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Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?

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

One will find, for instance, that the Romanian Constitutional Court was deeply involved with the impeachment of the country's president in the spring of 2007.^{*1} After a scandal erupted around him in early January 2007, the Constitutional Court first reviewed an amendment to the referendum law that would have made it easier to impeach the President (20 February 2007); then it found that it was constitutional to set up a parliamentary investigation commission inquiring into the President's activities (21 March 2007). These decisions were followed by the court finding that, although the President's alleged acts were seriously problematic, they were not severe enough to merit impeachment (5 April 2007) — a point made while the impeachment procedure was still pending in Parliament. The Constitutional Court then sent an explanation of this decision to the parliament in a matter of days (17 April 2007). Once Parliament voted in favour of suspending President Bănescu, the Constitutional Court confirmed the interim president without further ado (20 April 2007). President Bănescu 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 grow tense after a coalition government led by the Law and Justice Party (PiS) entered the political scene. In February 2006, the Constitutional Tribunal's chairman at the time, Marek Safjan^{*4}, published a commentary in *Gazeta Wyborcza* harshly criticising President Kaczynski's statements about the Constitutional Tribunal, calling the President's words "astonishing and disturbing to a great degree".^{*5}

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." The document is available in English at <http://www.cdep.ro/pls/dic/site.page?id=371&idl=2&par1=3>. It contributed to the scandal that President Bănescu's political opponents control the majority in Parliament. President Bănescu vowed to run for office again if impeached (AP report, 13 April 2007).

² Ousted Romanian President Defiant. 20 April 2007. Available at <http://news.bbc.co.uk/2/hi/europe/6577573.stm>.

³ Romania President Survives Vote. 20 May 2007. Available at <http://news.bbc.co.uk/2/hi/europe/6665919.stm>.

⁴ Professor Safjan's term on the Constitutional Court expired in 2006. He was appointed to the Constitutional Tribunal in 1997 and has served as its chairman since 1998.

⁵ M. Safjan. Nie wklajamy Trybunału w politykę PiS. – *Gazeta Wyborcza*, 7 February 2006. The full text of the article is available from the Web site of the Polish Constitutional Tribunal in Polish via <http://www.trybunal.gov.pl/Wiadom/Prezes/prezes.htm>. The article attracted consid-

The Polish Constitutional Tribunal most recently^{*6} clashed with the political branches in a high-profile case wherein it invalidated the newest lustration law in May 2007 — right before the contested lustration procedure was to have taken effect.^{*7} The bill was the Kaczynski government's pet project in its mission to clear the public sector of old Communists. In the decision, Chief Justice Jerzy Stepien issued a reminder that "a state based on the rule of law should not fulfill a craving for revenge instead of fulfilling justice".^{*8} A commentary in the Polish edition of *Newsweek* reminds the reader that, while in striking down the lustration decision the Constitutional Tribunal preserved its independence in the face of constant attacks from the ruling coalition, the decision was reached over a record number of dissenting opinions.^{*9} President Kaczynski reportedly indicated 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 Ukraine is deeply involved in the political crisis centring on parliamentary dissolution.^{*11} In early April 2007, President Yushchenko ordered the dissolution of Parliament and called for early elections, in part because — as a result of defections — the Yanukovich-led parliamentary majority was dangerously close to acquiring sufficient support to override presidential vetoes.^{*12} The dissolution orders were challenged before the Constitutional Court, which — not for the first time — exposed the judges of a constitutional court to immense political pressure. The chairman of the Constitutional Court resigned, and five of its judges 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 the 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 were not imposing any pressure on the Constitutional Court but acknowledged that they were investigating corruption charges against a Constitutional Court judge.^{*15} Soon three judges were dismissed from the Constitutional Court and another four went on sick leave, a development that prompted the President's 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 Constitutional Court's new chairman took office, he assured the polity in a lengthy newspaper interview that the Ukrainian Constitutional Court was not politicised.^{*18}

These are some of the harshest instances of constitutional courts getting involved in intense political scandals. As even such a short record indicates, fears of 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, systematic consideration of all the issues and relevant jurisprudence. I hope to highlight on the following pages at least some of the most disturbing problems and draw the reader's attention to concepts and considerations that may assist in addressing these issues.

erable attention and triggered discussion in the Polish press and 'blogs'. Excerpts from the article are available in English in BBC Monitoring International Reports, Lexis-Nexis account No. A220602094C-10084-GNW.

⁶ Previously the Constitutional Tribunal had a major clash with the government when it invalidated legislation intended to end the mandate of those local authorities that 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). See decision K 31/06.

⁷ Decision K 2/07. An English language summary of the decision is available at http://www.trybunal.gov.pl/eng/summaries/documents/K_2_07_GB.pdf.

⁸ Quoted in English from: Poland's Anti-Communist Law 'Unconstitutional'. — The Daily Telegraph, 12 May 2007. Available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/05/12/wpoland12.xml>.

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

¹⁰ Judge Curbs Polish Informers Law. — The Financial Times, 11 May 2007. Available at http://www.ft.com/cms/s/56ee999e-0004-11dc8-c98-000b5df10621_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" (document available in English as part of the CODICES database).

¹² Under Article 94 of the Constitution, a presidential veto may be overridden by a two-thirds vote of the MPs.

¹³ BBC Monitoring International Reports, 10 April 2007. The circumstances of Constitutional Court Chairman Ivan Dombrowsky 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. Interfax-Ukraine, 14 April 2007. Available at <http://www.interfax.com.ua/en/news/main-news/25693/?print>.

