ‘denied power’, an apolitical legal professionalism denying politics (in other words, ‘real’ power). Thanks to this ‘symbolic alchemy’, the position of the Constitutional Tribunal in the existing order stabilises.

Pollution of the Sacred and Purification Ritual

The truth about the Tribunal’s sanctity manifests itself when this sanctity is endangered or attacked, or as Mary Douglas (2003) calls it, ‘polluted’. When politics (the sphere of the profane) enters the legal domain—for instance, when politicians ‘attack’ the Constitutional Tribunal with statements encroaching upon its ‘purity’ (by criticizing its lack of universalism, objectivism, impartiality, neutrality, etc.)—this sphere becomes ‘polluted’. Douglas (2003: 45) states that

[d]irt is the by-product of a systemic ordering and classification of matter, in so far as ordering involves rejecting inappropriate elements. [...] Shoes are not dirty in themselves, but it is dirty to leave cooking utensils in the bedroom. In short, our pollution behaviour is the reaction which condemns any object or idea likely to confuse or contradict cherished classification.

Politics entering the sacred sphere of law (i.e., the Tribunal) causes ambiguity, and brings about a combination of what should be separated across the entire symbolic system. Therefore, defilement and disorder result from the disruption of the dichotomous code (the sacred/the profane, law/politics) as presented before. Although regarded as controversial, a comment made by Jarosław Kaczyński, leader of the party ruling Poland in 2005–2007, clearly illustrates the abovementioned process and its consequences. He claimed that

Treating [the Tribunal] as a group of wise men who are beyond any criticism, and in every case their decisions are in absolute compliance with binding law considered as a set of norms and interpreted using some commonly accepted rules, is a mistake, and moreover a fundamental mistake, concerning the very essence of law (*Kaczyński chce... 2006*).

Referring to his legal education, he added that ‘it is not that there are absolutely unquestionable rules of legal interpretation’. ‘Secondly, it is not the case that these people are fully neutral as far as their decisions and statements, which are also made individually as so-called dissenting opinions, are concerned’ (*Kaczyński chce... 2006*) (emphasis W.D.). On another occasion he clearly pointed to the political background of the Constitutional Tribunal’s members, saying that ‘[...] in the Constitutional Tribunal there are individuals whose relationship with the Democratic Left Alliance is self-evident, and which manifests itself in their rulings. Somehow nobody makes a fuss about it’ (*Kublik and Olejnik 2006*).

Kaczyński’s comment was considered controversial because it violated the boundary of the sacred, and caused a situation where the profane entered the sphere of sanctity. Like any other ‘pollution’ of the symbolic order, such an ‘anomaly’ causes social outrage or even distaste, and in response to this situation recovery of the *nomos* is attempted. Kaczyński’s comment had the same effect. Among other critics, Marek Safjan, the then president of the Constitutional Tribunal, made the following explicit and emotional comment:

16 years after the beginning of Poland’s transformation to gain full freedom and become an entirely democratic country, obvious truths have to be defended, and trivial statements recalled. Unfortunately, this seems essential given that the leader of a ruling party is reiterating aggressive and, most importantly, untrue statements about the Polish Constitutional court. It is uncommon for the Constitutional Tribunal, its judges, or its president to engage in disputes with politicians. They also refrain from reacting to comments made about them. In this case, however, the language and statements are extreme and, moreover, they are voiced by the leader of a ruling political party. Lack of reaction and comment would necessarily imply there is a silent consent to these kinds of judgements. [...] The accusation is so serious that, if justified, the Tribunal’s judges should immediately resign for intentionally acting to the detriment of the country, its authorities, and the entire society. However, I am not going to counter the accusation thus formulated because no justification has been provided, which indicates it has to be regarded as sheer insinuation (*Safjan 2006: 20*).

