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## HOSTILE CONSTITUTIONAL INTERPRETATION

The arguments included in this paper were first presented on October 7, 2017, in Krakow, during the symposium "On the problems of interpretation of the Constitution of the Republic of Poland." The role was difficult, because as we know, in ancient Greece the term symposium (Συμπόσιον) used, e.g., by Plato meant a joyful feast, whereas this paper pertains to issues that are hard to enjoy. Actually, for lawyers they may be particularly hard to digest.

The question was whether constitutional interpretation can be law-making. The answer seems obvious, even banal: it certainly can, but we need to explain precisely what we understand by the relationships between the constitution and its interpretation. First, it is predominantly the process of interpreting a specific provision of the basic law. Second, it may also mean the interpretation of lower order acts with consideration of the content of the constitution. Third, we may treat the text of the basic law not only as a set of norms but also as a source of certain interpretation directives. Constitutional interpretation understood this way has already been discussed in extensive source literature, so it is hard to quote here in detail<sup>1</sup>. Actually, it is not only the object of interest of constitutionalists and legal theoreticians but also of legal philosophers<sup>2</sup>.

But it all follows some basic paradigms of classic jurisprudence. In this paper, however, we attempted to identify an empirical phenomenon evading the paradigms, both of jurisprudence in general, the constitutional law doctrine, and the theory of law and legal philosophy in particular. This phenomenon can be referred to as "hostile constitutional interpretation." To a lawyer's ears, this sounds really strange, almost like an oxymoron. We are used to some phrases such as "pro-constitutional interpretation" or "friendly constitutional interpretation," so

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<sup>1</sup> From the newest work, see, for example: *Wykładnia konstytucji. Inspiracje, teorie, argumenty*, eds. T. Stawecki, J. Winczorek, Warszawa 2015.

<sup>2</sup> See, for example: T. Gizbert-Studnicki, *Interpretacja wzorców konstytucyjnych z perspektywy filozofii prawa*, „Przegląd Konstytucyjny” 2017, No. 3, pp. 33–49.

reference to the category of hostility naturally arouses confusion. But upon closer examination this may turn out to be a *prima facie* conclusion, because for over two years this surprising phenomenon has really existed in Poland, as we try to prove below with some specific examples.

Nevertheless, the very term “hostile constitutional interpretation” may seem so absurd in Polish legalese that we have decided to express it using a Latin, perhaps semantically more neutral phrase: *interpretatio constitutionis hostilis*. In other languages, for example, in German, the adjective *verfassungsfeindlich* sometimes occurs, but it never refers to interpretation (*Auslegung*). Instead, it is sometimes used to refer to, e.g., anti-system political parties. The expression *verfassungsfeindliche Auslegung* would sound as absurd as does the Polish *wykładnia wroga wobec konstytucji* (“hostile constitutional interpretation”). But the connotations of the expression and its actual meaning are two different things.

Undoubtedly, the most extensive theory of constitutional interpretation was developed in American jurisprudence. In a way, Americans had no choice: for one thing, they have the oldest valid written constitution in the world, and for another, their basic normative act is extremely brief and succinct. Numerous amendments to the American constitution have not changed much. Actually, they have only increased the spectrum of possible concepts. Hence, Americans really have a multiplicity of constitutional interpretations: from originalism, through textualism, pragmatism and structuralism, up to philosophical interpretation<sup>3</sup>.

It is assumed that the problem of the law-making role of constitutional interpretation depends to a large extent on the concept of the constitution itself. According to Jack M. Balkin, two basic approaches can be identified in this area<sup>4</sup>. First, we can treat the constitution as a finished structure (the skyscraper model). In this case, both amendments and constitutional interpretation are very limited, because the interior of this structure must not be changed. Second, we can decide instead that the constitution is a specific framework, so as time goes by, we should make some transformations within the structure by means of interpretation, without changing its foundations. This apparently leads to two interpretative attitudes: *passivist* (the skyscraper model) or *activist* (the framework model). Obviously, as a representative of the so-called living constitution movement, the author prefers the latter.

Yet, there are still some authors in contemporary American jurisprudence who go even further, beyond the limits of living constitutionalism. Louis M. Seidman, using the term *constitutional disobedience*, is a typical example<sup>5</sup>. At first glance, this expression seems as absurd as the above-mentioned *interpretatio constitutionis hostilis*, but this is only a pretense. In reality, according to Seidman, the

<sup>3</sup> S.A. Barber, J.E. Fleming, *Constitutional Interpretation. The Basic Questions*, New York 2007.

