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The Juristocratic Form of Government and its Structural Issues

Activism is the most widespread criticism over the activities of the constitutional courts. This means partly the exceeding of their authority given by the written provisions of the Constitution and, on the other hand, the downgrading of the democratic parliamentary majority and the will of millions of citizens who elect this majority. However, if we go beyond the widespread and recurring indignation, and we level-headedly look at the provisions of constitutions created in the recent decades, then it can be noted that these constitutions and the laws on the constitutional court themselves raise them to the level of the supreme organs of state power. In this way, the activism of the constitutional courts has partly become legalized and their power is wide ranging in order to limit the legislation and the will of the citizens expressed in the elections. It appears that this new, powerful actor in state power cannot be captured within the old forms of government (presidentialism or parliamentarism) because it bursts these old frameworks. Beyond these old forms, the study therefore proposes to introduce a new form of government based on the wide-ranging power of the constitutional court. As the most important structural issues of this new form of government, four aspects are analyzed: 1) the degree of the monopolized access of the constitutional court to the constitution; 2) *the breadth of the constitutional interpretative power given by the general formulas of the constitutional text; 3) the speed of activation of its power when it comes to the annulment of Parliamentary acts; 4) and finally the term of office of the constitutional judges which separates them from being re-elected by the political actors.*

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The takeover of the idea of constitutional adjudication from the USA to European countries caused the redesign of power relationships of the central state organs. Nevertheless, the new actor of state power has been theoretically placed in the framework of previously established forms of government, i.e. parliamentarism or presidentialism. The change caused by this takeover was conceptually grasped as an increase in the separation of powers. [2] In the original birthplace of constitutional adjudication in the United States, there was no need for reshaping the established forms of government because here this activity was achieved by the ordinary courts and these were seen as a branch of power next to the other two branches of power (legislation and presidential power). In Europe and on other continents, however, the constitutional courts were separated from the ordinary courts and they mostly are not a simple third branch of power anymore for two important reasons. Firstly, the new constitutional courts can control the legislation not only in the course of the litigation processes, but they can also annul the new Parliamentary acts immediately after their enactment. Thus, while in the USA constitutional adjudication could affect the central political battles and laws created in these battles only after years, in the case of the new constitutional courts, their role in the

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[2] For a more detailed analyzes of this questions see my previous study Béla Pokol: The Hungarian parliamentarism. Cserépfalvi Press, 1994, especially 11-45. p.

power game is more evident. On the other hand, in the USA the control of constitutional adjudication over the legislation and the government is more limited than in the case of the new constitutional courts because here the laws are not annulled formally by the main courts (Federal Supreme Court in the last instance), but only prohibited for the lower courts to use them. In contrast, the new constitutional courts cannot only formally annul the Parliamentary acts but they can also give instructions, the content of which must be included into the future law by a parliamentary majority.

In Europe from the 1950s onwards and then on other continents in the 1980s and 90s a great transformation in the public power structure was set up by the new constitutional courts. This has already begun in the case of the German constitutional court set up in 1949, because here the control and the annulment of the new laws immediately after their enactment in Parliament has become possible without any preliminary judicial process. The constitutional court in Italy institutionalized in 1946 went in this direction also, although here the control of the new Parliamentary acts can take place only in the preliminary judicial processes, but here the judges can stop the judicial process and may directly ask the Constitutional Court to annul the statutory provisions. Thus, the direct involvement of the constitutional judges in the state power struggles became intensified compared to the original American model of constitutional adjudication. But the growing power role of the constitutional courts was really created in the 1980s when it spread to South American countries, and then in the 1990s, after the Soviet empire fell apart, and throughout the Eastern European countries new constitutional courts were created with increased power. This trend then established strong constitutional courts in several Asian countries too; there are Taiwan, South Korea and Thailand, for example.

Constitutional theory has not yet reacted to these recent developments and the role of the constitutional courts is only seen as a segment of the separation of powers. The activity of these courts is conceptually grasped in the previously established forms of government, i.e. parliamentarism or presidentialism. However, the real political processes have been bursting this inclusion, because in many countries the activity of the constitutional court fundamentally determines the rest of state power. In this way, it can be stated that we can understand real state power (beyond parliamentarism and presidentialism) if we create a new form of government for the central role of the constitutional court named the *juristocratic form of government.* Before we start analyzing the structural characteristics of the new form of government, however, it makes sense to analyze the structural links between the Constitutional Court and the political actors.

