DE GRUYTER OPEN

Wroclaw Review of Law, Administration & Economics

THE POLISH CONSTITUTIONAL COURT FROM AN ATTITUDINAL AND INSTITUTIONAL PERSPECTIVE BEFORE AND AFTER THE CONSTITUTIONAL CRISIS OF 2015-2016

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INTRODUCTION

The term "judicial behaviour" refers to what judges do as judges. "The most consequential forms of judicial behaviour typically consist of decisions or contributions to decisions"[1]. Of course, there are many kinds of behaviour that might influence judicial decision making in a very subtle and delicate way.

Academic scholars of higher courts have depicted three ideal types of judicial behaviour: legal, attitudinal, and strategic[2]. It is quite obvious that most judges see their own behaviour in the framework of the legal model. In this model, judges only want to find the correct interpretation of law. It does not matter what their views on the matter of interpretation are. Whether they are intentionalists or textualists, their main concern is the appropriate legal framework of decisions they are making. This attitude towards judicial behaviour is strongly embedded in the tradition of western law. The only goal that judges should seek is legality of their decisions. Here, decision-making is all about the law and doctrinal positions on the basis of legal merits. Because the law is all that a judge needs in order to support his or her decision, "(…) the judge can reach the required decision without recourse to nonlegal normative considerations of morality or political philosophy"[3].

In the attitudinal perspective, the law is merely a rationalization for judicial decision making, because it is too general and imprecise to determine the decision. Judges may be even more vulnerable than other decision makers

DOI: 10.1515/wrlae-2018-0006

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[1] Lawrence Baum, *The Puzzle of Judicial Behavior* (Michigan University Press 2005) 2.

[2] Lawrence Baum, *Judges and their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006) 5.

[3] Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?' (2010) 16 Legal Theory 111.

because the rules of law are "typically available to support either side"[4]. The law does not constrain the judicial decision in any meaningful way. United States Supreme Court justices are motivated by a single goal, which is their interest in good public policy. This does not mean that other forces are irrelevant, but we cannot argue with the fact that attitudes largely determine judges' choices. In the words of the most rigorous and enthusiastic supporter of the attitudinal model: "The [United States] Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices"[5]. Judicial attitudinalists have carefully limited the model in its pure form to the area where it might plausibly apply: the US Supreme Court's decisions on the merits.

Another model of judicial behaviour is called the strategic model. "In most strategic models judges seek to make good policy, but they define good policy in terms of outcomes in their court and in government as a whole"[6]. It is unquestionable that, at some level, all political and social behaviour must be explained in reference to individual values, attitudes or personalities. But all these factors should be explained in contexts of their occurrence. As one of the Pioneers of Judicial Behaviour pointed out: "even if we could complete a perfect description and prediction of judicial decision making on the basis of individual attitudes, we still would be left with the question: what explains judicial attitudes?"[7].

In most strategic models judges seek to make good policy, but they modify outcomes on the basis of the possible impact of their decisions on the government. The institutional settings "are an omnipresent feature of our attempts to pursue a preferred course of action"[8]. Political behaviour can be explained only in an institutional environment. No supreme court or constitutional court exists in an institutional vacuum – this institution is a little more than a collection of individuals focused only on their personal policy preferences.

I believe that this *neo-institutional approach* is much closer to the origins of the Legal Realism Movement. Leading scholars of public law have recognized that judicial decisions "(…) are a mixture of law, politics, and policy and that judges' decisions were influenced by background, training, personality, and value preferences"[9]. Law cannot be understood in isolation but has to be considered in the light of larger political, economic, and social background structures[10].

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[4] C Herman Pritchett, 'The Development of Judicial Research' in JB Grossman, J Tanenhaus (eds) *Frontiers of Judicial Research* (Wiley 1969) 31.

[5] Jeffrey A Segal, Howard J Speath, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993) 65.

[6] Baum (n 2) 6.

[7] Glendon Schubert, *Judicial Behaviour: A reader in Theory and Research* (Rand McNally & Company Chicago 1964) 446.

