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## **POLISH JUDICIARY IN TIMES OF CONSTITUTIONAL RECKONING. OF FIDELITIES, DOUBTS, BOATS AND ... A JOURNEY**

*We, the Polish Nation - all citizens of the Republic,  
Both those who believe in God as the source of truth, justice, good and beauty,  
As well as those not sharing such faith but respecting those universal values as arising from other sources  
Equal in rights and obligations towards the common good - Poland [...]  
Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage [...]  
Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for  
freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities  
We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying  
respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others,  
and respect for these principles as the unshakeable foundation of the Republic of Poland.  
Preamble to the 1997 Polish Constitution*

### **I. Unconstitutional capture as a catalyst for change ?**

Paradoxically the constitutional crisis<sup>2</sup> that has been engulfing Poland<sup>3</sup> brought to the fore in a dramatic fashion long – forgotten and swept – under –

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<sup>2</sup> It is not my intention here to go into the schemes and statutory shenanigans behind the political assault on the Constitutional Court as it has been comprehensively explained and dealt with elsewhere. For a succinct and incisive analysis see L. Garlicki, *Disabling the Constitutional Court in Poland?* (s. 63–69) and M. Wyrzykowski, *Bypassing the Constitution or changing the constitutional order outside the constitution*, (s. 159–179) in A. Szmyt, B. Banaszak, (eds.), *Transformation of law systems in Central, Eastern and Southeastern Europe in 1989 - 2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, (Gdańsk University Press, 2016). For a recent useful and detailed recap see the report by the Helsinki Foundation for Human Rights, *The Constitutional crisis in Poland 2015–2016*, [http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR\\_The-constitutional-crisis-in-Poland-2015-2016.pdf](http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf). For my own account see T.T. Koncewicz, *Of democracy, rule of law and constitutional self – defense*, (2016) 53 *Common Market Law Review* 1753.

<sup>3</sup> On the constitutional crisis in Poland see in general A. Radwan, *Chess boxing around the rule of law. Polish constitutionalism at trial* at [www.verfassungsblog.de/chess-boxing-around-the-rule-of-law-po](http://www.verfassungsblog.de/chess-boxing-around-the-rule-of-law-po)

the – carpet question(s) of the “ethos of judging” of an ordinary Polish judge, his philosophy of law, system of values that the case law should uphold on a daily basis and ultimately his sense of constitutional fidelity<sup>4</sup>. What interests me instead, is to show how disabling the Constitutional Court and constitutional capture of checks-and-balances<sup>5</sup> should translate into the case law of ordinary judges. This latter aspect received only scant attention from the academia. One caveat is in order here. The main argument espoused in this contribution should not be seen through the prism of critique of Polish judges. That would be oversimplification and yet another example of rejection by the judges of any critique. Quite to the contrary. This contribution should be seen first of all as a vote of confidence and trust in Polish judiciary in these difficult constitutional times. Of course, question whether they will be indeed up to the challenge and meet our hopes, is a different one altogether.

In what follows, though, I will argue in favour of a guarded optimism. There is light at the end of the tunnel and long over – due internal judicial empowerment and soul-searching might be in the making<sup>6</sup>. Crippling the constitutional review and incessant constitutional capture<sup>7</sup> of the rule of law, challenged also

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lish-constitutionalism-at-trial/; A. Śledzińska-Simon, *Poland's constitutional Tribunal under siege*, [www.verfassungsblog.de/en/polands-constitutional-tribunal-under-siege/](http://www.verfassungsblog.de/en/polands-constitutional-tribunal-under-siege/); M. Kisłowski, *Polish democracy is crumbling* at [www.politico.eu/article/polands-court-international-help-democracy-reform-rights-rule-of-law/](http://www.politico.eu/article/polands-court-international-help-democracy-reform-rights-rule-of-law/); T.T. Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, [www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/](http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/); V. Chadwick, J. Cienski, *Polish opposition challenges new law on constitutional court, A growing political crisis worsens*, [www.politico.eu/article/polish-opposition-challenges-new-law-on-constitutional-court/](http://www.politico.eu/article/polish-opposition-challenges-new-law-on-constitutional-court/); T. G. Ash, *The Pillars of Poland's democracy are crumbling*, [www.theguardian.com/commentisfree/2016/jan/07/polish-democracy-destroyed-constitution-media-poland/](http://www.theguardian.com/commentisfree/2016/jan/07/polish-democracy-destroyed-constitution-media-poland/); I. Krastev, *Why Poland is turning away from the West*, [www.nytimes.com/2015/12/12/opinion/why-poland-is-turning-away-from-the-west.html?\\_r=0](http://www.nytimes.com/2015/12/12/opinion/why-poland-is-turning-away-from-the-west.html?_r=0); R. Lyman, *Head of Poland's Governing Party Leads a Shift Rightward*, [www.nytimes.com/2016/01/12/world/europe/head-of-polands-governing-party-leads-a-shift-rightward.html?\\_r=0](http://www.nytimes.com/2016/01/12/world/europe/head-of-polands-governing-party-leads-a-shift-rightward.html?_r=0) and Editorial *Poland Deviates from Democracy*, [www.nytimes.com/2016/01/13/opinion/poland-deviates-from-democracy.html](http://www.nytimes.com/2016/01/13/opinion/poland-deviates-from-democracy.html).

<sup>4</sup> See also T. T. Koncewicz, *Polish Judiciary and the Constitutional Fidelity in Liber Amicorum Professor Tomasz Kaczmarek*, (in print).

<sup>5</sup> For the concept of constitutional capture see note 7, *infra*.