1. Two Types of Political Ties for the Constitutional Judges

The function of constitutional adjudication and the selection mechanisms of the constitutional judges by politicians entail that in the decision-making of the constitutional court there are ties to politics. However, it is different between the courts and within each court as well which level and grades of these ties became realized in respect to the individual judges. Empirical research all over the world analyzing lots of courts and the separate opinions of the constitutional judges arranged on a scale showed a high degree of dispersion of judges in respect to their political binding. It seems that this binding can be divided into two major types. The greater degree of political binding on one side is that within which the constitutional judges act as party-soldiers. Another group of judges with a looser tie to politics is on the other side whose decisions are influenced only by the political values of a political camp, but the random interests and opinions of the parties

are not taken into account. Which type of these in a country dominates is affected by a number of institutional mechanisms, constrains and rules, and the personality traits of the individual constitutional judges play a big role as well. However, before analyzing them, it seems useful to highlight a distinction between the continental European judicial role and function and the American judicial role and function. Namely, due the adoption of the idea of constitutional adjudication from America to Europe, the European constitutional judges are closer to the American judicial role-playing than to the ordinary judiciary in Europe.

1.1. Career Judges and Recognition Judges

The European judges are career judges, who entered the court immediately from the schoolroom of the law faculties and there they adapt to the leaders, the senior judges and they move up the ladder of the judicial career and during this career they are under constant control and evaluation mechanisms monitoring the percentage of successful appeals against their judgments and in case of a high level of this percentage they are sanctioned by career retention etc. In contrast, the American judges are as a rule recognition judges who come to the courts according to the performance of other legal spheres. In this way the recognition judges get this position when there have many years of experience behind them and as a rule they are appointed to specified posts and in principle there is no promotion here, especially at the federal level they are appointed for life. Both in America and Europe all institutional conditions are regulated by law, and thus both within the judiciary and from the outside the possibility of influence of the judges is minimized. However, while in Europe in respect to the career judges the entry at a young age makes it uninteresting for the politicians to influence the judges' selection, in America the appointment of the recognition judges - particularly in the higher judiciary levels and the federal judicial levels - the judge-selection has the most importance for political camps and this selection is carried out by the politicians, and the recognition of prior legal capacity of nominees becomes finally a recognition by the politicians. As a consequence, the European career judges are less politicized, but the judiciary from the inside rather shows the organizational characteristics of the bureaucracy, and that is the reason why here the judges are put in the center who are able to accept the submission, while the recognition judges in the US are more strongly politicized and the decision-making of the individual judges is more autonomous from the collective of the court than their European counterparts have it. [3]

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[3] The two types of judiciary are analyzed by Tom Ginsburg and Nuno Garoupa as follows: „The distinction between career and recognition judiciaries is useful to identify general approaches to the balance between independence and accountability. (…) Career systems emphasize collective reputation (in which internal audience prevail over external audiences); recognition systems emphasize individual reputation (thus targeting more openly external audiences). Collective reputation emphasizes collegial aspects of the judicial profession. Individual reputation depends in part on the primary social function of the judiciary, such as social control, dispute resolution or lawmaking. We believe that collective reputation dominates when the legal system emphasize social control (….). In constitutional law, where lawmaking is presumably the dominant function of judges engaging with the grand principles of democratic governance in high-stakes issues, most common and civil law jurisdiction use recognition judiciaries. On the other hand in many areas of the administrative law, where social control of lower officials is the more relevant consideration, both common and civil law jurisdictions have shown a strong preference for career judiciaries. (…) Career judiciaries resemble a bureaucracy, and so raise issues of shirking and sabotage of the agency's mission that are familiar to organizational theorists. Not surprisingly we observe a formal reliance on codes and significant procedural limitations to constrain the judges, limit their ability to sabotage the law, and decrease the costs of monitoring their performance. As a result, a career judiciary is methodologically conservative and systematically unadventurous, and unwilling to acknowledge its role in lawmaking. (…) Recognition judiciaries are different. They are dominated by lateral entry; and promotion is of little significance to the individual judge. Since ex ante quality is easier to observe, judges are less constrained and tend to apply more flexible standards as opposed to clear rules. There are two possible behavioral consequences for the recognition model. First, the judiciary is more politicized (but not necessarily more democratic since it might not follow the legislator). Second, recognition judiciaries will be more

On the ground of their selection mechanisms, the European constitutional judges are as much the same recognition judges as the American judges, and so the characteristic of the "recognition judge" can be extended to them: "Constitutional judges belong to the recognition judiciary, appointed at senior stages in their careers, while ordinary judges are members of career judiciary, appointed at young ages and spending their whole lives in the job. In many cases, the appointment mechanisms of constitutional courts will be perceived as more political than those of the supreme court justices." [4] After the general presentation - where in the case of constitutional judges in relation to the ordinary judges the higher degree of politicization could be emphasized - we have to analyze in respect to politicization two types of constitutional judges.