¹⁵ BBC Monitoring International Reports, 11 May 2007.

¹⁶ BBC Monitoring International Reports, 18 May 2007.

¹⁷ The President's televised address is available in English translation from BBC Monitoring International Reports, 23 May 2007.

¹⁸ BBC Worldwide Monitoring, 27 July 2007.

1. Constitutional courts entering the political scene: Fears and expectations

Constitutional review is a task or power surrounded by serious doubts, distrust, and reservations in many jurisdictions. Those best known for their deep-seated objections against government by judges are the French, with these long-held sentiments clearly informing the creation of the Constitutional Council in 1958. Indeed, it took more than a decade for that council to abandon at least in some respects the intellectual confines surrounding its jurisdiction in its famous decision on freedom of association. 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}

In the time of transition to democracy, the creation of post-Communist constitutional courts was in large part fuelled by a distrust of the judiciary and by the firmly held belief that courts and judges inherited from the Communist regime were (or would be) incapable of exercising the powers allocated to the constitutional courts.^{*20} In post-Communist Central and Eastern Europe, constitutional courts were established at the dawn of transition to democracy.^{*21} Following to some extent the German model, newly created constitutional courts were established outside the ordinary judicial hierarchy.^{*22} 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 powers related to the control of elections and referenda.^{*23}

The newly created constitutional courts were frequently staffed by eminent lawyers, who often were not required to have served in a judicial office before.^{*24} The new constitutional courts enjoyed a high level of institutional

¹⁹ M. Tushnet. *Taking the Constitution Away from the Courts*. Princeton, 2000.

²⁰ On this, see L. Garlicki. *Constitutional Courts Versus Supreme Courts*. – *International Journal of Constitutional Law* 2007 (44) 5, pp. 44–68 (see especially pp. 44–45). See also Z. Kühn. *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*. – *American Journal of Comparative Law* 2004 (52), pp. 531–567.

²¹ The Polish Constitutional Tribunal was established in 1985; thus, formally it predates the Round Table Talks.

²² As an exception, Estonia does not have a separate constitutional court but entrusts a special chamber of the Supreme Court with constitutional review functions.

²³ See, e.g., Czech Constitution, articles 65 (covering the power to try the President for high treason) and 87 (on jurisdiction) (as available at http://test.concourt.cz/angl_verze/constitution.html); the Estonian Constitution, articles 149 (para. 3) and 152 (para. 2) (as available in English at <http://www.president.ee/en/estonia/constitution.php?gid=81918>); the Hungarian Constitution, articles 26.4 (on preliminary review of legislation upon the president’s referral), 31.A-32 (impeachment), and 32.A.1 (as available via <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/content/en/encont5b.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, articles 79.1 (on constitutional complaint), 122.3 (on the President’s preliminary review request), 133.2 (addressing compatibility of international agreements), 186 (on requests from the National Judiciary Council regarding guarantees of judicial independence), and 188–189 (as available via <http://www.trybunal.gov.pl/eng/index.htm>) as well as the Constitutional Tribunal Act of 1 August 1997, articles 2 and 3 (as available via <http://www.trybunal.gov.pl/eng/index.htm>); for Romania, see Romanian Constitution, Article 144 (available at http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=5); and for Slovakia, see Slovak Constitution, articles 107 (on prosecution of the President for wilful violation of the Constitution or treason) and 125–129 (as available via http://www.concourt.sk/A/a_index.htm).

²⁴ While high professional standing, or at least experience as a lawyer, tends to be a standard qualification criterion set forth in national laws, constitutional court judges in post-Communist countries are rarely required to be of such background as would qualify them for judicial office. For details on the Czech Republic, where constitutional court members hold a 10-year renewable term, see the Czech Constitution (Note 23), 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 the situation in Hungary, where justices hold a nine-year renewable term, see the Act on the Constitutional Court (Note 23), Article 5.1 (“Hungarian citizens with a law degree who [have] reached the age of 45 years and have no criminal record may be elected as Members of the Constitutional Court”) as well as Article 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 Court judges have a 10-year, non-renewable term, see Constitutional Court Act (Note 23), 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 Court members have a nine-year non-renewable term, see Lithuanian Constitution (Note 23), 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”); and for Poland, where Constitutional Court justices serve a nine-year fixed term, see the Constitutional Tribunal Act of 1 August 1997 (Note 23), 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

trust, and thus popular legitimacy in these fledgling democracies. While their current public opinion ratings might not be as high as they used to be, constitutional courts tend to be among the most trusted public institutions in the post-Communist zone, despite the problems exposed in this paper.

Post-Communist constitutional courts were expected to become the ultimate guarantors of the fundamentals of newly crafted democratic constitutions, guarding institutional arrangements (including separation of powers and the independence of the ordinary judiciary) and fundamental rights alike. Among their top achievements most constitutional courts by now may list their contribution to their countries' membership in the Council of Europe, membership in NATO, and their recent accession to the European Union — which had specified “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities” as a crucial prerequisite for membership.^{*25} These are undeniable success stories, in spite of occasional darker spots in the record.