[8] Howard Gillman, CW Clayton, 'Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making' in CW Clayton, H Gillman (eds) *Supreme Court Decision Making. New Institutionalist Approaches* (University of Chicago Press 1999) 3.

[9] Nancy Maveety, 'The Study of Judicial Behaviour and the Discipline of Political Science' in Nancy Maveety (ed) *The Pioneers of Judicial Behaviour* (Michigan University Press 2003) 3.

[10] See Richard Posner, 'The Decline of Law as an Autonomous Discipline: 1962 – 1987' (1987) 100 Harvard Law Review 761 – 780.

Historical institutionalists consider the broader structural and institutional factors that shape judicial decisions. These scholars challenge the instrumentalist view of judicial decisions as merely an aggregate effect of individual behaviour. Historical institutionalism considers norms, values and ideas to be an integral part of the analysis. In the judicial politics literature, this approach views the judges' conceptions of their proper roles as important ingredients in their decisions. From this perspective, institutions affect not only strategies and interests, but also patterns of relationships between actors, preferences, objectives, identities, and indeed, the very existence of actors. Institutions do not simply represent constraints or embody opportunities for action; institutions are central markers in the process of preference formation. Insofar as judges are concerned with the content of legal policy, the most contentious issue in the field has been the balance between their interest in good law and their interest in good policy.

All these models are successors of legal realism, the theory that suggests judicial decision making is essentially a matter of politics. O.W. Holmes said, "illusion and repose is not the destiny of man. Behind the logical form lies a judgement as to the relative worth of and importance of competing legislative grounds, often an inarticulate and unconscious judgement, it is true, and yet the very root and nerve of the whole proceeding"[11]. So lawyers can speak of logic, interpretation, rules, principles and objective and impartial judgement; but in fact the law is a matter of politics.

Nevertheless, it is important not be a naive legal empiricist. I agree with L. Baum, who argues: "the findings from these analyses do not establish that the content of legal policy is the only consideration that motivates [United States] Supreme Court justices to a significant degree. The evidence is too ambiguous and too limited to support this conclusion"[12]. Because scholars have not arrived at a definitive explanation of judicial goals and motivations, the "empirical findings that scholars use to support a particular interpretation of judges' behaviour typically are consistent with other interpretations as well"[13]. Consequently, judicial behaviour would probably puzzle scholars for a long time. Nevertheless, I think that those empirical findings give a lot of interesting and illuminating insights into how supreme and constitutional courts work.

In summary, justices can only maximize their policy goals by reacting to the constraints imposed by other significant players in the court's political and institutional environment – this is the basic thesis that is well established in the empirical findings. Of course, one can say that it is a trite cliché, but the consistency of empirical findings with a commonplace legal theory is not something that happens very often, hence we possess a high level of certainty in this matter.

The framework of empirical research on the Polish Constitutional Court has to be completely redesigned after major legislative changes in 2015-2016. Personal and institutional changes in the Court have created the

[11] Oliver W Holmes, 'The Path of the Law' (1987) 10 Harvard Law Review 457, 465-466.
[12] Baum (n 1) 41
[13] Baum (n 2) 173.

need for new perspective on the matter of judicial attitudes, strategies, dissenting opinions and institutional context.

I. THE POLISH CONSTITUTIONAL COURT IN THE POLISH LEGAL AND POLITICAL SYSTEM BEFORE THE 2015-2016 CONSTITUTIONAL CRISIS

In the institutional approach scholars examine judicial decisions as part of a political regime. The Polish Constitutional Court (*Trybunał* Konstytucyjny, TK) was introduced during the socialist period and still plays a crucial role in the Polish legal and political system.[14] In the next section, I will try to examine the relationship between the changes in the Polish political environment after transformation and the legal policy imposed by the Polish Constitutional Court, and how the former impacted the content of the Court's decisions. I will focus especially on the disagreement in the TK.

