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Summary

***CONSTITUTIONAL TRIBUNAL AND THE POLITICAL CONFLICT
LAW & ECONOMICS PERSPECTIVE***

**(Trybunał Konstytucyjny a konflikt polityczny
– perspektywa ekonomicznej analizy prawa)**

Doctoral dissertation prepared in the *Department of Theory and Philosophy of Law*, under the tutelage of prof. dr hab. Marek ZIRK-SADOWSKI and dr Jarosław BEŁDOWSKI in the discipline of legal studies.

The dissertation examines the relations between Polish Constitutional Tribunal (hereafter CT) and the domestic political actors, through the lens of the “*judicial reputation theory*” of T. Ginsburg and N. Garoupa (2015).

The motivation for the study came from two, apparently puzzling developments. First, CT managed to build its reputation and achieve the strongest *de facto* position during the economic and political transition following the 1989 breakthrough, despite numerous obstacles. Second, the most powerful assault on CT – indeed, the fatal one – had been carried out ten years after the EU accession, in an institutional framework perceived as relatively stable (what Ginsburg, 2020 called “*democratic erosion without prerequisites*”).

Chapter I introduces key theoretical concepts analyzed in the dissertation. It starts with H. Kelsen’s idea of the “negative legislator”, which paved the way for the establishment of modern constitutional courts. Then, it introduces R. Dworkin and R. Alexy’s distinction into “rules” and “principles” of law, which turned crucial for the development of modern constitutional jurisprudence in liberal democracies. It led to the proliferation of proportionality balancing – risking, to borrow from A. Stone-Sweet (2000), “*judicialization of politics*” and “*politicization of justice*”. Against this backdrop, Ginsburg and Garoupa’s “*judicial reputation theory*” is introduced. Subsequently, the specific aspects of legal reasoning carried out in constitutional courts had been examined in the context of judicial reputation. Emphasis had been placed on the distinction between *judicial ideology* (as in the attitudinal model of judicial behaviour) and *partisanship*. In this context, three models had been proposed, to describe relations between the Kelsenian constitutional court and the political actors in a post-transition democracy.

First, dubbed the *Court of Peers* (“*Sąd Rozjemczy*”) assumes that judges are selected by the political actors, thereby transmitting their ideological preferences into the bench. However, their decision-making tends to be consensual and dissent relatively rare. That in turn builds a specific reputation among the political actors, convincing them that their ideological sensitivities had been taken into consideration and reasonable compromise had been coined.

Second, dubbed the *Constitutional Chamber* (“*Izba Konstytucyjna*”) assumes that political actors have no impact on the constitutional judges’ appointment process, thereby their ideology is not transmitted into the court. Thereby, its reputation has to be built in a way similar to the ordinary courts.

Third, to describe the situation of non-independent, politically-controlled bodies referred to as “constitutional courts”, the *Quasi-parliamentary Chamber* (“*Quasi-Izba Parlamentu*”) had been proposed.

The main research hypothesis verified in the dissertation states that during the period of political and economic transition, CT reputation formation can be described using the *Court of Peers*, model. While the legal community attempted to shift it towards the *Constitutional Chamber* model, it ended up described well by the *Quasi-parliamentary Chamber* model.

Chapter II attempts to empirically verify this hypothesis, taking an internal perspective – examining full bench judgments that substantially divided CT justices. To this end, judgments issued by the full bench, with more than one-fourth of justices submitting dissenting opinions, had been qualitatively examined. Each judgment and its historical context had been briefly described, and the arguments of the majority as well as dissenters had been summarized, to examine whether they coincide with the ideological orientation of the parliamentary majorities, that appointed specific justices. The results indicate a consensual approach to the transition period CT, and the subsequent proliferation of the separate opinions. However, situations when justices appointed by a particular parliamentary majority advocated a specific view, rejected by all other judges turned out very rare.

Internal perspective fails to address interactions between the CT and political actors, that are not resulting in issuing the judgment. To fill this gap, historical analysis had been employed, and the departure point was an attempt to uncover the deep structure of constitutional conflict in modern Poland.

The results are presented in *Chapter III*, starting with insights from German historical school, R. Dworkin’s (1996) “*moral reading*” of the constitution and contemporary research on political polarization. Then it is argued, that a specific pattern of constitutional-making in mid-nineties Poland produced a constitution containing multiple ideologically-loaded principles. With the political constellation underpinning the Constitution replaced with a new divide, both sides tended to fill the Constitution with their ideology – sometimes in stark contrast to the original intent. As a result, they produced what can be interpreted as two alternative views of the single constitution – the *liberal-progressive* one and the *national-conservative* one. As the Kelsenian constitutional court can universally impose one of them, political pressure tended to increase to the point when its continued existence as an independent body had been questioned.

Chapter IV offers a historical analysis of the relationship between the CT and political actors, starting with what had been dubbed the “reinvention” of the CT after the 1989 breakthrough. It also introduces the long-lasting critique of this process, originating from the right wing. The body of the chapter was organized into six “crises” identified by the author. The first one dates back to the 1992 verdicts of the CT, related to the indexation of pensions and salaries. The second “crisis” involved procedural irregularities associated with the adoption of the so-called “*little constitution*” of 1992, while the third – action was taken by President L. Wałęsa against the post-communist parliamentary majority in 1995 (the year of the second democratic presidential elections). The procedure of appointing three CT judges in 1997 (as the new constitution extended the full bench from 12 to 15 justices) was analyzed as a fourth “crisis”. However, it has not produced any “crisis” outcomes, and was called by L. Garlicki (2020) a role model for resolving clashes like the 2015 Polish constitutional crisis. Finally, the fifth and sixth “crises” referred to the 2006-2007 and 2015-2016 attempts of the right-wing *Law & Justice* parliamentary majority to take control of the CT by appointing its president. In particular, similarities and differences between the two had been described, to examine alternative hypotheses on the root causes of the 2015 Polish constitutional crisis.

Finally, *Chapter V* compiles and analyses various data sources related to the “reputation” of CT in selected “external audiences” (in a Ginsburg and Garoupa sense). Specifically, it examines (i) parties initiating the constitutional review, (ii) retired CT justices, (iii) members of the parliament, (iv) the general public and key groups of voters and (v) international experts providing input for V-Dem indicator of *high court independence* (in case of Poland it refers to the CT).

Taken together, the presented evidence gives no reason for the rejection of the main research hypothesis.

Although the dissertation focuses on the experience of a single country, the conclusions stress similarity between the Polish and Hungarian experience, suggesting potential for further comparative study of the so-called “third generation” of constitutional courts (Biagi, 2020) established in democracies originating from democratic transitions.

Moreover, the importance of the findings for a potential “clean-up” of the Polish legal system had been stressed, as the reputation of the Kelsenian constitutional court among the politicians and their electorate seems crucial for its endurance.