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# Politics—and Constitutional Courts
## (Judge's Personal Perspective)

*Abstract:* The paper deals with different forms of political impact on the constitutional justice. The main subject of presentation is the analysis of recent Polish experiences which can help to identify better the threats to the independence of the constitutional justice in democratic space. The first part takes the effort to describe the specific phenomenon of political pressure exerted on the constitutional justice through indirect influence (so called "political mobbing"). The argumentation developed in the paper proves that even such indirect and sometimes subtle interferences from the political elite create the very danger for accountability of constitutional justice and have a negative impact on constitutional awareness of the society. The second part deals with typical reasons (ongoing in all constitutional courts) of inevitable "politization" of the constitutional review, first of all the political procedure of appointments of the judges and the political nature of constitutional cases. The thesis is defended through the analysis of Polish experiences which indicate that the presence of politics, inherent element of the constitutional justice, cannot be automatically identified with lack of the objective and independent judgments issued by the judges. Internal independence and formal external guarantees of it allow us to avoid the pathological impact of politics. Two factors have a particularly great impact on the attitudes of judges and support them in fulfilling their responsibility: the continuity of jurisprudential lines, accumulation of constitutional experience (*acquis constitutionnel*) and the permanent dialogue between the constitutional courts and the international courts or among the constitutional courts in the European space.

*Keywords:* constitution building; democracy; non-majoritarian institutions; political culture; political representation; public opinion; fundamental/human rights; judicial review; transparency.

## Political Mobbing Against the Constitutional Justice

### What is the "Political Mobbing"

Political impact[1] on justice including the constitutional courts should not be identified with the political mobbing. The former is a natural characteristic intrinsically linked with the nature of the constitutional justice. The latter (mobbing) is always at least a kind of deformation of relations between the justice system and the world of politics[2]. However, we should propose also a different distinction between the diverse

[1] The topic concerning complex relations between politics and the justice system is largely described in the legal, political science and the sociological literature, see for instance: R. Hirschl, 2004; Murphy F. Walter, 1974; Herbert Jacob *et al.*, 1996; Thijmen Koopmans, 2003; Mauro Cappelletti, 1990; Martin Shapiro, and Alec Stone Sweet (eds.), 2002.

[2] According to the *Oxford English Dictionary* (sec. Ed. volume IX: 929) "Mobbing is violent threateningaction taken in an effort to obtain a definite end and this distinguishes it from rioting and breach of

forms of political interferences into justice: namely between the acts which I would call—the mobbing (itself) as well as the direct, transparent (and not hidden) forms of the political acts against the independence of courts and judges. For the purpose of this analysis we will only look at the phenomena of the political mobbing in itself. Such choice of the topic is dictated by at least three reasons: firstly, the direct political acts against independence of the justice system are inscribed into the nature of undemocratic political structure and belong to the different world being rather the components of the complex reality creating the oppressive political system over the society. It is not my intention to analyze here undemocratic structures (for example those which exist in Belorusia (under Lukashenka) or semi-democratic systems of Russia or Ukraine).[3] Secondly, the political mobbing is less known and less analyzed in the legal and political literature probably because of the objective troubles and difficulties not only with precise identification of these "mobbing acts" but also with drawing of correct and clear distinctions between the normal and non-pathological political impacts on constitutional justice and pathology or deformations of the relations ongoing in the scope of these branches of state power. Thirdly, I am rather convinced about special importance of such an analysis because the slow and invisible process of erosion of democratic mechanisms, which undermines the fundamental principles of the division of powers, seems to be sometimes as dangerous as a direct attack against the independence of justice.

At the beginning, I would like to try to identify some common characteristics of political mobbing which seem to be common elements of apparently different ongoing forms of it.

Firstly, an indirect impact on the activity of constitutional courts exerted—only through legal instruments or political means.

Secondly, the political mobbing is directed rather against the persons (e.g. personally against the judges) than the institution of the constitutional court as a whole. For these reasons the ways of mobbing are more sophisticated, more complex. The process of mobbing is ongoing at the same time on two levels: that of individual psychology of the judges and on the level of public opinion.

Thirdly, the purpose of political mobbing is always motivated by intentions to reach some political goals e.g. direct and concrete political outcomes (e.g. to ensure in the future the "positive" constitutional judgments and to eliminate the risk of unsuccessful legislative activity; to limit too large a scope of the constitutional review, to accelerate the schedule of some cases).

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the peace which are disorderly conduct at large." Only as an interesting side note, it is worth noticing, in the Polish context, we can underline that mobbing is typical for birds' behavior ("The mobbing of hawks or owls is no doubt often dictated by revenge").

[3] My intention is not the analysis of the specific issues of political transformation in the Central European Countries, which present the complex relations and tensions between the different branches of power in that period after the collapse of communism system, see for instance Wojciech Sadurski, 2003 and 2005; Martin Krygier and Adam Czarnota (eds.), 1999.

**Diverse Forms of "Political Mobbing"**

Forms of "political mobbing" are different and less or more sophisticated. In my analysis, I attempt to put in order only some general and typical manifestations of it. Former and present experience and practice in this field allow us to identify three kinds of political mobbing against the constitutional court:

(a) acts promoting negative image of constitutional justice in public opinion[4],
(b) acts directed against the judges personally[5],
(c) acts against the institution—(e.g. against its status, scope of competences, internal rules, budgetary autonomy, enforcement of the judgments)[6].

Now, I would like to concentrate on the acts promoting negative image of constitutional justice in the public opinion.

Of course, the impact of political mobbing on the sphere of the public opinion is usually very strong and it depends also on the existence of largely spread "public prejudices." Public opinion remains the final arbiter in all political battles ongoing in the public scene and the definitive settlement belongs to it. Finally, only a democratic society through its representatives decides ultimately on the structure of state organs and even on the existence of the court (not to mention the scope of competences and the forms its activity). Importance of the public opinion is expressed also in other forms. We should not forget the specific social context and "entourage" in which constitutional review is effectuated in all democratic societies.

The important factor is also the very nature of issues subordinated to that review which differs strongly from the typical judicial cases in the ordinary justice system due

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[4] As an example we could quote a statement frequently repeated by Polish Prime Minister that the Constitutional Tribunal represents in its jurisprudence a specific approach namely the so called "impossibilisim" e.g. nothing is possible. It means that the Tribunal paralyzed the process of transformation trough its negative judgments deciding on the unconstitutionality of laws adopted by Sejm.

[5] For instance, during the last lustration procedure before The Court (*Judgment of the Constitutional Court of the Republic of Poland, Full Court, of 11 May 2007, case no. K 2/07*, Decisions of the Constitutional Court Official Digest no. 5A/2007, item 48; Journal of Laws 2007, No. 85, item 571) the representatives of Parliament asked the exclusion of two members of the bench because of their presumed cooperation with security services. Only some fragmentary information based on the security service files deposited in the IPN was disclosed during the public hearing, which could nevertheless invoke a negative image of the judges in the pubic opinion. Because the information was partial and consisted of a half-truths, immediate verification of the facts became impossible. In consequence, two judges were excluded from the bench to avoid an accusation that they decided in their own personal interest (*memo index in causa sua*). After disclosure of the contents of the secret services files a few month after the judgment, it became clear that the qualification of the judges as former cooperators of the communist secret services had no. justification and constituted unfair procedural abuse applied by the representative of Sejm.

