# Hostile Constitutional Interpretation

## Sending a Warning in Rebuilding the Polish Constitutional Court

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What to do with the façade institution that was once known as the Polish Constitutional Court in a way that would respect the Constitution? Recently, the Supreme Administrative Court stated the obvious when it remarked that the Constitutional Court has been infected with illegality and that "the Constitutional Court in its entirety has therefore lost, in a material sense, its ability to adjudicate in accordance with the law".

The question "what after the constitutional crisis" touches not just on the three usurpers that have been unconstitutionally forced on the bench in December 2015, in clear contravention of the judgments of the "old" Constitutional Court – a fatal flaw that has contaminated the institution ever since. It also brings to the fore equally fundamental questions on the future of those judges of the Court who were elected legally by the Parliament but who accepted the unconstitutionality by adjudicating willingly and hand in hand with the usurpers, thereby undermining the very foundations of the Polish legal order with their decisions.

While the usurpers must let go unconditionally, the persons elected by the Parliament were, at least formally speaking, elected lawfully and are the "judges". A recent and important proposal has argued that the judges who were legally elected by the current Parliament though they have supported the politicization of justice should enjoy the same right to retire as their legal predecessors. They would be given the opportunity to decide whether they want to continue as judges or retire. Otherwise, the argument goes, by refusing these judges the same privilege that their predecessors have enjoyed, we would be introducing unconstitutional discrimination.

We have serious doubts as to the long-term desirability of such a solution. We need a theory that explains why also these lawfully elected judges should be let go as a result of their blatantly unconstitutional adjudication, and why the entire unconstitutional body should be extinguished, rather than simply be tinkered with here and there. This must happen in accordance with the Constitution, because otherwise we would commit the same sins as those who brought about the demise of the Court. In these extraordinary times, formality of the election alone must not suffice. We cannot simply accept "business as usual" (on the danger of internalizing the unconstitutionality as a way of life, see here), because it would create the appearance of legality.

### Own up to your sins

„A retired constitutional judge" sounds honorable. In normal times, the status is a privilege automatically tied to the status of a judge and serves as one guarantee of judicial independence. However, this assumption only works if the judge carries himself with dignity, integrity and lives up to the title of "a constitutional judge". However, the basic assumptions and paradigms must be revisited in case of a manifest and serious unconstitutionality. The solution adopted must serve as a warning for the future.

Hence, our argument comes down to refusing the judges behind the constitutional abuse and well-documented excesses of judicial review their right to retire as constitutional judges. Simply put, these judges must be reinstated to the situation *status quo ante* that corresponds to their positions held at the moment of their election to the Court. We realize that this might seem radical at first. Radical does not mean unconstitutional, though. Let us be clear that our proposal is

not about revenge or punishment. What we are concerned with here is simply making sure that these judges are not rewarded and that the practice of manifestly unconstitutional adjudicating and succumbing to political power will never be repeated. Would our proposal be creating a precedent? Yes, but a precedent that responds directly to the unthinkable constitutional debacle of these judges' direct doing. Distorting the judicial mandate beyond recognition and harnessing it for political justice must not be left unanswered. One scenario, contrary to our proposal, is that a retired judge responsible for perpetrating manifest unconstitutionality would have their accountability be subject to disciplinary proceedings. While we take this solution seriously, we suggest that such a *modus procedendi* should be reserved for situations where the rule of law is embraced and observed. Poland 2015 – 2023 does not meet these criteria. Of course, nothing would prevent judges who claim to have been wronged by a refusal to grant them the status of retired judges to seek judicial protection in the courts. However, in our proposal, it should be up to these persons to prove that they have not participated in the political justice that "their Court" was responsible for. *Onus probandi* matters here: given the widespread constitutional abuse and manifest unconstitutionality, the fitness for retirement as a constitutional judge must be proven by the interested persons, rather than being simply presumed with all the attendant privileges. While this presumption should, and rightfully so, prevail in a state ruled by law, the changed burden of proof as espoused here must be reserved for exceptional situations of an entrenched and manifest unconstitutionality. Poland A.D. 2023 is the latter, not the former, and we lawyers should be ready to adapt our thinking accordingly.

In our view, the concept of hostile constitutional interpretation helps to better understand and to put in more systemic context our proposal. It responds to the novel challenges entailed by the unprecedented assault on the constitutional order paradoxically by those who were elected to protect it.

## "Hostile constitutional interpretation" - what is in a name?

Hostile constitutional interpretation is a political strategy, adopted in this instance by the constitutional judges, and accompanied by specific perverse political rhetoric with primitive populist undertones. The authors of this strategy usually demonstrate the will or duty 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," etcetera. This strategy is deeply concealed behind the screen of showy slogans. In the current situation, the often-repeated phrase "our legislation is compliant with the Constitution because it was confirmed by a verdict of the Constitutional Court" is particularly perfidious. It creates a false appearance that the conflict is allegedly between the Constitution and the EU law, whereas the true conflict is created repeatedly by the blatantly unconstitutional statutes which pass the muster of the unapologetic rubber stamping from the usurpers and their acolytes. Therefore, *interpretatio constitutionis hostilis* is an example of extreme instrumentalization of 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.