<sup>6</sup> This analysis builds on my *In judges we trust? Long overdue paradigm shift within the Polish judiciary, (Part I)*, <http://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-i/> and *part II* available at <http://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-ii/>.

<sup>7</sup> On the concept of constitutional capture see J. -W. Müller, *Rising to the challenge of constitutional capture*, available, <http://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/>; T.T. Koncewicz, *Living under the unconstitutional capture and hoping for the constitutional recapture* available, [verfassungsblog.de/living-under-the-the-unconstitutional-capture-and-hoping-for-the-constitutional-recapture/](http://verfassungsblog.de/living-under-the-the-unconstitutional-capture-and-hoping-for-the-constitutional-recapture/) and L. Pech, K.L. Scheppele, *Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law* available, [verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/](http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/) On the concept of capture from European perspective see also T.T. Koncewicz, *Of the Politics of Resentment and European Disintegration: Are the European Peoples Ready to Keep Paddling Together? Part I* available, <http://www.iconnectblog.com/2017/02/of-the-politics->

us, lawyers, to take stock and identify the shortcomings of the judicial system in order to come up with the road map for a much needed debate on the state of Polish judiciary. If those opposing PiS want to win over the trust of average citizens, or at least dent the ruthless and populist rhetoric, they must also appreciate the importance of this darker side of the transformation. As important as the case pending now before the Polish Supreme Court on the legality of acts of the new President of the Constitutional Tribunal is<sup>8</sup>, we should never lose sight of the bigger picture. This case is not the first, and certainly not the last, to test the judicial temperament and courage of Polish judges. It is but a prelude to what is to come. This case gives hope that something is finally happening and the legal complex and mobilisation might be in the making to break the cycle of helplessness and passivity. Taking this case as a point of departure, I want to go further and deeper, though. As much as this case raises hopes of judges finally siding with the Constitution, it is also fraught with doubts whether Polish judges will indeed be up to the challenge of *principled* and *long-term* resistance against the constitutional debacle. That is why it is so important to look beyond the case at hand. I would argue that full picture of the dynamics on the ground and the state of mind of ordinary judges will only be revealed by combing three perspectives: hopes, challenges and doubts. I have been calling for years now<sup>9</sup> on the Polish judges to recalibrate their perspective away from “authority of judging” understood as a privilege to “duty of good” judging that builds trust and adds to the public acceptance of, and in, courts. I asked what it means to be a good judge? What makes a good judge beyond independence and impartiality? How judges should communicate with the public so as to make sure that justice is indeed being seen done by an average citizen? How courts should build their legitimacy in XXI century? How should they interpret the law? I could go on. Yet every time I have spoken up, my voice has been seen as a biased and unjustified attack on the judges and their independence. Not even one voice from the judges saw it as a useful critique coming from an *amicus curiae* and an invitation to start true and long - overdue debate on these issues.

How and why does it all matter now? The answer is short: in a dramatic way. The judges are asked today to defend the Constitution and the rule of law and

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of-resentment-and-european-disintegration-are-the-european-peoples-ready-to-keep-paddling-together-part-i/.

<sup>8</sup> On the case see M. Matczak, *A Polish Marbury v Madison* available [verfassungsblog.de/a-polish-marbury-v-madison/](http://verfassungsblog.de/a-polish-marbury-v-madison/).

<sup>9</sup> *Prawo i niesprawiedliwość*, (*Law and Injustice*) Gazeta Wyborcza 11<sup>th</sup> of September 2012, [wyborcza.pl/magazyn/1,124059,12441725,Prawo\\_i\\_niesprawiedliwosc\\_\\_Po\\_co\\_ludziom\\_sad.html](http://wyborcza.pl/magazyn/1,124059,12441725,Prawo_i_niesprawiedliwosc__Po_co_ludziom_sad.html) and [wyborcza.pl/magazyn/1,124059,20702797,prof-tomasz-koncowicz-dzisiaj-bardzo-duzo-osob-czuje-ze-nie.html](http://wyborcza.pl/magazyn/1,124059,20702797,prof-tomasz-koncowicz-dzisiaj-bardzo-duzo-osob-czuje-ze-nie.html) and *Sądzie sądz*, POLITYKA no 50, 12<sup>th</sup> of December 2012, *Jaka interpretacja w polskim sądzie* (*What kind of interpretation in the Polish court?*), Rzeczpospolita 8<sup>th</sup> of November 2013, *Sędziów polskich trzeba uczyć*, (*Polish judges must be taught*), IN GREMIO 3/2013, *Nie(ludzki) polski sąd* (*(In)human Polish Court*), IN GREMIO 4/2013.

take a stand against the government in times of constitutional crisis. This is a tall order. The most important question, though, should be: are the judges ready, mentally, temperamentally and intellectually, to take on the challenges thrown at them, and deliver on the expectations, that have been placed on them? Are we justified in our thinking and hoping that they will be up to the task? The lack of true debate and judges' stubborn refusal to own up to their own imperfections are haunting us now. The public confidence in the judges is at its lowest and the populist government takes full advantage of this anti-judicial sentiment. People do not understand why fighting for the judiciary is worth the effort and that indeed judicial independence must be the backbone of the rule of law. Their reply is simple, yet revealing: *"Why should we defend the courts and the system that have been failing us for years?"* As dramatic and shocking as this might be to an outsider, this answer should not come as a surprise given the past, recent and more distant.