[6] Good exemplification are two drafts of the amendments to the constitutional law provisions proposed by the governmental majority in 2006 and 2007. One of them wanted to impose on the Court a strict formal chronological order of the procedure for all cases (the date of hearing should be determined by the date of initiating the procedure) and the requirement for all cases to be heard by full bench of the court (now there are a 3-judge bench, 5-judge bench, plenary session—for most important issues); the second one wanted to change the rules of election of the President of the Constitutional Court at the moment in which the election of the new President started (the purpose of the amendment was to enlarge the Head of State prerogatives linked with that procedure).

to its sensitivity and its inherent controversies appearing in the political, sociological and sometimes philosophical dimension (abortion, euthanasia, homosexuality, equal treatment of women and men etc.). For these reasons one has to say the very support of public opinion is at least a necessary factor (though not a sufficient condition) enabling the constitutional court activity and allowing it to play a real function as the institution shaping the democratic, constitutional standards and culture among the citizens. Hence, to undermine the status of constitutional courts in the eyes of the public opinion means finally that it becomes a weak and ineffective institution being deprived in fact of real weapons e.g. its authority as an impartial and independent judicial body.

What are the methods applied to raise the public opinion criticism against the court and to undermine its accountability in the eyes of the society?

First and most important purpose is to convince the public opinion that the constitutional judgments express the subjective (politically and ideologically influenced) and arbitrary viewpoints of the judges and not the objective rational legal reasoning. One can say that such specific explanation complies with a largely spread concept of incompatibility of the "majoritarian democracy" and a vague (perhaps too vague?) model of constitutional review.

Some apparent conduct of the representatives of the public bodies can serve for exemplifications of it. For instance, the Polish President formulated—during an official ceremony in the Constitutional Tribunal this year—that the court should be authorized only to apply precisely the constitutional provisions and it should be authorized to issue exclusively judgments on the legal matters which have a clear and transparent "constitutional basis." Such approach would exclude clearly an interpretation used to explain the content of very vague and undefined general clauses (like social justice, notion of democratic state ruled by law, the human dignity and even the proportionality principle etc.). At the same time the President expressed his support for necessary amendments to the Constitution for better determination (e.g. more precise and concrete forms) of the constitutional review, in fact the intention was to limit the prerogatives of the court. This statement was made by the President one month after the judgment (unfavorable for governmental majority) on the unconstitutionality of some provisions of electoral law concerning the sanctions against the local government civil servants who violated the obligation to disclose in a very short time the patrimonial status and economic activities of the closest members of the family. Few days before the judgment the Prime Minister said that the compliance of the electoral law with the Constitution is "more than evident" and the Mayor of Warsaw (the political adversary of the government) should lose her post even though her declaration was submitted one or two days late. Argumentation was simple and populist but very convincing in the eyes of the so called average people—the rule of law is universal and applies equally to all people and no exception from these principles should be accepted. In this perspective, an essential motive of the judgment stemming from the proportionality principle has been finally recognized as the unjustified interpretation of the Constitution and politically and ideologically motivated.

## Critical Views on Constitutional Review: Public Opinion vs Politics

I mentioned above the importance of the public opinion and social or political context for constitutional review.[7] In the framework of my analysis I attempt to defend the opinion that consequent political mobbing against the court, if it transgresses some acceptable level, becomes dangerous for new democratic constitutional culture, deprecating and making fully relative all constitutional standards. In effect, the public confidence in the authentic and reasonable constitutional argumentation decreases dramatically and it destroys necessary space for rational public debate on the crucial legal matters. It should be also noted that a long term impact can appear in the sphere of social attitudes toward for instance the minority rights, social tolerance and other important constitutional values as the freedom of speech, freedom of conscience, privacy or the division of powers. Overturning and decreasing the constitutional review role can not only undermine the public confidence in the court itself but also can marginalize the importance of such values in the democratic society. However, we cannot avoid a question, whether the political criticism toward the constitutional review stimulated by the prominent public personalities has the same nature and exerts similar negative impact as the other kind of external criticism toward the court, for instance, the one presented by the free media. In other words, we need to analyze the issue, whether the open public debate on the accountability of the constitutional court, on the quality of its argumentation and consistency of jurisprudence or even on the arbitrariness of judges, stimulate the same harmful effect on the authority of constitutional courts as the criticism from the highest representatives of the state bodies. If the answer is affirmative, the conclusion would have a dramatic impact on the concept of transparency of the public debate. In such perspective, the latter should also be limited for the sake of protection of the higher value e.g. the constitutional court authority which is one of necessary elements of the democratic society. Adopting such position, it would be finally possible to assume that the constitutional court is a specific state institution which is protected through a "special immunity" from each kind of the external critical evaluation of its activity (including the one presented by the free independent media) and the judges should be placed in an enclave like an "ivory tower."

Of course, such position is not acceptable: the public debate is open *per nature* to all important public topics including the justice system and constitutional review. But, if the answer is negative, we should try to draw the distinguishing elements between both forms of public criticism: the ones made by the high state body's representatives and the others represented by the free media and wide public opinion.

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[7] The supreme courts in democratic states profit from relatively very high positive evaluation according the public survey. In US a 1998 national poll reported that 50% of Americans expressed a high level of confidence in the Court compared to 26% for the executive branch and only 18% for the Congress. But it is interesting to note that Americans, according to a 2000 national poll, were equally confident in the president and the Court (both 49%) and more confident in the military (69%) and police (57%); see Terri Jennings Peretti, 2002.

So it raises the next question, what are such differences or, more exactly, the characteristics typical of the political mobbing described above, which yet could not be related to the other forms of public criticism?

Firstly, the political mobbing meant here as the state bodies' criticism toward the constitutional jurisprudence seems to be an instrument devastating the principle of public power division and can degenerate the relations between the different segments of power.

Secondly, the political mobbing sends a clear signal to the society or to the citizens, which undermines the principle of the rule of law itself.

Thirdly, the negative impact of criticism of state body's representatives is exceptionally negative and devastating the citizen's awareness.

Ad. 1) Official (and sometimes aggressive) statements made by high state executive or legislative representatives on the presumed erroneous constitutional judgments are *de facto* equal to saying: "we know better which laws comply with the constitution and what should be the correct settlements in the matter" (it is illustrated very well by the typical Prime Minister's assumption: "it is more than evident that the judgment should be such or such…"). This way the executive (or legislative) power seems to enter the scope of prerogatives of the other branches of the state power. It destroys finally the necessary balance and introduces pathological relations between the state bodies: some of them—e.g. the legislative and executive bodies express clearly the wish "to occupy the position of the first and most important power branches" in the state.

Ad 2) The rule of law means not only the universal and equal subordination to the rule of law of both the individuals and state organs but also the primacy of legal argumentation over the political interests or majoritarian opinion. It means also the acceptance by conflicted parties of the settlement of the disputes before the court and finally its authority as a state body being a publicly recognized arbiter for all kinds of legal dispute in a democratic state. For these reasons the criticism formulated by the representatives of other state bodies (which are sometimes directly engaged in the dispute before the court), when spread by the public media, has undermined the role of the justice system and sends clear signals to the society that the court is not sufficiently accountable to have necessary confidence of the public opinion. Let us say, it leads to the following conclusion: the constitutional dispute could be—perhaps better and more correctly—resolved outside the justice system. It also means that the duty of subordination of the court authority is relative and conditional. The approach can finally reduce the crucial element of a democratic state ruled by law.

