

# **NOWA KODYFIKACJA PRAWA KARNEGO**

**Tom XLIII**

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# Polish Judiciary and the Constitutional Fidelity. “In Judges We Trust”?

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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 be-  
tween the public powers, social dialogue as well as on the principle of sub-  
sidiarity 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

As the Polish government continues to strike at the very heart of the rule of law  
by refusing to implement, and publish, the judgments of the Constitutional Court<sup>1</sup>,

<sup>1</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-polish-constitutionalism-at-trial/](http://www.verfassungsblog.de/chess-boxing-around-the-rule-of-law-polish-constitutionalism-at-trial/); A. Śledzińska-Simon, “Poland’s constitutional Tribunal under siege”, at [www.verfassungsblog.de/en/polands-constitutional-tribunal-under-siege/](http://www.verfassungsblog.de/en/polands-constitutional-tribunal-under-siege/); M. Kislowski, “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” at [www.icconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/](http://www.icconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/); V. Chadwick, J. Cienski, “Polish opposition challenges

the issue of legal consequences of a judgment delivered, but unpublished and/or unimplemented, comes to the fore. I do not intend to go here into the schemes and statutory shenanigans behind the political assault on the Court as it has been comprehensively explained and dealt with elsewhere<sup>2</sup>. What interests me instead, is to show how disabling the Constitutional Court and constitutional capture of checks-and-balances<sup>3</sup> should translate into the case law of ordinary judges. This latter aspect received only scant attention from the academia.

It is only fitting then to make inquiries about the possible judicial reactions to the constitutional capture in a book honoring the work of Professor Tomasz Kaczmarek. His writings and public engagement never shied away from the challenges facing Polish judiciary as he often bemoaned the untenable *status quo* on the ground and emphasized the growing chasm between “law-text” on the one hand, and, what he called “deformations in law’s factual operation”, on the other<sup>4</sup>. Yet, doing so, he always spoke from the position of a true *amicus curiae* who not only puts great stock in truly independent and reflective judges, but also realizes how much work still remains to be done to make this ideal come true. His was not a simple critique, but a true concern and readiness to speak up so that things might get better. Writing with his usual perspicacity, intellectual elegance and piercing thoughtfulness for the 2015 classic treatise on Polish criminal law, he rightly asked

new law on constitutional court. A growing political crisis worsens” at [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”, at [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” at [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”, at [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” at [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>2</sup> For a succinct and incisive analysis see L. Garlicki, “Disabling the Constitutional Court in Poland?” (pp. 63–69) and M. Wyrzykowski, “Bypassing the Constitution or changing the constitutional order outside the Constitution” (pp. 159–179), in: *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H.C. Rainer Arnold*, ed. A. Szmyt, B. Banaszak, Gdańsk 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*, available at [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).

<sup>3</sup> For the concept of constitutional capture see J.-W. Müller, “Rising to the challenge of constitutional capture”, available at <http://www.eurozine.com/articles/2014-03-21-muller-en.html>, and T.T. Koncewicz, “Of the Politics of Resentment and European Disintegration: Are the European Peoples Ready to Keep Paddling Together? Part I”, available at <http://www.iconnectblog.com/2017/02/of-the-politics-of-resentment-and-european-disintegration-are-the-european-peoples-ready-to-keep-paddling-together-part-i/>; Part II available at <http://www.iconnectblog.com/2017/03/of-the-politics-of-resentment-and-european-disintegration-are-the-european-peoples-ready-to-keep-paddling-together-part-ii/>

<sup>4</sup> *The System of Criminal Law*, ed. T. Kaczmarek, Warsaw 2015, p. 274.

fundamental questions that should focus our discussion about the state of the Polish judiciary as we move forward. These questions touch on:

the manner and style of doing justice by the generation of youngest judges, the quality (or lack of it), of their university education and training to perform a judicial **mission** of solving pressing conflicts, human fates and tragedies. Various replies are possible to these questions, yet more often than not, they express pessimism and raise justified concern over the state of the Polish judiciary<sup>5</sup>.

The main argument espoused in this contribution should not be seen through the prism of the critique of Polish judges. That would be an oversimplification and yet another example of dangerous “passing the buck” syndrome that has been besetting Polish judiciary for years now.