Safjan felt obliged to make a statement to restore the lost symbolic order. The ‘act of impurity’ committed by Kaczyński had to be expiated in order, using Douglas’ analogy, to restore the sanctity of the Constitutional Tribunal, and hence of the democratic rule of law considered the ideal model for a modern state. It should nevertheless be underlined that this public dispute focused not only on formal issues regarding competence, or utilitarian or instrumental relationships. Rather, similar reasoning, which

seems purely rational (the conflict of explicitly stated interests) derives from extra-rational forms situated in what Bourdieu calls ‘cultural unconsciousness’ or ‘doxa’ (common sense). Bourdieu (2000: 98) claims that these forms have a dichotomous structure (here law vs. politics). Douglas ascertains they cause a particular reaction, which can be very emotional. Once violated, they blend with each other, causing unbearable ambivalence, i.e., anomaly.¹

Nevertheless, this conflict and other conflicts involving politics allow the Constitutional Tribunal to maintain its strong position. Hence, it is always possible to refer to the fundamental opposition: law vs. politics. Again, Douglas’ metaphor may be referred to here to explain the symbolic benefits for the Constitutional Tribunal when confronted with politics. The British anthropologist says:

[...] a garden is not a tapestry; if all the weeds are removed, the soil is impoverished. Somehow the gardener must preserve fertility by returning what he has taken out. The special kind of treatment which some religions accord to anomalies and abominations to make them powerful for good is like turning weeds and lawn cuttings into compost (Douglas 2003: 201–202).

Emphasizing the profane of politics and the characteristics (particularism and ideological orientation, or even the ‘irrationalism’ of politics) to be associated with the sphere in this discourse, could, given the contrast, serve to present the Tribunal as a basically objective, rational, and universal institution.

The Twofold Truth of the Tribunal

Apart from the symbolic construction of sacred law vs. profane politics, with the related ‘defilement’ and obligatory purification, the above statement by Kaczyński discloses another thing. As in ethnomethodological experiments where the disruption of the interaction order reveals its intrinsic, hidden rules, Kaczyński’s statement and its relevant polemics disclose a fundamental, but non-evident, principle governing the Tribunal and common to all institutions of power. The Tribunal operates within what Bourdieu called ‘twofold truth’, i.e., ‘objective’ and ‘subjective’. The objective truth revealed in the first, relatively simple example of unmasking shows that the Constitutional Tribunal is a political subject (engaged in a broadly understood game of power, being an institution of power itself, which should not be naively interpreted as an indication of common partyism). Subjective truth, on the other hand, is demonstrated by subjects engaged in the Tribunal’s functioning, i.e., to the greatest extent by its judges. The judges claim to protect the democratic rule of law, which is universal (unbiased), and there is no reason to question their ‘subjective truth’ and assume they

¹ Douglas recalls here the concept of stickiness referred to earlier by Jean-Paul Sartre, who said that if something is sticky, it is neither solid nor liquid. Being transitional, it is situated in between, thus being anomalous. This explains clearly why stickiness has such unpleasant connotations (Douglas 2003: 48). Zygmunt Bauman used this metaphor to explain the irrational and popular aversion towards Jews before WWII, which exceeded any social or economic interests. According to the then social perception, Jews represented anomaly, i.e., stickiness. They violated the ‘we and they’ (friend/enemy) opposition, by living ‘here’ they were not ‘us’ and literally became ‘the Other’ (See: Bauman 1991).

do not believe this truth themselves. Both truths are closely intertwined, so it may be stated that the subjective truth in a way ‘covers’ the objective truth, and consequently collective misrecognition of power occurs. That is to say, the ‘twofold truth of the Tribunal’ is to some extent a game of self-deception, analogous to that of giving a selfless gift, which, from an objective perspective, is an economic exchange, while from the ‘subjective’ angle (the perception of those involved in such a relationship) it is simply an expression of generosity, friendship, or even love. It is worth noting that as regards the Constitutional Tribunal and the act of giving alike, time is one of the key elements enabling the objective truth to be repressed. The temporal gap between a gift and counter-gift results in forgetting that exchange is the actual subject matter (Bourdieu 1990b: 105–107). Similarly, the public expectation, discussed above, of a grace period between a political function (MP, senator, i.e., those who explicitly represent power) and the function of judge of the Constitutional Tribunal leads to masking that the Tribunal is an institution of power. The collective and public expectation indicates that the abovementioned ‘self-deception’ is conditioned by ‘collective self-deception’. Therefore, Bourdieu talks about ‘common miscognition’ which is a game ‘[...] in which everyone knows—and does not to know—that everyone knows—and does not want to know [...] the objective truth’ (Bourdieu 2000: 192).