Ad 3) Public opinion receives the information that the legal argumentation is not authentic but always hides a specific political interest, which is "sold" in the form of a specific "package"of the legal reasoning. In such perspective, the judges are never authentic and they could never represent their own legal opinions, evaluation and viewpoints. If everything is relative, non authentic and subordinated to the current and unclear interests, unavoidably such opinion would be consequently related to all institutions of democratic state, not only to the Constitutional Court and other judicial bodies. Such kind of experimentation on public awareness is especially dangerous for

the societies which—like the post-communist ones—were living for more than 40 years in the public space impregnated by official hypocrisy and great lack of an authentic public debate, which in the stable democracies is based on the presumption of good faith of all participants of the political or legal dispute.

The above mentioned negative impact cannot be related to the free media critical approach toward the justice system. To the contrary: the open public debate, representing rather differentiated viewpoints and argumentation is a necessary condition to spread the constitutional culture among the society. The public debate cannot be limited and all important topics should be a subject of the open public discourse in democratic space. It is justly underlined by legal doctrine that judicial activity, especially the constitutional review, is the subject of legitimated public interest. The democratic society can use (and should use) different kinds of monitoring the activity of all state bodies (including the judiciary) and free media monitoring is one of the most important instruments of it. However, the relations between the media and the judiciary institutions are not easy and become sometimes a very fragile and delicate matter.[8] Very often the decisions of the court in the constitutional debate have to be contrary to the prevailing opinion represented by the majority of democratic society. The specific pressure exerted sometimes on the attitude of the judges by the public opinion through the media can create a situation in which hostile social environment seems to raise (at least psychologically) a barrier to passing good and objective e.g. constitutionally justified decisions (for example in the Polish context the decision related to the freedom of assembly and "gay parade"). But plausibly we should accept that there is no remedy for such situations in the democratic society and the independence and big courage of the judges who are sufficiently empowered to resolve the most complex dilemmas in the public space are the only possible solutions to be proposed.[9] We should not forget that constitutional review is also a specific form of public dialogue in democratic society and the convincing rational, transparent argumentation is a necessary and probably unique way to ensure the public confidence and the very authority of the court[10].

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[8] See an interesting opinion of Robert Badintere, 2004: "The media are thus in a position of critical power, though not of authority, in relation to judges. And they can similarly influence the course of justice, in an indirect but effective manner […] the matter is so much the more important because judicial time and media time do not coincide. Justice works according to strict procedural rules, those of the legal process. Itunfolds prudently and often slowly. The media are comprised of commercial enterprises competing in the information marketplace."

[9] I can agree with Christopher F. Zurn (2007) opinion that the concept of the judicial independence should be understood broadly: "[…] this value ideally requires not only independence from the formal branches of government whose officials are more directly politically accountable (legislature and administrative branches) but also from various forms of concentrated social powers."

[10] It is worth mentioning that the Constitutional Tribunal has been able to defend its independence and its authority in the public eyes and the recent public survey confirms that constitutional justice in Poland is placed among the public institutions profiting from very high confidence of the society (more than 60% positive assessments). That situation, however, raises a question whether the above analysis on the negative effects of the battle is justified? In my opinion, the negative effects appear to be strong politization of the constitutional justice. Public opinion largely accept its activity but at the same time treats it (at least in majority) as a purely political institution. In the future the negative impact of such attitudes could be damaging for the constitutional awareness of the citizens.

## Politics and Constitutional Courts—Points of Convergence

### Preliminary Remarks

Politics is present, though in diverse forms and with diverse intensity, in all constitutional courts both in the new democratic countries and in the stable democracies—in Western Europe.

At least three reasons can be mentioned: (a) political procedure of appointments of the judges (through the parliament—partially like for instance in Italy and Ukraine and exclusively like in Poland and Czech Republic); (b) the matters and the nature of the constitutional cases is political –the review involves the laws politically made because created by the political bodies; (c) the consequences of the constitutional judgments are political because are followed by necessary legislative (and so political) steps on the governmental or parliamentary level. All three factors accompany the activity of all constitutional justice in both parts of Europe, but their intensiveness and their impact on the very court activity are different.

All constitutional decisions, if they are taken by the courts in the strongly politically impregnated context, have—by nature—a political classification[11], irrespectively whether it would be a concrete decision issued by the court (positively or negatively evaluated by the public opinion, legal milieu or politicians) and hence they can never avoid the political interpretation e.g. the attempt to identify the political motives and goals of judgment adopted by the court. For instance, each lustration decision—irrespectively whether allowing or barring the lustration—should be always qualified as the "political decision" of the court. Moreover, into a nature of the constitutional activity are inscribed inevitable tensions between the world of politics and the world of law. As justly highlighted Kim Scheppele (2002), the fact of the existence of the tension can be even a positive sign proving the authenticity of the constitutional review:

> If there is no struggle between the political branches and the judicial branch over the meaning of the law and the way that is to be applied in concrete cases, then there is not only no meaningful separation of powers but also no meaningful distinction between law and politics. Only when the judges are empowered to resist direct commands through invoking the power to make law themselves can they be truly independent within a broader legal order.

The verification of the correctness of constitutional jurisprudence meets the barriers simply because of the vague and imprecise notions playing the crucial role as main references in the constitutional reasoning such as the "democratic state ruled by law," "social justice," "the essential element of basic rights," "the human dignity" and "public order or public morality." Hence, there are very popular stereotypes spread among the population: "Only God and the Constitutional Court are not liable for their decisions" or "Neither the constitutional courts nor the Providence's decisions

[11] See Ran Hirschl (2004) "The expansion of judicial power through constitutionalization and the corresponding acceleration of the judicialization of politics in so many countries over the past few decades may shed light on an aspect of constitutional politics that is often overlooked: their political origin of constitutionalization."

and choices are foreseeable." But lack of the precise evaluation instruments which could be applied for verification of the correctness of the judicial decisions cannot be deemed in itself as a convincing and sufficient proof of "political contamination" of the judgments.[12] In the next parts of my analysis I would like to focus on the selected issues concerning fragile borderlines between the politics and the judiciary activity e.g. appointments of constitutional judges and a political impact on the content of constitutional decisions.

**Appointment of Judges**

What are the reasons for political methods of the appointment of the constitutional judges? Hypothetically, we can identify the following reasons: (a) the constitutional cases have not only legal but also political character and it requires consequently not only a legal approach but either the considerations taking into account the political rationality and political background; (b) the directly democratically legitimated political representations in the parliament should exert their permanent influence on the jurisprudence through "their" judges who should express the political preferences simply because the constitutional review constitutes a very segment of the legislative power and it is required by the democratic ethos; (c) interpretation of the constitutional matters is based on a vague concept of the general clauses impregnated by axiological contents and in result the choices among different outcomes of interpretation made by the constitutional judges should reflect the diversity and complexity of the social and political environment in which constitutional review is made.

It is evident that political concept of the constitutional judge's appointment (in all European countries) is not hazardous[13] and it has been accepted intentionally as the

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[12] By the way, it should be noted that paradoxically the main impact on the quality of the process of transformation and the quality of the legal order is exerted by the jurisprudence which seems to be placed apparently far from the direct political controversies. The examples are numerous:

— the judgments on the social rights protection resolved one of the crucial constitutionals problem of what is the model of social justice in market economy context (the decision on the health system was the most important reason for resignation of the Miller Government in 2005),
— the apparently very formal jurisprudence involving the issues of the fair legislation principles (*non-retroactivity*), the legal security; *vacatio legis* (see: Judgment of 23 March 2006, case no. K.4/06, Decisions of the Constitutional Court—Official Digest no. 3A/2006, item 147; Journal of Laws of 2006, No. 2006, No. 202, item 1493) and the official publications of laws; tax law principles: the minimum guarantees for current interests of individuals who started some activities on the basis of the existing regulations,
— the jurisprudence related to the state liability for unlawful normative acts changed dramatically the relations between the public power and the individuals (see: Judgment of Constitutional Court of 4 December 2001, case no. SK/18, Decisions of the Constitutional Court—Official Digest no. 1/A, item 4); etc.

the decisions on the former nationalization rules (1944–46) caused the important effect for the restoration of property relations in Poland (see: resolution of Constitutional Court of 16 April 1996, Decisions of the Constitutional Courts—Official Digest 1996, no. 2, item 13; procedural decision of 28 November 2001, Decisions of the Constitutional Court—Official Digest 2001, no. 8, item 266).