In one of his resplendent works, Jeremy Waldron looks for the reason why law and politics can claim authority over citizens in the light of widespread disagreement about almost every basic matter[15]. Waldron believes that reasonable disagreement is a common feature of the liberal conception of politics. If so, he concludes, there is no reason for constraining majoritarian political procedures by judicial review. To some extent I can agree with this. But, I want to argue that whether the judicial review is morally repulsive or not, will depend on reflection of disagreement about socially important matters. Many studies in the U.S. have shown that the public thinks that judges are influenced by their personal political views, but, at the same time, the public also believes that most judges are fair and impartial arbiters of law.

Many respondents have expressed a great deal of confidence in the U.S. Supreme Court. "In short, the public has internalized what recent scholarship demonstrates – that judges are subject to legal and political influences – but the public nonetheless continues to express considerable confidence in the courts"[16]. In history of the U.S. Supreme Court, Chief Justice John Marshall is credited with forging the tradition of consensus in arriving at opinions for the Court[17].

He believed that unanimity is one of the most important factors that would build the Court's prestige and legitimacy. I think that there is a glaring error in Marshall's thinking. It is almost impossible, in modern societies, to

[14] On the socialist origins and post-1989 evolution of the TK see e.g. Rafał Mańko, '"War of Courts" as a Clash of Legal Cultures: Rethinking the Conflict between the Polish Constitutional Court and the Supreme Court Over "Interpretive Judgments" in Michael Hein, Antonia Geisler and Siri Hummel (eds), *Law, Politics, and the Constitution: New Perspectives from Legal and Political Theory* (Peter Lang 2014); Adam Sulikowski, 'Government of Judges and Neoliberal Ideology' in Rafał Mańko, Cosmin Cercel and Adam Sulikowski (eds), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Counterpress 2016).

[15] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999).

[16] Charles G Geyh, 'Can Rule of Law Survive Judicial Politics?' (2012) 97 Cornell Law Review 222.

[17] DM O'Brien, Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions in Clayton, Gillman (eds), *Supreme Court* (n 8) 92.

find room for a unanimous political position. Since the Marshall Court, scholars have noted the rise of individual opinions and the "demise of consensual norms in United States Supreme Court"[18]. Scholars admitted that the decline in consensus on the Supreme Court provided the initial impetus for studying the Supreme Court decision-making as an essentially political enterprise[19]. The high level of disagreement, which is essential to the liberal idea of politics, calls into question the Courts impartiality and devotion to the legal principles. Somehow the Court is a political institution and yet thought to be entirely free of politics. This schizophrenic image is widely recognized in research about the role of Constitutional Courts in modern constitutional democracies[20].

Established in 1985, the Polish Constitutional Court issued its first judgment that same year. However, the TK had limited power to shape the policy of the socialist system, because the court decision could be overruled by an Act of Parliament. The decisions of the TK were not final, and the Parliament could reject its decisions by a majority of 2/3 votes cast. Nevertheless, the TK was able to develop many important cases, which played a crucial role in filling constitutional gaps in the early years of transformation. Upon this, the TK has built a very strong institutional position based on its reputation and legal authority. Legal doctrine developed by the TK has played an important role in Polish constitutional theory – especially with regard to the notion of the "democratic state of law" (*demokratyczne państwo prawne*) – and was, in the end, reflected in the new Polish Constitution of 1997[21] At that time, the TK was accused of "making law" instead of just "interpreting" it.[22]. I believe that, at that time, those charges were unjustified. The TK was trying to find and restore many well-known legal concepts that had been abandoned during the period of state socialism. The ideas of *vacatio legis* or *lex retro non agit* do not require a special argumentation for their justification because they are strongly embedded in western law culture.

The new Constitution of 1997[23] brought about many reforms and changed the institutional setting of the Polish government, and, what is

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[18] See TG Walker, L Epstein, WJ Dixon, 'On the Mysterious Demise of Consensual Norms in the United States Supreme Court' (1988) 50 Journal Of Politics 361.

[19] Keith J Bybee, *All Judges Are Political, Except When They Are Not* (Stanford University Press 2010) 13.