If deemed to be collective, the crucial role in this process belongs to linguistic structures. This means that socially constructing a belief, i.e., legitimization, is inherent in language objectivity, which here indicates the binary codes dividing the world into the sacred and the profane, and deriving from the contrast between law (and the Constitution as the highest epiphenomenon of law) and politics. The principle is analogous to that applicable to the Catholic Church. Being an economic entity (functions, property management, fundraising, state support), the church functions within a twofold truth, rejecting the economic exchange and endorsing the ‘subjective’ religious truth rich in euphemisms (service instead of work, vocation instead of choice etc.). Similarly, the Constitutional court denies being an institution of power, and employs a discourse referring to universalism and neutrality. Like a priest who, driven by his ‘subjective truth’ and vocation, sacrifices his life to God and serves the Church, the judges serve the democratic state in the name of the common good and values, and uphold Constitutional principles. At the same time it becomes clear that the tendency to discard or even collectively repress the ‘objective truth’ is not an act of consciousness, and so does not necessarily entail cynicism. The self-deception game is effective because its actors are integrated into their social realms (legal or religious), which is also where they have developed their most deeply-rooted dispositions and patterns of acting and thinking (it is sufficient to mention the time-consuming legal education which instils in students certain ‘universalizing’ ways of thinking about law).

In other words, actors in a given realm participate in the games played in the legal field, while not being entirely rational, but using a ‘practical sense’, i.e., ‘intuitively recognizing’ the applicable rules. Given the significant similarity of the dispositions that judges develop and internalize (through similar education) it may be assumed that this leads to collective misrecognition of the political nature (power) of the Constitutional Tribunal as the incarnation of law.

The more apolitical the image of the Constitutional Tribunal is, the easier it becomes for its judges' rulings or statements to convey a particularistic message, which, with symbolic tools, becomes universalized. The symbolic efficiency (and hence the symbolic power) of the Tribunal derives from its image as the model of rational, formal knowledge and universal objective values serving the common good. In reality, its rulings impose numerous ideological visions (especially using formal means) (Dębska 2013). Because they are imposed from a 'neutral place'—the sacred sphere (not politically polluted)—they seem neutral and objective, and the symbolic power remains misrecognised, including by agents of the field of law itself.

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Biographical Notes:

Tomasz Warczok (Ph.D.), is an Assistant Professor at the Pedagogical University of Cracow and a researcher at the Institute for Social Studies, University of Warsaw, Poland. He recently published a co-authored book

with Andrzej Niesporek and Łukasz Trembaczowski titled *Granice symboliczne. Studium praktyk kulturowych na przykładzie działań zawodowych pracowników socjalnych* (Symbolic Boundaries: A Case Study of Cultural Practices Among Professional Social Workers) (Nomos, 2013). He has published articles in refereed local and international journals (*Current Sociology, Studia Sociologiczne, Kultura i Społeczeństwo*). His current research is focused on sociology of social sciences.

E-mail: tomaszwarczok@gmail.com

Hanna Dębska, Ph.D. in Law from Jagiellonian University in Cracow, Poland. She is currently working on Ph.D. in Sociology at the University of Warsaw, Poland. She is an Assistant Professor at the Pedagogical University of Cracow and researcher at the Institute for Social Studies, University of Warsaw. She is the author of a book entitled *Prawo, symbol, władza. Społeczne tworzenie Trybunału Konstytucyjnego* (Law, Symbol, Power. The Social Construction of the Constitutional Tribunal in Poland) (forthcoming, Wydawnictwo Sejmowe, 2015). Her research focuses on critical sociology of law, cultural sociology, sociology of knowledge, Constitutional Tribunal and the discourse of gender.

E-mail: hannadebska86@gmail.com