[13] See a similar opinion expressed by former President of European Court of Justice Gil Carlos Rodriguez Iglesias, 2004: "As far the recruitment of constitutional judges is concerned, the purely 'professional' judicial model is excluded—whether we speak of the United States or of the European nations that have systems of constitutional supervision. Selection procedures are varied, but they share the characteristics of intervention by political bodies."

alternative to the typical way of selection of the candidates for the post of ordinary judge (based on objective non-political criteria). However, not evident is the answer to the question: which of the motives mentioned above were a real reason for the political appointment of judges?

In my opinion, the adoption of specific appointment system for the constitutional judges is motivated differently on the theoretical and practical level. Theoretically, among the reasons mentioned above as the hypothetically possible explanations for political "methodology" of designation of the judges, the two of them (point 'a' and 'c') play the most important role. The motives selected in point (b) (judges as the political representatives who should express the political preferences by their decisions) were never in a official and open debate given as a *good ratio* for that solution. Paradoxically, the very political practice in the matter both in Poland and in all European countries proved that *de facto* the political parties represented in Parliament want to have—trough the procedure of the appointment of the constitutional judges—an effective instrument to ensure their political interests ("we have our court" or "we have to regain our court"—such statements are not hypothetical but we heard them sometimes just after the electoral campaigns). This negative or pathological impact is manifested apparently when the parliamentary majority "takes" everything including the constitutional court posts—on the basis of simple and primitive explanation: "because they belong to us." The candidates are not consulted with other political milieus and the political consensus is not searched. Of course, real motives for the political appointments of the judges are rather a kind of pure *wishful thinking*. The formal guarantees of independence of the judges are strong and the automatic and direct transposition of the political expectation on the judicial attitudes is fortunately not possible. However, the ongoing practice is not acceptable taking in account the normal democratic standards. In my opinion, it constitutes even a kind of political mobbing on the judges who are confronted just at the starting point of their activity with a specific political pressure and must bear a great burden of presumed political expectations. The barriers against such abusive political practice of the constitutional judges appointments are, as I mentioned above, the formal requirements which should be fulfilled by the candidates (they are the same as for the Supreme Court judges) and more and more active monitoring made by the civic society representatives (last time in Poland: the Helsinki Foundation for Human Rights Protection organized the meeting and attempted to verify the merit formation of the candidates).

It is worth raising the question in that context, whether it is sufficiently justified to continue such a separate and specific procedure of the appointment of constitutional judges. If we even accept the existence of objective reasons—mentioned above—for the necessity of the parliamentary influence at the moment of designation of the constitutional judges, however we could not accept the pathological practice which is intrinsically linked with the purely parliamentary way of the election of the judges.

In my opinion, future remedies should be searched through the necessary improvement of the parliamentary procedure: one of them would be introducing to the Constitution the requirements of qualified majority (used in some states e.g. Ger-

many) which forces the opposite political sides in parliament to reach the consensus.[14] Another remedy would be the reliance on the procedure of appointments, though partially on some non parliamentary bodies' consultations and opinions.[15]

Additionally, I can stress that similar problems are still to be solved in the case of the appointments of the candidate for the post of international judges.

## Political Impact on Jurisprudence

### Nature of the Constitutional Cases

*Par nature*, a lot of constitutional cases belong to the categories of the political fragile cases and they are strongly impregnated by the political and ideological controversies manifested before in larger public socio-political environment.[16] This characteristic cannot be related exclusively to the dynamic and instable structure of the new democracies in CEE but is typical for all constitutional justices around the world.[17] Over the last few years we could easily find numerous manifestations confirming this assumption: in USA (the emotional disputes on the presidential election), in Austria (the dispute on minority rights in Karyntia), in Germany (the cases concerning unconstitutionality of the political parties), in Belgium (the disputes on euthanasia legislation) etc.[18]

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[14] See for instance a correct opinion of John Ferejohn, 2002–2003: "[…] While these judges are appointed politically (as are those in the United States), these appointments tend to be made in a way that requires assert by the majority political factions. For example, to get appointed to the German Federal Constitutional Court, a prospective justice, must gather the votes of two thirds majorities in both chambers of parliament (Bundestag and Bundesrat). Thus, all the major political formations must agree on a new appointment. As a result, nearly all of the constitutional judges tend to have moderate judicial viewpoints."

[15] For these reasons I share the opinion presented by Christpher F. Zurn, 2007: "The various forms of recruitment and selection are, as it were, institutional responses to the fact that constitutional courts play a crucial role in a fundamentally political task: the further elaboration of constitutional law" (p. 277). But this argument does not justify still the complete separation of politics from the appointment procedure. The author correctly adds that "[…] the role of politics in the recruitment and selection of constitutional court members is the response for sensitivity in the elaboration of constitutional law" (p. 277).

[16] The opinion about the presence of politics has been dramatically changed during the last decades. We can recall for instance the opinion by Justice Brennan who stressed in the case Baker v. Carr, 369 US 186, 217 (1962) that political dispute is not-justifiable because of the lack of judicially discoverable and manageable standards for resolving it. I rather share in this matter the opinion of my colleague, judge Ahron Barak, 2006: "The mere fact that an issue is political that is, holding political ramifications and predominant political elements—does not mean that it cannot be resolved by a court. Everything can be resolved by a court, in the sense that law can take a view as to its legality." See also Martin Shapiro (2002) who analyses the courts as political agencies and judges as political actors "[…] any given court is thus seen as a part of the institutional structure of American government basically similar to such other agencies […]".

[17] See for instance opinion expressed by Carlos Rodriguez Iglesias, (2004) (the former president of European Court of Justice): "[…] every judge, particularly one in supreme or a constitutional court, is sometimes confronted with jurisprudential options that not do not simply offer an opportunity, but impose an obligation, to choose. The choice among such options can contribute to the development of the law. And such choices often have important social and, hence, political consequences."

[18] My personal experiences confirm the opinion of Ran Hirschl (2004) on the tendency among the politicians toward judicialization of specific politically difficult issues: "[…] such a transfer of these and other 'big questions' from the political sphere to the courts has been tacitly supported, if not actively initiated, by political actors representing hegemonic elites and established interests. Judicial empowerment through constitutionalization provides these elites and their political representatives with effective means for reducing the risks to themselves and to the institutional apparatus within which they operate […] The

This inevitable political connotations which accompany the constitutional review linked also with political nature of the parties standing before the Court and with the goals expected by them through the final judgment. As justly said Alec Stone Sweet (2000):

The rules governing the exercise of constitutional review differ radically from rules governing parliamentary decision-making. This difference is exactly what attracts the opposition to the court, since under majority decision rules, the opposition always loses. Because the court is not a parliamentary chamber, but a judge of the constitution, the move to the constitutional review stage recasts the strategic environment in which legislations find themselves… At this point, it is enough to note that the referral instantaneously redistributes political initiative in the opposition's favour, and reduces the influence of the government and the parliamentary majority over the legislatives outcomes. The government and its majority are placed on the defensive. Forced to participate, as a co-equal party, in processes that they can neither block nor control.