Nonetheless, one cannot help but notice that some of their powers almost automatically drag constitutional courts into the dark den of daily politics. The Romanian as well as the Ukrainian case 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 had decided twice already on the constitutionality of the exercise of presidential powers to dissolve the Bundestag, and, while these not might be the least-criticised decisions of the court, they did not harm the court's legitimacy or reputation. To cite a reassuring example from the post-Communist region to this effect, it is worth remembering 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 of government by unacceptable means such as forced dismissals or court-packing. While reduction of judicial terms of office and 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 sets out to demonstrate, constitutional systems differ in their definition of the type of decisions occasioning such political questions for consideration that are worth reflecting upon. After this discussion, the paper moves on to continue the analysis of post-Communist constitutional jurisprudence.

2. ‘Political questions’ and constitutional review: On and beyond Baker

In continental Europe, the belief that well-functioning courts should and do 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 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 judges are expected to be blind to the political turmoil their decisions could spark).

Nonetheless, when ‘political questions’ and constitutional review are mentioned in the same sentence, one cannot help but think of the US Supreme Court's political question doctrine as expounded upon in the semi-

Court or the Chief Administrative Court”). The Web site of the Constitutional Tribunal includes the following comment: “The qualifications required to become a candidate for the office of a judge of the Supreme Court or the Chief Administrative Court are as follows: at least 10-years [sic] 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 [an] official” (at http://www.trybunal.gov.pl/eng/About_the_Tribunal/info.htm). For Romania, where Constitutional Court judges serve a nine-year non-renewable term, see Romanian Constitution, Article 143 (available at http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=5) (“Judges of the Constitutional Court must have graduated law, and have high professional competence and at least eighteen years of experience in juridical or academic activities”). For Slovakia, see the Slovak Constitution, under which Constitutional Court judges serve for a 12-year non-renewable term, Article 134.3 (available at <http://www-8.vlada.gov.sk/index.php?ID=1384>) (“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.

²⁵ See the so-called Copenhagen criteria in articles 6.1 and 49 of the Treaty on European Union as established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.

²⁶ The decision is available in English at <http://www.lrkt.lt/dokumentai/2004/d040406.htm>.

nal decision *Baker v. Carr* (369 U.S. 186 (1962)).^{*27} In this case, Justice Brennan 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 by various departments on one question.^{*28}

In *Baker* the US Supreme Court seemed to subscribe to the view that political questions of this kind are not capable of judicial determination and as such are 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 considerations related to separation of powers 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 order. First, it has to be admitted at the outset that, as it has been applied by the US Supreme Court, the political question doctrine has acquired a somewhat tainted reputation. There is no room here to elaborate on the relevant line of jurisprudence and scholarship. A reminder of the decision of the US Supreme Court in *Bush v. Gore*, 531 US 98 (2000), the case that ultimately determined the outcome of the 2000 presidential elections, stands as a stark reminder of the limits of judicial self-restraint.

Secondly, several types of powers exercised by constitutional courts are regarded by scholars and practitioners as political *per se*. According to Patricia Wald, preliminary review, abstract constitutional interpretation, and testing of 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. The German Constitutional Court, for instance, did not develop a doctrine similar to the US political question doctrine.^{*31}

In the light of these considerations, it is especially worth looking at the jurisprudence of the Canadian Supreme Court in 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 exempt *per se* from constitutional review. In the words of Justice Wilson (in para. 64):

[I]f we are to look at the Constitution for the answer to the question [of] whether it is 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.

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

²⁸ Note that in a case much preceding *Baker*, that of *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*. 2000, p. xiv. Wald's examples include the Russian Constitutional Court's decisions on the legality of the Communist Party and the Fascist Party, and on the legality of the war in Chechnya, as well as the decisions of the Bulgarian Constitutional Court on bans affecting ethnic parties.

See also B. Bugarcic. *Courts As Policy-Makers: Lessons from Transition*. – *Harvard International Law Journal* 2001 (42), pp. 247–288 (especially p. 259).

³⁰ H. Schwartz (Note 29), p. 4.

³¹ See D. P. Currie. *The Constitution of the Federal Republic of Germany*. Chicago 1994, pp. 44–46.

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, e.g., in the *Pershing 2* and *Cruise Missile I* case, (BVerfGE 66, 39) and *Cruise Missile II* case (BVerfGE 68, 1) available in English in D. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Duke 1997, p. 155 ff.

In one of its most politically charged decisions, in the Reference re Secession of Quebec case, [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 Canada. In a *per curiam* decision, the Supreme Court said (in paras 27–28):

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 because 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 although the US Supreme Court and the Canadian Supreme Court differ greatly in their stance on justiciability, it is clear that both courts are unwilling to accept certain issues for judicial decision, matters that they deem it appropriate for the political branches to decide. These judicial stances are in part informed by separation of powers — well-grounded considerations, to which prudential concerns are added. Both courts are uneasy in making policy determinations: the US 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 and dilemmas also faced by post-Communist constitutional courts.

3. Handling transitional justice cases: Never too political

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 including transitional justice measures. Some of these decisions were handed down a long time ago, and in some cases the procedures initiated by the contested legal measures have already expired. Nonetheless, despite the passage of time, this body of jurisprudence continues to cast a long shadow over current constitutional jurisprudence. And as the second round of the lustration saga in the Czech Republic (discussed below) and also the most recent lustration controversy in Poland suggest, some of these matters keep re-emerging on the political horizon and thus before constitutional courts.