1.2. Politically Value-Bounded vs. Party-Soldier Constitutional Judges

The stronger politicization of the constitutional court and judges compared to the ordinary courts is a well known thesis on the basis of empirical studies, and it is well known, too, that there are countries and periods within which a higher degree of politicization can be detected than elsewhere or at other times. The different emphasis of politicization could be seen above in the analysis of different schools, but with some modification of these schools these are able to capture the actually existing differences of politicization among a lot of constitutional judges. As we could see, the decisions of the constitutional courts were explained by the behavioralist (or attitudinalist) school entirely on the basis of the political preferences of the judges, while the school of strategic action attributes only a reduced strength to political preferences, and this recognizes other aspects in the determination of the judges' decision which reduce the impact of the political preferences. Presumably, considering all constitutional courts and judges, the latter is right, and the political preferences of judges do not have a strong role as the previous one claims, but in the case of more politicized judges this can still be true.

Thus, I think that these schools can not only be understood as the different explanations of the constitutional court's decisions, but as the two real grades (or levels) of the politicization of the constitutional judges.

With this amendment of the explanations of these schools, which emerged as the explanation of the American ordinary courts anyway, each European constitutional court can be analyzed as one of the two types in respect to its level of politicization. Especially where the constitutional judges in their existential conditions remain strongly bound to the dominant political parties by the institutional and regulatory arrangements, there the dependence of the judges can create the dominance of the party-soldier type. In contrast, where by the institutional arrangements the existential conditions are optimally designed, there, as a rule, the strong party ties are removed and only reduced political ties still exist. In the last case, the attachment of the constitutional judges to their nominating parties exists only on the level of political values of a political camp and this loose binding makes it possible that the constitutional judges specifying the provisions of the constitution develop solid clues to the case law and to assist their colleagues in creating such. In the case of the loose binding, the constitutional judges always try to vote on the basis of the case law created by them and their decision-making is influenced only by the political values but not by the simple interests of a political party. In contrast, the constitutional judges with a strong degree

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creative in establishing and developing precedents (presumably inducing higher rates of reversal.)" Ginsburg/Garoupa, *Hybrid Judicial Career Structures: Reputation v. Legal Tradition*, University of Chicago Law Scool, Coase-Sandor Working Paper Series in Law and Economics 6-7 (2011)

[4] Nuno Garoupa/Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 Arizona Journal of International and Comparative Law 547 (2011)

of party-ties do not care about case law standards and they do not even follow the cases that are not politically important; they leave such drafts prepared by others and if one such judge becomes the judge-rapporteur in a case, the politically indifferent matters he gives his staff in order to create a draft and at the meeting he remains indifferent whether the aspects of his draft can fit into a coherent case law or not. This type of constitutional judge activates himself only in politically important cases when he has in mind only the interest of the political party that nominated him.

The types of party-bound versus politically value-bound judges really do exist, and each constitutional judge can be placed easily in one of the two types if the decision-making behavior of a judge is observed for a long time including his separate opinions and the coherence between them, as in the case of a judge with a close party binding, where probably the lack of coherence in his decision-making behavior is remarkable.

However, the two versions of the political constraints - and the question of the political affiliation at all – do not appear in such purity in all decisions of the constitutional courts. Namely, this affiliation is activated by certain affairs of the courts in a different degree. In respect to the three main groups of cases at the European constitutional courts, the least political constraint can be observed in cases of constitutional complaints against the ordinary judicial decisions. Although it is possible that a constitutional complaint against a judicial decision in a corruption case of a major party leader or a criminal case which affects the entire leadership of a political party exceptionally affects important political interests and political values, but as a rule these cases are largely apolitical and the opposing political ties within the constitutional court are not activated. Then the decision-making is more clearly legal in nature and this is intersected not with political considerations, but rather with particularistic antagonisms within the body, and during the decision-making process the antipathies /sympathies, prestige considerations, etc. are activated.

Political ties come more clearly into the center in cases of subsequent constitutional review, where the subject of the decision is the annulment of a statutory provision or of a whole legislative act. This may come if originally only a judicial decision was attacked, but in connection with this the annulment of statutory provision - which was the basis for this judicial decision - emerged. At that time, it may be that the political cleavage within the constitutional court comes into focus, and this activates beyond this cleavage the fault line between the more closely-knit party soldiers and the more relaxed political value-bounded judges, too. Eventually, the strongest political orientation comes into play in cases of the preliminary constitutional review. In these cases it may be that the constitutional judges take the place of the opposition MPs and the legislative acts - whose creation earlier these MPs in their minority position could not stop - could still be annulled by the majority of the constitutional judges. That is, while the constitutional complaint against the judicial decisions makes the decision-making processes more legal in nature, the subsequent constitutional review and particularly the preliminary one can, on the contrary, cause a higher degree of its politicization. [5]

