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Political Questions in Constitutional Review:
What is the dividing line between
routine constitutional review
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CONSTITUTIONAL COURTS IN CENTRAL AND EASTERN EUROPE WHAT MAKES A QUESTION TOO POLITICAL?

by

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I. When constitutional courts and political questions are mentioned in the same sentence in post-Communist Central and Eastern Europe, several rather discomforting scenarios come to mind even when international news of the past year are scanned.

One will find, for instance, that the Romanian Constitutional Court has been deeply involved with the impeachment of the president in the spring of this year.[1] After a scandal erupted in early January, 2007 around the president, the Constitutional Court first reviewed an amendment to the referendum law that would have made it easier to impeach the president (February 20, 2007), then it found that it was constitutional to set up a parliamentary investigation commission inquiring into the president's activities (March 21, 2007). These decisions were followed by the Court finding that although the president's alleged acts were seriously problematic, they are not severe enough to merit impeachment (April 5, 2007) – a point made while the impeachment procedure was still pending in parliament. The Constitutional Court then sent an explanation of this decision to parliament in a matter of days (April 17, 2007). Once parliament voted in favor of suspending president Basescu, the Constitutional Court confirmed the interim president without further ado (April 20, 2007). President Basescu refused to resign[2] and in a month voters refused to impeach him in a referendum.[3]

In Poland it did not take long for relations between the Constitutional Tribunal and the political branches to get tense after a coalition government lead by the Law and Justice Party (PiS) entered the political scene. In February, 2006 the Tribunal's then-chairman, Marek Safjan[4] published a commentary in Gazeta Wyborcza harshly criticizing President Kaczynski's statements about the Constitutional Tribunal, calling the president's words 'astonishing and disturbing to a great degree.'[5] The Polish Constitutional Tribunal most recently[6] clashed with the political branches in a high profile case, when it invalidated the newest lustration law in May, 2007 – right before the contested lustration procedure was to take effect.[7] The bill was the

[1] Romanian Constitution, Article 95: "(1) In case of having committed grave acts infringing upon Constitutional provisions, the President of Romania may be suspended from office by the Chamber of Deputies and the Senate, in joint session, by a majority vote of Deputies and Senators, and after consultation with the Constitutional Court. The President may explain before Parliament with regard to imputations brought against him. (2) The proposal of suspension from office may be initiated by at least one third of the number of Deputies and Senators, and the President shall be immediately notified thereof. (3) If the proposal of suspension from office has been approved, a referendum shall be held within 30 days, in order to remove the President from office." As available in English at http://domino.kappa.ro/guvern/constitutia-e.html. It contributed to the scandal that the President Basescu's political opponents control the majority in parliament. President Basescu woved to run for office again, if impeached (AP report, April 13, 2007)

[2] "Ousted Romanian president defiant," April 20, 2007 at http://news.bbc.co.uk/2/hi/europe/6577573.stm.

[3] "Romania president survives vote," May 20, 2007, at http://news.bbc.co.uk/2/hi/europe/6665919.stm.

[4] Professor Safjan's term expired in 2006.

[5] Marek Safjan: "Nie wikłajmy Trybunału w politykę PiS," February 7, 2006, Gazeta Wyborcza. The article attracted considerable attention and triggered discussion in the polish press and blog-sphere. Excerpts from the article are available in English in BBC Monitoring International Reports, Lexis-Nexis Acc. no.: A220602094C-10084-GNW.The full text of the article is available with the website of the Polish Constitutional Tribunal in Polish via http://www.trybunal.gov.pl/Wiadom/Prezes/prezes.htm.

[6] Previously the Constitutional Tribunal had a major clash with the government when it invalidated legislation which meant to to end the mandate of those local authorities which were late with their property (wealth) declarations. (The law was an attempt by PiS to remove its political opponents from major local posts, like the office of mayor of Warsaw.)

[7] Decision K 2/07. Available in Polish with the website of the Constitutional Tribunal, via http://www.trybunal.gov.pl/index2.htm.