At the time at which these transitional justice measures were enacted as 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, the members of that court were trapped: the daily political considerations (interests and stakes) behind each legislative measure were all too clear, and all of a sudden striking down a measure on the basis of formal constitutional arguments (as in saying that it violates the constitutional prohibition of retroactive criminal legislation) seemed risky, as it might result in an open confrontation of the court with the legislature and the government.^{*35}

Without entering into a detailed discussion, it is important to emphasise that letting transitional justice measures stand was made possible via making exceptions to constitutional rules and principles in the name of ensuring justice in relation to 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 court’s judges, in their very first decision, upheld the law,

³³ In the decision’s paras 25 and 26, the Supreme Court made it clear that criteria for justiciability in reference cases (i.e., where the court issues advisory opinions on 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, in para. 65 ff.

³⁵ For an exception, see Decision 11/1992 AB of 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) *Transitional Justice, How Emerging Democrats Reckon with Former Regimes*. Vol. 2. Country Studies (Washington DC, U.S. Institute of Peace Press, 1995), on p. 366 ff. In addition to lifting the statute of limitations to allow for the prosecution of crimes committed between 25 February 1948 and 29 December 1989 that

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., for extra-legal reasons. Therefore, according to the Czech court, the ordinary logic of legal certainty could not be invoked in the case: “This ‘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} It was on the basis of such considerations that 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 finds 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 in which constitutional courts paved the way for conflicts stretching far into the future is lustration. In countries where lustration laws were enacted, this became an endless game of ping-pong between the courts and the political branches, with courts giving in to parliaments’ will by using some sort of transition exception, then being approached for further exceptions when the political forces saw further persecution as necessary. 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 catapulted into the limelight of public attention. The recent conundrum about the Polish lustration law is a clear example of this.

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 here does not look the same after almost a decade. References to the Constitutional Court’s established jurisprudence sounded strange, and the reinforcement of the notion of the need for transitional measures in 2001 appears 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 reasoning that is acceptable for a constitutional community. The short and often rather cryptic decisions of the French Constitutional Council, for instance, might not satisfy the needs of other polities for reasoned decisions on constitutional matters. And while constitutional courts’ decisions sustaining transitional justice measures may be justified as *sui generis* instances of the rule of law in scholarly works, on the level of constitutional praxis they seem to have introduced a genre of judicial reasoning in which situational and context-dependent exceptions become acceptable without much further ado. Such an approach does not assist constitutional courts in staying out of decision-making scenarios for which the constitution does not offer conclusive guidance, leaving decision-makers to exercise discretion with reference to pre- or extra-constitutional principles and considerations.

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 organisation (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.

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: “The conditions prescribed by the statute for holding certain positions shall apply only during a relatively short time period by the end of which it is foreseen that the process of democratization will have been accomplished” (by 31 December 1996) and “The basic purpose of this statute is to prescribe, exclusively for the future, the preconditions for holding certain narrowly defined offices or for engaging in certain activities precisely specified in the statute, and not permanently, but only for a transitional period.” Available in English 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.

4. Courts participating in politics ordinary

Constitutional courts were burdened with many tasks, fears, and expectations when they were inserted into 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 their individual members' readiness to tackle certain constitutional questions at a particular moment, or on the political climate of the day. Constitutional jurisprudence supplies 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 that are relevant from the standpoint of the present study on political questions. For this discussion I will try to cite more recent or less famous cases, to further emphasise the sheer number of cases about which some of the points can be made.

The most obvious instances of political decisions are probably the ones that directly affect access to public office and the (re)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 above, these cases are political because abstract constitutional questions about eligibility of elected office or the protection of judicial independence emerge in the actual context of a concrete case in a manner that cannot be accounted for without reliance on premises that are not mandated by the state's constitution. The following section of the paper reflects on the role of constitutional courts in the Czech Supreme Court appointment saga⁴²; on the Lithuanian presidential impeachment cases of 2004; and, lastly, on the Hungarian referendum turmoil of 2007.

As a most recent example we can take the saga around the dismissal of Iva Brožová from the helm of the Czech Supreme Court by President Klaus on the grounds that she failed to fulfil her duties.⁴³ In a rushed appointment, Jaroslav Bureš (a former justice minister and presidential candidate) was appointed to the Supreme Court and was made Chief Justice to replace Brožová.

In response to the deposed Chief Justice Brožová's complaint, the Constitutional Court invalidated the law on which the dismissal was based, relying on Article 82.2 of the Czech Constitution, which declared the prohibition of removal of judges against their will.⁴⁴ In its decision the Constitutional Court responded directly to arguments made in the course of parliamentary debates that the principle 'he who appoints may remove' shall apply also to judicial appointment. The Constitutional Court said in the case:

[T]he principle "he who appoints, may remove" is inherent in a system of state administration [...] i.e. in relations of hierarchy, in other words, relations of superiority and subordination. [...] [I]n character, [however] the performance of state administration of courts does not correspond to the general definition of the performance of state administration. [...] [T]he office of chief judge of a court, just as the Chief Justice of the Supreme Court, is inseparable from the office of judge, for one cannot construe the dual nature of the legal status of a court chief judge as an official of state administration on the one hand and as a judge on the other. It is, thus, necessary to relate, in the above-indicated respect, the attribute of the independence of the judiciary, alternatively the independence of judges, also to the chief judges of courts.⁴⁵

The decision of the Constitutional Court that reinstated Iva Brožová in office and at the same time terminated the appointment of Jaroslav Bureš⁴⁶ did not put an end to the dispute over Supreme Court appointments. After the unsuccessful attempt to replace the Chief Justice, in November 2006 President Klaus decided to appoint a second deputy chairman to the Supreme Court, the same Jaroslav Bureš whom he meant earlier to lead the court. Article 62.f of the Czech Constitution provides that the President of the Republic "shall appoint from among judges the Chairperson and Vice-Chairpersons of the Supreme Court". Until this controversy erupted,

⁴² My discussion of these Czech cases owes much to the research assistance of Jana Jaseckova and Peter Kocvar (both students at CEU Legal Studies in the 2007–08 academic year). I remain fully responsible for all mistakes and misunderstandings.