<sup>4</sup> J.M. Balkin, *The Framework Model and Constitutional Interpretation* [in:] *Philosophical Foundations of Constitutional Law*, eds. D. Dyzenhaus, M. Thorburn, Oxford 2016, pp. 241–264.

<sup>5</sup> L.M. Seidman, *On Constitutional Disobedience*, Oxford–New York 2012.

possibility of refusing obedience to the constitution in some justified situations is in a way metaphoric and partially results from the character of the American constitution. So this attitude is not hostile to the constitution, but is based on a certain kind of pragmatism, since one problem recurs all the time in American jurisprudence: the question of whether a basic law that is more than two hundred years old is not simply obsolete, in spite of all the amendments<sup>6</sup>.

But returning to *interpretatio constitutionis hostilis*. If this phenomenon did empirically occur in our political and legal reality, I think it is worth considering its origin, essence, expressions, and mechanisms, but first of all its effects on the Polish legal order as a whole. Even if the phenomenon evades the traditional instrumentation of jurisprudence, we can of course try to approach it from the perspective of political philosophy, e.g., the concept by Carl Schmitt, often referred to in public discourse. But in this dimension, the authors of *interpretatio constitutionis hostilis* may also encounter a serious disappointment. I propose the thesis that conservative political philosophers imposed a certain interpretation of Carl Schmitt on us which does not have to be true in light of legal theory and philosophy. If we approach Schmitt as a lawyer, which has been an increasing tendency in global science recently<sup>7</sup>, we find out that he would also be very surprised at the possibility of hostile constitutional interpretation. Recognizing the occurrence of the so-called constitutional moment, he would himself have simply rejected the valid constitution *par force* by means of the sovereign's decision and would have adopted a new one. But he would never have thought of a hostile interpretation, because, contrary to appearances, he had great respect for the legal order. This, however, is beyond the scope of the present paper and I can only recommend new source literature, especially literature analyzing the only work by Carl Schmitt concerning legal philosophy, *On the Three Types of Juristic Thought* from 1934<sup>8</sup>.

Hostile constitutional interpretation is a political strategy accompanied by specific perverse political rhetoric with quite a primitive, populist character. The authors of this strategy usually demonstrate the will or even obligation to observe the constitution, but at the same time they call the constitution "internally contradictory and conflictogenic," "postcommunist," "a constitution for elites, not for ordinary people," etc., etc., etc. This strategy is not even overt but deeply concealed behind the screen of showy slogans. In the current situation, the often repeated phrase "our legislature is compliant with the constitution, because it was confirmed by a verdict of the Constitutional Tribunal" is particularly perfidious, perverse, and even wicked. So in the final instance, the phenomenon of *interpretatio constitutionis hostilis* is an example of extreme instrumentalization of

<sup>6</sup> *Is the American Constitution Obsolete?*, ed. T.J. Main, Durham (North Carolina) 2014.

<sup>7</sup> See, for example: V. Neumann, *Carl Schmitt als Jurist*, Tübingen 2015 and M. Croce, A. Salvatore, *The Legal Theory of Carl Schmitt*, Routledge 2013.

<sup>8</sup> More on the topic: J. Zajadło, *Schmitt*, Gdańsk 2016.

the process of interpretation for the needs of current politics, ergo an example of recognizing the primacy of politics over the law, even at the level of the basic law.

Obviously, we could elaborate on whether the Constitutional Tribunal in the present form really meets the standards of a normal supervision body, but let us leave it and focus instead on some specific examples revealing the mechanism of functioning of *interpretatio constitutionis hostilis*. We will avoid pointing to particular names, as individual names are unimportant in this discussion; what really matters is the interpretative decisions concerning norms, institutions, and procedures. Besides, due to editorial limits, we will not analyze factual and legal situations in great detail. We will only concentrate on the issue of justifying connecting certain interpretation decisions with the phenomenon of hostile constitutional interpretation.