## II. Portents of hope?

On April, 26, 2016 the General Assembly of the Polish Supreme Court composed of 85 judges of the Supreme Court and acting to ensure the uniformity of the case law of ordinary and military courts, adopted the following resolution: *"in accordance with the article 190 paragraph 2 of the Constitution, judgments of the Constitutional Court shall be immediately published. Unpublished judgment of the Constitutional Court that declare the specified provision to be unconstitutional repeals the presumption of constitutionality on the moment it is pronounced by the Court in the proceedings"*<sup>10</sup>. This resolution was adopted on the basis of art. 16 paragraph 1 point 6 of the Law of November, 23, 2002 on the Supreme Court which lists the competences of the General Assembly of the Judges of the Supreme Court. Point 6 lists the Court's competence to *"adopt resolutions in matters important to the functioning of the Court"*. The resolution met with the usual ridicule and disdain from the ruling majority. The speaker for the Law and Justice party referred to the General Assembly as the *"group of buddies preserving the status quo of the old regime"*.

In response to this statement, Supreme Administrative Court decided to speak up, too. The College of the Supreme Administrative Court adopted its own resolution on April, 27, 2016. The College criticised as inadmissible and outrageous statements by politicians which refer to the General Assembly of the Supreme Court as a *"group of buddies"*. Preamble to the Polish Constitution and its art. 10 state that the system of government of the Republic of Poland is based in the separation and equilibrium of powers between the legislative, executive and judiciary. Having recalled art. 8 of the Constitution (constitution is the supreme law of the land and is granted direct application), the College called for a respect of the judicial independence in a democratic state ruled by law in which courts and

<sup>10</sup> [www.rp.pl/Sedziowie-i-sady/304269844-Uchwala-Zgromadzenia-Ogolnego-Sedziow-Sadu-Najwyzszego-ws-publikacji-orzeczen-TK.html](http://www.rp.pl/Sedziowie-i-sady/304269844-Uchwala-Zgromadzenia-Ogolnego-Sedziow-Sadu-Najwyzszego-ws-publikacji-orzeczen-TK.html).

tribunals are separate and independent from other branches of the government and are called on to safeguard the rights and freedoms of the citizens. Judges are subject to the Constitution and statutes only. Supreme Administrative Court reminded that on many occasions Polish administrative courts have approvingly referred to the rich case law of the Constitutional Court. The case law of the administrative courts always accepted the binding and final character of the rulings of the Constitutional Court (art. 190 paragraph 1 of the Constitution). The statute declared unconstitutional was treated as deprived of the presumption of constitutionality and, as a result, courts refused to apply it. At the same time, the College pointed out that the rulings of the Constitutional Court are to be promulgated immediately in the official journal in which the act was initially published (art. 190 paragraph 2 of the Constitution).

We must never forget, though, that courts (judges), are not alone. Lawyers and legal community should always lurk in the background. When two Polish Supreme Courts finally broke their silence, they aligned themselves with other legal professions that have been voicing their concerns over the dismantling of the rule of law and undermining the authority of the Constitution. Taken together, we witness the emergence of the legal complex in Poland. Legal complex stands for a coalition of legal occupations that come together to embed, enable, draft, litigate, implement, oppose, critique, and ally with judges and courts<sup>11</sup>. When Polish rule of law as we know is crumbling down, there are no comfort zones for lawyers and usual fence-sitting. It is the time of mobilisation, speaking in one voice. However, as consequential as this process is, it is not enough to deliver constitutional goods in Poland today. Much more is needed: constitutional fidelity which transcends lawyers' heads and touches people's hearts and such endeavour is much more difficult than simply changing laws in force.

### III. Of Constitutional fidelity. What's in a name?

Constitutional fidelity is more than a duty and an obligation to observe the text. It should be construed as much more. I agree with J. Balkin that *"Fidelity is not simply a matter of correspondence between an idea and a text, or a set of correct procedures for interpretation. It is not simply a matter of proper translation or proper synthesis or even proper political philosophy. Fidelity is not a relationship between a thing and an interpretation of that thing. Fidelity is not about texts; it is about selves. Fidelity is an orientation of a self towards something else, a relationship which is mediated through and often disguised by talk of texts, translations, correspondences and political philosophy. Fidelity is an attitude that we have towards something we attempt to understand; it is a discipline of self that is related to the discipline of a larger set of selves in a society.*

<sup>11</sup> T.C. Haliday, *Why the Legal Complex is Integral to Theories of Consequential Courts* (in:) D. Kapiszewski, G. Silverstein, R. A. Kagan, (eds.), *Consequential Courts. Judicial roles in Global Perspective*, (2013), s. 337, 339.

*Fidelity is ontological and existential; it shapes us, affects us, has power over us, ennobles us, enslaves us. Fidelity is a form of power exercised over the self by the self and by the social forces that help make the self what it is. As such, fidelity is an equivocal concept, full of both good and bad, mixed inextricably together. Fidelity is the home of commitment, sacrifice, self-identification and patriotism, as well as the home of legitimation, servitude, self-deception and idolatry*<sup>12</sup>.