Empirical studies are usually limited only to the detection of the political binding without differentiation, and I could not find information regarding the proportions of the two grades of this binding. This can be the consequence of the fact that in the comparative research of Nuno Garoupa and Tom Ginsburg, who are in the center of this research field, the main effort is to demonstrate the higher frequency of the limited political ties intersected with constraints of institutional

[5] That these effects can be considered valid in respect to constitutional adjudication in the whole world is confirmed by Nuno Garoupa and his co-authors also: „Whereas concrete review „judicializes" constitutional courts, preventive review has the opposite effect. Mere preventive review makes a constitutional court less judicial and more political in nature." Nuno Garoupa, *Empirical Legal Studies and Constitutional Courts*, 35 Indian Journal of Constitutional Law, 33 (2011). Another empirical research showed the high level of the party affiliation in the case of the preventive review: „There is a high correlation between party affiliation and voting, with respect to preventive review" Garcia/Garoupa/Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal*. Illinois Law and Economics Research Papers Series, Research Paper No. LE08-021 9.p. (2008)

conditions against the explanation of the behaviorist school which asserts the total determination of the judicial decisions by political ties. Thus, they neglect the systematic analysis of possibility of the political binding on two different levels. However, some data can be found in the empirical studies to prove it. For example, in case of the Spanish constitutional judges, while in their voting behavior a high degree of party-binding is showed by the empirical research, a study demonstrates that this stronger party affiliation exists in cases when the political motivation of the judges is more directly affected, but if it is not the case, then the direct party affiliation becomes diminished and only the political binding as to political values comes to the fore. This is the case when the Spanish Constitutional Court decides disputes between the unified Spanish state and regional splits as Catalonia and the Basque territory, which aims to achieve a separate statehood. Then the ties of the judges to the political parties that nominated them become reduced and the cleavages at the level of political values come to the fore: "Our paper, looking at how judges vote, also indicates that Spanish constitutional judges are less likely to vote to party interests in the presence of strong regional or national interests." [6] Analyzing the Portuguese Constitutional Court, it comes out even more clearly that the political binding of the constitutional judges may be different and while in the case of one group of judges this binding can be very strong in form of direct party affiliation, the other group of judges has only a binding at the level of political values. Nuno Garoupa and his research team in a study in 2008 found that the Portuguese constitutional judges who were nominated to the constitutional court by the leftist (socialist or communist) parties have a voting behavior that shows a closer party binding than detectable in case of judges nominated by the right-wing (Christian Democrat and Conservative) parties: "We have shown that there is a strong association between being affiliated with the left-wing party (socialists and communists) and voting unconstitutionality, whereas the association between the right-wing parties (conservatives and Christian-democrats) and voting is weak. These results are confirmed when we look at voting according to party interests and legislation that have also been endorsed by the party with which the constitutional judge is suppose to be affiliated." [7]

2. Structural issues of the juristocratical form of government

The decisive point in the transformation from a simple actor in the system of checks and balances into the juristocratic form of government for the constitutional courts is the competence to annul the parliamentary acts immediately after their creation. This is the crucial point because, in this way, the constitutional judges become directly included into the political struggles of the democratically elected actors. In democracies based on political competition, parliamentary opposition and eventually the other public actors that oppose the parliamentary majority and its government - especially the local governmental bodies, or, in federal states the national / regional governments, local parliaments etc. – try to instrumentalize the constitutional court in order to block the parliamentary majority and the governmental activity. In this way, the opposing political forces behind the constitutional court can wholly or partly impose their will on the governmental majority. This is no longer parliamentarism, but the appearance of the juristoctratic form of governance which exists side by side with the parliamentary majority suppressed in the form of a semi-parliamentary system. This is similar to other mixed forms of government that can be seen in the semi-

[6] Nuno Garoupa/Fernando Gomez-Pomar/Veronica Grembi, *Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court*, 5 (2010) (online)

[7] Garcia/Garoupa/Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal,* Illinois Law and Economics Research Papers Series, Research Paper No. LE08-021 19 (2008)

presidential systems. In fact, although it is not explicitly emphasized in its name, the semi-presidential system always has a counter-force in semi-parliamentarism. In other words, these two forms of government operate in co-existence and the powerful head of state has to struggle permanently with the parliamentary majority and its prime minister. This co-governance causes no great tension if in a country there are more or less centralized political parties and both positions (i.e. the head of state and the prime minister) are filled by the same political party. In that case, the mixed form of government mostly operates in a smooth way. If the public opinion has shifted in the meantime, however, and at the two different elections these positions are filled by political leaders from opposing political camps, then ongoing public fights will start between the head of state and the parliamentary majority and its prime minister. Since this has first and most clearly evolved since the system in France was set up in 1958, called V. Republic, the co-governance of the political enemies is in general called *cohabitation.*

