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Constitutionalism in a Post-Conventional Society[2]

Abstract

Modernity understood as a permanent crisis of legitimacy and authority is a constant challenge for constitutionalism. The article reconstructs the danger of substituting political nature with moral imperatives. In modern societies, political disputes turn into so-called culture wars, and the dividing lines are marked by two moralities fighting each other: a liberal morality and a conservative morality. Using selected examples from the constitutional judiciary, I put forward a proposal of rethinking the definition of political nature in constitutionalism to deal with the crisis of legitimacy and authority that plagues it.

Keywords: constitutionalism, political nature, morality, legitimacy, structure of authority

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When considering the problem of the functioning of legitimacy in democratic political systems, Seymour Martin Lipset stresses that "the stability of any given democracy depends not only on economic development but also upon the effectiveness and the legitimacy of its political system. Effectiveness means actual performance, the extent to which the system satisfies the basic functions of government as most of the population and such powerful groups within it as big business or the armed forces see them. Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society. The extent to which contemporary democratic political systems are legitimate depends in large measure upon the ways in which the key issues which have historically divided the society have been resolved."[3] This way, Lipset draws our attention to the crisis of legitimacy that occurs in periods of transition to a new social structure, when the status of the already functioning institutions is unable to satisfy the political expectations of the main social groups.

The aim of the article is to examine the nature of the legitimacy crisis based on the example of the Polish constitutional judiciary. By analysing three decisions of the Polish Constitutional Tribunal, I intend to show that the present crisis is nothing new and should not be associated only with changes in the judiciary as initiated by the ruling party, Law and Justice, after it won the 2015 election. In a broader – philosophical and political – context, a legitimacy crisis involves irreversible changes initiated by the age of modernity (I) and an emergence of a post-conventional society (II), and thus a need to change the structure of the authority of law (III).

Modernity and the authority crisis

Herbert Schnädelbach, a German philosopher, speaks of four planes of the use of "modern" predicate (modern): chronological, historical, structural, and evaluative.[4] The domain of conflict changes depending on which aspect of modernity we mean. I would like to make it clear at the same time that wherever I use the word 'modernity' as a noun, my intention is always to use it as a predicate. In other words, I do not associate the meaning of the word with some objective reality or a subjective

[3] S.M. Lipset, *Homo politicus. Społeczne podstawy polityki*, Warszawa 1995, p. 81.

[4] Cf. H. Schnadelbäch, *Próba rehabilitacji animal rationale*, Warszawa 2001, pp. 328–334.

impression. To me, modernity is a set of qualities that make it possible to describe some state of affairs as "modern". The distinction below, like every other typology, involves considerable simplifications. It is frequent that "modern" predicate is used in several or perhaps even in all of its meanings at the same time. But I do believe that the distinction made is valuable because it sheds light on the multidimensionality of the argument over modernity.

The chronological use of "modern" predicate is determined by an emphasis on the otherness of the times we happen to live in. In this sense, modernity means that which is clearly separated from the past, constantly underlining the new, the yet undiscovered. The present is depicted as a moment of a constant dialectical negation of the legacy, 'worn out' images of the world. In this context we can speak of lingering in modernity. Lingering in times where it is "*en vogue*" to remain constantly in motion, under a constant tension between what is and what will be. This openness of modernity, the self-awareness of turning to the future, is especially stressed by the chronological use of "modernity" predicate.

We speak of modernity in a historical context when we refer to the age of modernity. Authors dealing with the issue of modernity are not unanimous as to when this age actually started. Adorno and Horkheimer claim that modernity first appeared in Bacon's programme of the dominion of science over nature, others argue that it came with the outbreak of the French Revolution, the times of the Enlightenment, the era of mass industrialisation, the twilight of classicism, romanticism, or the beginning of the aesthetic modernism of 1950. If modernity is considered from a historical perspective, the important thing is that, as claimed by H. Schnädelbach, that modernity understood as an age has its beginning and end – it needs to come with a past and a future. Modernity in a historical meaning will always be described as a movement governed by its own dynamics.