⁴³ CTK National News Wire, 9 February 2006. The conflict over appointment of ordinary court judges commenced in 2005, when President Klaus refused to appoint 32 trainees to judicial positions. In the resulting cases, the President clashed with the Supreme Administrative Court and also with the Constitutional Court. For an account in English, see J. Kysela, Z. Kühn, *Presidential Elements in Government: The Czech Republic*. – *European Constitutional Law Review* 2007 (3), especially p. 107 ff.

⁴⁴ See Pl. ÚS 18/06, decided 11 July 2006, available in English at http://test.concourt.cz/angl_verze/doc/p-18-06.html. The Czech Constitution's Article 82.2 reads: "Judges may not be removed or transferred to another court against their will; exceptions resulting especially from disciplinary responsibility shall be laid down in a statute," as available in English on the Web site of the Czech Constitutional Court, at http://test.concourt.cz/angl_verze/constitution.html.

⁴⁵ See Pl. ÚS 18/06, decided 11 July 2006. Available in English at http://test.concourt.cz/angl_verze/doc/p-18-06.html.

⁴⁶ Jaroslav Bureš questioned the legitimacy of the Constitutional Court proceedings, as he was not party to the procedure initiated by Chief Justice Iva Brožová against President Klaus. On this, see the document entitled 'Bures Says Constitutional Court Violates His Right to Just Proceedings', as available at http://www.ctk.cz/zpravy/anglicko_view.php?id=223854.

however, only one person served on the Supreme Court in the capacity of the latter, although the language of the Constitution clearly is in the plural.

In August 2007, President Klaus unsuccessfully challenged the constitutionality of legal rules on Supreme Court administration.^{*47} In September 2007, the Constitutional Court found the appointment of Dr. Bureš as the deputy chairman unconstitutional on grounds that he did not possess a valid judicial appointment.^{*48} Thereupon Dr. Bureš resigned from the Supreme Court to re-emerge in a few days as the deputy chairman of the High Court in Prague and as the chief co-ordinator for the planned judiciary reform.^{*49}

President Klaus employed a familiar justification for his actions: the mission of preventing government by the judiciary (*soudcokracie*). He argued that, as a necessary limitation, judicial administration has to be under administrative control.^{*50} Despite such submissions, according to eminent court-watcher Jiří Příbáň, in these cases the Czech Constitutional Court managed to preserve the bulwarks of judicial independence in its three decisions going clearly against President Klaus's preferences. Nonetheless, one cannot help but notice that in this lengthy contest over Supreme Court appointments the personalities of various decision-makers cast a long shadow over the constitutional boundaries of their powers.

The Czech Constitution provided at least some guidance regarding Supreme Court appointments. When the Lithuanian Constitutional Court had to decide about a newly enacted law preventing the impeached president of the republic from seeking re-election, the judges of the Lithuanian Supreme Court had less textual guidance.^{*51} On 4 May 2004, the Lithuanian parliament amended the Lithuanian Act on Presidential Elections, providing, inter alia, that a person who has been removed from office via impeachment may not be elected President of the Republic if less than five years has elapsed since his removal from office. The amendment was passed to address the freshly impeached Lithuanian president, Rolandas Paksas.^{*52} He had made it clear without delay that he planned to run in the upcoming presidential elections, in June 2004.

The petitioners in the case argued forcefully that under the Constitution the only consequence of impeachment is removal from office. The Constitutional Court, however, placed the entire constitutional and political crisis in the broader context of discussing the importance of preserving trust in a constitutional democracy based on the rule of law^{*53}, and the need for an opportunity for self-defence, including an authorisation for the removal of violators of the law and of the Constitution from the highest public offices.^{*54} Furthermore, the Constitutional Court accorded special significance to the fact that, upon entering office, the President of

⁴⁷ The complaint of President Klaus in the resulting case Pl. ÚS 87/06 is available in Czech at <http://www.vaclavklaus.cz/klaus2/asp/clanek.asp?id=zgUf44Tj3PIQ>. The President's complaint argues that since the Constitution employs plural language in its material on deputy chairpersons, he is entitled to appoint more than one such official.

⁴⁸ Decided together with President Klaus's complaint as Pl. ÚS 87/06, available only in Czech at <http://www.concourt.cz/scripts/detail.php?id=541&keyword=Pl.+%DAS+87%2F06>. Four Justices dissented, all of whom had been appointed to the Constitutional Court by President Klaus. On the controversial appointments to the Czech Constitutional Court of 2003–04, see J. Kysela, Z. Kühn (Note 43), p. 106 ff.

⁴⁹ Czech Justice Minister Proposes Bureš to High Court Post. 18 September 2007. Available in English at <http://www.czech-republic-prague.com/article-306624-en.html>.

When commenting on the decision of the Constitutional Court removing him from the office of Supreme Court Deputy Chairman, Dr. Bureš was reported to have said: "I remain a judge, and I intend to be a judge, so I'm hoping to receive an offer from a court chair." Quotation from English translation in: Klaus Loses to Brožová for Third Time. 17 September 2007. Available at http://www.hn.ihned.cz/c410048260-22039750-500000_d-klaus-loses-to-brozova-for-third-time.