This raises important questions for my own understanding of the fidelity to Polish Constitution. It also impacts the reading of the above resolutions. Fidelity must not be simply a matter of text and following the letter of the law. Being faithful to the document and the institutions it creates is more a state of mind, not mere practice. As such constitutional fidelity has a lot in common with constitutionalism which is not only about the document, but rather about the state of mind, limited government and culture of restraint. Fidelity can refer to the original meaning of the constitutional document or to its fundamental core or to the text as such, speak to the principles and concepts that are embedded in the Polish constitutional structure and tradition, principles that make up our constitutional identity. Fidelity and its object thus have the potential of explicating who we were, where we came from and where we are headed and finally, strives to grasp in the possible way, who we are today. Each constitutional document has its past, present and future and these three temporal dimensions are linked by the rationale of the underlying principles of values. Principles and values that make up the constitutional identity must be interpreted so as to ensure both the continuity of the messages contained therein and their durability. What is needed is the compromise and equilibrium between necessary change that embraces *The New* and the stability that caters to *The Tradition*. The latter enables us to move forward and set our gaze on the future while not forgetting about the past and about the places we come from. In other words constitutional interpretation must be conservative (preserving the values) and reformative (reading these in the light of ever-changing circumstances). Future emerges at the intersection of both dimensions: looking back and staying in the present. Again as argued by Balkin: "*Fidelity is a sort of servitude, a servitude that we gladly enter into in order to understand the Constitution. To become the faithful servants of the Constitution we must talk and think in terms of it; we must think constitutional thoughts, we must speak a constitutional language. The Constitution becomes the focus of our attention, the prism of our perspective. Our efforts are directed to understanding it-and many other things in society as well-in terms of its clauses, its concepts, its traditions. Through this discipline, this focus, we achieve a sort of tunnel vision: a closing off to other possibilities that would speak in a different language and think in a different way, a closing off to worlds in which the Constitution is only one document among many, worlds in which the Constitution is no great thing, but only a first draft of something much greater and more noble. And to think and talk, and focus*

<sup>12</sup> *Agreements with hell and other objects of our faith*, (1997) 65 Fordham Law Review 1703.

*our attention on the Constitution, to be faithful to it, and not to some other thing, we must bolt the doors, shut out the lights, block the entrances. Fidelity is servitude indeed. But this servitude is not so much something the Constitution does to us as something we do to ourselves in order to be faithful to it".* Such understanding of fidelity underscores aspirational function of the constitutional document. It aspires to reflect "us" in the best, and not perfect, way. It aspires to capture this reflection, and yet it will never achieve this goal in a definite and final way, since "we" change and evolve along with the document. Preamble to the Polish Constitution shows the commitment to which Polish nation aspires, commitments that are anchored in the past, developed and refined in the present and carried over into the future. It means that the Constitution's commitments have not been yet met. This never - ending meandering between the past and the back-ward looking and the future with its forward-looking is a matter of constitutional reflection and politics. Such constitutional and trans-generational pacting must be undertaken by each generation which has its own distinctive role to play in spelling out what the constitutional pact mandates today. Constitutional fidelity underpins this process and arises at the interstices of practice, text, interpretation and culture.

The fact that the promise of the Constitution was not fully realised (argument often repeated by the new Polish majority in favour of rejecting the Constitution) must not detract from our Fidelity. Quite to the contrary. It should fuel it and make us try even harder to make these commitments a reality. It is in this sense that the constitutional fidelity is about generational reading of the document. It is not about uncritical iconoclasm. It is about pragmatic recognition that our constitutional allegiances are shaped, reshaped, reexamined as we move forward and as the world around the constitution changes and fluctuates. There is no place for fear of failure, because failure is the part of the fidelity as no Constitution is perfect. Fidelity is about the journey and the process, rather than a boat and final destination. Past must be the key to the future, but not only. After all, constitutions that are meant to last must be understood as documents made for people of fundamentally different views, as Justice Oliver Wendell Holmes rightfully said. Again American constitutional tradition of looking to the past in a constructive way might be used here: *"We turn to the past not because the past contains within it all of the answers to our questions, but because it is the repository of our common struggles and common commitments; it offers us invaluable resources as we debate the most important questions of political life, which cannot fully and finally be settled"*<sup>13</sup>. Each generation should build on the best of the past and move forward with this baggage. After all, this is exactly what the Preamble to the Polish Constitution mandates. This is the kind of fidelity I am talking about, and the one that should inform the understanding of the constitutional commitments the judges should owe to the Constitution of 1997.

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<sup>13</sup> J.M. Balkin, R.B. Siegel, *Introduction* (in:) J.M. Balkin, R.B. Siegel (eds.), *The Constitution in 2020*, (2009), s. 4.

## IV. Polish judges and the Constitution

### IV. 1. The weight of the past

All this takes on special importance today when the Constitution is under systemic attack and flouting. The resolutions above offer promising vistas moving forward but right now they are just this: non-binding acts of two Polish Supreme Courts sending important messages on their respective position in the constitutional crisis that has been engulfing Poland for the last 18 months. „Constitutional fidelity” of Polish judges will be tested by persistent refusal by the ruling majority to publish the judgments of the Constitutional Court. Recent developments only show that non publication becomes normal state of the game and will be resorted to at will wherever the Court’s rulings go against the will of the majority<sup>14</sup>. In case SK 39/16, the Court has reiterated that rulings of the Court must be published immediately in the shortest possible Court’s time given the circumstances of each case. Government authorities have no discretion, but to publish all rulings of the Court. *A fortiori*, the Court, criticised in the strongest possible words practice of singling out its rulings that will be published in the Journal of Laws, and these that will not be. The Court saw through the intentions of the Sejm. The Sejm performed a review of individual rulings and concluded that judges behind these rulings acted *ultra vires*. Therefore, the refusal to publish these “negatively reviewed” rulings would be held to be justified and, as a result, make the future publication of the Courts’ rulings dependent on the consent of the legislative branch. For the Court this is inadmissible encroachment by the executive on the competences of a constitutional court and aims at the stigmatisation of the judges who decided these cases. Such practice runs afoul of the standards of the state governed by the rule of law (*Rechtstaat*) and is alien to the legal culture to which Republic of Poland belongs. The Tribunal was clear: *all* rulings are unconditionally binding and must be published.