Quite the contrary. This contribution should be seen first of all as a vote of confidence and trust in the Polish judiciary in these difficult constitutional times. Of course, the question of whether they will indeed be up to the challenge and will meet our hopes is a different one altogether. In what follows, though, I will argue in favor of guarded optimism. There is light at the end of the tunnel and long overdue internal judicial empowerment and soul-searching might be in the making.

### Institutional “Great Yes”

Not only humans have their own moments of truth. Institutions do too, and the choices they make in 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) is important 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.

On April 26, 2016 the General Assembly of the Polish Supreme Court composed of 85 judges of the Supreme Court and acting to ensure uniformity of the case law of ordinary and military courts, adopted the following resolution: “in accordance with Article 190 paragraph 2 of the Constitution, judgments of the Constitutional Court shall be immediately published. Unpublished judgment of the Constitutional Court that declares the specified provision to be unconstitutional

<sup>5</sup> Ibid., p. 273 (emphasis in the original; my translation).

repeals the presumption of constitutionality on the moment it is pronounced by the Court in the proceedings”.

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, the 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 criticized as inadmissible and outrageous statements by politicians which refer to the General Assembly of the Supreme Court as a “group of buddies”. The Preamble to the Polish Constitution and its Art. 10 states 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 respect of the judicial independence in a democratic state ruled by law in which courts and 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. The 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).

### The courts have spoken but how and why does it matter?

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. The 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>6</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 mobilization, speaking in one voice. However, as consequential as this process is, it is not enough to deliver goods in Poland today. Much more is needed: constitutional fidelity which transcends lawyers' heads and touches people's hearts.

### 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. 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>7</sup>.

This raises important questions for my own understanding of fidelity to the Polish Constitution and 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 a 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, can 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

<sup>6</sup> T.C. Haliday, "Why the legal complex is integral to theories of consequential courts", in: *Consequential Courts. Judicial Roles in Global Perspective*, ed. D. Kapiszewski, G. Silverstein, R.A. Kagan, Cambridge 2013, pp. 337, 339.

<sup>7</sup> J.M. Balkin, "Agreements with hell and other objects of our faith", *Fordham Law Review* 65, 1997, p. 1703.

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. 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 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. The Preamble to the Polish Constitution shows the commitments 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 yet been met. This never-ending meandering between the past and the backward-looking and the future with its forward-looking is a matter of constitutional reflection and politics. Such 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 realized (argument often repeated by the new Polish majority in favor of rejecting the Constitution) must not detract from our fidelity. Quite 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 the 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>8</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.

### Polish judges and the Constitution. 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 12 months. How these resolutions will translate into the daily practice of lower courts is altogether a different question.

### "In Judges we Trust?" Not so fast

The common thread that runs through the resolutions 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 come. 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 law-mak-

<sup>8</sup> J.M. Balkin, R.B. Siegel, "Introduction", in: *The Constitution in 2020*, Oxford 2009, p. 4.



er<sup>9</sup>. Polish judge is a true believer in what Lord Reid ridiculed 40 years ago as a fairy tale that bad decisions are given when a judge muddles the password. As a rule, the fairy tale goes, simply uttering “open Sesame” should do the trick<sup>10</sup>. As a result when a case breaks the mold and calls for more than just textual reconstruction, a 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 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>11</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>12</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 have 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

<sup>9</sup> For a more detailed and multi-angle analysis see T.T. Koncewicz, *Prawo z ludzką twarzą* [Law with the Human Face], Warsaw 2015.

<sup>10</sup> The quip comes from his celebrated essay “The judge as law-maker”, *Journal of the Society of Public Teachers of Law* 12, 1972–1973, p. 22.

<sup>11</sup> More on this T.T. Koncewicz, “‘Mechanical jurisprudence’ under strain? Eastern Europe judiciary under the European influence”, in: *Liber Amicorum Judge Lech Garlicki*, ed. M. Zubik, Warsaw 2017.

<sup>12</sup> See an English version of his most famous treatise *The Judicial Application of Law* (1991), translated by Zenon Bankowski and Neil MacCormick.

the transformation, the approach marked by the mechanical attitude to law and by textual positivism continues to be one of the most long-lasting legacies of communism. The fear of being creative and critical is omnipresent and every attempt by a judge to interpret the statute beyond 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 opinions and defend them in the public” which then results in the structural judicial independence, but no mentally independent judges. 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>13</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 these 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.