The juristocratic form of government can be involved in the same situation. This can emerge if such a majority of the constitutional judges exists for a longer period of time with stable political preferences (caused by the filling method of these positions of an earlier parliamentary majority) that stand in sharp contrast to the ones of a new parliamentary majority. In this way, the new parliamentary majority and its government will be continuously prevented from realizing its plans by the existing constitutional interpretation and the constitutional case-law produced on this basis. While in the case of the same political values there will be no greater tensions between the parliamentary majority and the majority of the constitutional court, and furthermore the control of the legislation will cause only smaller conflicts, in the case of a radical change in the political preferences of parliamentary majority, sharp struggles of cohabitation between the two mixed forms of government can be activated. Then, the elected new parliamentary majority and the millions of people behind him will be faced with a reality in which there will be no chance to realize the election promises. Namely, the majority of the constitutional court selected for these posts by the earlier dominant political forces can annul all the new laws and the parliamentary minorities can dominate through the constitutional court despite their electoral failures. In this situation of the mixed system of semi-presidentialism, as in France for instance, it is a natural consequence that the opposing positions start looking for a way out and after a while the head of state plans the dissolution of the parliament if he thinks that there was in the meantime a shift of the public opinion and in a new election his political camp will triumph. At the same time, the opposing prime minister and its parliamentary majority try to block the institutions next to the head of state in order to reduce the possibilities of the opposite side.

In the case of the constitutional court, this situation of cohabitation has only rarely emerged so strongly in the last decades - at least so far -, and over the past half-century, this stemmed from the fact that in Europe and the wider Western civilization (America, Australia) such an economic and demographic stability and prosperity existed, by which a rare tranquility in the history was brought about. In this way, through the densely consolidated constitutional framework and binding political preference value the political parties were forced to the center and the radical changes by the parliamentary elections were improbable. The alternation of political parties in government was thus more or less only the "left" and "right-wing" alternative of the same political center. In this way, there was not so much difference between the political preferences of the constitutional court's majorities and the ones of the changing parliamentary government majorities always stemmed from the political center. However, this situation seems to have started to disappear in recent years for two reasons. First, in the Western countries the control of the social sub-systems has undergone a radical transformation in recent decades and the banking and financial sectors were able to acquire total control over the whole society (the mass media, the arts and cultural sub-

systems, scientific research and commercialization in the military sphere, etc.). [8] However, this caused such great distortions that since the outbreak of the 2008 financial and economic crisis, the entire Western civilization seems to have reached an evolutionary dead end. This crisis is intensified by a more profound demographic crisis. The latter was observed within a few decades, however, its consequences have increased dramatically in recent years. Because of the declining population and the work forces, millions of migrant workers were brought in to work - mainly imported from the Islamic countries. Through their higher birth rates and family unification, the number of Muslims in Europe has expanded to 23 million who live in Western Europe's major cities first of all and they have built up parallel societies in these cities. The Christian culture of Europe's population and the constant battles and tensions with the Muslim population has become the main political cleavage in recent years in most Western European countries. The recently launched big masses of new Islamic migrants combined with the inertia of the political parties that make up the center give rise to the radical parties that were marginalized in the past. And because of the tensions caused by migration and the demographic crisis, it seems plausible in a few years to replace the central parties by the radical new political forces. In this way, the difference between the new parliamentary majorities and the political preferences of the constitutional courts in European countries can be forecasted in the near future. This can bring forth the tensions between the two mixed forms of government that have hitherto existed only on paper as part of the constitution.

This situation was created because of a series of random reasons in recent months in Poland. In this country a political alternation had existed during several cycles, in which a left-wing and a center-right party dominated and then the radical national-Christian political force, the Truth and Order Party, got the majority in Parliament in 2015. In this situation, the sharp contrast between the political preferences of the constitutional judges and the ones of the new parliamentary majority came to the fore. In order to realize its program, the new Polish government majority tried to neutralize or at least reduce the resistance of the forces that the juristocratic form is made up of as much as possible. For example, taking advantage of a faulty step of the previous government's majority, which illegally filled the posts of the constitutional court, the new parliamentary majority elected five new members into this court and with the help of the head of state stemming from its political camp, these new members became appointed instead of the earlier elected members. Furthermore, to neutralize the still opposing majority of the constitutional judges, the new parliamentary majority has modified the law on the constitutional court and for the annulment of the parliamentary acts by the constitutional judges required two-thirds majority. As a next step in the defense of the constitutional judges, a six-month moratorium was introduced and the judges can start to control the new laws only after this six-month period. With the theoretical explanation which can view together the co-existence of the juristocratic form of government and the half-parliamentarism of the parliamentary majority government, these regulations can be analyzed as exciting developments - at least as long as both sides avoid the violation of the rules of co-governance. If, however, we cannot separate the two mixed forms of government, but view them only as parts of the parliamentary form of government and the separation of powers, then these regulations can be mistakenly grasped as the abuse of power.