How these resolutions will translate into the daily practice of lower courts is altogether a different question? The common thread that runs through the resolutions (above) is making the Constitution supreme law of the land and relevant part of *daily* decision- making process of a lower judge. Supreme Courts have clearly laid down the route to follow. Now, the time for real actions on the ground has arrived. However, at this point, the fidelity of an average judge to the Constitution remains simply unknown.

*Firstly*, the legal world of an average Polish judge continues to be dominated by Montesquieu, formalism and unflinching faith in the rationality of the lawmaker<sup>15</sup>. Polish judge is a true believer in what Lord Reid ridiculed 40 years ago as

<sup>14</sup> For more see T.T. Koncewicz, *Of constitutional defiance, migration and borrowing of unconstitutional tactics and European defiance*, <http://www.iconnectblog.com/2016/08/of-constitutional-defiance-migration-and-borrowing-of-unconstitutional-tactics-and-european-resistance/>.

<sup>15</sup> For more more detailed statement of my arguments see T.T. Koncewicz, *Prawo z Ludzką twarzą*, (*Law with the Human Face*, 2015) and note *supra* note 9.



a fairy tale that bad decisions are given, when a judge muddles the password. As a rule, the fairy tale goes, simply uttering "Sesame open up" should do the trick<sup>16</sup>. As a result when a case breaks the mold and calls for more than just textual reconstruction, Polish judge is awe-stricken and defenseless and turns his/her eyes towards legislator pleading for ... more text. The legislator acquiesces and enacts new text which is only good, though, until new controversy arises and a judges come knocking on the door yet again ... What results is a vicious circle.

Secondly, given the historic baggage of Polish judges and their limited understanding of judicial function, the positive reception of the resolutions at the "bottom" of the judicial ladder must not be taken for granted. The weight of the past and old habits might obviate the embrace by the ordinary judges of the resolutions of the supreme courts. The minds of Polish judges continue to be hostage to the belief that the Constitution is a purely declaratory document with no normative content and no role to play in the judicial resolution of disputes<sup>17</sup>. As a result, constitutional document is often relegated to the margins of the judicial practice. The ideology of bound judicial decision making as developed by the leading Eastern legal theoretician and philosopher of law Jerzy Wróblewski has been keeping Polish judges captive for decades now<sup>18</sup>. This ideology rests on the textual positivism and formalism and stands for the limited law and limited sources of law, with the role of the judges reduced to the mechanical application of the legal text. The judges acted exclusively on the plain meaning of a statutory text and framed their decisions as the inevitable and the only correct deduction from the text in any case. As a result Polish judges has been rightly described as perfect examples of "textual judges" and impervious to the context in which the legal text operates. Their interpretation was and still is invariably code-bound which means that a judge's role consists in simply reconstructing the pre-existing standards enacted and changed, when necessary, by the legislator. The so-called presumption of "rationality of the legislator" assumed that the legislator can do no wrong and provides *ex ante* for all possible circumstances in which law in the only form known to judges inscribed in codes, will be applied in the future. Should the existing law prove to be insufficient, it is not the business of the judge to override the clear textual meaning of the text, but for the legislator to amend accordingly. I would argue that 25 years after transformation, the approach marked by the mechanical approach to law and by textual positivism continues to be one of the most long-lasting legacies of the communism. The fear of being creative and critical is omnipresent and every attempt by a judge to interpret the statute beyond

<sup>16</sup> The quip comes from his celebrated essay *The Judge as Law-maker*, (1972-1973) 12 *Journal of the Society of Public Teachers of Law* 22.

<sup>17</sup> More on this T. T. Koncewicz, *Mechanical jurisprudence" under strain? Eastern Europe Judiciary under the European influence* (in:) M. Zubik (ed.), *Human Rights in Contemporary world. Essays in Honour of Professor Lech Garlicki* (2017, forthcoming).

<sup>18</sup> See English version of his most famous treatise *The Judicial Application of Law*, (1991), translated by Zenon Bankowski and Neil MacCormick.

the text is seen as an example of judicial overreaching and dismissed with scorn as inadmissible judicial imperialism. What follows is the self-imposed image of a judge, who, in the words of one commentator, resembles “an anonymous grey mouse, hidden behind piles of files and papers, unknown to the outside world ...”, who is not used to “stand by his opinion and defend them in the public” which then results in the structural judicial independence, but no mentally independent judges<sup>19</sup>. As one leading textbook on the subject succinctly put it: “*the courts (of Eastern Europe) try to follow the letter of the law, however problematic and absurd the results may be which this course produces*”<sup>20</sup>.

All the above clouds my plea for constitutional fidelity with lingering doubts as to its feasibility in practice. After all, “constitutional fidelity” is based on the rejection of the unwavering belief among Polish judges that any case can be decided by relying on textual statutory arguments. It takes ordinary judges out of their comfort zone in a dramatic fashion as it makes the Constitution part and parcel of the judicial decision - making process. It calls on the judges to evaluate critically the statutes and it empowers them to fully embrace their forgotten role of being judges over the “Constitution *and* statutes”, not only judges applying and interpreting statutes. Having expressed those doubts, what is desperately needed today, is the vote of confidence and trust in the Polish judiciary. Polish judges must finally understand that they have their own constitutional promises to keep and these are no less than the Polish rule of law and democracy. They must not be idle and watch helplessly as the constitutional edifice crumbles.