Kaczynski government's pet project in its mission to clear the public sector from old communists. In the decision Chief Justice Jerzy Stepien reminds that „a state based on the rule of law should no fulfill a craving for revenge instead of fulfilling justice."[8] A commentary in the Polish edition of Newsweek reminds that while with striking down the lustration decision the Constitutional Tribunal preserved its independence in face of constant attacks from the ruling coalition, the decision of the Tribunal was reached over a record number dissenting opinions.[9] President Kaczynski was reported indicate before the decision that „if the law was ruled unconstitutional, the government would make thousands of secret police files public. . . After learning of the tribunal's ruling, Mr Kaczynski said: 'This isn't over.'"[10]

In the meantime, the finally operational Constitutional Court of the Ukraine is deeply involved in the political crisis which centers around parliamentary dissolution.[11] In early April, 2007 President Yuschenko ordered the dissolution of parliament and called for early elections, in part because – as a result of defections – the Yanukovich-lead parliamentary majority was dangerously close to acquire sufficient support to override presidential vetoes.[12] The dissolution orders were challenged before the Constitutional Court which -not for the first time- exposed constitutional justices to immense political pressure. The chairman of the Constitutional Court resigned and five justices complained about unacceptable political pressure at a news conference.[13] Indeed, in less than two-weeks Prime Minister Yanukovich became so impatient as to say to Polish media that if the Constitutional Court is unable to decide about the constitutionality of the dissolution order, it deserves to be disbanded.[14] In mid-May the chief of the security services said in a television interview that the services are not imposing any pressure on the Constitutional Court, but acknowledged that they are investigating corruption charges against a constitutional judge.[15] Soon three judges were dismissed from the Constitutional Court and another four went of sick leave, a development which prompted the presidential administration to conclude that the Constitutional Court did not exist anymore[16] and then to order a probe against the Court with the prosecutors' office.[17] When the new chairman

[8]Quoted in English from " Poland's anti-communist law 'unconstitutional'," May 12, 2007, The Daily Telegraph, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/05/12/wpoland12.xml.

[9]As reported in English in Polish News Bulletin, May 17, 2007.

[10]"Judge curbs Polish informers law," May 11, 2007, The Financial Times, http://www.ft.com/cms/s/56ee999e-0004-11dc-8c98-000b5df10621,_i_rssPage=7c485a38-2f7a-11da-8b51-00000e2511c8.html.

[11]Ukraine Constitution, Article 90.2: "The President of Ukraine may order the early termination of powers of the Verkhovna Rada of Ukraine where: (1) there is a failure to form within one month a coalition of parliamentary factions in the Verkhovna Rada of Ukraine as provided for in Article 83 of this Constitution; (2) there is a failure, within sixty days following the resignation of the Cabinet of Ministers of Ukraine, to appoint members of the Cabinet of Ministers of Ukraine; (3) the Verkhovna Rada of Ukraine fails, within thirty days of a single regular session, to commence its plenary meetings.", as available in English with the CODICES database.

[12] Under Article 94 of the Constitution the a presidential veto may be overriden by 2/3s of the MPs.

[13]BBC Monitoring International Reports, April 10, 2007. The circumstances of Constitutional Court Chairman Ivan Dombronskyy are unclear: it is known that the majority of constitutional justices voted against his resignation, and it is also suggested that his resignation was announced in public before he formally handed in his resignation letter

[14]"Constitutional Court should be disbanded if it fails to assess constitutionality of presidential decree to dissolve parliament, Yanukovych says

, "14 April 2007, Interfax-Ukraine,. http://www.interfax.com.ua/en/news/main-news/25693/?print

[15]BBC Monitoring International Reports, May 11, 2007.

[16]BBC Monitoring International Reports, May 18, 2007.

[17]The President's televised address is available in English translation at BBC Monitoring International Reports,

took office, he assured the polity in a long newspaper interview that the Ukrainian Constitutional Court was not politicized.[18]

These are some of the harshest instances of constitutional courts getting involved and even hurt in intense political scandals. As even such a short record indicates, fears about the political repression of constitutional courts in the post-Communist sphere are not completely unfounded. It remains a question, however, how much politics is too much before and around a constitutional court. The limitations of the present paper certainly do not allow for a comprehensive, systemic consideration of all the issues and relevant jurisprudence. On the forthcoming pages I am hoping to highlight at least some of the most disturbing problems and draw the readers' attention to concepts and considerations which may assist in addressing these issues.

