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**DISPUTES  
OVER CONSTITUTIONAL  
INTERPRETATION IN POLAND**

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prof. Marijan Pavčnik,  
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# Constitutional interpretation matters?

1. Debates in the USA since 1970s.
2. Interpretative turn in legal philosophy (including distinction between rules, principles and policies; method of balancing in case of collision of principles, easy cases and hard cases, concept of law as integrity etc.)
3. Establishment of constitutional courts in Central and East Europe (in Poland in 1985)

# Constitutional interpretation matters?



4. New constitutions in post-communist countries, including (democratic) *Rechtsstaat* principle and the principle of direct application of constitution
5. The concept of constitution conforming to interpretation of statutes
6. Internal and external multicentricity of interpretative authorities

# Constitutional interpretation matters?



7. Experiences of openly political decisions of the Constitutional Tribunal (religion at schools, abortion, “vetting” of communist regime collaborators [“lustration”], various social rights etc.)



# Constitutional v. statutory interpretation

1. Clear distinction in the USA
2. Political nature of constitutional interpretation
3. Between intuitive distinction and empirical data confirming differences

# Poland – long story with happy end?



1. Debates before World War II
2. Influence of the Kelsenian Pure Theory of Law, concept of legal system and the idea of a constitutional court
3. Theoretical not a practical debate (no constitutional court )
4. Strong legal presumption of constitutionality of statutes
5. Search for universal theory of interpretation of laws

## Poland (before WWII) (cont.)



6. Lack of integration (split) between legal theory and legal practice.  
Consequence: neither legal theory nor judicial practice was able to formulate a sound theory of constitutional interpretation

# Constitutional interpretation after 1945



1. Independence lost – purely ideological role of the constitution
2. Disputes over the normativity of the constitution adopted in 1952 (with personal corrections by Joseph Stalin)
3. Constitution as a Basic Law (fundamental statute) [mid 1960s] interpreted in the spirit of Hans Kelsen's theory of law



## After 1945 – Stalinist era (cont.)



4. General critique of the idea of constitutional court and the idea of judicial review of legislation: distrust in judicial independent power (“against judicial bureaucracy”), “an imperative of people’s rules” performed by the Parliament
5. Support to the Montesquieu’s model of limited judiciary and limited interpretative work (“judge as a mouthpiece of law”)

# 1960s – development of legal and constitutional theory



1. Search for universal theories of legal interpretation (J. Wróblewski, Z. Ziemiński, M. Zieliński)
2. Threat of ideological element in the law (“return to the worst past”)
3. Against “unwritten constitutional law”
4. Continuing critique of the idea of judicial review of legislation

# 1980s – the search for legitimacy



1. Growing interest in comparative studies
2. **1985 – the Constitutional Tribunal established**
3. Judicial practice – political game with communist apparatus for social values
4. “Blessed activism” – building of the *Rechtsstaat* (“*democratic rule of law*”)
5. First critiques of the principle of priority of semantic interpretation („black letter approach”)

# After 1985 –search for the standards



1. “Taking rights seriously” – “positivisation” of the human and civic rights
2. Introducing “balancing” and redefining it (principles, values and interests)
3. Disputes around judicial discretion
4. Two conflicts:
  - with the Supreme Court on “interpretative judgments”
  - with the Parliament on “judicial impossibilism” (withholding reforms)

# Autonomous interpretation of constit.



1. New idea developed by the Constitutional Tribunal: meaning of the constitutional terms (notions) is independent from the meanings attached to them by statutes (“court case”, “expropriation”, “ownership”)
2. Argument of limited scope and of specific use of constitutional terms
3. “Taking the Constitution seriously” (in the hierarchy of legal acts)

# Constitutional interpretation of the new Basic Law (after 1997)



1. Principle of the “democratic rule of law” – sometimes preservation of “rule **by** law” and abdication with respect to social and economic issues (differences with German *Sozialerrechtsstaat*)
2. The concept of “rational lawgiver” – obsession of the Constitutional Tribunal
3. Principle of the Constitutional Tribunal as a “negative lawgiver / legislator” – intentional resignation from shaping policies of law

# Serious (although partial) disputes



1. Is judicial activism unavoidable? What is recommended: passivism or restraint?
2. Is there a hierarchy of constitutional values (objectivity of constitutional standards or incommensurability of values (impossibility to compare the weight of competing values))

# Empirical research on constitutional interpretation (1)



1. Between Polycentrism and fragmentation. The Impact of Constitutional Tribunal Rulings on the Polish Legal Order. A report on the study conducted under the Ernst & Young Program *Better Government*), [together with W. Stańkiewicz and J. Winczorek], 2009 [available at: [http://www.ey.com/PL/en/Industries/Government---Public-Sector/Debate\\_Constitutional-Tribunal](http://www.ey.com/PL/en/Industries/Government---Public-Sector/Debate_Constitutional-Tribunal)]



# Empirical research on constitutional interpretation (2)



2. Standards of constitutional interpretation in Poland and in Central and East European countries (grant, 2009-2012) [book in print]
  - a) Theoretical studies and
  - b) Empirical studies

# Conclusions of the recent studies



Interpretation of constitutional provisions narrower than interpretation of statutes (26% v. 84%)

Most popular arguments:

- a) a. from its own previous “decisions”,  
idea of “judicial / interpretative lines”
- b) a. from opinions of legal doctrine
- c) a. from basic principles
- d) semantic arguments

## Conclusions (cont.)



1. Rare references to the decisions of other courts (from Poland and outside)
2. Differences between constitutional and statutory interpretation (different arguments)
3. Internal coherence of decisions of Constitutional Tribunal
4. Changes in the practice of CT prior to 1997 and after that date
5. Positivistic (and passivistic) ideology of Tribunal's decision

# Three important questions



1. Does the concept of the constitutional court as a „negative legislator” determine the practice of interpretation?
2. “Aversion to ideology” – does it have sense in 21st century?
3. Legal positivism in constitutional courts: hard, soft (sophisticated) or dead?



**THANK YOU!**