Last but not least, two resolutions (above) must be now read in the light of most recent developments in the case law of two Polish supreme courts. On March, 17, 2016 Polish Supreme Court delivered a judgment in which it declared unconstitutional one of the provisions of the Tax Code<sup>21</sup>. Crucially, the Supreme Court found unnecessary to send questions to the Tribunal and proceeded with its own constitutional review of the provision in question. In the clearly circumscribed motives it pointed out the judgment of the Tribunal from 2013 in which the it has already declared unconstitutional provision in the Code which was identical to the provision under consideration by the SC in the case at hand. SC acknowledged that formally speaking the Tribunal should be also given an opportunity to declare unconstitutional this new provision of the Code, because ruling on the incompatibility of statutes with the Constitution falls within the exclusive competence of the Tribunal. However, SC referred directly to the unclear

<sup>19</sup> M. Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, (2008) 14 (1) *European Public Law* s. 99–123; also [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=995220](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=995220).

<sup>20</sup> Z. Kühn, *The judiciary in Central and Eastern Europe. Mechanical jurisprudence in Transformation?*, (2011) at s. 201 (my emphasis).

<sup>21</sup> Case V CSK 377/15, (judgment of 17 march 2016). More on the case <http://www.lex.pl/czytaj/-artykul/sad-najwyzszy-stwierdzil-niekonstytucyjnosc-przepisu-bo-tk-w-kryzysie><http://www.lex.pl/czytaj/-artykul/sad-najwyzszy-stwierdzil-niekonstytucyjnosc-przepisu-bo-tk-w-kryzysie>.

situation surrounding the Tribunal right now and concluded: *“Formalism cannot get better of the common sense. Bearing in mind current exceptional situation, referring now questions to the Tribunal would be incomprehensible to the interested parties”*. This ground-breaking decision might usher in a new era of the constitutional empowerment and save <sup>22</sup>. Importantly though, the SC took pains to precisely delimit and condition its emergency constitutional review. It made clear that its review does not exclude the competence of the Tribunal. The latter continues to be the guardian of constitutionality in Poland. On the other hand, however, the SC was well aware of the attempts to marginalise the Tribunal and undercut its powers. Refusal to publish the judgments of the Tribunal could have been a straw that broke the camel’s back and prompted the SC to stand up and side with the rule of law. Should the constitutional crisis and the inability of the Tribunal to discharge its constitutional powers continue, SC might as well build on this precedent. The big question is whether this empowerment will trickle down to the lower courts?

#### IV.2. Unpacking the constitutional premises for judicial road map

Let us start with the sin of sins, or fairy tales of fairy tales that continues to reign in Poland and defines the judicial philosophy of an average judge: limited conception of law and sources of law. It equates law with “the law” (statutes, codes and other written enactments by the legislature). It is submitted that this assumption ties the hands and blocks the minds of a Polish judge and is used as a convenient excuse for not doing more. After all, their argument goes, they do nothing more (or less) than applying the law and this is what they are supposed to do! As much as there has been a dramatic shift today from law acting as a sword to punish (post-communist heritage) towards law as a shield (new paradigm dictated by the rule of law) that protects individual against the state, this process has not been embraced by the judges in Poland and Eastern Europe for that matter. *“Law as a sword”* still reigns in Polish courts and the minds of their judges. *“The law as a shield”* continues to be seen as an aberration. As a result one finds dramatic gap between people’s expectations (new rights, new procedures in the wake of EU law) and the quality of performance by the courts in providing effective and adequate legal protection. Citizens still live in the shadow of the state and the role of the law is seen in serving as a tool to punish with the courts providing the state with swift and efficient *“enforcement services”*. *“Living on the frontier”* is painfully verified by a judge who is not up to the challenge of *“adjudicating on the frontier”* and embracing the new protective rationale of the judiciary and new judicial functions that come with it. As a result people are relegated to mere case numbers. The courts do not see people with flesh and blood and are

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<sup>22</sup> Supreme Administrative Court follows into the footsteps of the Supreme Court. In one of its most recent judgments, it quashed a judgment of the lower court and instructed it to take into account the unpublished judgment of the Constitutional Tribunal of 28 June 2016 in case SK 31/14, <http://www.lex.pl/czytaj/-/artykul/nsa-wyrokuje-w-oparciu-o-niepublikowane-wyroki-tk?refererPliid=5227804>.

taken by surprise when litigants do claim rights and expect judicial protection and constructive interpretation of the law. They are surprised because formally speaking everything is correct as judges decide cases according to the law in force. The crucial question about justice is lost in the process of such interpretive ritual.