II. Constitutional review is a task or power surrounded by serious doubts, distrust and reservations in many jurisdictions. The French are known best for their deep-seated objections against government by judges, long held sentiments which clearly informed the creation of the Constitutional Council. Indeed, it took more than a decade for the Council to abandon at least in some respects the intellectual confines surrounding its jurisdiction. While in the United States the judicial review power of the Supreme Court as established by Chief Justice Marshall in *Marbury v. Madison* has slowly acquired its place in the constitutional edifice, its critiques never really ceased and the current voices calling for 'taking the constitution away from the courts' (to borrow Mark Tushnet's proposal) merit serious scholarly discussion.[19]

The creation of post-communist constitutional courts was in a large part fuelled by a distrust of the judiciary and the firmly held belief that courts and judges inherited from the Communist regime were (or would be) incapable of exercising the powers allocated for the constitutional courts.[20] Indeed, the newly created constitutional courts were widely staffed by eminent lawyers – who were not required to have served in a judicial office before.[21] The new constitutional

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[18]BBC Worldwide Monitoring, July 27, 2007.

[19]Mark Tushnet, Taking the Constitution Away from the Courts,

[20]On attitudes towards the judiciary in Central and Eastern Europe see Zdenek Kuhn XXXXX and Lech Garlicki,

[21]While high professional standing, or at least experience as a lawyer tends to be a standard qualification criterion on national laws, constitutional court justices in post-communist countries are rarely required to be of such background that would qualify them for judicial office. For the Czech Republic where constitutional justices hold a 10-year renewable term see the Czech Constitution, Articles 84.3. ("Any citizen who has a character beyond reproach, is eligible for election to the Senate, has a university legal education, and has been active in the legal profession for a minimum of ten years, may be appointed a Justice of the Constitutional Court.") and 19.2 ("Any citizen of the Czech Republic who has the right to vote and has attained the age of forty is eligible for election to the Senate."), for Hungary where justices hold a 9-year, renewable term see Act on the Constitutional Court, Article 5.1 ("Hungarian citizens with a law degree who reached the age of 45 years and have no criminal record may be elected as Members of the Constitutional Court.") and 5.2 ("Parliament elects Members of the Constitutional Court from among learned theoretical jurists (university Professors or Doctors of political science and jurisprudence) and lawyers with at least twenty years of professional experience. Such professional experience must be acquired in a position demanding a degree in political science and jurisprudence."), for Latvia where constitutional justices hold a 10-year, non-renewable term, see Constitutional Court Act, Article 4.2 ("Any citizen of Latvia who has a university level legal education and at least ten years' working experience in a legal profession or in a scientific or educational field in a judicial specialty in a research or higher educational establishment, may be confirmed a justice of the Constitutional Court. A person who may not be nominated for the office of a justice under Article 55 of the Law "On Judicial Power", must not be appointed as a justice of the Constitutional Court."), for Lithuania where constitutional justices hold a 9-year non renewable term see Lithuanian Constitution, Article 103 ("Citizens of the Republic of Lithuania who have an impeccable reputation, who have higher education in law, and who have not less than a 10-year work record in the field of law or in a branch of science and education as a lawyer, may be appointed as justices of the Constitutional Court."), for Poland where constitutional justices serve a 9-years fixed term, see the Constitutional

courts enjoyed a high level of institutional trust, and thus popular legitimacy in these fledgling democracies. While their current ratings might not be as high as it used to be, constitutional courts tend to be among the most trusted public institutions in the post-communist zone despite problems exposed in the paper.

Post-communist constitutional courts were expected to become the ultimate guarantors of the fundamentals of newly crafted democratic constitutions, guarding institutional arrangements and fundamental rights alike. Among their top achievements, constitutional courts by now most of them may enlist their contribution to their countries' membership in the Council of Europe, NATO and their recent accession to the European Union which made „stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities" a crucial precondition of membership.[22] These are undeniable success stories, in spite of occasional darker spots in the record.

In contrast, in post-Communist Central and Eastern Europe constitutional courts were established at the dawn of transition to democracy.[23] Following to some extent the German model, newly created constitutional courts were established outside the ordinary judicial hierarchy.[24] These new courts were then entrusted with broad powers, often but not always encompassing abstract and concrete judicial review, preliminary review of legislation, abstract constitutional interpretation, presidential impeachment, and with powers concerning the control of elections and referenda.[25]