## Understanding the animus behind the hostile interpretation

In the Polish context, the examples of *'hostile constitutional interpretation'* by the Constitutional Court are multiple, including a recent "decision" on abortion or rulings entailing a factual POLEXIT from both the ECHR and the EU legal order. The Constitution has been torn apart and cast away by the very judges that were called upon to protect it.

While hostile constitutional interpretation is a *sui generis* phenomenon, the post-2015 trajectory of the body that was once the Polish Constitutional Court allows us to identify its basic characteristics. First, while it is a hidden strategy, it is applied fully consciously and intentionally, sometimes aided and

abetted by other constitutional institutions, for example, the presidential veto or the referral of a law to the Court under the pretense of doubts as to its constitutionality. Sometimes the hostility may refer to a specific provision of the basic law or a certain interpretation 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 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 hostile narrative around the Constitution, because then the mask of "fabricated friendliness" towards the Constitution quickly disappears and the true motives of the enemies of the Constitution are revealed. An expression of this bad faith is reflected by the excessive use of various legal tricks (*apices iuris*) and involves the formation of new principles of interpretation and rules that lead to often vicious circles of argumentation. Third, 'hostile constitutional interpretation' does not recognize any commonly accepted paradigms of jurisprudence. Rather, it creates its own illegal reality and new paradigms that nobody could have imagined before. The aggressive deviations from the constitutionality become more and more obvious and manifest, as the institution grows emboldened by its own illegality and abuse of power. Normative acts that are known from the beginning to be contradictory (hostile) to the constitution and its axiology are then validated with equally hostile entrenching interpretation. Legal chaos and relativity ensue.

## Moving forward and revisiting Fuller

For us, the rationality of the basic question "what after the constitutional crisis?" makes sense only based on the assumption that the constitutional order will nevertheless survive, and that we will not only seek solutions to eliminate the effects of the crisis, but also determine the causes of its emergence and think honestly about the responsibility of its perpetrators. While the problem of restoring the rule of law after lawless times is complicated and multifaceted, the discussion is neither new nor unfamiliar to legal philosophy. In modern philosophy of law, the question of the choices we have when it comes to cleaning up the consequences of the excesses of an autocratic regime have long been debated. In the essay *The Problem of the Grudge Informer,* published in his revised edition of "*Morality of Law*", Lon L. Fuller explored a not all that fictional scenario. After the fall of a regime, called the Purple Shirts, the new Minister of Justice calls his five deputies and asks them what to do "after". Five different answers are given, which for the sake of our argument might be presented as follows. First – there is nothing we can do: the Purple Shirts regime was a legal regime. Despite all our negative assessment, it was nevertheless the law. Second – even though the Purple Shirts regime was a state of lawlessness, let's drop the veil of silence over this dark period, cross it off with a thick line and move forward without burying ourselves in the past, and without resorting to their methods. Third – we must be ready to distinguish and separate the wheat from the chaff: while some of the actions of the Purple Shirts regime were normal and lawful, others constituted a manifest lawlessness. Those behind lawless acts must be held accountable in an equitable way and according to our legal standards. Fourth – in the name of restoring elementary justice, a new law should be passed that would provide a legal basis for holding the Purple Shirts' accountable for their crimes, even if it is retroactive. Fifth – we should stay put and do nothing and leave it to the people, who will handle the problem in their own way and deliver the Purple Shirts the justice that they deserve. Simply: let's "give an outlet to the human instinct for revenge".

Fuller ends his text with the following question: "As Minister of Justice, which of these recommendations would you adopt?". Our analysis should be read as embracing the third option. As he puts it: "Where the Purple Shirt philosophy intruded itself and perverted the administration of justice from its normal aims and uses, there we must interfere". We agree. Our theory explains why the judges of the Court who are behind hostile interpretations and who have willingly

entrenched the manifest unconstitutionality, have never earned through performance their right to retire as constitutional judges.

## Rebuild as a warning and a fidelity, not a revenge

Anyone who feels ill at ease after reading our analysis, must understand that extraordinary times call for extraordinary measures not simply to clean up, restore the rule of law, but also warn against similar excesses in the future ("it has happened, and now we know that it might happen again"). Otherwise, those bent on destroying the constitutional document will always have a leg-up on those who want to defend it. Simply put, the Court as presently constituted and the many instances of manifest unconstitutionality and abuse that it has helped to entrench are an affront to the rule of law. As we try to ponder the question "what's after the constitutional crisis?" and crucially, how to support public opinion formation on what should happen to the judges who are responsible for constitutional abuse, the many acts of constitutional hostile interpretation must be unequivocally called out, stigmatized, never rewarded or *s*wept under the rug. Our interference must be resolute and calibrated to the gravity of the perversions committed and always stay true to the Constitution. This must be the only way forward.

Today our commitment to "never again" must be tangible and serious. If we get the rebuilding of the Constitutional Court in Poland wrong from the very beginning, that will taint all future ambitions and legislative projects aimed at recapturing the rule of law. All our efforts aimed at rebuilding must be solidly anchored by and driven by the fidelity to the spirit of our constitutional document, downtrodden and humiliated for too long.

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