The chronological perspective is strongly linked to the evaluative perspective. New times – of being modern – become a normative principle. Modernity, connected strongly with the idea of progress, dissociates itself with the dictate of tradition. Modernity is a normative concept where the new is defined as rational. The evaluative perspective is an affirmative expression of the chronological perspective.

The structural perspective on modernity is related to its theoretical characteristics. In this sense, we can speak of modernity theories, pointing to general recurring properties. In this case, modernity is an abstract notion, a Weberian ideal type, created by liberal, humane sciences. We could say that a structural use of the "modernity" predicate is an outcome of scientific objectivisation. A theoretical study of modernity may reveal both a falsity of common notions thereof, some concealed assumptions, and superficiality, which may enhance our general idea thereof. What

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matters in the structural perspective on modernity is the lack of a narrative structure in the explanations of the concept. Modernity is something that does not refer only to some areas of knowledge or culture. It can emerge and occur anywhere provided that the essential conditions are fulfilled. Modernity may not thus be reduced to a specific time in history – a historical perspective. The objective of an analysis of a structurally described modernity is to capture the objectivised, recurring forms of its manifestation. But it does not mean that modernity does not have any connection to past events. On the contrary – the shape of modernity is determined mainly by the past revolutionary processes and the current globalisation trends. The historic moments such as the French Revolution or the Industrial Revolution in England, like any other moments of radical transformations, signify the "ageing" of the heart of tradition, which has so far successfully coordinated and legitimised the existence of social institutions.

"Modernity is renewed every time the present is taken as a door opened onto the future".[5] The quote perfectly illustrates the relationship between modernity and the past, authority, and the related problem of the legitimacy of inherited orders. Every modern entity should understand their era regardless of what has been passed on to them by authorities from the past. The responsibility for the choices made and actions taken rests solely with them.[6] Hence, modernity is a structure in which we become aware that we bear responsibility for the overall order that we have come to and will live in. Conscious of its detachment from the past and orientation towards the future, towards what is anticipated, modernity needs to become a source of normative references for itself.[7] One can even hazard a claim that the reason-authority relationship is a fixed point of reference for the times we are living in. A discussion initiated by Jürgen Habermas, for whom modernity appears whenever the present is treated as a door opened onto the future, is especially useful in this context. In the German philosopher's writing, the relationship between reason and authority is linked to the problem of rational justification of our actions and claims, and the increase in the level of rationality in the social dimension involves communication taking over the coordination of actions whose justification has been so far based on a blind approval of the authority of tradition. According to Habermas, the highest post-conventional stage of social development involves a final liberation from authority. It is not hard to notice that authority as

5 G. Borradori, *Filozofia w czasach terroru. Rozmowy z Jurgenem Habermasem i Jacques'em Derridą*, Warszawa 2008, p. 107.

6 Cf. H. Schnadelbäch, op. cit., p. 241.

7 A.M. Kaniowski, *Jürgen Habermas wobec sporów filozoficznych wokół epoki nowoczesności*, Colloquia Communia" 1986, 4–5(27–28), p. 41.