Tribunal Act of 1 August 1997, Article 5.3 ("A judge of the Tribunal may be a person who possesses the necessary qualifications to hold the office of a judge of the Supreme Court or the Chief Administrative Court."). The website of the Constitutional Tribunal includes the following comment: "at least 10-years practice in the legal profession and a degree in legal studies with successful completion of the relevant examinations. Professors of law are, however, exempt from these requirements. In practice, the Tribunal has been dominated by professors of law: from 1985 to 2002, 28 judges have been professors of law, seven have been judges, three prosecutors, two barristers, and one official.", at http://www.trybunal.gov.pl/eng/About_the_Tribunal/info.htm, for Romania where constitutional justices serve a 9-year non-renewable term see Romanian Constitution, Article 141 ("Judges of the Constitutional Court must have graduated law, and have high professional competence and at least eighteen years experience in juristic or academic activities in law."), for Slovakia see Slovak Constitution where constitutional justices serve for a 12-year non-renewable term, Article 134.3 ("A judge of the Constitutional Court must be a citizen of the Slovak Republic, eligible to be elected to the National Council of the Slovak Republic, not younger than forty years and a law-school graduate with fifteen years of experience in the legal profession.") Estonia is an obvious exception as the Supreme Court's constitutional review chamber is composed of regular justices of the Supreme Court.

[22] See the so-called Copenhagen criteria at Articles 6.1 and 49 in the Treaty on European Union as established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.

[23]The Polish Constitutional Tribunal was established in 1985, thus formally it predates the Round Table Talks.

[24]As an exception, Estonia does not have a separate constitutional court, but entrusts a special chamber of the Supreme Court with constitutional review functions.

[25]See e.g. Czech Constitution, Articles 65 (power to try the president for high treason) and 87 (jurisdiction) (as available at http://test.concourt.cz/angl_verze/constitution.html), Estonian Constitution, Articles 149.3 and 152.2 (as available at http://www.president.ee/en/estonia/constitution.php?gid=81918), the Hungarian Constitution, Articles 26.4 (preliminary review of legislation upon the president's referral), 31.A-32 (impeachment), 32.A.1 (as available at http://www.mkab.hu/en/enpage5.htm) and Act XXXII of 1989 on the Constitutional Court, Article 1 (as available at http://www.mkab.hu/en/enpage5.htm), for Latvia, see Latvian Constitution, Article 85 (available at http://www.satv.tiesa.gov.lv/?lang=2&mid=8) and Constitutional Court Act, Article 16 (as available at http://www.satv.tiesa.gov.lv/?lang=2&mid=9), for Lithuania, see Lithuanian Constitution, Article 102 (as available at http://www.lrkt.lt/Documents2_e.html),

for Poland see Polish Constitution, Articles79.1 (constitutional complaint), 122.3 (president's preliminary review request), 133.2 (compatibility of international agreements), 186 (request by National Judiciary Council regarding guarantees of judicial independence), 188-189 (as available at http://www.trybunal.gov.pl/eng/index.htm) and the Constitutional Tribunal Act of 1 August 1997, Articles 2 and 3 (as available at http://www.trybunal.gov.pl/eng/index.htm), for Romania see Romanian Constitution, Article 144, for Slovakia see

One cannot help but note that some of these powers almost automatically drag constitutional courts into the dark den of daily politics. Note, for instance, that the Romanian as well as the Ukrainian cases discussed above arose as a consequence of the exercise of such powers. This certainly does not mean that constitutional courts testing the constitutionality of impeachment or parliamentary dissolution automatically make themselves targets of political persecution. It is well known that the German Federal Constitutional Court decided already twice about the constitutionality of the exercise of presidential powers to dissolve the Bundestag, and while these not might be the least-criticized decisions of the Court, they did not harm the Court's legitimacy or reputation. To bring a reassuring example from the post-communist region to this effect, it is worth reminding that the Lithuanian Constitutional Court was left unscratched when it ruled in 2004 that it was acceptable to prevent an impeached president from running for re-election.[26]

Even such a short account makes it clear therefore, that it is not the inherently political nature of certain review powers that drags constitutional courts into being hassled by the political branches by unacceptable means like forced dismissals or court packing. While reduction of judicial terms of office or salary cuts are truly political decisions (since they are taken by the political branches out of political considerations) the present paper focuses on more subtle readings of what may amount to a political question before a constitutional court. As the following section hopes to demonstrate constitutional systems differ in their definition of what type of decisions amount to such political questions for considerations which are worth reflecting upon before moving forward with the analysis of post-communist constitutional jurisprudence.

III. In continental Europe the belief that well-functioning courts keep away from politics is a firm one. It may be credited to Hans Kelsen's insistence on 'pure theory,' bad experiences with politically controlled courts and to numerous other factors. Therefore it is an unpleasant task to talk about the political involvement of constitutional courts, or even the political consequences of constitutional court decisions (after all, constitutional court justices are expected to be blind to the political turmoil their decisions could set off).