[20] Adam Sulikowski, 'Między tekstem, rozumem i polityką. Modernistyczne fundamenty wykładni konstytucji i ich praktyczne implikacje' in Przemysław Kaczmarek (ed), *Lokalny a uniwersalny charakter interpretacji prawniczej* (Wydawnictwo Uniwersytetu Wrocławskiego 2009) 259.

[21] cf Rafał Mańko, 'Law, Politics and the Economy in Poland's Post-Socialist Transformation: Preliminary Notes Towards an Investigation' in Bálazs Fekete and Fruzsina Gárdos-Orosz (eds), *25 Years After Transition in Central and Eastern Europe: Understanding the Transition from an Internal Perspective* (Peter Lang 2017).

[22] Lech Morawski, 'Precedens a wykładnia' [Preceden and Interpretation] (1996) 10 Państwo i Prawo 6.

[23] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. uchwalona przez Zgromadzenie Narodowe w dniu 2 kwietnia 1997 r., przyjęta przez Naród w referendum

important here, strengthened the TK's position *vis-á-vis* that of legislature. Since 1999, the decisions of the TK have become final and conclusive, and there are no further appeals (in particular, the *Sejm* cannot overrule the TK's decision, as had previously been the case). Also, in its famous judgment in Case K 26/97, the TK acknowledged that the catalogue of constitutional principles is not closed, thereby granting itself the competence to discharge other constitutional standards. Lech Morawski pointed out that the "TK created an easy-to-use tool that allows it to freely disqualify legislation which is not in conformity with the political attitudes of judges"[24].

This legal framework aside, it is also important to examine the political one. In Poland, the nominations to the Court are decided upon by the Sejm – the lower chamber of the Parliament. Hence, nominations are strictly political, based on compliance with policy preferences of the parliamentary majority. The Sejm elects judges to the TK by an absolute majority of votes; therefore the majority in the Sejm is the key to the appointment of constitutional judges. In many legal systems constitutional judges are political agents, in part because the appointment mechanism is usually politicized. It is no mystery that appointment politics dictates and plays a crucial role in judicial behaviour. The people who select TK judges are obviously very interested in the policy views of candidates and, as a result, they favour those with similar policy preferences. Those people are likely to care a great deal about the content of what they considered to be good policy. The interaction of constitutional judges and the political audience is not fully understood, but there is no doubt that judges seek to advance the preferences of their appointers. Although TK judges are not allowed to be re-elected, they may still be incentivised to cast ideological votes, hoping for future appointment to other public offices[25].

II. THE POLISH CONSTITUTIONAL COURT AFTER THE 2015 ELECTIONS

The origin of the constitutional crisis in Poland in 2015-2016 was the Constitutional Court Act of 25 June 2015[26]. Article 137 contained a provision stating that candidates for TK judges to be appointed until the end of 2017 were to be submitted within 30 days of the entry into force of that Act. The provision created the possibility that the Sejm of the 7th term should appoint judges that normally should be appointed by the Sejm of the next term[27]. It was declared that this provision was proposed in order not to block the

konstytucyjnym w dniu 25 maja 1997 r., podpisana przez Prezydenta Rzeczypospolitej Polskiej w dniu 16 lipca 1997 r. (Dz.U. 1997 no. 78 item 483).

[24] Lech Morawski, 'Zasada trójpodziału władzy. Trybunał Konstytucyjny i aktywizm sędziowski' [The Principle of the Separation of Government into Three Branches: the Constitutional Court and Judicial Activism] (2009) 4/93 Przegląd Sejmowy 60.

[25] This is not only the case of Poland; see Bathula Venkateswara Rao, *Crisis in Indian Judiciary* (Michigan University Press 2001) 150.

[26] Dz. U. 2015, item 1064

[27] Later this provision was considered unconstitutional by the Constitutional Court. It was declared inadmissible on account of individual nature of the tenure of judges; Case K 34/15, OTK ZU no. 11 A/2015, item 185.