Very seldom one can differ the affairs without larger political consequences[19] which are based only on the mere legal disputes (however, additionally one can mention that even legal and theoretical disputes open frequently an emotional debate among the justices and can provoke strong division in the court e.g. in the Polish court most emotional debate appeared in the case, without the political connotation, concerning the application and the scope of application of the principle of equal treatment).[20]

## Nature of the Constitutional Reasoning

It is not my purpose in this section to treat the very large and complex issue of the constitutional interpretation as a whole but rather to raise some questions which seem to be important from the perspective of my personal experience.

The presence of the subjective and personal elements linked with the judges' own preferences seems to be inherent to the constitutional reasoning.

Firstly, all constitutional judges have their political and moral preferences.

Secondly, the essence and the nature of constitutional reasoning is expressed by the permanent choices made by the judges among the basic values, which cannot be objectively measured and empirically verified (related not only to the so called

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removal of policy—making power from legislatures and executives and its investiture in courts may become attractive to political power-holders for any of several reasons: when they seek to gain public support for their contentious view by relying on national high courts' public image as professional and apolitical decisions-making bodies; when they regard public disputes in majoritarian decision-making arenas as likely to put their policy preferences at risk ; or when they estimate that abiding by the limits imposed by expanded judicial power will enhance their absolute or relative position vis à vis rival political elements and their alternative worldviews or policy preferences […]."

[19] We should also stress that there are a lot of constitutional cases which can be qualified only apparently as non-political cases taking into account an enormous impact of such decisions on the social and economic situations of the state, for instance almost all case concerning the tax laws or the legal instruments of social protection (see famous *Judgment of the Constitutional Court on tax amnesty and so called proprietary declarations of 20 November 2002, case no. K.41/02, Decisions of the Constitutional Court—Official Digest no. 6A/2002, item 83, Official Journal "Monitor Polski" of 2002, No. 56, item 763*.

[20] See the *procedural decision of the Constitutional Court on the principle of equality as a sole basis of the constitutional complaint of 24 October 2001, case no. SK 10/01,Decisions of the Constitutional Court—Official Digest no. 7/2001, item 225*. We should add that such intellectual controversies which stemmed from different "legal thinking" represented by the judges very seldom became the very subject of public opinion interest.

general constitutional clauses but also to the socio-economic—political consequences of the jurisprudence).[21] My judicial experience proves that almost all constitutional reasoning may be confronted with opposite, alternative and different argumentations (in almost all important cases there are at least two or more alternative drafts of the judgment prepared by the judges reporters). We should accept that constitutional reasoning and decisions are inherently stigmatized by the personalities of judges and the constitutional truth and correctness remains always a very relative concept.[22]

Correctly and in a very convincing manner, the former President of the Supreme Court of Israel Aharon Barak (1987), explains the role of the subjective components which inevitably strongly influence the attitude of judges:

> A decisive component in the determination of the reasonableness of the choices is the judge's personal experience: his education, his personality, and his emotional makeup. There are judges who are more cautious and judges who are less cautious. There are judges whom a certain argument influences more than other judges. There are judges who insist on a heavy burden of proof before they will deviate form the existing law, and judges who are satisfied with a light burden of proof in deviating from existing law […] Every judge has a complex human experience that influences his approach to life and therefore also his approach to law. A judge who experienced the Weimar Republic will not have the same attitude toward the activity of undemocratic political parties as someone who did not experience it […]. All these considerations—and many others—determine the judge's personality and his human experience. One cannot ignore this factor. It seems that we would not want to operate in a system in which this factor did not carry substantial weight.

If it is unavoidable, the question arises whether the constitutional justice is able to fulfill expectations expressed by the society and can be inscribed into an objective and rational model of debate and dialogue and settlements of all disputes? Is the "reasonableness" of argumentations of the Court being the crucial and the necessary element of constitutional jurisprudence possible?[23]

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[21] See Martin Shapiro's (2002) opinion, who stressed correctly: "Since the Court generally deals with the 'trouble cases', it is typically called upon to decide precisely these questions for which neither the existing body of law nor the other agencies of government have been able to provide a solution. In short, it is asked to make social policy, and to do so it cannot depend on neutral interests but must look to its own assessment of the social and political interests involved and its own vision of the long—range goals of American society. In other words, it is asked to perform the same tasks that every other political decision making-maker asked to perform and to do so as a complementary and supplementary segment of the whole complex of American political Institutions."

[22] Relative nature of the constitutional decisions is caused also by the dynamic character of their social and economic context. The court has to take into account not only the purely legal argumentations but also the impact of its decisions. That thesis is of course hardly controversial and there is no. space here to develop the presented position. But, generally, in my opinion, it is necessary to ensure a large scope of flexibility at the level of the constitutional jurisprudence. The application of the simple legal *rationis pereat mundis fiat iustitia* seems to be very doubtful in that context. Sometimes the negative effects of unconstitutionality which could be hypothetically established by the court prevails over the positive effects of immediate restoration of the conformity with the constitution, for instance, when that decision would provoke big legal vacuum of the system and could deprive of even a minimal protection of the constitutional rights. Typical exemplification was *the judgment of the Constitutional Tribunal concerning the law on the salaries of medical staff of 18 December 2002, case no. K.43/01. Decisions of the Constitutional Court-Official Digest no. 7A/2002, item 96; Journal of Laws 2003, no. 1, item 14*). The so called social rationality is also the necessary component of the "common good" being one of the most important constitutional values protected expressly by the Constitution (art. 1).

[23] "Reasonableness" is the specific methodology of assessment. I agree with the opinion of Neil MacCormick, 1984: "[…] what justifies resort to the requirement of reasonableness is the existence of a plurality

## When Politics Becomes Dangerous?

We should leave aside our analysis of the fascinating topic, whether the constitutional justice can bear big public responsibility for the rationality and reasonableness of its decision if there are so many subjective, personal factors exerting pressure on the very activity of the judges. I can only here signal my personal opinion: paradoxically the great differentiation among the judges, diversification of presented judicial approaches to the particular topics, various constitutional sensibility and even different moral and political approaches became the condition for authentic, deep and balanced debates among the justices. Constitutional justice is not based on the absolute truth, and it is not a real way allowing to search the single, perfect solution for everyone. More differentiated is a constitutional court composition; more adequate (from the public perspective) become the answers to crucial social issues given by the judges. The very menace for constitutional justice is not a different political origin of the judges and their different moral, social, ideological convictions, but rather their uniformity and political homogeneity due to the simple majority rule adopted by parliament and its primitive judges appointment practice. We should accept either a banal truth that rational and balanced disputes on important topics do not take place in reality in an open public space among the average citizens because such debates have been replaced by the disputes among the representatives of the society on a different level.

The parliament (the lawmaker) and the constitutional justice are placed on the highest level of the public debate and such debate is possible and even necessary not because of the different political and ideological composition of the parliament and in result also the constitutional justice but just because of the different methodology and different kind of argumentation which is applied by them. The presence of politics as one—among many—constitutional factors which determine the constitutional thinking is not in itself pathological.[24]

Inversely, the politics could become a dangerous factor for the essential role played by the constitutional court if the composition of the court became homogenous and the methodology applied by the court reflected the earlier parliamentary political battle. In such perspective, the politics becomes a pathological factor in the constitutional activity because the political motivation prevails over the other types of argumentations and the constitutional decisions start to be subordinated to the political demands and political expectations and not to the "balancing methodology" which is based on the rational consensus among the opposite sides of disputes and should express the necessary guarantees for fundamental rights of individuals.