Nonetheless, when „political questions" and constitutional review are mentioned in the same sentence, one cannot help but think of the U.S. Supreme Court's political question doctrine as exposed in the seminal decision *Baker v. Carr*, (369 U.S. 186 (1962)).[27] In the case Justice Brennan of the US Supreme Court defined political questions in the following terms (at 217):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements

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Slovak Constitution, Articles 107 (prosecution of the president for willful violation of the Constitution or treason), 125-129 (as available via http://www.concourt.sk/A/a_index.htm).

[26]The decision is available in English translation at http://www.lrkt.lt/dokumentai/2004/d040406.htm

[27]The case involved a challenge against the design of electoral districts, a matter traditionally regarded unjusticiable by US courts. Justice Brennan accepted that to the extent the design of electoral districts violated the Equal Protection clause, the matter was capable of judicial determination and thus justiciable.

> by various departments on one question.[28]

In *Baker* the Supreme Court seemed to subscribe to the view that political questions of this kind are not capable of judicial determination and as such is not justiciable. Justice Brennan makes it clear that a question is not political solely for the reason that it is being considered by Congress or the President. 'Political' as an adjective refers not to everyday high (or low) politics. As the above quote signals, considerations supporting this gesture of self-restraint are informed in part by separation of powers considerations, and to a large extent, by prudential considerations. In this logic, a political question should be resolved not by courts of law, but by the political branches.

At this point two caveats are in place. First of all, it has to be admitted at the outset that as it has been applied by the U.S. Supreme Court, the political question doctrine acquired a somewhat tainted reputation There is no room here to elaborate on the relevant line of jurisprudence and scholarship. A reminder to the decision of the U.S. Supreme Court in *Bush v. Gore*, 531 US 98 (2000), the case which ultimately determined the outcome of the 2000 presidential elections stands as a stark reminder on the limits of judicial self-restraint.

Secondly, several types of powers exercised by constitutional courts are regarded by scholars and practitioners as *per se* political. According to Patricia Wald preliminary review, abstract constitutional interpretation and testing the constitutionality of political parties are all tasks that could "catapult the courts into a political maelstrom."[29] To this list Herman Schwartz added the duty to oversee elections, and the dilemmas of economic and social transformation.[30] Furthermore, not all courts exercising constitutional review rely on the distinction between political and legal (constitutional) matters in determining justiciability. According to Donald Kommers, the German Constitutional Court did not develop a doctrine similar to the US political question doctrine.[31]

In the light of these considerations it is worth looking at the jurisprudence of the Canadian Supreme Court on drawing the line between political (and thus unjusticiable) and justiciable questions. The Supreme Court of Canada in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441[32] unanimously was of the view that political or foreign policy decisions are not per se exempt from constitutional review. In the word of Justice Wilson (at para 64):

> if we are to look at the Constitution for the answer to the question whether it is

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[28]Note that in a case much preceding Baker, in Marbury v. Madison, 5 U.S. 137 (1803) Chief Justice Marshall used the following words (at 165-166): "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. "

[29] Patricia M. Wald's Foreword in Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe (), at xiv. Wald's examples include the Russian Constitutional Court's decisions on the legality of the Communist and the Fascist Party, and on the legality of the war in Chechnya and the decisions of the Bulgarian Constitutional Court on bans affecting ethnic parties.

[30]Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe, at 4.

[31]

[32]The decision concerned human rights based challenges brought under the Canadian Charter against the decision of the Canadian government to permit the US to test cruise missiles in Canada.

The German Constitutional Court handled similar objections in the XXXXXX case. BVerfGE, available in English in Kommers, ...

> appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so.

In one of its most politically charged decisions, in the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 a unanimous Canadian Supreme Court agreed to determine whether the province of Quebec had a unilateral right to secede from the rest of Canada. In a *per curiam* decision the Supreme Court said (at paras 27-28) that

> As to the "proper role" of the Court, it is important to underline . . . that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions . . . as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. . . . As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question.[33]

Most recently, the Canadian Supreme Court refused to handle a reference request as the government indicated that they would proceed with the measure in question irrespective of the Court's advice.[34]

Thus, even this brief account suggests that the US Supreme Court and the Canadian Supreme Court are unwilling to accept certain issues for judicial decision. Considerations behind these judicial stances are in part informed by separation of powers – based considerations, to which prudential concerns are added. Both courts are uneasy to take policy determinations: the U.S. Supreme Court is uneasy when there is no judicially manageable standard, while the Canadian Supreme Court – taking a much more relaxed approach – prefers to stay away if it is asked to rubber stamp a decision already taken by the political branches. These observations certainly do not offer a clear distinction between political and legal (constitutional) matters, but they at least shed light on some of the problems arising in the cases to be discussed on the forthcoming pages.