depicted in Habermas' classical theory is understood in terms of power and viewed as a vertical structure of horizontal relationships, which hinders an individual's autonomy. This encouraged Hans-Georg Gadamer to undertake a philosophical intervention. The debate between the two philosophers[8] focused mainly on the issue of the necessity of the disappearance of authority. According to Gadamer, authority does not have to involve only controlling and losing autonomy; rather, it is based on a relationship of recognition. In other words, it is impossible to abandon the authority of tradition in liberal sciences, and this authority has nothing to do with blind obedience. On the contrary. Given the fact that authority is based on a relationship of recognition, it is an outcome of, in fact, reasoning. The third participant of the debate offers some very apt observations. Paul Ricœur, who clearly stood against a reductive bringing of authority down to hierarchical dependencies, argued strongly for acknowledging the existence of a horizontal structure next to the vertical framework. "Yet it remains the case that the vertical relation of authority, even when considered within the limits of discursive or written claimed authority, constitutes a thorn in the flesh of an enterprise like my own, deliberately limited to reciprocal forms of mutual recognition".[9] According to the French philosopher, authority does not disappear when an individual is able to challenge it having recognised it, thus becoming able to include authority in the process of self-identification. The ambivalence of authority is related strictly to its dual structure. In practice, authority is – on the one hand – the power of ones over the others (vertical structure) and – on the other – respect for mutual autonomy (horizontal structure).

In a design of modernity, the authority of tradition should be substituted with the authority of reason. According to Frank Furedi, a British sociologist, strong cultural pressures have led to a transformation of scientific propositions into absolute truths.[10] The emergent expert cultures fail to see that the notion of "science" is a strongly politicised and moral category. The claims made to subordinate oneself to their authority resemble rather acts of recognition of papal infallibility. Paradoxically, extending the expert authority over the discipline of law and politics leads to a dual delegitimisation: the first stage is connected with the depoliticisation of citizens as a result of the transfer of a part of the decisions made onto expert bodies; at the second stage, the monopoly of expert systems has led to their own authority being questioned because of their inability to form sufficient normative grounds to prevent the expansion of political demands and to convince the society that the existing political institutions are the best for the society. In other words, the social environ-

8 Cf. A. How, *The Habermas–Gadamer debate and the nature of the social: back to Bedrock*, Aldershot 1995.

9 P. Ricouer, *The Course of Recognition*, Cambridge MA–London 2005, p. 212.

10 F. Furedi, *On Tolerance: A Defence of Moral Independence*, London 2011, pp. 186–188.

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ment has started viewing expert systems in terms of vertical authority, related to an imposition of a new epistemological and moral hierarchy, and expert systems often fail to see the need to recognise dialogue and persuasion in the articulation of content in the horizontal structure.

Post-Conventional Society

According to Gertrude Himmelfarb, the author of "One Nation, Two Cultures", the current social conflicts are connected strictly with the crisis of legitimacy and authority. While studying the American society, she found that the revolution of the 1960s led to the appearance of a new dividing line among the citizens of the United States, running not according to the traditional division into the rich and the poor, the educated and the non-educated, but somewhat across "classes as well as religions, races, genders, ethnical and political groups". Contemporary ideological conflicts are motivated rather by moral and cultural values, and not *strictly* economic reasons.[11] The conflicts between the rich and the poor, the educated and the non-educated, typical of liberal societies, have become replaced with cultural conflicts, which in some aspects determine even greater divisions than the polarisation of classes, which Karl Marx considered the key aspect of capitalism. "The polarization is most conspicuous in such hotly disputed issues as abortion, gay marriage, school vouchers, and prayers in public schools. But it has larger ramifications, affecting beliefs, attitudes, values, and practices on a host of subject ranging from private morality to public policy, from popular culture to high culture, from crime to education, welfare, and the family."[12] These divisions transform into political demands and claims made by different political parties in every political campaign and process of the establishment of law. A turning point in the definition of justice in moral terms has also been described by Linda Skitka in her article entitled *Exploring the "Lost and Found" of Justice Theory and Research*[13]. When conducting social psychology studies on the changing concept of justice, she has proven that the social notion of justice has changed considerably in recent years. Starting from the 1970s, the notion of justice has been defined in terms of three categories for which she suggested a typology described below. *Homo economicus*, meaning justice based on the category of interest. The understanding of justice typical of the period

11 E. Ciszewska, *Konflikty w Amerykańskiej duszy*, "Znak" 2008, 636.

12 G. Himmelfarb, *One Nation, Two Cultures*, New York 1999, p. 197.

13 L.J. Skitka, *Exploring the "lost and found" of Justice Theory and Research*, "Social Justice Research" 2009, 22, pp. 98–116.