Court's work despite the serious concerns regarding its constitutionality[28]. In the parliamentary elections that took place on 25 October 2015, the Law and Justice Party (*Prawo i Sprawiedliwość*) obtained 37.50% of votes which gave it 235 seats in the Sejm. Thus, the Law and Justice Party was able to construct the first single-party government since 1989. The first session of the Sejm was planned for 12 November 2015. One of the first legislative initiatives taken by the new governing majority concerned the Act on the Constitutional Court adopted in June 2015.

As the representatives of the governing majority explained, the main purpose of the amending act was to *"rectify the mistakes made by the previous Sejm while changing the Act on the Constitutional Court."*[29] In practice, however, the amending act constituted a serious threat to the independence of the Constitutional Court and its judges. The draft Act amending the Act on the Constitutional Court foresaw changes in the procedure of electing the President and Vice-President of the TK, introduced a three-year tenure of office for the President and Vice-President of the TK, terminated the tenures of the incumbent President and Vice-President of the Court within three months of the act's entry into force and contained a new transitional provision regulating the elections of constitutional judges in 2015. The Speaker of the Sejm referred the draft amending act for the first reading which took place a day later on 18 November 2015. During the first reading, at the session of the Sejm's Legislative Committee, motions were submitted to request an opinion concerning the draft act from the Sejm's Bureau of Research. The second reading took place on the following day, on 19 November 2015. The act was adopted unanimously by 268 votes (representatives of opposition parties – the Civic Platform, Nowoczesna and Polish People's Party left the room before the vote). A day later, on 20 November 2015 the Senate adopted the act without amendments and the act was transmitted to the President of the Republic who signed it on the same day. The amending act entered into force 14 days after its publication in the Journal of Laws. On 2 December 2015, the Sejm chose five new judges of the Constitutional Court. The Sejm selected the judges based on the provisions which were not yet in force at that time (the Act of November 2015 amending the Act on the Constitutional Court was to enter into force on 4 December 2015). Thus, the elections of judges did not have a legal basis. The President took the oath from four judges overnight from 2 to 3 December 2015.

One may pose the legitimate question as to why did the ruling party want to capture the TK? There is an opinion that the Constitutional Court is the main obstacle to establishing a populist electoral autocracy in Poland, as has

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[28] Sejm, *Record from the session of the Justice and Human Rights Committee (no. 236) and Legislative Committee (no. 129)*, available at: http://orka.sejm.gov.pl/Zapisy7.nsf/wgskrnr/SPC-236; Senate, *HFHR's opinion on the Act of 27 May 2015 on the Constitutional Court* (in: *Senate's publication no. 915*), available at: http://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/komisje/2015/ku/materialy/915_hfpc.pdf.

[29] Marek Ast, in: *Record of the Sejm's session of 19 November 2015*, available at: <http://orka2.sejm.gov.pl/StenoInter8.nsf/0/40EB18089521535BC1257F020056C01D/%24File/01_ksiazka_e_bis.pdf> 4.

happened in Hungary. The Court would not allow adopting laws restricting the independence of the judicial system, freedom of the media and civil liberties. This is a very dangerous trend. Violation of the principles of the constitutional State can result in a systemic threat to the rule of law in Poland. There is no doubt that these changes were based solely on political motives, without any respect to the rule of law[30]. However, critical legal scholars point out that the constitutional crisis of 2015-2016 led to the dispelling of the myth of the apolitical character of the court, and shone a light on its political character, which had been hitherto concealed.[31]

On 21 December 2016, the President of Poland appointed Julia Przyłębska as the President (Chief Justice) of the Constitutional Court. The appointment of Przyłębska came two days after the term of the previous Court head, Andrzej Rzepliński, ended. Przyłębska was nominated by the conservative Law and Justice (PiS) party. Przyłębska's appointment gave rise to controversies. The Vice President of the Constitutional Court, Stanisław Biernat, said that eight Court judges refused to vote on candidates for the post of the court's new head.[32]