IV. In the early days of transition to democracy post-communist constitutional courts ended up deciding about the constitutionality of retroactive justice laws, compensation (restitution) laws and lustration laws, which contained transitional justice measures. Some of these decisions were handed down a long time ago, and in some cases the procedures opened by the contested legal measures have already expired. Nonetheless, despite the passage of time, this body of jurisprudence keeps to cast a long shadow over current constitutional jurisprudence.

At the time these transitional justice measures were enacted into law, they were not required by national constitutions or international obligations. It was out of sheer political considerations that national legislatures decided to adopt such measures, which indeed often contravened existing international or constitutional obligations. Thus, once a bill or law was challenged before a constitutional court, justices were trapped: daily political considerations (interests and stakes) behind each legislative measure were all too clear, and all of a sudden striking down a measure

[33] In the case at paras 25 and 26 the Supreme Court made it clear that criteria of justiciability in reference cases (i.e. Where the Court issues advisory opinions in constitutional questions) were different from the test applied by the Court when it handles ordinary litigation.

[34] Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79, at para 65 et seq.

on the basis of formal constitutional arguments (like, saying that it violates the constitutional prohibition of retroactive criminal legislation) seemed risky as it were to result in an open confrontation of the Court with the legislature and the government[35]

Therefore, with a few exceptions, constitutional courts were trying to find their way around. Note, however, that letting transitional justice measures stand was made possible via making exceptions to constitutional rules and principles in the name of doing justice about the past.

In Czech constitutional jurisprudence, the principle of the rule of law suffered considerably, when the Czech Constitutional Court approved the constitutionality of the Law on the Illegality of the Communist Regime and Resistance to It.[36] The Czech constitutional justices, in their very first decision upheld the law, arguing that there was a discontinuity of values between the Communist regime and the new regime in the following terms:

> The Czech Constitution accepts and respects the principle of legality as a part of the overall basic conception of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of "old laws" there is a discontinuity in values from the "old regime". This conception of the constitutional state rejects the formal-rational legitimacy of a regime and the formal law-based state.[37]

The Czech Constitutional Court attributed significance to the fact that during the Communist regime certain crimes were not prosecuted for ideological or political considerations, i.e. extra-legal reason. Therefore, according to the Czech justices the ordinary logic of legal certainty could not be invoked in the case: "(t)his "legal certainty" of offenders is ... a source of legal uncertainty to citizens (and vice versa). In a contest of these two types of certainty, the Constitutional Court gives priority to the certainty of civil society, which is in keeping with the idea of a law-based state."[38] Upon such considerations the Czech Constitutional Court decided to uphold the law on the illegality of the Communist regime.

When keeping an eye out for political questions one will find that judicially manageable criteria were scarce in the Czech constitution. While as a result of the decision the Czech Constitutional Court avoided an open confrontation with the political branches (as it upheld the law), it faced an unexpected collision with the ordinary courts and the Supreme Court, which were unwilling to enforce retroactive criminal measures in individual cases.

The other zone of transitional justice jurisprudence where constitutional courts paved the way for long stretching conflicts is lustration. In countries where lustration laws were enacted this became an endless pingpong game between the courts and the political branches, with courts giving in to parliaments' will via using some sort of transition exception and then being approached for further exceptions when the political forces saw further persecutions necessary.

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[35] For an exception see Decision 11/1992 AB from the Hungarian Constitutional Court declaring a retroactive criminal justice bill unconstitutional.

[36] Act no. 198/1993 (9 July 1993). The full text of the Czech law is available in English in N. Kritz, ed., *Transititonal Justice,* vol. 2 at 366 et seq. In addition to lifting the statute of limitations to allow for the prosecution of crimes committed between 25 February 1948 and 29 December 1989 which for political reasons were not prosecuted (Article 5), the law denounced the Czech Communist regime as 'illegal and contemptible' (Article 2(1)) and declared the Czech Communist Party a criminal organization (Article 2(2)).

[37] Pl. ÚS.19/93. Available in English at http://test.concourt.cz/angl_verze/doc/p-19-93.html.

[38] Pl. ÚS.19/93.