[8] See the analysis of this topic: Andreas Bieler / A. Morton D. (ed.): Social Forces in the Making of the New Europe. Palgrave. Hamshire 2001 47-69. p.; William C. Carroll / Colin Carson: Forging a New Hegemony? The Role of Transnational Policy Groups in the Network and Discourses of Global Corporate Governance. In: Journal of World-Systems Research. IX. 1, Winter 2003, 67-102. p.; and D. Joseph A. Smith / Böröcz (ed.): The New World Order? Global Transformation in the Late Twentieth Century. Greenwood.

The crucial point for the creation of the juristocratic form of government is the chance when the constitutional court can annul the new laws of the parliamentary majority immediately after their creation. In this way, the constitutional judges come into the center of state power. However, the weight of power in both sides also depends on several factors.

1) In order to assess the power of the juristocratic actor against the parliamentary majority and its government, it is the degree of the monopolized access of the constitutional court to the constitution that is the most important aspect. The direct access to the constitution conceptually derives for the constitutional court's function, so it does not require an explanation. Conversely, one may ask whether the parliamentary majority has the competence to overrule the decisions of the constitutional judges or to change its organizational conditions; there are, in this respect, big differences among the countries. Ultimately, however, it depends on the extent to which the constitutional court has superior power over the parliamentary majority, and by these judges the majority will be utterly suppressed or only a moderate suppression takes place. The more difficult it is to amend the Constitution to the parliamentary majority, or to change the laws on the constitutional court, the greater the degree of the constitutional court's monopolized access to the constitution is. Conversely, the lighter the constitutional amendment, or at least the process of rewriting the law on the organizational conditions of the constitutional court by the parliamentary majority is, the more partial the weight of the juristocratic power against the parliamentary majority becomes. In this way, the suppression of parliamentarism into the form of half-parliamentarism takes place only in a moderate version. To furnish an example of the easy way of the constitutional amendment, there is the case of the Austrian Constitution, which only requires for its amendment the vote of a majority of all the members of the parliament, and it happened several times in the past that the decision of the Austrian Constitutional Court was neutralized by a corresponding amendment of the constitution itself. In Hungary, the constitutional amendment is bound to the two-thirds votes of all MPs, and when, in the period of 2010 – 2015, the government majority has this qualified majority, the neutralization of the decisions of the constitutional judges occasionally takes place by the amendment of the constitution too. In Poland, the constitutional amendment is similar to that of Hungary, but to change the law on the organizational conditions of the constitutional judges is easier and it is only connected to a simple parliamentary majority. So when in the 2015 parliamentary election a parliamentary majority with radically different political values from the previous constitutional interpretation of the constitutional judges was established, the polar opposing new parliamentary majority had enough legal means to modify the opposing majority of the constitutional court. However, in a number of countries more difficult preconditions exist in order to change the constitution, or at least to rewrite the laws on the constitutional court, and, therefore, the juristocratic form of government may have a stronger position against the parliamentary majority and the half-parliamentarism than it has in Poland.

2) By the constitutional court's high degree of monopolized access to the constitution its power is increased. This could, however, be further amplified if the wording of the text of the constitution was based on general declarations and vague principles and, in this way, instead of precise control such vague formulas provided the empowering of the constitutional review. To understand this, compare, for example, the fairly accurately worded rights and freedom within the United States Constitution to the German constitution, which contains such vague formulas as the right of the "all-round expansion of the personality" or the phrase according to which "human dignity is inviolable". In the latter case, the constitutional court can essentially decide without any normative determination and in the absence of normative content, the majority of the constitutional judges will decide quite freely what the constitution actually is.

Conversely, if the rules in the constitution are worded precisely, then the interpretive power of the constitutional judges is more limited. If we look at the two together, and we see that in a country the constitutional court has a high degree of monopolized access to the constitution, and, in addition to this, the text of the constitution inherently contains general-empty normative guidelines thereby giving the constitutional judges wide and uncontrollable interpretational power, then, essentially, this body can be regarded as the constituent power in the country. Conversely, if the parliamentary majority has an easy way to the amendment of the constitution or the laws on the constitutional court and empowerment of the constitutional judges is based on precise constitutional wording, then the power of the juristocratic form of government is suppressed, and the institutions of half-parliamentarism have the possibility to counteract the opposing constitutional court.