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of factors requiring to be evaluated in respect of their relevance to a common focus of concern […] Unreasonableness consists in ignoring some relevant factor or factors, in treating as relevant what ought to be ignored."

[24] See on this topic for instance John Ferejohn, 2003. I share the opinion of Chritopher F. Zurn (2007) which seems to be very correct: "If however, any organ with the power of constitutional review is introduced into the system, and if the protection—elaboration dynamics is unavoidable, then the authorized constitutional review organ will be ineluctably involved with the generation of general and prospective constitutional norms, and thereby undermine the classical conception of the separation of powers."

## Internal and External View on Political Presence in the Constitutional Justices

Politics is always present and the postulate of its elimination from legal and constitutional justice is an irrational dream which itself could paradoxically become a destructive factor for the constitutional justice. Such utopian perspective can justify an unrealistic approach to the court activity (and even a kind of hypocrisy toward it) and in consequence can inspire the lawmaker to set up unreasonable limits for constitutional court activity, to reduce court prerogatives to the merely dogmatic disputes which could be resolved only through precise legal reasoning without the need to enter a fragile field occupied by the general clauses and the so called constitutional values. If it is not true, as the Montesquieu wanted, that politics leaves the courtroom when the court comes in, it is necessary to try to evaluate when manifestations of the political presence signalize the very danger of pathological outcomes. Such an assessment is not the same in all circumstances and we should differ between the internal and external perspective on constitutional activity.

### Internal Viewpoints

The crucial issue is related to the question: are the judges real "prisoners" of their own political, moral, philosophical preferences and are they immunized to other positions, arguments and reasoning?

My personal experience during almost 10 years of my term as the constitutional judge gave me an exceptional point of observation.

Three points should be stressed.

Firstly, the core element of the judicial reasoning should be the so called internal independence. What is the internal independence and which elements separate that concept of independence from the independence itself? I think that the concept can be well understood only by persons who practiced the judicial activity and they are permanently confronted with the problems appearing on two levels: the objective constitutional reasoning and the personal preferences. Whereas the external independence generally means the lack of external pressure, lack of subordination to another body or other persons (whatever would be the nature of such an institution and the position of the persons[25]), the internal independence means the ability to separate the objective judgment from one's own personal preferences and for these reasons that attitude is—at least from the psychological point of view—more difficult, more complex and even sometimes heroic. Internal independence requires resignation from the subjective point of view and acceptance of a different perspective of the evaluation and a different assessment of the issues which should be decided. Clearly, this opinion is expressed by Aharon Barak (2006):

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[25] See the opinion of Christopher F. Zurn, 2007: "The crux of such independence is that the constitutional court and its members are institutionally independent of political accountability […]. its membership should be determined through non political processes. The point, rather is that, one selected to serve on the court, appointees should not be subject to ongoing political pressure as they carry out their duties, and the internal administration of the court should likewise be independent of direct control by politically accountable officials."

Judges must look for the accepted values of society, even if they are not their values. They must express what is regarded as moral and just by the society in which they operate, even if it is not moral and just in their subjective view.[26]

The internal independence is a necessary component of the judicial good faith. I agree with the opinion of Allan C. Hutchinson, (1999):

As such, the requirement to act in good faith is at heart of a revised understanding of the rule of law. Beginning the reasoning process with a more or less definite conclusion in mind is not the problem: most judges start with some more or less vague notion of where they think that their judgment should go or come out. A minimal democratic restraint asks that judges make some genuine effort to support that conclusion by reference to the rules; judges must work *within* as well as *with* law's rules and argumentative resources. The justificatory requirement of 'good-faith' is not unique to adjudicative practice […] Good faith cannot in itself tell people what to do in situations of uncertainty doubt; it can only give them the courage to act on their own convictions in a way that takes seriously the responsibility to act fairly.

Are such attitudes possible? My answer is positive though with two reservations.

Firstly, even the internally independent judge is not able to leave completely his intellectual personality, his concept of life and his mode of understanding of some fundamental values. If an independent judge can accept the decisions which are susceptible to cause a lot of negative effects for "his political side" because of clear and evident constitutional argumentations, however his evaluation would never be free from a subjective approach in the sphere of vague general constitutional clauses leaving a relatively great margin for judicial interpretations. As for my second reservation, I should stress that beside the different judicial sensibility related to the values enrooted in the constitutional clauses (e.g. justice, proportionality, human dignity or freedom) another factor which will probably cause considerable divisions among the judges arises in strictly "moral cases" such for instance as abortion, euthanasia or homosexual marriages (in all constitutional courts in Europe, also in EHRC, such problems caused a lot of dissenting opinions).[27]

Polish constitutional practice confirms that assumption. Internal independence has been proved apparently in such cases with a very high degree of political sensibility as the decision on the parliamentary investigation committee (it was a "flag political project" to destroy the political opponents by the governmental majority[28])

[26] The same opinion A. Barak expressed in the *case C.A. 243/83, Municipality of Jerusalem v. Gordon, 39/1/ P.D. 113, 131*: "[…] It is not his own subjective values that the judge imposes on the society in which he operates. He must balance among various interests according to what appear to him to be the needs of the society in which he lives. He must exercise his discretion according to what seems to the best of his objective understanding, to reflect the needs of society. […]"

[27] I share the opinion of Ninian M.Stephen, (1985): "These issues are not only of their nature highly emotive; the rival contentions will often be non-negotiable. Matters of high principle, passionately adhered to, will be at stake, often on both sides. Because such issues are usually seen in absolute terms, as matters of right and wrong, those who dispute over them are seldom inclined to compromise their differences."

[28] *See the Judgment of the Constitutional Court of 22 September 2006, case no. U4/06, Decisions of the Constitutional Court—Official Digest no. 8A/2006, item 109; Official Journal "Monitor Polski" of 2006, No. 66, item 680*. The main purpose of that parliamentary committee was the examination of the presumed corruption that would happen during the transformation of the banking and finance system and process of privatization. This political project has been addressed directly and personally against the famous, symbolic political figure of the economic transformation period just after the collapse of the communist system—professor Leszek Balcerowicz. Leszek Balcerowicz symbolized and materialized for his political opponents (being in the government at this time) the face of pathological post-communist mysterious "structure." The decision of the Constitutional Court definitively blocked the intention of the government.

or the famous decision on IPN (Institute of National Remembrance).[29] On the other hand, the court became strongly divided in the cases concerning moral cases, such as abortion[30] or religion lessons in public schools.[31]

Secondly, my observation confirms that the scope or the level of internal independence increases with the length of the judicial practice. At the very beginning of the term the judges are susceptible to be more dependent on their own moral, philosophical, or ideological positions. However, this period is relatively short, and finally with the new judicial experiences the judges become more and more alienated from former dependencies and current social and political quarrels. One can say that the "judicial ethos," built on the model of persons who are distanced from the politics and able to keep a neutral position without engaging in the current public debate as passive "witnesses" of the external reality, has become prevailing and, finally, allows the judges to reach higher and higher degrees of their internal independence.