Since the primary purpose of lustration laws is to discredit political opponents,39 a constitutional court ruling on extended, revised or expanded lustration legislation is always launched to the limelight of public attention. The recent conundrum about the Polish lustration law is a clear example for that.

In its early decisions on lustration the Czech Constitutional Court found the whole lustration procedure acceptable mainly because it was temporary (transitional).40 Then in 2001 the lustration process was expanded, with the Constitutional Court finding the law constitutional again.41 The same reasoning did not look the same in almost a decade. References to the constitutional court's established jurisprudence sounded strange and the reinforcement of the need for transitional measures is 2001 appeared a little out of place.

This last observation takes us to an important point: a judicial decision, and a constitutional court decision is no exception, is at least suspicious if it is not based on reasons which are acceptable for a constitutional community. The decisions of the French Constitutional Council might not satisfy the needs of other polities for reasoned decisions on constitutional matters. And while constitutional courts decisions sustaining transitional justices measures may be justified as sui generis instances of the rule of law in scholarly works, on the level of constitutional praxis they seemed to have introduced a genre of judicial reasoning in which situational and context-dependent exceptions are acceptable. This approach does not assist constitutional courts in staying out of decision-making scenarios for which the constitution offers no guidance.

V. Constitutional courts were burdened with many tasks, fears and expectations at the time when they were inserted in post-communist constitutions. While the jurisdiction of these courts expands to adjudicating institutional conflicts between the various branches of government in order to safeguard separation of powers, the primary task of constitutional courts was the protection of human rights. Some courts were more eager than others when plunging into their mission - depending on the issues raised before them (thus also depending on rules of standing), on the readiness of justices to tackle certain constitutional questions at a particular moment, or on the political climate of the day. Constitutional jurisprudence serves with excellent examples and comparative literature is abundant on the subject. Instead of engaging in a detailed discussion of cases it might be more useful to point out a few trends and phenomena, which are relevant for the present study on political questions. For this discussion I will try to use more recent or less famous cases, to further emphasize the prevalence of some of the points made.

The most obvious instances of political decisions are probably the ones which directly affect the distribution of powers among constitutional players. The cases are not political because they concern the powers of political players, after all, political players are usually constitutional players as well. Rather, as was mentioned before, these cases are political because abstract constitutional questions about presidential appointment powers or the protection of judicial independence emerge in the actual context of a concrete case. As a most recent example take the saga around the dismissal of Iva Brozova from the peak of the Czech Supreme Court by President Klaus on the grounds that she failed to fulfill her duties.42 In response the

[39]It is often comfortably forgotten that victims and the polity receive information not from lustration clearances and 'agent lists', but from access to Communist secret police files. Alleged national security considerations plague any discussion on this aspect of access to information, and prevent courts from interfering with governmental decisions out of (misunderstood) judicial self-restraint.

[40]Pl. US 1/92, available in English translation at http://test.concourt.cz/angl_verze/doc/p-1-92.html

[41]Pl. US 9/01, available in English at http://test.concourt.cz/angl_verze/doc/p-9-01.html

[42]CTK National News Wire, February 9, 2006.

Constitutional Court invalidated the law on which the dismissal was based.43 The conflict over the appointment and dismissal of Supreme Court judges still lingers, with personalities participating in particular decisions being as important as the abstract boundaries of their powers.

The role of constitutional courts in shaping the identities of their polities is often discussed. Sometimes these decisions are highly political in the sense of relating to a hotly debated current matter of public interest, may that be a citizenship law or the above mentioned lustration laws. Constitutional courts banning ethnic, religious or other political parties also belong here, as they prevent certain groups in the polity to participate in public affairs in a manner of their choosing. The frontiers of the polity are also delineated in cases concerning the rights of other less popular groups such as homosexuals, persons with disabilities or the homeless. While these examples might be obvious, it is crucial to point out that some of the decisions marking the characteristics of belonging are rendered in less charged cases, such as in decisions on religious instruction or days of rest (Sunday laws), or on entitlement to pensions.44

Note also that cases on these issues come before constitutional courts typically in the form of complaints about the infringement of constitutional rights, and not as separation of powers cases. What makes these cases interesting is that unlike in other, politically highly charged scenarios, in many of these cases, timing and agenda setting is in the hands of private individuals and the constitutional court itself.