With this in mind I group the challenges facing the Polish judges in the following way. *First*, right to a court (aspect of an *access*) must be complemented by right to a good judge (aspect of the *procedural quality* of the right)<sup>23</sup>. *Second*, we must move beyond independence and impartiality paradigm and towards the aspect of good judging. The latter denotes much more than these two basic features. We need a new “turn to judicial virtues” like discursiveness, openness, rationality, criticism, responsiveness, art of listening, wisdom of deferral, acceptance of my limits as a judge, courage to reject opportunism and pressure to fall in line with judicial mainstream. These qualities constitute right to a court as much as traditional first - generation independence and impartiality. They make up our “*right to a good judge*” today and should determine methodology of deciding cases. *Thirdly*, “*new public management*” approach to judging puts emphasis on presenting courts as user-friendly institutions with judicial know - how necessary to balance arguments and wielding power of choice within judicial zone of discretion. Participatory justice underlines that courts can as well claim democratic legitimacy based not on the representativeness, but on accessibility and participation. Judicial proceedings need to be transparent, speedy and well managed, user-friendly, ensuring full and fair participation for all interested (proverbial “*have one’s day at court*”). *Fourthly*, judicial temperament needs drastic reconsideration. Polish judge must be ready to make justice and not simply decide cases. *Fifthly*, moving beyond result-based justice, towards procedural thinking and satisfaction: correct question is not *why* people go to courts in the first place but rather *why* people *are ready to go back to courts*? The lack of appreciation for the procedural dimension of rights is a more general phenomenon that characterises “*post-communist mind*” trapped between two extremes: either procedure will be “*followed to a T*” irrespective of consequences *or* neglected completely since, as the argument goes in the latter case, procedures are said to limit judges’ “*freedom*” and discretion. *Sixthly*, move away from formalism and new understanding of division of powers. Courts should be seen as actors with their own promises to live up to and expectations to fulfil. They are “*courts of law*”, not only “*courts of statutes*”. *Seventhly*, building culture of justification where what counts is the *power of arguments*, not mere *arguments of power*. Judicial legitimacy is derived from transparency and from weight of arguments. What is important is not only “*who says*” (dominant approach “*I, Supreme Court hereby rule ...*”) but also “*how it is said*”. *Last but not least*, constructive interpretation must take place of the reigning infatuation with the literal interpretation. The latter overpowers

<sup>23</sup> *Le droit à un bon juge* is the term used also by S. Guinchard, *Droit processuel*, (2011), p. 415.

and incapacitates Polish judges almost to a point of intellectual embarrassment. Mere attempts to consider the text in the light of the general scheme or the law's *ratio legis* are viewed suspiciously and treated as inadmissible judicial activism. In XXI century it is constructive and holistic legal interpretation that builds discursive legitimacy of the courts. Literal interpretation might end up to be an evil and a good judge should learn how and where to draw the line. Judges who keep denying that their interpretation is creative are simply liars<sup>24</sup>.

### IV. 3. „Bottom-up” constitutionalism and the challenge of translating constitutional fidelity

Again as argued by Balkin: *“To have faith in the Constitution is to have faith in an ongoing set of institutions whose meaning the individual will not be able to control. Most of us participate only in the great mass of public opinion that eventually affects the meaning and direction of the Constitution; our views are like a drop of water in a great ocean. We cannot mold the object of our faith to our will [...]”*. As important as institutions are, engaged citizenry has its own fidelity and commitments to live up to. Our fidelity is at its best when people (not only lawyers!) see themselves as being part of the process that the constitution embodies *from* nation - building *through* nation- discovery *to* nation-sustaining and growth. Fidelity is not about logic, but first of all about sense of belonging, emotions, tradition and history. Only combination of these factors is able to define the contours, and, finally, durability of, our fidelity to, the Constitution. That is why the statements by the supreme courts must be read in the light of more general trend of professing the allegiance to the Constitution and to the Constitutional Court by various quarters of Polish society. *“The great mass of public opinion”* not only affects the meaning and direction of the Polish Constitution, but also impacts its very survival. This political mobilization of Polish society must be seen as a reminder of 1000-year long Polish history to which the Preamble proudly refers. Our fidelity to the Constitution should be an expression of loyalty to the great moments in our history and the past that is marked by plurality of voices and respect for the Other in the best Polish tradition of openness and tolerance. 1997 Constitution is only part of this tradition. Rule of law, democracy, freedoms and rights, functioning system of judicial protection, constitutional court with a strong record of human rights protection and rule of law, all are built on the tradition of limited government, separation of powers, centrality of the individual and the respect for the self-imposed rules that had been a staple of Polish constitutional narrative and on which Polish Constitution now builds.

My appeal for „constitutional fidelity” on the part of Polish judges is premised on the the assumption that the judges are ready to finally leave their comfort zone. makes the Constitution part and parcel of the judicial decision - making

<sup>24</sup> See classic analysis by M. Shapiro, *“Judges as liars”*, (1994) 17 Harvard Journal of Law and Public Policy 155.

process. It calls on the judges to evaluate critically the statutes and it empowers them to fully embrace their forgotten role of being judges over the “Constitution *and* statutes”, not only judges applying and interpreting statutes. There is simply no for place indifferent „business as usual”. The politics of refusal by the executive to publish and implement the judgments of the constitutional court and the persistent and no-holds-barred undermining the status of courts are indeed mind – boggling and unheard of in Europe. It was never entertained by the Polish Founding Fathers, either. When the Constitution of 1997 has been drafted, it was thought that the authority of a judicial pronouncement and the respect for the Constitution will carry enough clout to secure the universal observance of the judgments issued by the Court and that the rule of law is rooted in the public consciousness to the point where no politicians would ever dare to undermine the judicial review. The very moment the Polish judges embrace and internalize the Constitution as true law of the land, take ownership of the constitutional essentials here and now, Polish rule of law and the Constitution will be given a new lease of life.

