Being a Lawyer in Times of "Constitutional Pandemics"

On Sheltered Memories and Fidelities: Personal and Constitutional

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04.05.2020 doi: 10.17176/20200504-133742-0

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.

C. Cavafy, Che Fece … Il Gran Refiuto

The majority of the readers of *Verfassungsblog* write and engage in academic discussions aimed at better understanding the rampant anti-constitutional shenanigans and at finding adequate cures. While this crucial conceptual work must continue, it is no longer sufficient. Much more is needed, no less a constitutional temperament and engagement on the ground that place us and our work in a more general context and explain what and how we respond on a behavioral level. Looking through the prism of temperament invites questions about the necessary virtues that go beyond academic excellence. This is clearly palpable in the evocative concept of constitutional fidelity.

The times of isolation like the ones we live in right now helped me to stop for more than a second, reflect and understand and contextualize my own role in all that is going on and beyond.

The Personal. History of one Great Yes

Let me start on a personal note by telling you the story of my grandmother, Czesława Kisielewicz Strąg, and little Jewish girl Rozalia Kateganer. It is a story showing the importance and difficulty of choosing rightly and wisely when time comes calling. It is a story of one Yes, so simple in its expression and yet so great in its symbolism and consequences.

Rozalia Kateganer was born in Kańczuga, Poland, in 1935. Her parents escaped at the beginning of the war and arrived in Brzeżany, in the Eastern Borderlands (Kresy), but when persecution of the Jews began there in 1942, Rozalia's mother was captured by the Germans and never seen again. Her father wanted to find someone to hide his little girl. He decided to ask Czesława Kisielewicz, a 19-year-old Polish girl who lived next door, if she would take it upon herself to protect his daughter. Czesława agreed. She had her priest baptize the child and issue a birth certificate under the name of a girl of the same age she knew who had been sent to Siberia by the Soviets. Rozalia Kateganer became Maria Szkolnicka. Czesława tried to move out of her parents' house and find work to support herself and the child but was unable to do so. She was desperate for a solution and sought the advice of her family doctor, whom she knew and trusted. He advised her to send Maria to a Franciscan orphanage nearby in Podhajce. Mother Superior Helena Chmielewska, another remarkable woman with Her own Great Yes, was made aware of the little girl's real origins and did not hesitate to receive her. She cared for her with love and dedication.

Maria's father was kept informed of her progress and sent contact information for relatives in the United States, in case he should not survive the war. Indeed, in 1944 he was captured by the Germans and, like his wife, murdered. After the war, serendipity helped Czesława and Maria to reconnect. Amid the chaos and redrawing of the borders, my grandmother and her family were resettled to Nysa, in southwest

Poland. One day, on her way to work, she saw a group of children led by a nun on a bridge over the Nysa River. As it turned out, Maria's orphanage was … also evacuated to Nysa.

Maria started medical studies in Wrocław and became a pediatrician. My grandmother and her family settled for good in Wrocław, where my mother and I were born. Maria eventually joined relatives in the United States, where she married Marek Damaszek, himself a Holocaust survivor. Throughout all these years Maria and Czesława stayed in touch. My grandmother visited Maria in the United States on numerous occasions, and Maria visited us in Poland. Maria corresponded also with, and supported, Sister Helena Chmielewska for the many years that she lived and visited her as well. My grandmother passed away in March 2010. In 2014 Yad Vashem recognized her, her mother Rozalia Kisielewicz and Sister Helena Chmielewska as the Righteous Among the Nations.

Learning and living my own Great YES

Why does their history matter now, and how does it resonate with me?

During my law studies in Wrocław, I lived with my grandmother. I found her stories captivating, yet I was so busy with my studies that I did not really reflect on the deeper meaning of our conversations. The last six weeks helped me to recall some of the conversations I had with my grandmother over the years and to dwell on the messages hidden therein. I came up with "5 Nevers" that I believe defined her life and should define mine. *First*, never allow the limitations of others to become your own limitations. The moment you allow this, you stop living your own life and start living someone else's. *Second,* never accept business as usual. Sometimes you have to stand up and let your voice be heard, regardless what others say and think. Business as usual robs us of the courage to say No to comfortable routine. *Third*, never accept the view, "No, that can't be done". Indeed, I keep hearing (for an example of my own YES that went against the mainstream see here) such "a comforting good advice" all the time. I reject comfortable narratives as I see it as a convenient excuse for doing nothing. *Fourth*, never compromise when fundamentals come into play. Sooner or later shortcuts will catch up with you. Finally, *fifth*, never look the other way when injustice happens. Speak up.

Living now in the captured state of opportunism and surrounded by rampant legal relativization and cynicism, provides a perfect testing ground for these 5 Nevers. It invites to ask more general questions about the academic ethos in times when more often than not things do not go as planned. In such times we lawyers are constantly being put to our own tests.