One factor which can make any constitutional decision highly political that was not mentioned yet is money, i. e. the financial consequences of the constitutional court's decision. Pension, health care or welfare reform is not only a political issue because it is a difficult decision to take away long-enjoyed benefits from potential voters. As post-communist constitutional provisions say very little about the type of institutional setting in which social-welfare rights have to be realized, these constitutional rules do no offer judicially manageable standards for their enforcement. Any kind of intervention by the court will cost money and a constitutional court is unlikely to be in a position wherein it can assess the consequences of its decision. Costly constitutional courts decisions, in addition to being political because the court overtakes a redistributive task entrusted with the other branches, are also likely to cause tension between the branches. After all, unelected constitutional court justices do not have to face elections by voters who are also taxpayers.

VI. Reactions of constitutional court to EU membership and its consequences are interesting for the present paper not only because EU accession was an utmost political priority for all post-communist democracies, but also, because the application of EU law is a field where constitutional courts face an unlikely competitor for attention: the ordinary courts. After all, in EU member states national judiciaries are entrusted with applying EU law, and also with approaching a high judicial instance, the European Court of Justice, with preliminary references. Yet, according to the working presumption traceable in most post-communist countries in the early days of transition to democracy, ordinary courts are simply not suited for such grand tasks as applying a constitution or an international treaty, or resolving incompatibilities between various applicable legal norms in a given case. Also, in the old EU member states are not that enthusiastic to co-operate in the grand national game of applying EU law. Thus, a glance at how constitutional courts in post-communist democracies are cooping with the challenges of their changing institutional environment.

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[43]See Pl. US 18/06 - decided 11 July 2006, available in English at http://test.concourt.cz/angl_verze/doc/p-18-06.html.

[44]"Czechoslovak pensioners may claim Czech pensions," Czech News Agency, March 29, 2007

Interestingly, post-communist constitutional courts tend to make relatively little noise with their decisions in EU matters outside professional and scholarly circles. This is primarily due to the fact that that issues in these decisions are relatively technical. Even where a decision is believed to affect such precious subjects as national sovereignty (a real gem for those who just regained their independence) as long as the case involves the validity of a temporary measure concerning the agricultural surplus stocks, whatever a constitutional court says is difficult to communicate for a larger audience.

The most attractive matter so far has probably been the fate of the European Arrest Warrant. When the Polish Constitutional Court struck down the national implementing legislation, it did not have to engage in complicated reasoning exercises as the Polish constitution flatly prohibits the extradition of Polish nationals.[45] By the time the Czech Constitutional Court took its decision in the affirmative, [46] the excitement over the whole arrest warrant issue died down considerably, with genuine topics of national politics dominating the scene.

VII. While there are numerous examples where constitutional courts become ordinary participants of a decision making process over matters of public concern. Nonetheless, most constitutional courts in the region have experienced direct challenges against their institutional integrity from the political branches. Delays with judicial appointments maiming the courts for extended periods are not unprecedented. Hungary and the Czech Republic had their phase in the mid-1990's while the Slovak Constitutional Court had its experience more recently. After the most recent lustration decision the Polish Constitutional Tribunal also found itself in the middle about a public brainstorming campaign on whether reforming the manner of appointments to the Tribunal was necessary.[47]

When looking at political questions before post-communist constitutional courts, one of course finds more subtle webs of interaction. It is apparent that during these almost two decades constitutional courts became competent participants in a public decision-making and discourse space where the affairs of their polities are conducted in an increasingly judicialized fashion (Ran Hirschl). Constitutional courts are routinely engaged in any matter of public concern which are on the parliamentary or governmental agenda. Rules on jurisdiction and standing make them rather accessible. The nature and extent of its participation depends on the willingness and temper of a constitutional court.

Over the years post-communist constitutional courts experimented with many techniques to deliver their points to the political branches. Instead of striking down legislation, courts are inserting conditions of constitution conform interpretation in their rulings and many courts are seen to give some time for parliaments to enact missing legal rules. Although these solutions do not always advance the goals of rights protection, these approaches might have long-term political advantages. While open conflicts between constitutional courts and the other branches are unavoidable, these result not from the fact that constitutional courts touched political questions, but that are due to the fact that they handled them improperly and without due care.

[45]P 1/05, as available in English translation via http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm. The Polish Consitutional Tribunal's subsequent decision K 18/04 was somewhat more controversial due to some Eurosceptic overtones. See K. 18/04, available via http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm.

[46]PL. US 66/04, for an English language summary see http://test.concourt.cz/angl_verze/doc/pl-66-04.html.

[47]As reported in English in Polish News Bulletin, May 17, 2007.