III. DISSENTING OPINIONS IN THE POLISH CONSTITUTIONAL COURT BEFORE AND AFTER THE CRISIS

Courts decisions are a function of many factors. Beyond attitudes, institutional environment, and Court's audiences, role conceptions are important[33]. A role orientation is a psychological construct which is the combination of the holder's perception of the role expectations of significant others and his or her own norms and expectations of proper behaviour for a judge. There is a widely shared notion that courts are the guardians of their nation's constitutions and, therefore, their chief and ultimate interpreters. Judge's role orientations are their beliefs about the kind of behaviour proper for a judge; hence judges in supreme courts may see themselves as "guardians of the constitution". But, as chief justice of the U.S. Supreme Court Charles Evans Hughes observed: "We are under a Constitution, but the Constitution is what the judges say it is". Constitutional text does not announce or declare its own interpretive methodology, because no text does. Hence the potential arbitrariness in constitutional interpretation. Supreme courts are heavily ideologically biased. There are several reasons for this: judges often seek to advance what they consider to be a good policy, the court exists in various institutional settings, recruitment must be seen as a process by which individuals are inducted into active political roles, courts interact with their political audiences and constitution text cannot create appropriate constraints in judicial decision making. None of the interpretation methods "(…) imposes

[30] M Matczak, Poland's Constitutional Court under PiS control descends into legal chaos, <https://www.academia.edu/31940186/Polands_Constitutional_Court_under_PiS_control_descends_into_legal_chaos> (accessed March 2017).

[31] Adam Sulikowski, 'Trybunał Konstytucyjny a polityczność. O konsekwencjach upadku pewnego mitu' [Constitutional Court and the Political: On the Consequences of Dispelling a Certain Myth] (2016) 4 Państwo i Prawo 3.

[32] <https://www.tvp.info/28309869/stanislaw-biernat-o-wyborze-julii-przylebskiej-na-stanowisko-prezesa-tk>

[33] James L Gibson, 'Judges Role Orientations, Attitudes, and Decisions: An interactive Model' (1978) 72 American Political Science Review 911 – 924.

a sufficiently powerful constraint in the mere policy preferences of interpreters"[34].

There is a myth of the objective meaning of the Constitution, which is the standard, rhetorical argument used by constitutional courts throughout the world.[35] "The notion that judges are complicated creatures whose decisions are variously influenced by law, ideology, strategic objectives, self-interest, and the audiences they address is neither counterintuitive nor ground shaking",[36] but legal scholars failed to successfully adapt this outlook in legal discourse. It is quite hard to distinguish different dimensions of judges' behaviour, especially that policy preferences themselves might be very complex and voting patterns do not have to reflect directly judges' interests in good policy. Hence, I will focus on the dissenting opinions in Polish Constitutional Court.

The rules for reporting a dissenting opinion have not been changed following the constitutional crisis. According to art. 69 of The Constitutional Court Act[37] "A ruling of the Court shall be determined by a majority vote; Para 3: A judge of the adjudicating bench who disagrees with the Court's ruling may submit a dissenting opinion when signing the ruling. The dissenting opinion may also concern only the statement of reasons for the ruling". It is important to recognize that a judge, who disagrees with the TK rulings, has no obligation to write a dissenting opinion. In a partial typology of possible goals for judges, presented by L. Baum, life in Court is one of the frameworks of the analysis. Social psychologists have argued that the situations in which individuals act are more important than intrinsic traits of individuals.[38] Segal and Speath argued that lack of electoral accountability and lack of ambition for higher office frees judges to concentrate on the policy considerations[39].

But any supreme or constitutional court is a little more than a collection of individuals who are pursuing their personal policy preferences. Scholars associated with the Attitudinal Model can argue that their goal is to make a successful prediction of the decisions that justices' make. As Goldman and Jahnige argue: "we cannot say that attitudes cause votes when we have defined those attitudes in terms of the same votes. Nevertheless, it is clear that if the attitudinal hypothesis were invalid, neither repeated findings of bloc voting, scale patterns, nor consistent issue-oriented voting would be found. It is therefore reasonable to suggest that judges tend to behave as if their

