What the Oath-Taking Opinion Really Means

The Venice Commission and Non-Formalist Legal Reasoning

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In her recent post here, my colleague[1] at the Venice Commission, Professor Angelika Nussberger, discussing the Venice Commission's potential contribution to the restoration of the rule of law in Hungary, observed: "For the Venice Commission, it is important that the measures aimed at restoring the rule of law are, as a rule, themselves compatible with the overall standards of the rule of law. However, *exceptions are permitted when adherence to existing legislation would perpetuate an unacceptable status quo*" (emphasis added).

The italicized words in this passage, with which I fully agree, emphasize a broader truth related to the dilemmas of restoring the rule of law in a post-illiberal setting: strict compliance with certain statutory rules, especially those enacted by the *ancien régime* deliberately to maintain its power even beyond an eventual electoral defeat, may result in the "perpetuation of an unacceptable status quo", a condition which I had characterized, darkly, as a "Sisyphean democracy". Nowhere is this condition more visible than in post-2023 Poland. A recent Opinion of the Venice Commission on the presidential oath-taking from newly elected judges of the Constitutional Tribunal illustrates well an approach of principled resistance to "adherence to existing legislation". As such, it offers broader lessons for political actors in post-illiberal states, as well as for European adjudicatory and advisory bodies, on how to deal with entrenched authoritarian enclaves embedded in constitutional systems under populist rule and persisting beyond the end of populists' parliamentary domination. The Opinion is a case study of something much broader than the seemingly marginal question of the top executive's (here, the President's) putative duty to administer an oath to judges elected by another body (here, the lower chamber of Parliament) where national law so provides. And it is likely to be relevant in European countries beyond Poland.

Re-creation of the Tribunal

But first, a brief background to the Opinion of 9 October 2026. There is neither room nor, probably, any need here to describe in detail the sorry state of the Constitutional Tribunal, a legacy of the institutional destruction and political capture of that body during the years 2015-2023. As the Sejm (the lower chamber of Parliament) stated in its resolution of 6 March 2024, constitutional violations within the Tribunal had reached a scale that prevented it from performing its constitutional functions, and the situation "requires the re-creation of the constitutional court." The next step was to draw practical conclusions from this assessment. Such a "re-creation" was envisaged in legislation adopted by the parliamentary majority on 13 September 2024, which provided for the election of judges to the CT by a qualified majority of three-fifths of the Sejm, broadened the range of institutions entitled to nominate candidates to the CT, shortened the term of office of the President of the CT to three years (renewable), and introduced the random allocation of cases. But the law never entered into force. President Duda referred it to the CT for ex ante review and, predictably, it was struck down on 29 July 2025.

Fast forward to early 2026. That year witnessed a major turnaround. After several years of effectively

[1] A disclaimer: while I am a member of the Venice Commission, I did not participate in the preparation or adoption of this Opinion because VC rules require that members from the country affected by the Opinion do not participate in a discussion or vote on it. I write here solely in my personal capacity.

"boycotting" the Constitutional Tribunal through a combination of refusing to publish its judgments and leaving judicial vacancies unfilled, the government changed course by nominating candidates to several vacant judicial positions. This shift was driven mainly by the emergence of a sufficiently large number of vacancies, owing to natural attrition, to create a realistic prospect of securing a non-PiS majority on the Tribunal. Thus, 2026 marked a strategic shift in the government's approach to the Tribunal, signalling a move from disengagement to active participation in reshaping its composition. In March 2026, the Sejm elected six new judges, all with the governing coalition's support, while the opposition either voted against them or abstained. A seventh judge followed in June, and an eighth in September 2026. The ninth vacancy, and thus the ninth new judge, is due in January 2027.

Presidential Refusal

But at this point, a major institutional struggle, encapsulating the fraught cohabitation between President Karol Nawrocki and the government led by Donald Tusk, commenced. With the exception of three judges, President Nawrocki refused to administer the oath of office to the remaining five. The reasons offered were vague. Presidential spokespersons suggested that certain nominees' profiles raised doubts in the President, or that he simply needed more time before administering the oath. Neither they nor the President ever provided a clear timeline for when he would invite them to his office for the ceremony, or whether he intended to do so at all.

In response, the "2026 judges" who had not been sworn in by the President, loyally supported by the judges who had previously taken the oath before the President, took an oath "addressed to" the President, as the text put it, but in his absence from the ceremonial hall of the Sejm, in the presence of the Speaker of the chamber, a notary, several other public officials, and former Presidents of the Constitutional Tribunal. They subsequently sent certified copies of their declarations to the President who, predictably, reacted with indignation and declared that this "circus" (as he put it) disqualified its participants from serving as judges of the Constitutional Tribunal. He refused to recognise the validity of the commencement of their terms of office, a position shared by the incumbent President of the Tribunal and by the entire opposition.