Great Yes: Constitutional dimension

The concept of constitutional fidelity stands for more than a duty to observe the text. Fidelity is painted with broader attitudinalbrushes. J. Balkin has argued 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."*

How does this affect lawyers then, and academia in general?

The last 5 years have been a real shock for all those who believed that Polish democracy is a consolidated

democracy and that Poles are full citizens. If rebuilding the rule of law is to be effective this time, it must be carried out on more solid civic foundations. Lawyers and academics have a special role to play here. If we truly want to give the rule of law a chance, we need to supplement thus far dominant institutional thinking with the tedious and less spectacular process of building attachment to the state ruled by the law with a human face and to the institutions that first of all protect the citizens. With constitutional essentials of our respective legal systems on the line, lawyers must change and adapt their vocabulary and conceptual arsenal to better prepare for constitutional times when things do not go accordingly. We must start translating a constitution for fellow citizens in the spirit of greater inclusion so as to make it *their* constitution. We must help build a constitutional culture that will strengthen constitutional law and individual fidelities to the founding document. We must stay vigilant and understand that each and every voice can ultimately bring about a change for better because as Ovid put it, "the drop drills the rock not by force but by frequent falling".

Times for cozy writing, academic hair-splitting and comfortable lecturing and preaching to the converted have long passed. We should wake up to this new reality and change our ways of doing things and explaining the world. We must understand that all too often the law of the XXI century not only *protects* and is used at the service of good causes. Law is also prone to *abuse* and *manipulation*. It masks and legitimizes anti-constitutional practices and hides the true malicious intents that drive the minds of smart legalistic autocrats. Law in their hands creates a veneer of legitimacy. We must be able to see through all this, alert our fellow citizens to the new dangers and educate them accordingly. We must show solidarity and practice active empathy towards our colleagues who are persecuted.

Saying nothing when something should be said is tantamount to tacit consent. Such a symbolic resistance by speaking up is crucial to building a societal agreement on what constitutes a violation and to explaining to the citizens what *the law,* rather than the skewed interpretation imposed on the public discourse by the new authoritarians, really mandates. It will leave a trail of symbolic resistance that will serve as a signpost to look for and guide us in better constitutional days. Nobody will do it for us, and silence will always equal giving up. *Non possumus* is simply no longer an option and looking the other way only emboldens the other side. Again, the concept of fidelity perfectly captures these behavioral challenges and defines our frame of reference:

> *"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."*

The YES and NO within each of us

As I write these words, for those of us who care about the constitutions, culture of limitations, good and decent government and are ready to speak up in defense of these constitutional virtues, the days of true constitutional reckoning have indeed arrived. As powerfully argued by Professor M. Wyrzykowski "*The*

ghost of an authoritarian state stands at the door of your home. It will not knock on the door. It will come in uninvited. And it will stay a long time". Each of us always faces his own day when he will be called upon to answer with his own Yes or No.

One nagging question has always been coming back to me and, I am afraid, will never go away. How would I have behaved in those inhuman times that my grandmother must have lived through? I have to be honest: I simply don't know. This feeling of uncertainty makes me feel uneasy and uncomfortable. It looks like sometimes you can't have all the answers in advance. All I can hope for is that when the day comes, I have and will have what it takes to make the right choice and live by it. As put by Cavafy: *"It's clear at once who has the Yes ready within him."* And yet, despite this uncertainty I am pretty sure of at least one thing that uplifts me in trying times when heart and resolve sink. My grandmother's Great Yes will forever live with my family and me. I know that I must always avoid complacency, stay vigilant, look around and get ready for my own unique Great YES, say it, find solace in it and be ready to live with the consequences of a decision which I feel is true to myself. This gives me peace of mind. The life and its immeasurable diversity will in the end put all of us to the ultimate test of decency and humanity. Then, you will have your own YES/NO within you or … you won't. We should never forget that what truly matters is how we live our lives and treat others, what we believe, and what we do. Good life is not about grand gestures, but about little things, a kind smile, an honest word of encouragement, here and now, day by day.

This is something I have learnt to better appreciate during last 6 weeks. For that I am forever grateful to my late grandmother and her own Yes that keeps influencing my own choices as a lawyer and an academic and underpins my set of values. After all, why would I feel discouraged and give up and throw my arms in despair now, when she never had in the darkest of days and always stayed true to her own Great Yes?

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SUGGESTED CITATION

Koncewicz, Tomasz Tadeusz: Being a Lawyer in Times of "Constitutional Pandemics": On Sheltered Memories and Fidelities: Personal and Constitutional, Verfassungsblog, 04.05.2020, doi: 10.17176/20200504-133742-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200504-133742-0.