[34] Mark Tushnet, 'The United States: Eclecticism in the Service of Pragmatism in Jeffrey Goldsworthy' (ed) *Constitutional Interpretation* (Oxford University Press 2006) 51.
[35] Adam Sulikowski, *Współczesny paradygmat sądownictwa konstytucyjnego wobec kryzysu nowoczesności* [The Contemporay Paradigm of Constitutional Justice and the Crisis of Modernity] (Wydawnictwo Uniwersytetu Wrocławskiego Wrocław 2008) 64.
[36] Geyh (n 15) 220.
[37] Dz.U. 2016, item 1157.
[38] Lee Ross, Richard Nisbett, *The Person and Situation: Perspectives of Social Psychology* (McGraw-Hill New York 1991).
[39] Jeffrey A Segal, Howard J Speath, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993) 69.

attitudes and values governed their voting choices".[40] Nevertheless, it is important to distinguish prediction from explanation.[41] The latter does not need a predictive accuracy, and is focused on the role of inherent goals that drives judicial behaviour. We cannot neglect the fact that relations with other judges and other participants in the court, limited workloads or access to court resources are important motivations for TK justices. Therefore, it can be assumed that many TK justices may refrain from writing a dissenting opinion in order to maintain a good relationship with other justices or that they want to limit their workloads. It is important to have that in mind, when interpreting the data. We do not want to jump too quickly to the conclusions that might be weakly supported by the available evidence.

In 2014 in the Polish Constitutional Court, in only 21% of the cases was a dissenting opinion issued[42]. But since 1998 we can see a growing tendency in issuing dissenting opinions. This trend was already recognized in the U.S. Supreme Court and in most of the E.U. countries: "In recent years, there has been a growing trend towards allowing at least constitutional judges to issue separate opinions. Many Eastern European Countries that have recently joined the EU follow this practice"[43]. This trend is particularly evident in the context of the EU. Central and Eastern European countries have followed the German model of judicial review[44].

Since the appointment of judge Przyłębska as the President of the Constitutional Court, 27 judgments have been issued by the Court with 11 dissenting opinions submitted in 7 cases. Most of them were issued in cases with a strong political context: the Constitutional Court Act[45], law on assemblies[46] or the process of selecting Supreme Court judges[47]. Only two politically charged cases were resolved without dissenting opinions due to the fact that judge Przyłębska does not appoint judges elected before the crisis to the adjudication panel. 90% of dissenting opinions were submitted by judges elected before the crisis. Thus we can expect the demise of dissenting opinions in Constitutional Court which reflects the growing political influence that Law and Justice party has over the Court.

Prior to the constitutional crisis of 2015-2016, the TK enjoyed a fairly good reputation in Polish society, but the proportion of surveyed opinions perceiving the Court as a good political actor has decreased since 2008. According to the public opinion survey (CBOS), at the beginning of 2008 roughly 55% of surveyed individuals had a good opinion of the work of the TK. In 2013 this percentage dropped to 37%. This still should be considered as being high since, by comparison, only 15 % of the same surveyed individuals positively assessed the work of the Parliament. For many scholars there is a connection between the amount of dissenting opinions and public

[40] S Goldman, TP Jahnige, *The Federal Courts as a Political System* (New York 1985) 137, cited after: Baum (n 1) 15.
[41] Baum (n 1) 5
[42] <http://trybunal.gov.pl/fileadmin/content/dokumenty/ds.pdf> (accessed March 2016).
[43] Rosa Raffaeli, *Dissenting opinions in the Supreme Courts of the Member States*, European Parliament Policy Department C Study, PE 462.470 (European Parliament 2012).
[44] ibid.
[45] Case K 1/17 (24.11.2017), OTK ZU – 2017. A.79
[46] Case Kp 1/17 (16.03.2017), OTK ZU – 2017. A. 28
[47] Case K 10/17 (11.09.2017), OTK ZU – 2017. A. 64

confidence in the constitutional court[48]. Another important question is whether the dissenting opinions undermine the authority of the court and violate the principle of secrecy of deliberations, or does it strengthen the court's reputation and make the administration of justice more transparent?