Another question within this context is whether the amendment of the constitution can be reviewed by the constitutional judges. This option emerged in Germany after the Second World War when for the first time a powerful constitutional court in Europe was created. This took place because here the occupying US military government had more faith in the constitutional court filled with trustworthy lawyers returned from the USA than in a mass democracy based on an election by millions of German people. In this atmosphere, the German Constitutional Court expanded its competence in the following manner: the whole chapter of fundamental rights was declared untouchable by the constitutional amendment. This pattern has then given impetus to some other countries so that - unlike the original American constitutional idea - the review of the constitutional amendments has consequently been brought under the authority of the constitutional court. This move already means the takeover of the constituent power openly, since, in this case, the constitutional court's monopolized access to the constitution becomes almost complete. However, this step was exceptionally made by only some constitutional courts. Although in 2011 there was an experiment in Hungary alone by the then constitutional judges to completely annul the new constitution. As the petition for the annulment had just been rejected by a slight majority of the constitutional court, the constituent power explicitly regulated this option in such a way that it essentially restricted this possibility in order to avoid such a new attempt. [9] Within this sub-question, a further question is whether or not a country's constitution - following the German model in this respect, too – contains a competence of the constitutional court to review the domestic law compared to the general rules of the international law. In this case, the domestic constitution and its amendments can be reviewed by the constitutional judges on the ground of the general principles and rules of the international law also. And because there is no codification of these general principles, the constitutional judges can decide whatever they want. In Hungary, the possibility of this annulment was already declared in 2011 by the earlier majority of the constitutional court.

3) The activation speed of the competence to annul Parliamentary acts is the third in order of importance of structural issues of the juristocratic form of government. Due to the monopolized access to the constitution and the broad interpretation power based on general-empty formulas of the constitution, the of the constitutional court's high level of dominance can already be achieved, but it can arrive at the top if the activation speed of its competence to annul Parliamentary acts is secured. This can be possible if all the opposing parliamentary parties or all single MPs have the right to challenge any law, and, in this way, the constitutional court can annul all the new laws immediately after their publication. A further sub-question in this respect is the constitutional court's scope of review determined by the petition for annulment. It is possible that this petition means only a necessary formal

[9] "The Constitutional Court can review the amendments to the Basic Law and the Basic Law itself only in respect of the procedures provided for in the Constitution." Basic Law, Art. 24 (5).

prerequisite and once it has taken place the constitutional court can include additional laws and their provisions under review by simply declaring the relationship between them. Even here wide possibilities can be further enhanced if the constitutional court has the right to start the review of the new law ex officio, through which the annulment process can be activated at will. In this way, the majority of the constitutional judges can annul laws and measures of the parliamentary majority if they have opposing political values. In all this respect, a wide variety of regulations exist, and there are countries where the weight of juristocratic institutions is increased by this and, conversely, where the parliamentary majority can preserve some opportunity to resist. For example, by the regulation of the earlier Hungarian Constitution, the constitutional judges have enjoyed the greatest freedom in this respect and all single people have the right by way of what is called popular action to ask the constitutional court to review the new law. If the constitutional judges wanted to annul a new law, but nobody challenged this law, then the wife of a law clerk of the chief justice would quickly appear as petitioner and the annulment process would start. Conversely, the new Hungarian constitution entered into force in January 2012 - learning from the past problems – cut back the wide popular action to start the review of the law and there were many changes in this area. In sum, it is noted that these questions must be examined in detail in a comparative way, if we want to know in a country, whether the parliamentary majority of the half-parliamentarism still has dominance over the governance of this country or, conversely, the forces of the juristocratic form of government already have the upper hand in this area.