of the 1970s was based on a principle of ensuring a balance between the costs incurred by individuals and the outcomes of their activity. *Homo socialis*, with the principle of justice focusing on a need to understand the mechanisms of economic and social exclusion and on ways to counteract economic injustice. The last type of justice, predominant in the era of today, is *homo moralis*, where the principle of justice is defined based one's own moral interest. What my environment or I consider moral, what I believe should be a standard, is regarded as just. Skitka summarises the contemporary perception of justice in the following way: "Judgments of preference are defined as matters of subjective taste. People may differ in whether they prefer apples to oranges, for example. Matters of preference are seen as autonomous, subjective, and quite specific to perceivers. Conventions, in contrast, are socially or culturally shared notions about the way things are normally done in one's group. Conventions are often formally sanctioned by authorities, rules, and laws. Although everyone within the group boundary is supposed to understand and adhere to matters of convention, people outside of the group boundary need not. Matters of moral imperative, in contrast, generalize and apply regardless of group boundaries. Moreover, a key distinction between normative conventions and moral imperatives is their relative degree of authority independence. People are likely to ignore authorities, rules, and laws if they perceive them to be at odds with personal moral standards."[14] The thesis is confirmed by the findings of studies by a Anna Macko, Polish researcher who has explored the views and attitudes of members of youth organisations affiliated with the Civic Platform [PO], Law and Justice [PiS], and Democratic Left Alliance [SLD] political parties, reaching a conclusion that the lines of the political conflict in Poland are now defined mainly by differences in moral attitudes.[15] Nowadays it is typical to see political dialogue being colonised by moral imperatives. According to Leszek Koczanowicz, a philosopher from Wrocław, the political dialogue taking place in Poland has become a culture war which "is a battle between the defenders of canon and the supporters of difference."[16] Moral views define conflicts in the context of privacy, religion, and even public policy or the shape of public institutions. In addition, the advancing juridification of our life makes the ideological conflicts dividing the society turn into legal disputes. The tendency of the American society to settle all and any conflicts by way of legal action, what Alexis de Tocqueville found quite shocking, is slowly becoming our custom as well.

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14 Ibidem, p. 103.

15 A. Macko, *Umysł moralny. Jak powstają oceny moralne?*, Warszawa 2018.

16 L. Koczanowicz, *Post-postkomunizm a kulturowe wojny*, [w:] R. Nycz (red.), *Kultura po przejściach, osoby z przeszłością. Polski dyskurs postzależnościowy – konteksty i perspektywy badawcze*, Kraków 2011, p. 15.

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Many researchers stress that the process of the political-legal transformation in Central and Eastern Europe involves traditional social divisions cemented by the bygone socialist system: the working class and the bourgeoisie or supporters of the authoritarian regime and pro-liberation oppositionists being substituted with a division typical of Western democracies: supporters of the liberal option as opposed to supporters of the conservative option. The former are to be characterised by modern morality; the latter – by traditional morality. It is impossible to solve the existing conflicts without an understanding of their moral background and the condition of the times we are living in. The solution needs to consider the question of how to maintain the possibility to coordinate political activity knowing that we have no external and objective organisation-oriented convention that will be independent of the waged culture wars.