The first example comes from the period before the latest parliamentary election and is connected with the moment of the new (current) president assuming office. As we remember, one of his first decisions was to pardon a person sentenced with a court decision that was not yet valid. Doubts arose as to whether the President had the right to do so, and in response we received a certain interpretation of the provision of Article 139 sentence one in relation to Article 144 section 3 item 18 of the constitution: the power of pardon is one of the powers of the President, and the constitution provision does not limit it in any way. Indeed, *prima facie* it is hard to find a hostile constitutional interpretation here. Perhaps as a result of the clarity of this provision, we simply have two modes of extending the power of pardon: the application one arising from the content of the Code of Criminal Procedure, and the unlimited one directly arising from the basic law. This interpretation would sound rational, but for one thing. The draft constitution of 2010 prepared by the political formation represented (it does not matter whether *de nomine* or *de facto*) by the President includes the following provision in Article 71 section 1 item 13: "The President of the Republic of Poland [...] shall extend the power of pardon to persons sentenced with a valid court decision, in the mode laid down in the act." In logic and in rhetoric, there is an argument called *argumentum ex rerum natura*. If we were to refer to it, we could justifiably claim that the presidential political formation, even in 2010, perceived that the power of pardon by nature only applied to persons sentenced with a valid court decision, which was stated *expressis verbis* in its draft of the constitution. This institutional interpretation was later confirmed by the Supreme Court in its resolution by 7 judges of May 31, 2017, in case I KZP 4/17: "The power of pardon as a power of the President of the Republic of Poland laid down in Article 139 sentence one of the Constitution of the Republic of Poland may only be applied to persons whose guilt was stated by a valid court decision (convicted)." What happened, then, to change the president's perception of *rerum naturae*? He simply needed to apply the power of pardon instrumentally in the particular factual state *ad personam* and thus make an interpretation hostile to the constitution and

to his own former views. Obviously, a certain weakness of our argumentation may be pointed out: the draft we mentioned was not a valid legal act. Besides, according to a popular saying, a wise man changes his mind, a fool never will. But the issue is too serious to bring the legal discourse to this level.

Another example is especially spectacular, because we have not one but a series of interpretation decisions that can be called *interpretatio constitutionis hostilis*. We mean the long series of attempts to amend the Act on the Constitutional Tribunal. Since this paper is limited in length, we will not discuss them in detail, especially that they have already been described in source literature<sup>9</sup>. Actually, the thing is not the specific interpretation decisions, but the whole complex of acts, drafts, opinions, expert opinions, parliamentary speeches and even media presentations that in this case make the real syndrome of hostile constitutional interpretation. From the vast material we selected one example that seems particularly telling. After the adoption of the Act on amending the Act on the Constitutional Tribunal on December 22, 2015, it immediately went to the Senate, where a committee within the upper house of parliament held a debate with the participation of lawyers from the parliament legislation services, broadcast live on television. They presented a number of doubts regarding the constitutionality of the adopted solutions, but some senators remained adamant. Astonished viewers could hardly believe they were hearing utterances such as: “these are only examples of many legal opinions, but we are going let our own consciences guide us.” Doubtless, the reference to senators’ consciences without reference to interpretation principles and rules worked out in the legal science and practice is nothing but political instrumentalization resulting in hostile constitutional interpretation, particularly that most of the parliamentary experts’ doubts were later shared by the Constitutional Tribunal in its decision of March 9, 2016, in case K 47/15. If we add the confusion connected with the Prime Minister’s refusal to publish the Constitutional Tribunal’s decisions, we can clearly see the absurd dense atmosphere of *interpretatio constitutionis hostilis*.

The third example is especially dangerous, as it refers to the sphere of civic rights and liberties. Let us again refer to the constitution draft of 2010 prepared by the current ruling political formation, and compare it with what it has done in the sphere of legislation since its acquisition of power. Article 36 sections 1 and 2 of the draft read: “1. Citizens shall have the freedom of peaceful assembly, also in public places, in order to jointly express their beliefs, opinions, or demands. 2. No permission shall be needed for citizens to assemble. The statute may introduce the requirement to report the intention to organize an assembly subject to applicable notification periods.” At first glance, this solution seems to be more liberal and pro-freedom than the one provided for in Article 57 of the current constitution: “The freedom of peaceful assembly and participation in such assemblies shall be

<sup>9</sup> *Spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015–marzec 2016*, eds. P. Radziejewicz, P. Tuleja, Warszawa 2017.

ensured to everyone. Limitations upon such freedoms may be imposed by statute." Again, we might ask what happened that the same political formation after obtaining power decided to introduce changes in the Peaceful Assembly Act that aroused huge doubts regarding their constitutionality. The introduction to the act and the preferential treatment of so-called cyclical assemblies are especially controversial. This time, it is also rather obvious that we can see a kind of political instrumentalization, because this regulation was clearly designed *ad casum* for a specific celebration that is a major propaganda project of this political formation. Ergo, again we can see a hostile constitutional interpretation, because the solution is everything but compliant with the spirit of the interpretation directive in *dubio pro libertate* resulting from the provision of Article 31 of the constitution, particularly the proportionality principle laid down in section 3.