To finish this point it is worth noting that my experience confirms also an enormous difference between the external description of the attitudes of the judges (made by the media, politics, or even legal doctrine) and real voting in the Tribunal. Media always look for the direct causal links between "the political origin" of the judges and their vote, but in practice the hypotheses formulated by the media are completely erroneous. The voting is very often unpredictable and it happens frequently that it goes across the presumed political preferences of the judges. The different legal approaches or different school of legal thinking represented by the judges seems to be a more important factor of the judicial disagreement than their political or even moral background.

## External Viewpoint

External opinions on the judicial independence are important for the public authority of the Court and sometimes they are decisive for the ability to shape the standards of constitutional culture in the society. The Constitutional Court being the political instrument and serving as the means of transmission for political directives loses immediately the capacity to bear responsibility and to answer the constitutional challenges. I stressed above that the very public confidence to the fairness of constitutional court is one of the elements called "objective independence" (which involves both structural independence of the court among the states bodies institutions and the image of it in the public opinion) and gives to judges necessary support in its fight for the observance of the constitutional standards against present political majority in parliament. My experience confirms the correctness of the assumption formulated by the former President of the Hungarian Constitutional Court, Soloyom, who said: The very independence of the constitutional court is measured by equal degree of the

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[29] See *the judgment of the Constitutional Court of 26 October 2005, case no. K31/04, Decisions of the Constitutional Court—Official Digest no. 9A/2005, item 103*.

[30] See the *Judgment of the Constitutional Court of 28 May 1997, case no. K.26/96, Decisions of the Constitutional Court—Official Digest no. 2/1997, item 19*.

[31] See the *Judgment of the Constitutional Court of 30 January 1991, case no. K.11/90, Decisions of the Constitutional Court—Official Digest of 1991, item 2* and *the judgment of 20 April 1993, case no. U.12/92, Decisions of the Constitutional Court—Official Digest of 1993, item 9*.

reluctance toward it manifested by all political parties. If none likes the constitutional justice, one can say that it is a clear proof of independence and the existence of very courageous attitudes of the judges. However, Alec Stone Sweet (2000) is right skeptically assuming that the politicization of constitutionality review poses a potentially intractable dilemma for the constitutional judge.

The symptoms of the political dependence are never transparent and clear but it is imaginable that pathological political influences on the constitutional court could be easily disclosed by the non-direct proofs, for instance: by the exceptionality of decisions on the unconstitutionality of reviewed normative acts; by typical and simple political division between the judges presenting their dissenting opinions; by the frequency of refusing the decision on the basis of procedural arguments in sensible political cases; frequency of the coincidences between the political expectations and the content of the court decisions.

Over the last few years, the strict political division among the judges appeared once—during the last lustration case before the Tribunal (in May 2007)[32]. For the first time in more than 20 year-long history of the constitutional jurisprudence in Poland the judgment was passed with nine dissenting opinions (out of eleven judges in the full bench in this case only two justices did not decide to write their *votum separatum*). I suppose that two factors played a crucial role here: firstly, the highly controversial matter of all the issues related to the communist past and secondly, extremely emotional atmosphere in Poland caused by the fact that lustration had to involve more than 700 thousand people including the university staff, journalists etc.). I hope that it was a kind of the "constitutional accident" though finally with a very positive and rational settlement.[33]

Finally, I had to agree once again with wise remarks formulated by Alec Stone (2000):

> […] in resolving the dispute, the court may compromise its reputation for neutrality by declaring one party, let us say the government, the loser. In any case, that is what the opposition (or litigating party) hopes will happen. We can express this dilemma as a fundamental, institutional interest: the interest of the constitutional court is to resolve legislative conflicts about constitutionality while maintaining, or reinforcing the political legitimacy of constitutional review into the future.

## Formal and Substantive Means of the Judicial Independence Protection

It would be irrational and not very wise to deny the importance of formal, largely described, means of the protection of judicial independence, but it seems to be more and more clear that such formal mechanisms protecting the independence and impartiality of judges[34] are not sufficient to prevent the pathological influences of politics on the jurisprudence and to ensure objective, and balanced approach to the cases reviewed by the court. I tried above to stress the importance of the specific political

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[32] See the *Judgment of the Constitutional Tribunal of 11 May 2007, case no. K2/07, Decisions of the Constitutional Court—Official Digest no. 5A/2007, item 48; Journal of Laws of 2007, No. 85, item 571.*

[33] See unfortunately the second accident in the case of the immunity of judges of 28 November 2007.

[34] One of them different than in the ordinary justice system is, almost in all constitutional courts, the one-term mandate for the constitutional judge who cannot be reappointed once again to the post of the judge. Due to that solution the judges do not have the motive to remain in good relations with the politicians.

environment which can sometimes play a role as an autonomous, negative factor, influencing and threatening the judges, irrespectively of the formal status of the court and its members and the guarantees given by the direct and expressly formulated constitutional provisions. I stressed strongly the important significance of the internal (sometimes heroic) independence of judges, which in such situations becomes an essential element, deciding on the quality of jurisprudence. However, in this context related to the different devices of the judges independence protection is worth raising the question, what are other factors which can support the judges in their determination to resist against the politics and to defend them against political pressure? Beside the formal requirements which, as I said above, are necessary but not sufficient, we can try to select the specific "substantive factors" which could be used as an essential instrument to support the judges in fulfilling their responsibility. I decided to indicate, profiting from my personal experience, only two such factors because I asses them as having a particularly great impact on the attitudes of judges and finally on the quality of the constitutional jurisprudence:

(a) the continuity of jurisprudential lines and accumulation of constitutional experience (*acquis constitutionnel*),
(b) the permanent dialogue between the constitutional courts and the international courts (the international patterns becoming stable elements of constitutional jurisprudence determine the future direction of its development) and among the constitutional courts in the European space (the visible effects are not only the mutual exchange of experience between the judges but also the mutual monitoring system being a real and important factor which can effectively eliminate all attempts of the political abuse).

Ad (a) *Acquis constitutionnel*[35]. The constitutional jurisprudence is built step by step and the continuity of its elaborated lines plays the crucial role for the predictability of the judgments and also for the stability of the constitutional system as a whole.[36] We should stress that such a relative stability of the constitutional jurisprudence, rooted in the fundamental "stare decisions" is at the same time, a guarantee protect-

[35] That notion of *acqui* is applied in the European jurisprudence of the ECJ *acquis comunataire*. However its use in the constitutional jurisprudence is well justified because of the crucial similarity between the constitutional methodology of interpretation and this one which has been applied in European space for almost 50 years to create common standards of the European law. The notion of the *acquis connstitutionnel* was applied for the first time by the Constitutional Court in its famous *decision of 20 November 2002, case no. K.41/02, Decisions of the Constitutional Court—Official Digest no. 6A/2002, item 83; Official Journal "Monitor Polski" of 2002, no. 56, item 763* concerning the so called tax abolition and the patrimonial declarations e.g. leading project of the governmental majority at that time. It is interesting to stress that the Constitutional Tribunal was strongly attacked by the politicians at the moment and the recalling by its motives the continuity of the jurisprudence in the matter such as protection of privacy and the fair legislation principle (two of the topics were the permanent element of the *acquis constitutionnel* had an important impact on the public opinion and supported the Tribunal in its position). See also Marek Safjan, (2007).