In traditional terms, the notion of "post-conventional" is associated with Habermas' communicative action theory. According to the German philosopher, a post-conventional society is a normative concept, which provides the foundation for the main assumptions of public reason: impartiality, inclusivity of the public domain, and the rationality of arguments. Leszek Koczanowicz offers a different interpretation of the notion of "post-conventional". He argues that a post-conventional society is not a normative concept, but a category that describes the political nature of contemporary societies. Coming back to the earlier discussion on the permanent crisis of modernity, the condition of a post-conventional society is defined by two opposing trends: a necessity to collaborate on the one hand and increasingly stronger trends and processes of the diversification of world views on the other. "A democratic society, by making use of its emancipation potential, needs to take advantage of the resources of the community in order not to become a network of individuals joint together by an external bond of law and social institutions."[17]

In other words, in contemporary modern societies there is no option to establish an external and objective organisation-oriented principle. Given the irremovability of differences in the system of values, the process of establishing such a principle alone becomes a political battlefield. Since we are unable to base the justifications of our actions on a social or cultural *a priori*, the need to coordinate our action forces an attitude open to dialogue. On the one hand, an individual may not be uncritical of the reservoir of patterns passed on by tradition. On the other, it is forced to constantly confront its own ideas with those of others. In post-conventional societies, all solutions are just an ordinary *modus vivendi*, not an impartial and infinite compromise. Of course, solutions to the occurring problems may become problems to be solved in the future.

[17] Idem, *Wspólnota i emancypacje. Spór o społeczeństwo postkonwencjonalne*, Wrocław 2005, pp. 206–207.

Example 1. Abortion

On 1 March 1989, MPs from the Polish Catholic-Social Union [Polski Związek Katolicko-Społeczny] submitted a bill on the legal protection of a conceived child, which was an outcome of consultation with the Polish Episcopate only. The scale of protests led to an initiative of gathering signatures to organise a nationwide referendum. Although there were almost 1.7 million valid signatures gathered, state authorities never organised the referendum. The Act on Family Planning, the Protection of Human Foetuses, and the Conditions Under Which Pregnancy Termination is Permissible was passed on 7 January 1993, establishing legal protection of human life since the moment of conception, replacing the notion of "foetus" and "pregnancy termination" with the notion of "conceived child". On 30 August 1996, the Sejm, under the rule of a coalition composed of the Democratic Left Alliance and the Polish People's Party, amended the said Act by including an additional reason to terminate pregnancy, i.e. social reasons. In December of the same year, a group of senators addressed the Constitutional Tribunal with a request to examine the compliance of the 1996 Act with the then-binding Small Constitution, resulting in the Constitutional Tribunal finding the provision of Article 4a. 1. 4) permitting abortion in the case of "women who find themselves in difficult living conditions or a difficult personal situation" unconstitutional. (Decision of 28 May 1997, K. 26/96)

Example 2. Freedom of conscience

On 30 April 1990, the Minister of Health and Social Welfare issued a regulation to the Act on the Conditions of Permissibility for Abortion of 1956, which included provisions on the conscience clause for a doctor who could refuse to carry out an abortion. In December 1996, a new Act on Medical Practitioners, whose Article 39 implemented the institution of the conscience clause into the Polish legal framework permanently. Including the conscience clause in the legislation regulating the profession of a doctor caused a debate that has continued to this day, with its subject being whose conscience in the case of a legal abortion should come first – the doctor's or the patient's. The Polish Chamber of Physicians appealed against the provisions of the conscience clause in the area of the obligation to suggest another doctor or another medical facility to a woman whose doctor providing her with prenatal care quoted the conscience clause to refuse to carry out an abortion. The Constitutional Tribunal recognised this provision as unconstitutional in its decision of 7 October 2015 (Decision of 7 October 2015, K. 12/14).

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Example 3. Cyclical assemblies

On 13 December 2016, the Law on Assemblies was amended, with the amendment introducing a new category of cyclical assemblies under Article 26a. 1, a category yet unknown to the Polish legal framework. If assemblies are organised by the same organiser in the same location or on the same route at least 4 times a year in line with an established schedule or at least once a year on state or national holidays and such events have been held over the past three years, even if not in the form of assemblies, and have aimed at commemorating momentous events and ones which are meaningful for the history of the Republic of Poland, the organiser may apply to the province governor for a permission to organise such assemblies on a recurrent basis. Supporters of the opposition considered it an attempt to limit civic liberties and the right to express one's opinion. The government described it as a solution to organise the law, to increase the security of citizens, and to improve public order. Upon the president's request, the Constitutional Tribunal examined the amendment, paying particular attention to Article 26a. 1, and declared it to be constitutional (Decision of 16 March 2017, Kp 1/17).