### Not all hope is lost (yet)

Last but not least, these two pronouncements must now be read in the light of most recent developments in the case law of two Polish supreme courts. On March 17, 2016 the Polish Supreme Court delivered a judgment in which it declared unconstitutional one of the provisions of the Tax Code<sup>14</sup>. Crucially, the Supreme Court found it 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 it has already declared unconstitutional provision in the Code which was identical

<sup>13</sup> Z. Kühn, *The Judiciary in Central and Eastern Europe. Mechanical Jurisprudence in Transformation?*, Leiden, Boston 2011, p. 201 (my emphasis).

<sup>14</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>.

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 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>15</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 marginalize 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, the SC might as well build on this precedent. The big question is whether this empowerment will trickle down to the lower courts?

"Constitutional fidelity" becomes of paramount importance in the light of 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>16</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 criticized in the strongest possible words the practice of singling out its rulings that will be published in the Journal of Laws, and those 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

<sup>15</sup> The 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. See <http://www.lex.pl/czytaj/-/artykul/nsa-wyrokuje-w-oparciu-o-niepublikowane-wyroki-tk?ref-erPlid=5227804>.

<sup>16</sup> For more see T.T. Koncewicz, "Of constitutional defiance, migration and borrowing of unconstitutional tactics and European defiance", available at <http://www.iconnectblog.com/2016/08/of-constitutional-defiance-migration-and-borrowing-of-unconstitutional-tactics-and-european-resistance/>.

the future publication of the Courts' rulings dependent on the consent of the legislative branch. For the Court this is an inadmissible encroachment by the executive on the competences of a constitutional court and aims at the stigmatization 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 the Republic of Poland belongs. The Tribunal was clear: *all* rulings are unconditionally binding and must be published.

### “Bottom-up” constitutionalism and translating constitutional fidelity

“It is the institutions that help us preserve decency. They need our help as well. Do not speak of ‘our institutions’ unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other unless each is defended from the beginning. So choose an institution you care about — a court, a newspaper, a law, a labor union — and take its side”<sup>17</sup>.

As Balkin rightly reminds us: “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 a sense of belonging, emotions, tradition and history. Only a 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 a 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. Recent months<sup>18</sup> saw the biggest mass protests post-1989. In Warsaw and elsewhere thousands of people took to the streets and made their voice heard against hijacking of the last 25 years of Polish history. This political mobilization of Polish society must be seen as a reminder of the 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

<sup>17</sup> T. Snyder, *On Tyranny, Twenty lessons from the twentieth century*, London 2017, p. 22.

<sup>18</sup> My time frame is that of writing, that is October 2016.

of openness and tolerance. The 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, are all built on the tradition of limited government, separation of powers, centrality of the individual and respect for the self-imposed rules that had been a staple of Polish constitutional narrative and on which the Polish Constitution now builds.

My appeal to “constitutional fidelity” of Polish judges is premised on the assumption that the judges are ready to finally leave their comfort zone and will make 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. There is simply no place for indifferent “business as usual”.

The politics of refusal by the executive to publish and implement the judgments of the Constitutional Court is indeed mind-boggling and unheard of in Europe. It was never entertained by the Polish founding fathers either. When the Constitution of 1997 was 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 Polish judges embrace and internalize the Constitution as true law of the land, and 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 mobilization are the first symptoms of constitutional fidelity in the making. As we continue to discover our fidelity on the fly, the 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.

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

Both work and life of Professor Tomasz Kaczmarek show why our trust in the judges and our yearning for the judicial empowerment do not have to be relegated, as is too often the case in Poland, to the domain of noble dreams.

## Polish Judiciary and Constitutional Fidelity. „In Judges We Trust”?

### Summary

As the Polish government continues to strike at the very heart of the rule of law by refusing to implement, and publish, the judgments of the Constitutional Court, the issue of legal consequences of a judgment delivered, but unpublished and/or unimplemented, comes to the fore. The primary objective of the analysis is to show how disabling the Constitutional Court and constitutional capture of checks-and-balances should translate into the case law of ordinary judges. This latter aspect received only scant attention from the academia. Ordinary courts have their own promises to fulfill when faced with the all-out capture of constitutional essentials making up Polish legal order. As we move forward, these courts should be ready to take on the mantle of quasi-constitutional courts and defend the integrity of the system. Whether they are ready to perform such systemic function is a different question altogether.

**Keywords:** rule of law, constitutionalism, judges, courts, judicial review, direct effect, constitutional fidelity, integrity, judicial ethos, fidelity, text v context, judicial empowerment.