4) Finally, the length of mandate of the constitutional judges that separates them from the re-elections by the political actors is important for the analysis of the strength of the juristocratic form of government. Despite the high level of monopolized access to the Constitution and the widest interpretation power over the Constitution based on the general-empty formulas of it and, further, the sufficient activation speed of the competence to the annulment of the Parliamentary acts, the power of the constitutional court over the parliamentary majority is constrained, if the constitutional judges are appointed only for a short period of time. In this way, the determination of the juristocratic forces will always revert to the parliamentary majority and the head of state in form of the new judicial appointments. In particular, in addition to the short cycle, even if the re-election of the old judges is possible, the obedience of the constitutional judges to the parliamentary majority is - more or less - inevitable. By all of this, the weight of power of the juristocratic form of government against the parliamentary majority can be kept below a threshold. Conversely, if the cycle of the constitutional judges is long, eventually for a lifetime (especially if there is no upper age limit for compulsory retreat, as in the USA, for instance), then all this tendency will increase the power of juristocracy. The very long cycle of the judges alone is enough in order to enhance to weight of power over the other branches of power, as is shown in the US, where the supreme judicial body has in every aspect a tighter power than the new constitutional courts in Europe or Asia. However, the American supreme judges in office for 30 or 35 years represent power unchanged throughout generations, and conversely, the judges of the new constitutional court in the world mostly have only a limited period of mandate. There are big differences among the constitutional courts of the world; the most common is the nine or twelve-year cycle, but also the six-year cycle in some cases with the ban on re-election, and it is usually an upper age limit (for example, 70 years) that assures the obligatory exits.

So if a political scientist wants to establish the country-ranking of the power weight of the constitutional court against the parliamentary majority in the whole world, then it (s)he needs to get started on the basis of the above parameters. The constitutional court‘s degree of monopolized access to the constitution must be analyzed; the breadth of the constitutional interpretative power given by the general formulas of the constitutional text; the activation

speed of its power to annul the Parliamentary acts; and finally the length of mandate of the constitutional judges which separates them from the re-elections by the political actors.

3. Epilogue

By these structural characteristics only the relationships between the juristocratic form of government and the half-parliamentary form of government (or the semi-presidentialism) are given in an abstract fashion. However, on a more concrete level, these relationships can be understood if a lot of further aspects are included in the analysis. It may be important in this respect to see how the formal prerequisites for the post of the constitutional judge are regulated. For example, whether in a country all lawyers with a few years of experience can be candidates for this position, or is it just one of the supreme court judges and a university law professor who can occupy this position. In fact, the fewer the prerequisite for this, the more opportunities will be opened for the political parties to send a party-lawyer into the constitutional court. And if it is possible only with the parliamentary opposition together, then the party-lawyers of both sides will be sent into this body on a parity basis. In the latter case, the completely unknown lawyers have the chance to become constitutional judges, because, in this way, they have no aversion from the opposite side. However, it means that the totally inexperienced new judges will always be exposed to the experienced law clerks of their predecessors and the old case law will be mechanically taken over by them. Further, it is equally essential how the actual decision-making processes of the constitutional court are established in a country. For example, how great a power for the chairman of the constitutional court is given in the determination of the agenda or in the selecting of the rapporteur in the cases etc. [10] These details are important for the complete understanding of the functioning of a constitutional court in a political system, but, in my opinion, these just give color to the understanding of the power relationship between the juristocratic form of government and the semi-parliamentary form of government with the parliamentary majority. Thus, the crucial aspects can be explored by the analysis of the four main dimensions indicated above.

In connection with the closing of thoughts, it is worth mentioning that the juristocratic form of government is necessarily a mixed form of government in the political systems based on democracy – at least in the Western civilization circle. While no conscious break with the democratic legitimacy of state power takes place in a country, the power of the constitutional court cannot be institutionalized as the main state power. Only the direct election by the people can be the source of main state power and this is why the juristocracy can use its power only together with the elected state organs. In this way, the juristocratic form of government is always a mixed government. It is possible in the form of the suppression of the parliamentary majority to a half-parliamentarism and there will be a co-existence of two government forms. But it is possible in a country that parliamentary majority has already been suppressed there to a half-parliamentarism by the semi-presidentialism and this mixed form is changed further by the juristocratic system. The above analysis has always kept this in mind. Of course, not with non-formal constitutional structures but only with factual reality can such a situation emerge when it would be a case of a full reign of juristocracy, while the institutions elected by the people would still formally operate. (A situation which has been familiar in Eastern Europe from the time of the one-party Soviet systems.) If, for example, in a country the most monopolized access to the constitution by the constitutional judges already

[10] For a detailed analysis of all these issues, see Bela Pokol: The Sociology of the Constitutional Adjudication, Schenk Verlag, Passau, 2015.

exists, the wide interpretative power is given by the general formulas of the constitutional text, the high activation speed of its power to the annulment of the Parliamentary acts can be seen and all these would be completed finally with the length of mandate of the constitutional judges for lifetime – which separates them completely from the re-elections by the political actors – then would the full power of juristocracy emerge. In this situation, the democratic institutions elected by people would operate only as a disguise for the full power of the juristocracy. This situation is unlikely in Europe, but as indicated in Ran Hirschl's excellent book, by certain constellations of power such a move can be made that seems at first sight irrational and yet some dominant political groups do make it.