Such examples of *interpretatio constitutionis hostilis* in the area of the above-mentioned relationships between the basic law and the principles and rules of interpretation could be multiplied. The newest examples would be regulations concerning amendments to the Acts on the Supreme Court and the National Council of the Judiciary, as well as election ordinances. Thus, the phenomenon is clearly not fading, but becoming more and more widespread instead.

Let us briefly sum up then: hostile constitutional interpretation is a *sui generis* phenomenon, and actually it is hard to find a similar one in the history of constitutionalism of the states within our civilization. We do not know how it will develop, but even now we can identify its basic characteristics.

First, it is a hidden strategy, although applied fully consciously and intentionally, sometimes paradoxically camouflaged with other constitutional institutions, e.g., the presidential veto or referring a law preventively or consequentially to the Constitutional Tribunal. This is logical: after all, a normal individual will never declare to observe and respect the constitution and at the same time overtly admit to making a hostile interpretation of it. Sometimes the hostility may refer to a specific provision of the basic law or a certain interpretation directive resulting from it, but sometimes it may simply involve the contestation of constitutional axiology as a whole or the creation of a negative atmosphere with regard to individual constitutional values.

Second, this strategy is based on acting in bad faith. This is also logical: after all, *mala fides* must naturally be an inherent part of *hostilitas constitutionis*. Again, it is obviously hidden behind the screen of catchy declarations of respect for the constitution and the obligation to observe it. But this camouflage is hard to reconcile with the aforementioned epithets concerning the constitution, because then the mask of mock friendliness towards the constitution disappears. An expression of this bad faith is the excessive use of various legal tricks (*apices iuris*), among others, considered even by the Roman lawyer Ulpian to be inappropriate

in legal discourse<sup>10</sup>. It also involves the formation of new interpretation principles and rules and leading e.g., constitutional supervision bodies to procedural traps of a vicious circle of argumentation<sup>11</sup>.

Third, the most perverse logic applies to the problem of the law-making character of hostile constitutional interpretation. Paradoxically, this interpretation really is law-making, even more so than pro-constitutional interpretation. In the latter case, we act in good faith, and applying friendly constitutional interpretation we recognize certain solutions as conforming or non-conforming to the basic law, because we want only norms that meet constitutional standards to be part of the legal system. In the case of hostile constitutional interpretation, it is otherwise: its aim is mostly to forcibly include in the legal system even normative solutions which are clearly unconstitutional, but the authors want them to become the valid law. Of course, on the basis of the adopted interpretation principles and rules we would say it is quite easy: it is sufficient to abrogate those norms from the system using the basis known to all lawyers with average knowledge: *lex superior derogat legi inferiori*. And this is the whole problem. *Interpretatio constitutionis hostilis* does not recognize any commonly accepted paradigms of jurisprudence; it creates its own, new paradigms nobody knew before<sup>12</sup>.

And last but not least, this strategy is very dangerous for the legal order, because using it, people consciously work toward legal chaos and introduce into the system normative acts that are known from the beginning to be contradictory to the constitution, sometimes even grossly.

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## CONSTITUTION-HOSTILE INTERPRETATION

The Author tries to describe a very strange phenomenon which one can observe in actual Polish constitutional practice. He calls it *interpretatio constitutionis hostilis* (constitution-hostile interpretation). The considerations are based on some legislative examples and the Author comes to the conclusion that this constitutional strategy is: firstly, hidden, although applied fully consciously and intentionally; secondly, based on acting in bad faith; thirdly, very dangerous for the legal order.

<sup>10</sup> J. Zajadło, *Sztuczki prawne*, „Gazeta Wyborcza”, 14 January 2016.

<sup>11</sup> J. Zajadło, *Władza bez sakiewki i miecza*, „Gazeta Wyborcza”, 8 January 2016.

<sup>12</sup> J. Zajadło, „Nowa” PiS-owska nauka prawa, „Gazeta Wyborcza”, 29 December 2015.