⁵⁰ Centrum pro ekonomiku a politiku (the Center for Economics and Politics), a think tank close to President Klaus, produced a report to support this reasoning, which was marketed with the President's recommendation. See *Soudcokracie v ČR – fikce, nebo realita?* Available at <http://cepin.cz/cze/kniha.php?ID=71> (in Czech).

⁵¹ Case No. 24/04, of 25 May 2004, as available in English at <http://www.lrkt.lt/dokumentai/2004/r040525.htm>.

⁵² Under Article 74 of the Lithuanian Constitution, the grounds for impeachment are gross violation of the Constitution, breach of a public oath, and commission of a crime. President Paksas — the first European president to be removed by impeachment — was impeached on three counts: for improperly granting citizenship to a Russian businessman in exchange for campaign funds, breaching official secrets, and influencing the outcome of a privatisation. The Constitutional Court found him guilty with its decision in Case 14/04, of 31 March 2004, as available in English at <http://www.lrkt.lt/dokumentai/2004/c040331.htm>.

Parliament decided to amend the law on presidential elections and not the Lithuanian Constitution itself, as a constitutional amendment would have been formally impossible to enact following the impeachment of the President and before the upcoming presidential elections. See Articles 148 ff. on the amendment of the Lithuanian Constitution, as available in English at http://www.lrkt.lt/Documents2_e.html.

⁵³ Decision in Case No. 24/04: "[I]n order that the citizens – the state community – could reasonably trust the state officials [...] a public democratic control over the activity of the state officials comprising inter alia a possibility to remove from office the state officials who violate the Constitution and law, who bring their personal interests or the interests of the group above the public interests, or who disgrace state authority by their actions is needed. One of the forms of such public democratic control is the constitutional institute of impeachment." As available in English at <http://www.lrkt.lt/dokumentai/2004/r040525.htm>.

⁵⁴ Decision in Case No. 24/04: "The application of impeachment, an institute of a special parliamentary procedure, and the constitutional sanction – removal from office [...] is one of the measures of self-protection of the state community, the civil nation, a way of its own defence from the said top officials of state power who ignore the Constitution and law in such a manner that they are prohibited from holding certain office, as they do not fulfil their obligation unconditionally to follow the Constitution and law or follow the interests of the nation and the State of Lithuania, and who have disgraced state authority by their actions." As available in English at the Court's website.

the Republic takes an oath with more than symbolic consequences. The court stated that when the President of the Republic has sworn this oath, his duty emerges to act in only the way he is obliged to by the oath given to the nation, and to breach this oath under no circumstances. According to Article 74 of the Constitution, the breach of the oath is one of the bases for removal of the President of the Republic from office, according to the procedure for impeachment proceedings. The Constitutional Court Justices added that an impeached president “will always remain as the one who breached the oath to the Nation and grossly violated the Constitution, and who was removed from the office”.

Thereupon the Lithuanian Constitutional Court found the newly introduced limitations on eligibility for the office of President of the Republic acceptable in an unusual manner — expanding the scope of the ban to all public offices requiring an oath and with no time limitation. The following elections turned out to be rather close, though, after a barred Mr. Paksas openly supported Kazimira Prunskienė, the leader of the Peasants’ Party. She lost in the general election of June 2005 by a mere four per cent to Valdas Adamkus, who won 52 per cent of the vote. This story is not complete without adding that Dr. Adamkus had been the president of Lithuania between 1998 and 2003, and lost on account of a ‘populist grassroots’ protest stirred up by the impeached Mr. Paksas.^{*55} Note that the decision of the Constitutional Court effectively prevents Mr. Paksas from running for any public position that requires taking an oath.^{*56}

Yet another example of constitutional court justices rearranging the balance of powers between constitutional players comes from Hungary, where the Constitutional Court is entrusted with substantial powers to review referenda. The jurisdiction of the Constitutional Court over referenda is based on the election law, which grants the Constitutional Court jurisdiction to entertain objections (in extraordinary proceedings) against decisions of the National Election Commission concerning the acceptability of questions to be posed for referenda.^{*57} Among the challenges most often raised against questions proposed for referenda one finds the prohibition of constitutional amendment and raising of budgetary questions^{*58}, along with the requirement that questions for referenda be clear and unambiguous.^{*59}

The jurisdiction of the Hungarian Constitutional Court is not an unusual one among constitutional review fora. What makes it worthy of attention for the purposes of the present paper is how referenda have been used in Hungarian politics recently, a manner that has serious burdensome consequences also for the Constitutional Court. Hungarian party politics has become known to be rather polarised and immune to any attempt at consensus-seeking (save decisions that improve the position of members of Parliament). While the constitutional position of parliamentary opposition is rather strong, for reasons dating back to the Round Table Talks, parliamentary parties on the opposition side have regularly resorted to symbolic acts. Ever since becoming the largest party on the opposition side, the approach preferred by the Alliance of Young Democrats (FiDESZ) to express its dissatisfaction with the government has been to resort to extra-parliamentary means, like being absent from parliamentary sessions. Stronger dissatisfaction prompts calls for referenda. When it came to challenging the Socialist–liberal coalition government’s convergence package in 2007, instead of challenging the measures in Parliament FiDESZ initiated a string of referenda against all central measures of the package, such as the introduction of tuition fees for higher education^{*60} or the abolition of the ‘treatment (visit) fee’ for public health care providers^{*61} and the ‘*per diem*’ to be paid for stays in public hospitals.^{*62}