Taken together, the statements and rulings from Poland’s highest courts and the societal mobilisation are first symptoms of a constitutional fidelity in the making. As we continue to discover our fidelity on the fly, present generation of Poles has a special responsibility to balance the past and the future against the present dangers to the very survival of Our Constitutional document that was adopted in 1997 by far greater majority than the one that voted for the current majority in 2015. In recent courageous appeal addressed at Polish judges, First President of the Supreme Court explicitly called for judicial courage, engagement and resistance against the dismantling of the rule of law<sup>25</sup>. Yet, if anything is to change for better at the bottom of the judicial ladder, the example must be set at the top. The constitutional fidelity and judicial temperament must first inform the actions of the highest jurisdiction in the land and then trickle down to lower courts with a strong message of empowerment and judicial ethos. Then, and only then, we could indeed start building our hopes on more stable foundations and look forward with more optimism. The road ahead is bumpy, yet there is light at the end of the tunnel as I will try to demonstrate in part II. Make no mistake, though. Polish democracy and the rule of law A. D. 2017 will not be saved by the European Commission enforcing European values against yet another recalcitrant government or by lawyers, no matter how many, coming together. The rescue package must come from within or, in other words, from the popular “*Great Yes*” as the expression of *Our Constitutional Fidelity*. Polish judges do have their own unique role to play in translating this forgotten sentiment nation-wide, *here and now*, in *each and every* case that comes before them. This embrace of the Constitution by lower judges is of fundamental importance, so it is worth repeating: *here and now*,

<sup>25</sup> See [wyborcza.pl/7,75398,21315772,prezes-sadu-najwyzszego-wzywa-sedziow-do-oporu-dramatyczne.html](http://wyborcza.pl/7,75398,21315772,prezes-sadu-najwyzszego-wzywa-sedziow-do-oporu-dramatyczne.html).

in *each* and *every* case. Then and only then, constitutional fidelity and culture, will be given a chance in Poland.

### **Looking ahead: Judges judging the crises? Too many boats, not even one JOURNEY**

Former President of the Israeli Supreme Court Aharon Barak once written: “at the core of judging is judicial temperament. That is the quality that allows the judge to listen to the parties’ arguments with an open mind, without interrupting and without constantly seeking to educate them; that is the quality that allows the judge to restrain his power and to understand its limits; it is a quality of humility and the lack of arrogance that educates the judge to understand that he does not have a monopoly on wisdom; it is recognition of his capability of erring and the need to admit mistakes”<sup>26</sup>. To judge others or deciding on others’ rights and obligations involve listening to their stories in order to arrive at conclusions that conform to law, but where possible, also appear to be just. The list above of challenges facing Polish judges is tentative and by no means exhaustive. One should be clear about one thing. For a judge to capture the change and challenges ahead it is crucial to make a clear break with the past and reconsider judicial craft. He needs a new model for dispensing with justice and new language for understanding his role in a democratic state governed by the rule of law. Only such rethinking will take him out of his comfort zone.

I am the last one to criticise Polish courts for the sake of mere criticising and this paper is no exception. My argument is much more complex. Polish courts have been squandering the capital invested and hopes placed in them for years now. Regaining trust and confidence of the citizens will not happen over night. It will take years. This is the price to be paid for the cosy ivory tower Polish judges locked themselves in. Any attempt to look critically at them was, and still is, castigated as an assault on their independence. Clock has been already ticking for much too long. Now with the Constitution in shambles, the Constitutional Court disabled and constitutional debacle at the door of each and every judge, the question of “what judges are for” becomes more dramatic than ever before<sup>27</sup>. Already before PiS came to power, one could have detected first signs of public revolt against the rule of formalism in Polish courts and growing critique of the methodology adopted by the judges in solving cases. The judges themselves started to understand and feel that “business as usual” approach and maintaining *status quo* are no longer a tenable alternative. Today, the time left for getting things right is scarce, and we must learn on the fly.

<sup>26</sup> A. Barak, *The Judge in a Democracy*, (Princeton University Press, 2005), s. 309–310.

<sup>27</sup> For an argument in favour of the dispersed constitutional review exercised by ordinary judges to offset the emasculation of the Constitutional Court see my *The „emergency constitutional review” and Polish constitutional crisis. Of constitutional self - defense and judicial empowerment*, (2016) 2 (1) Polish Law Review, <http://polishlawreview.pl/abstracted.php?level=5&ICID=1232099>.

The easiness with which the ruling majority has dismantled the rule of law in the name of democracy has been startling and disconcerting. It is time to recognise that Polish courts do have both mandate and means to break the full throttle unconstitutional capture. Whether they will, is a different question altogether, one that hinges on the uneasy combination of *Hopes, Doubts* and *Challenges*. One thing must be beyond doubt, though. Passivity and fence – sitting is no longer an option. Stakes could not be higher, both for Polish rule of law and for the judges, their legitimacy and long-term societal perception. The way they respond to the constitutional exigency of today and the kind of face they show now, will reverberate in the long years to come. Let us never forget that it is always the *journey*, not the *boat*, that counts and makes tangible difference. Seen from this perspective, the resolutions (above) and upcoming decision by the Supreme Court on the legality of acts adopted by the new President of the Constitutional Court, could become much more than just a boat. This decision, in particular, has the potential of either keep the *status quo* and confirm the *carte blanche* of the majority and passivity of the judiciary, or, start a process of true soul - searching among Polish judges. This admonition and plea come from a true *amicus curiae* to Polish courts and judges and should be read as such.

As A. Barak reminds us in the final sentence of his book: “*As you sit at trial, you stand on trial*” let me repeat. Not only humans have their own moments of truth. Institutions do too, and the choices they make at these moments of critical juncture weigh heavily on the legacy of an institution. The poem by C. Cavafis, *Che fece ... il Gran Rifiuto* (translated by Edmund Keeley) speaks volumes here:

*For some people the day comes  
when they have to declare the great Yes  
or the great No. It's clear at once who has the Yes  
ready within him; and saying it,  
he goes from honor to honor, strong in his conviction.  
He who refuses does not repent. Asked again,  
he'd still say no. Yet that no—the right no—  
drags him down all his life.*

With this, the time for true constitutional reckoning for ALL Polish judges has finally arrived. Will they be ready for their own constitutional “*Great Yes*”?