By quoting the abovementioned cases, I intended to describe them as objectively as possible, using as descriptive a language as I could. But it is not hard to guess that those events stirred up some really strong emotions in the society. Each time, the political conflict took on the form of a culture war between the supporters of the so-called modern morality and those in favour of conservative morality. It is hard to speak of an open dialogue in politics when politics is defined by morality. As already said, the logic of a political conflict fuelled by imperatives never leads to a compromise. The final confrontation then becomes a legal battle for a universal hierarchy of values.

The political, morality, authority of law

In the case of culture wars, the law is in a very disadvantaged position – regardless of the complexity of the constitutional matter, the dispute is very simple from the point of view of the parties involved – each party is convinced of being right. The Constitution of the Republic of Poland consists of 243 articles, which makes it an extensive regulation. But if we are talking about specific subjective rights, with specific guarantees, it appears that they are regulated in detail by ordinary acts. The Polish Constitution makes references to ordinary acts in about 150 cases. In addition to that, the Constitutional Tribunal has the right to carry out an abstract court control, and the dominant model of constitutional control is *ex-post* control. All this makes

the constitutional judiciary an active political actor when deciding on the compliance or non-compliance of acts of a lower tier than the constitution. As Andrew Heywood, an American political scientist claims, "where spontaneous agreement or natural harmony occurs, politics cannot be found." But it is hard to reach spontaneous agreement and harmony in circumstances of a conflict over abortion, the role and significance of freedom of conscience, or over the issue of freedom of expression. By counteracting the arbitrariness of other authorities, the judiciary may not expose itself to being accused of acting in an arbitrary manner, which gives no option to control and prevent misjudgement, especially in cases of decisions being final. Hence, statements of reasons of decisions and contrasting opinions are perfectly suitable for examining and reviewing the policies of conflict adopted in the constitutional judiciary.

One of the tools used to examine such statements of reasons involves tracing the so-called hybrid statements. The metaphor is borrowed from Rafał Włodarczyk's work, where it was used to explain the effect of a programme underlying education. Włodarczyk, examining the ideological elements present in education, has noticed that the impact of ideology "(…) resembles a situation in which our statements made in a foreign language are occasionally, imperceptibly, distorted by the grammatical structures of our native language, forming a kind of hybrid. This blurs the intended message, distorting or warping it. Hybrid statements reveal some learned form of organisation of content, which causes effects against what is intended."[18] In the context in question this means paying special attention to fragments of statements of reasons where the declared "objectivity and neutrality" of the examination of the hierarchy of values conflicting with constitutionally protected rights is distorted by the *a priori* hierarchisation of values. Cases in which the Constitutional Tribunal makes efforts to justify the adopted hierarchy of values using objectivistic, rationalistic, and moral epistemology seem to be particularly interesting. In a democratic system, reaching a permanent hierarchy or balance of values is fiction. This fiction becomes all the more visible when we try to arrange for a hierarchy of values without taking the conflict between the constitutional rights being the subject of a given case into account. Like Sanne Taekema, I believe that "(…) it is possible to distinguish the *a priori* incommensurability of values from the need for a reasoned choice between values in a particular situation."[19]

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18 R. Włodarczyk, *Ideologia, teoria, edukacja. Myśl Ericha Fromma jako inspiracja dla pedagogiki współczesnej,* Kraków 2016, p. 275.