These calls for referenda have a complex impact on the Hungarian political scene, making the Constitutional Court rather vulnerable to previously unseen pressure. To begin with, the referendum proposals resulted in an open clash between the National Election Commission and the Constitutional Court. The National Election Commission refused to allow public votes on the above questions, saying, in essence, that the proposals affect the central budget and as such are precluded by law. A divided Constitutional Court, however, was of

⁵⁵ Independent Centrist is Lithuania Viktor. – The New York Times, 28 June 2004. Available at <http://query.nytimes.com/gst/fullpage.html?res=9F03E4DE1438F93BA15755C0A9629C8B63>.

⁵⁶ Mr Paksas challenged the domestic proceedings before the ECtHR. See Paksas v. Lithuania, Application No 34932/04 on the list of communicated cases in Information Note No. 94 on the case-law of the Court of February 2007, as available at <http://0-www.echr.coe.int/millennium.unicatt.it/Eng/InformationNotes/INFONOTENo94.htm>.

⁵⁷ Act No. 100 of 1997, on elections, which also sets forth the detailed rules on referenda and public initiatives. The jurisdiction of the Constitutional Court is based on Article 130.

⁵⁸ Article 28/C (5) of the Hungarian Constitution enumerates subject matter on which referenda may not be held. In addition, the act on elections imposes additional restrictions.

⁵⁹ Act No. 3 of 1999, on national referenda and popular initiative, requires in Article 13 that a referendum be about a specific question that allows a straightforward answer.

⁶⁰ With AB decision 465/H/2007 the Constitutional Court required the National Election Commission to reconsider its decision, refusing the referendum initiative. This is the least surprising of the referendum initiatives: when entering government in 1998, FiDESZ was quick in abolishing the tuition fee introduced by its predecessor.

⁶¹ With AB decision 505/H/2007 the Constitutional Court required the National Election Commission to reconsider its decision, refusing the referendum initiative.

⁶² With AB decision 504/H/2007 the Constitutional Court required the National Election Commission to reconsider its decision, refusing the referendum initiative.

the opinion that these referendum initiatives affect a future budget and instructed the Election Commission to reconsider, which it eventually did.

In the meantime, using the momentum from FiDESz, a great number of referendum initiatives were lunched, essentially clogging the Constitutional Court's docket. Although it is not possible to tell what percentage of those proposals come from the ranks of the parliamentary opposition, it is clear that, instead of acting as a guardian of the Constitution in referendum cases, the Constitutional Court has become merely a toy in an increasingly populist political game, by now having to preside over a hundred objections in referendum cases. While some of the referendum initiatives landing in the Constitutional Court via objections against the decision of the National Election Commission do involve political 'hot potatoes' (such as the ones mentioned above), which also put the Constitutional Court in a fragile position, many of the questions are simply a waste of the Constitutional Court's time – and we are talking about more than 100 such objections on the Constitutional Court's docket by now.

Some of the questions are clearly rhetorical, and others appear to be plays on words as well. One proposed question was of this form: "Do you agreed with the finding that MPs are for us, and not that we are for the MPs?"⁶³ Consider also the initiative for the free distribution of beer, which the Constitutional Court found to be in violation of the Europe Agreement.⁶⁴ Or another initiative seeking to introduce a 'siesta', which was ultimately rejected as ambiguous.⁶⁵ What is clear from an overview of this large body of decisions is that, due to the referendum cases, the Constitutional Court has turned into a complaint forum for the people to a previously unseen extent. This is quite an achievement in Hungary, where the Constitutional Court is accessible to 'anyone' via *actio popularis*.⁶⁶ What distinguishes the new wave of cases from anything seen before is that — unlike with petitions coming before it through *actio popularis* before — in the referendum cases the Constitutional Court has to decide on each objection and provide a statutory remedy in each case.⁶⁷

Note, however, that not all of the initiatives are so playful. Among the referendum initiatives the Constitutional Court has had to decide upon is one raising the issue of the acceptability of the question "Do you agree with Parliament passing an act to legalise same-sex marriage?"⁶⁸ The National Election Commission rejected the question as an attempt at an indirect constitutional amendment. The Constitutional Court upheld the decision, making reference to its previous decision in 1995.⁶⁹ In the latter case, the Constitutional Court had said that, while marriage under the Hungarian Constitution was to be interpreted with reference to the traditional conception of 'union between man and woman', the Constitution leaves room for granting legal protection to alternative forms of private living arrangements. The main issue in the 1995 decision was the level of constitutional protection provided for *de facto* life-partnerships, irrespective of the sexual orientation of the partners. The Constitutional Court's decision prompted a minor amendment of the Civil Code and at the time was considered rather progressive.

In the recent referendum decision, the Constitutional Court simply repeated its words concerning the traditional conception of marriage as written in 1995. Nonetheless, without a reminder of the context of the 1995 decision and also considering the fact that same-sex couples continue not to have access to any legal recognition apart from the old-fashioned *de facto* life-partnership in the Civil Code, voices claiming that the Constitution or the Constitutional Court prohibited same-sex marriage are becoming stronger and more alarming. On a smaller scale, distorted references to constitutional jurisprudence impair any serious effort to introduce even such changes in the legal system as are less revolutionary than a (rather unlikely) constitutional amendment recognising same-sex marriage. On a larger scale, this decision indicates, in a national setting where the docket of the constitutional court is full already, how easy it is to place a major rights issue before the justices in a manner such that it does not merit proper consideration. In the current Hungarian setting, it seems that sending a referendum initiative by post is the best means of getting a hard constitutional question resolved in a short time.