Critics of the new judges argued that the statutory prerequisite for assuming judicial office was the taking of the oath before the President, an act rendered impossible, it should be noted, by the President's own persistent refusal to perform it. The newly elected judges and the governing coalition, by contrast, argued (correctly, in my view) that the only necessary and sufficient constitutive act is election by the Sejm. This is, after all, the only act expressly provided for in the Constitution regarding the appointment of Constitutional Tribunal judges. On this view, the swearing-in ceremony is precisely that: a ceremony. It adds symbolic solemnity to the appointment but derives solely from the statute governing the Constitutional Tribunal. As such, it cannot alter the constitutional framework by making the commencement of judicial office dependent upon a ceremonial act that the Constitution itself does not require.

The Commission Opines

At this point, the Venice Commission was drawn into the dispute. In its Opinion of 9 October 2026, requested not by any Polish body but by the Monitoring Committee of the Council of Europe (although the President's decision to send his senior legal adviser to Venice may be seen as implicit recognition of the Commission's authority), the Commission found the President's refusal to administer the oath unlawful.

Overall, it pursued a strategy built on the distinction between constitutional and statutory regulation and, consequently, between constitutive and ceremonial acts. The Opinion relied on a comprehensive comparative study of European states in which a distinction exists between the election of constitutional court judges and the taking of an oath before a body other than the electing authority (paras. 40-42), and concluded that, while "there is no uniform European model as regards the legal source governing the oath and the authority before which it is taken" (para.

53), nevertheless "even where the Constitution provides that the President of the Republic administers the oath, this does not imply that the President has the power to examine the merits of the appointment…" (para. 55). All the more so, this must be the case in countries where oath-taking is regulated by sub-constitutional legal sources (para. 55). Hence, in those countries (such as Poland), "the President does not have any discretionary power in respect of the oath taking: he or she is legally required to administer it" (para. 56; see also paras. 63-65). And if the President "unlawfully refuses to administer the oath" (para. 81), "the oath-taking requirement may (…) be fulfilled without the President's physical participation", for instance, "in the prescribed form, addressed to the President through a duly verified official written document and formally submitted to the President" (para. 84).

The Lessons

Yet, as important as *what* the Opinion determined is *how* it made its argument. From a methodological perspective, and particularly from the standpoint of legal argumentation in the process of restoring the rule of law in post-illiberal regimes, paragraph 81 of the Opinion is crucial and therefore deserves to be quoted in full:

> *"In the present case, the Commission is of the view that, in the prevailing circumstances of non-effectiveness of the constitutional remedy, strict adherence to the statutory requirement that the oath be administered before the President would enable the President, by refusing to act, or by applying to the Constitutional Tribunal to prevent the assumption of office by judges validly elected by the Sejm and thereby frustrate the constitutional distribution of powers. In such exceptional circumstances, it is arguable that the statutory requirement concerning the administration of the oath cannot be interpreted so as to permit the obstruction of the Constitution itself. Accordingly, the Commission considers that it is constitutionally justified to permit the assumption of office and the start of the judicial service relationship without the President's participation where the President unlawfully refuses to administer the oath. Although such a solution would depart from the literal wording of the relevant statutes, it would better preserve the constitutional allocation of powers and prevent the abuse of a merely ceremonial function to obstruct the functioning of the Constitutional Tribunal. The Commission moreover considers somewhat artificial the distinction between obtaining the status of a judge and the commencement of the judge's employment relationship, which depends, inter alia, on the assignment of cases by the President of the Constitutional Tribunal" (para 81, emphases added).*

I draw attention to the following features of the reasoning, which far transcend the specific Polish case:

1. The supremacy of *constitutional* principles over *statutory* regulations, and the setting aside of the latter when they contradict the former;
2. The idea that *exceptional* circumstances (as the President's unlawful conduct can arguably be characterized) call for departures from ordinary rules (see below, point 3);
3. A tolerance for departures from *literal* wording when its implementation would facilitate an abuse of power;
4. The distinction between what is *fundamental* (the "constitutional allocation of powers") and what is secondary and merely marginal ("a merely ceremonial function"), together with the primacy accorded to the former where it risks being nullified by the latter;
5. The rejection of extreme *formalism*, exemplified by the distinction between elevation to the office of judge and the commencement of a judge's employment.

These five themes, which may strike more formalistically minded lawyers as controversial, perhaps even unacceptable, cohere into a distinct methodological pattern that may, and I believe will, be applied far beyond the specific question of oath-taking and far beyond the Polish case. I welcome this approach. At

the same time, I recognize (grudgingly, to be honest) the reasons for the more traditional view held by legal formalists who adhere to an orthodox understanding of the rule of law, according to which public authorities must comply with all laws that remain formally in force, regardless of their origins, purpose, or normative quality. The difficulty with this position, however, is that, as the three years since the democratic coalition's victory in Poland have demonstrated, it becomes a recipe for the paralysis of reform. Or for a Sisyphean democracy.

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