19 S. Taekema, *What Should Be Transparent in Law? A Pragmatist Strategy to Justify Legal Decisions*. IVR-2003paper.doc 30 July 2003, p. 7, http://ssrn.com/abstract=1542068

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Focusing on the said elements of statements of reasons lets us draw a conclusion that constitutionalism in Poland is still held captive by legal formalism. Here, formalism does not mean a blind faith in the methods of legal analysis. A shared feature of different variants of formalism is the approval of the thesis that making judgements aims to find a pre-assumed answer to a legal question using legal methods, canons, and forms of argumentation. If the process of making judgements is understood this way, the main threat to the success of this process is the indeterminacy of the legal text. When it comes to the examined cases, a charge of non-specificity of statutory expressions is the main instrument of the conflict policy endorsed by the Constitutional Tribunal. Perusing fragments of statements of reasons featuring a charge of the indeterminacy of law makes it possible to advance a thesis that these fragments are most overbearing and arbitrary. The hidden heritage of formalism surfaces especially when an abstract hierarchisation of constitutional values is being established.

Let us quote a fragment of a statement of reasons of a judgement passed in a case concerning abortion. "As stressed many times, the attempt to valuate human life based on rational reasons needs to set a criterion on the basis of which such valuation would be made. To this end, it is not enough to refer to specific statutory regulations, making a distinction of the property rights of a child into those granted before and after birth. Regardless of the fact that this case concerns a different category of rights, ordinary legislation may not have a direct impact on the determination of the area of protection designated by constitutional provisions, if only for the reason that it may misinterpret the hierarchy of values defined in the constitution."[20] In the quoted fragment of the statement of reasons, the most striking thing is that the Constitutional Tribunal does not allow for a conflict between constitutionally protected rights. "The right to make a responsible decision to have children thus comes down in the negative aspect only to the right to refuse to conceive a child. But if a child has already been conceived, this right can be exercised only in the positive aspect, which is e.g. the right to give birth to and bring up a child."[21] An earlier fragment reads that "from the point of view of constitutional requirements, the indeterminacy of the expression of difficult personal situation disparages Article 4a, section 1, item 4 of the Act of 7 January 1996 in its post-amendment wording. It makes it possible to derive a norm that allows for the deprivation of life without taking other constitutional values into consideration."[22] What needs to be borne in mind is that this was the time during which the so-called Small Constitu-

[20] Constitutional Tribunal's decision of 28 May 1997, K. 26/96, p. 20.

[21] Ibidem, p. 19.

[22] Ibidem, p. 18.

tion was in force, which did not address the issue of abortion, and the Constitutional Tribunal based its decision mainly on the principle of a democratic state of law.

The analysed decisions reveal another – very dangerous – aspect of formalism, which troubles constitutionalism. Decisions are often criticised for being political, but what should draw our attention is the subordination of the logic of political disputes to moral imperatives in court decisions. When two persons agree on certain rules of conduct, this mutual obligation has a moral nature. Politics comes into play when a third person appears in the equation. With politics, we have to be aware that the consequences of our agreement will be borne by someone else. Political nature demarcates the boundaries of agreements made in democratic conditions. By concluding an agreement, we should interpret it in a way that it affects someone who is not present at its conclusion and who may not necessarily agree with us. The political understood this way is able to form a sufficient normative foundation to legitimise the institution of constitutional judiciary.

All three of the abovementioned statements of reasons are dominated by a vertical structure of authority. It is no use to look for elements of dialogue, for a real weighing of constitutional values, for consideration of the specificity of a political dispute or a need to consider those who have not enough social power to become an equal partner to such a political dispute. Disregarding the idea of establishing a horizontal structure, the Constitutional Tribunal and its decisions will only add fuel to the political dispute instead of moderating it. The constitutional judiciary will not avoid becoming entangled in culture wars. But it may not become their hostage. It is too precious for democracy because it gives a promise that politics will never be able to keep: an obligation to issue a decision and a statement of reasons, and a role of an observer. Pierre Rosanvallon, a French philosopher of politics, once made a remark that "there is something politically pedagogical about the activity of a court." Unfortunately, we fail to learn much from mistakes.

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