[36] I share opinion that the accumulated constitutional experience plays the crucial role as the instrument of the interpretation, creating also the (second order norms for the interpretation of the constitutional provisions) See on this topic Ch. F. Zurn, (2007), who stressed that culture of specific "stare decisions" is developed also in civil law countries in the framework of the constitutional justice. As Martin Shapiro (2002) said: "Even in civil law cultures where stare decisions are not formally acknowledged, constitutional law almost invariably becomes case law employing precedent-based reasoning even when the court's opinions do not formally announce such reasoning."

ing the judges from the political pressure. Of course, each constitutional jurisprudence in all countries is subordinated to the evolutionary process and in that sense is not definitively stable. We can moreover add that such a progressive evolution is positive and necessary for the quality of the constitutional democracy, giving the new impulses for the development of the constitutional doctrine and ideas. Nevertheless, it cannot be identified as a slow, evolutionary process of the constitutional jurisprudence transformation with a revolutionary dramatic breakthrough of it. The constitutional jurisprudence and its stable lines can serve as a good, convincing and sometimes crucial argument to oppose the constitutional standards against the bad legislative practice and, finally, to impose on the lawmaker the necessary respect for constitutional provisions. One can say that the content of stable jurisprudence, its applied argumentations and the interpretative approach serves as a metaphoric "mirror" for the Judges themselves and the Court. They can see better through it and better assess their own methodology and reasoning applied in the concrete case. But at the same time the continuity or dramatic breakthrough in the jurisprudence is a kind of the test for a large public which enables verification of the authenticity of the argumentations adopted by the Court. No doubt—the Court which resigns from the former stable lines of its jurisprudence without the important and transparent motives can easily lose also the authority in the eyes of the public opinion. Such political breakthrough of the jurisprudence is still very risky and finally the presence of such a real risk can restraint the judges from the politically opportunistic jurisprudence.

Ad (b) The issue related to the dialogue between the courts should be of course a separate subject of analysis and I restrain my remarks to only a few synthetic observations. Today the European common legal space is created not only by the adoption of the same universal normative standards determining our vision of democracy and human rights but also through the creative jurisprudence at all levels of the system of international and national justice. One can even say that the content, scope and the significance of particular guarantees in the field of the human right protection is due much more to the creative and dynamic evolution of the jurisprudence than to the purely formal, normative sense or the contingent of the provisions consisted in the international human rights conventions and the national constitutions. My experience proved that such methodology of construction of common legal space in Europe mainly through the jurisprudence of the national and supranational courts imposes at the same time the necessity of the strict and permanent cooperation between the different courts. If we analyze the jurisprudence of the international and constitutional courts we can easily observe the mutual references made by the courts–by the national courts to the jurisprudence of international courts and inverse.[37] One can

[37] An example of such "mutual verification" are the decisions of the Constitutional Tribunal and Human Rights Court in Strasbourg related to the same topics, namely: 1. the compensation for the former owners who lost their property just after the Second World War in result the new borders of the State (so called the "mienie zabużańskie"), see on one hand the judgment of the *Constitutional Court of 12 December 2002 case no. …, Decisions of the Constitutional Court—Official Digest…* and the other hand the judgment of ECHR (Grand Chamber) in case Broniowski v. Poland *of 22 June 2004* and the cases Wolkenberg and Others v. Poland, *application no. 50003/99* and Witkowska v. Poland, *no. 11208/02 of 4 December 2007*; 2. the compensation for the owners of private buildings who were deprived even minimally of the profits from

say that it introduced the system of mutual verification of the judicial decisions. In Polish constitutional jurisprudence, we accepted as one of the interpretative principles the necessary Europeanization or internalization of the national laws provisions, including the constitutional norms. It is effectuated by a "friendly interpretation" of the national laws allowing us to maximize the compliance between the national and supranational rules.[38] In effect, such more and more visible coincidence between the interpretative methodology and the substantive values protected both by national and the international justice system ensure the stability and predictability of judicial decisions and strengthen also the political independence of the courts. Similar phenomena are visible at the level of the constitutional courts cooperation. My personal experience confirms that very common constitutional space has been built in Europe and it appears through authentic permanent dialogue and mutual exchange of knowledge on the constitutional jurisprudence (for these reasons a big constitutional network has been created in Europe)[39]. Finally, it is not strange that there are a lot of common topics (cases) in the constitutional jurisprudence of many courts which could be treated in a similar way of interpretation.[40] If this common approach exists in different constitutional jurisprudence of the European countries, we can say that interference into that sphere made by politicians became more and more difficult. Common constitutional space based on the dialogue and cooperation between

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their property due to the protection of tenants' rights (see on one hand *the judgment of the Constitutional Court of 12 January 2000, case no. P.11/98, Decisions of the Constitutional Court—Official Digest no. 1/2000, item 3* and of the other hand the *judgment of the European Court of Human Rights (Grand Chamber) of 19 June 2006*, Hutten-Czapska v. Poland, case no. 35014/97). It is worth mentioning that the legal reasoning of both Courts was based on a similar approach and each of the Courts mutually used the arguments belonging to the jurisprudence of the other one.

[38] It is so called "the principle of interpreting domestic law in a manner "nice to European law." See for example the important *Judgment of the Constitutional Tribunal of 11 May 2005, case no. K18/04* on the Accession Treaty and the Poland 's memberships in the European Union.

[39] I can, for example, mention the cooperation in the framework of European Conference of the Constitutional Courts (every 4 years a fascinating debate is organized and devoted to the selected topics with the participation of delegates from almost all constitutional courts in Europe and representatives of international courts)—during the Brussels conference in 2002 we discussed the topic related the dialogue between the national constitutional courts and international courts (see A.Allen, A.Melchior, *Les relations entre les cours constitutionnelles et les autres jurisdictions nationals, y compris l'interference en cette matiere, de l'action des juridictions europeennes*, Rapport general de la XIIe Conference des cours constitutionnelles, Bruxelles 14–16 Mai 2002, *Revue Universelle des Droits de l'Homme*, vol. 14, no. 9–12, 31 decembre 2002: 333–360). The enormous data base of the European constitutional courts is collected by the Venice Commission (the body affiliated to the Council of Europe).

[40] See for example the jurisprudence concerning the issues of re-privatization and the de-communization (including the famous lustration cases) or the penal responsibility of the former functionaries the communist power organs—in Central European Countries; but there are also a lot of similar more universal cases reviewed by all constitutional courts around the Europe related to the basic human rights protection which could be very inspiring for the jurisprudence of different courts and serving as a point of reference in the motives of judgment (for example, almost all constitutional jurisprudence was confronted with the issues such as the ones related to the freedom of speech and privacy or religious neutrality of the State); also some formal principles and the constitutional methodology (for instance the concept of limitation of fundamental rights) or even the issues of enforcement of the constitutional judgments are the subject of deep comparative analyses in individual courts. In effect, we can see that in many constitutional fields (especially in the sphere of the human rights protection) the approach adopted by the different constitutional jurisprudences become more and more similar.

the different courts stars to play an essential role as the instrument immunizing the constitutional courts against the political influences.

## Conclusions

Let me try to summarize the most important ideas presented in this field in just a few points:

1. Politics is an inherent element of the constitutional justice—but the impact of it can have both pathological or non-pathological outcomes for the constitutional activity. However, total elimination of politics from constitutional justice should be treated as a utopian and unrealistic approach.
2. The judges with a political background, political appointment and political convictions are not doomed to be prisoners of the political parties which designated theirs candidatures. There is no simple interdependence between the political origin of judges and their later jurisprudence.
3. The independence of the judges had to be measured by means of different criteria, among them the most important being the so called internal and external independence.
4. Political mobbing exerted by politics and by the state public persons should be differentiated from the open free public debate on the constitutional justice and its consequences for the public space.

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