Almost half of the respondents (45%) declare that in a dispute concerning the recent Constitutional Court crisis, they are on the side of the Court; more than a quarter (29%) support Law and Justice and the current authorities in this matter[49].

If judges are appointed by parliament, as is the case for many constitutional courts, secrecy secures the court's credibility by preserving an appearance of independence, hence avoiding any undue politicisation of legal decisions and the public's perception that judges decide based on their political preferences, rather than on legal arguments. But this view is not consistent with the idea of law as argumentative practice[50]. Law is a medium that helps conflicted parties to find a way of moving on. So the essential work of the courts is "about getting an answer that is good enough to settle the matter in a way that people can accept"[51].

During the 2015-2016 constitutional crisis, the Constitutional Court was paralysed and was a loophole in the system of constitutional review and human rights protection. Furthermore, the fact that persons who are not legally appointed judges rule on cases submitted to the Constitutional Court raises serious concerns about the legality of the Court's decisions.

On March 16th 2017 the Constitutional Court, whose legality continues to be questioned by leading scholars,[52] and that has been successfully subsumed to the ruling party, found the bill consistent with the Constitution[53]. Four dissenting opinions were submitted, but only three questioned the constitutionality of the Act. Justice Sławomira Wronkowska-Jaśkiewicz has submitted separate opinions several times questioning the legality of the composition of the Court.[54]

CONCLUSIONS

Judicial attitudes, strategies, dissenting opinions and institutional context might be viewed as a part of interpretation practice of a political community and the rise of individual opinions in Court is a reflection of legal

[48] Franco Gallo, *Intervento al seminario di studi "L'opinione dissenziente"*, Conference held at the Italian Constitutional Court on the 22nd of June 2009 <http://www.cortecostituzionale.it/documenti/convegni_seminari/Relazione_Gallo_opinione.pdf> (accessed March 2016).
[49] <http://www.cbos.pl/SPISKOM.POL/2016/K_062_16.PDF>.
[50] Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press 2005).
[51] Leif H Carter, Thomas F Burke, *Reason in Law* (New York: Pearson Longman 2007) 186.
[52] M Matczak, 'Poland's Constitutional Court under PiS control descends into legal chaos' <https://www.academia.edu/31940186/Polands_Constitutional_Court_under_PiS_control_descends_into_legal_chaos> (accessed March 2017).
[53] Case Kp 1/17 (16.03.2017) OTK ZU A/2017, item 28.
[54] Case K 10/15 (20.04.2017) OTK ZU A/2017, item 31.

and political disagreement. Resting authority on secrecy, as Marshall wanted, instead of on a rational, exhaustive reasoning, has been considered to be a sign of weakness. Public reason, and every reasoning implies different ways of thinking that might be opposite, is much better suited to democratic societies. If a decision of a constitutional court is supposed to be authoritative, it must be publicly presented, reasoned and explained. As Ch.G. Geyh wrote: "Scholars devoted to the empirical study of judicial decision making have focused on developing positive theories of judicial decision-making behaviour with only passing regard to the policy implications of such theories"[55].

The current composition of the Constitutional Court, with a majority of appointees of one political force, will certainly impact upon the style of the Court's case-law. We can predict, in accordance with the theory of judicial behaviour, that the uniform political provenance of the judges of the Constitutional Court will increase the uniformity of judicial decisions, which does not reflect the real political disagreement present in the Polish society. Therefore, despite the hopes of critical legal scholars that, as an outcome of the 2015-2016 constitutional crisis, the Court would embrace the political dimension of its judicial activity,[56] there is a serious risk that it will remain, as it had been during the first 20 years of its existence, devoted to legal formalism and continue to hide the political aspects of the cases its decides behind the smokescreen of apparently compelling legal reasoning, in line with the tradition of 'hyperpositivism'.[57]

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[55] Geyh (n 15) 194
[56] Sulikowski (n 31).
[57] Rafał Mańko, Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome (2013) 7.2 *Pólemos* 207; Mańko (n 14) 81-82.

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