⁶³ 1118/H/2007, AB ruling of 6 November 2007. The question was rejected by the National Election Commission because it raised an issue that is not within Parliament's competence to decide. The Constitutional Court rejected the objection for formal reasons because it did not contain any substantive legal arguments.

⁶⁴ 26/2007 (IV. 25) AB decision.

⁶⁵ 976/H/2007 AB ruling of 30 October 2007.

⁶⁶ See articles 1 (b) and 21 (2) of Act No. 32 of 1989 on the Constitutional Court of the Republic of Hungary, as available in English via <http://mkab.hu/en/enpage5.htm>.

⁶⁷ See Article 130 (3) of Act No. 100 of 1997, on elections.

⁶⁸ 966/H2007 AB ruling of 15 October 2007.

⁶⁹ 14/1995 (III. 13) AB decision.

5. Conclusions: Unexplored directions, lessons, and caveats

In opening the concluding section of this paper, it is appropriate to note that the above discussion does not in any way cover the entire spectrum of potential instances where constitutional courts decide on questions that are indeed 'political'. Without a comprehensive discussion of such cases, I wish to draw attention to a few themes that are worthy of consideration. Firstly, in discussions about constitutional review and political questions the role of constitutional courts in shaping the identities of their polities is considerable. Constitutional courts reviewing bans on ethnic, religiously based, or other political parties belong here alongside decisions on lustration rules, as in those instances courts prevent certain groups in the polity from participating in public affairs in a manner of their choosing. The frontiers of the polity are also delineated in cases concerning the rights of 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 old-age or disability pensions, or to health care benefits.

In such cases, issues typically come before constitutional courts in the form of complaints about the infringement of constitutional rights and not as separation-of-powers cases. While along the lines of reasoning followed by Justice Brennan in *Baker v. Carr*, these cases should be less problematic at first sight, as they are decided on rights or equal protection grounds. And rights cases or discrimination issues are exactly the matters that courts performing constitutional review are equipped to handle. Note, however, that in many such cases the judges make such discretionary decisions and rely on such value preferences as are difficult to locate in any constitutional prescription, let alone find in the black letter of the constitution. Often such cases are all the more interesting because — as typically happens in rights cases — private individuals have a great role in agenda-setting and timing.

Another factor that can make any constitutional decision highly political and that still needs to be mentioned is money — i.e., the financial consequences of the constitutional court's decision. Pension, health care, or welfare reform is not a political issue merely 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 realised, these constitutional rules do not 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 from which it can assess the consequences of its decision. Costly constitutional courts decisions, in addition to being political because the court takes on a redistributive task entrusted to the other branches, are also likely to cause tension between the branches. After all, non-elected constitutional court judges do not have to face elections by voters who are also taxpayers.

The list of relevant issues and interesting cases worthy of further attention is constantly growing. When looking at political questions before post-Communist constitutional courts, one, of course, finds subtle webs of interaction between petitioners, political players, and the courts. It is apparent that in the course of these almost two decades constitutional courts have become competent participants in a public decision-making and discourse space where the affairs of their polities are conducted in an increasingly constitutionalised or judicialised fashion. Constitutional courts are routinely engaged in any matter of public concern that is or should be on the parliamentary or governmental agenda. Rules on jurisdiction and standing make the courts fairly accessible. The nature and extent of the court's participation depend on the willingness and temper of the constitutional court in question. In exchange, political players are increasingly well equipped to narrate their agenda items in light of a potentially impending hearing on the issue before the constitutional court.

While there are numerous examples of constitutional courts becoming ordinary participants in a decision-making process addressing matters of public concern, most constitutional courts in the region have experienced direct challenges to 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 turn here in the mid-1990s 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 where at issue was a public brainstorming campaign concerning whether reforming the manner of appointments to the Tribunal was necessary.⁷⁰

Over the years, post-Communist constitutional courts have experimented with many techniques to deliver their points to the political branches. Instead of striking down legislation, courts are inserting conditions of constitution-conformant interpretation in their rulings and many courts have been seen to give some time for parliaments to enact missing legal rules. Although these solutions do not always advance the goals of rights protection, they might have long-term political advantages. While open conflicts between constitutional courts

⁷⁰ As reported in English in Polish News Bulletin, 17 May 2007.

and the other branches are unavoidable, these result not from the fact that constitutional courts have touched political questions but from their having handled them improperly and without due care.

Post-Communist constitutional courts seem to be learning the most fundamental lessons and tricks of their trade — even if sometimes the lesson comes the hard way. The cases discussed in this paper demonstrate that although thoughtful constitution and legislative drafters are an important asset and certain scenarios are so unlikely to be realised that they are most difficult to prevent, judicial self-restraint and prudence is a property to be sought after in any constitutional case. At this point, one final caveat is in order: it is a problem, of course, if constitutional courts get tangled up in daily politics beyond the scope of those decisions that they are authorised to properly take within their respective jurisdictions. It is a problem not simply because they might clash with the political branches, but — more importantly — because such clashes could well undermine the powers and legitimacy of the courts in cases where the protection of constitutional rights and liberties is at stake.