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The Presidential and Semi-Presidential System of Government and the Model of Control of Legal Norms. Reflections on Political Dependencies[3]

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Słowa kluczowe: prezydencki system rządów, półprezydencki system rządów, sądownictwo konstytucyjne, europejski model kontroli konstytucyjności prawa, amerykański model kontrola konstytucyjności prawa

Abstract

The analysis focuses on the relations between the presidential and semi-presidential system of government and the model of control of legal norms. The authors formulate question, is there a correlation between these government systems and the model of constitutional review of the law? The authors argue that there is no such dependence. They justify that the system of government is created independently of the model of law constitutional review. They justify why it is and what are the consequences for the system of government.

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Streszczenie

Prezydencki i półprezydencki system rządów a model kontroli norm prawnych. Refleksje na temat zależności politycznych

W artykule poddano analizie sposób ukształtowania kontroli konstytucyjności prawa w prezydenckim i pół-prezydenckim systemach rządów. Bada się w nim zależność między tymi systemami rządów a realizowanym w nich modelem kontroli konstytucyjności prawa. Dowodzi się, że są to komponenty ustroju państwa tworzone niezależnie od siebie, nieoddziałujące na siebie aksjologicznie, instytucjonalnie czy behawioralnie. Stwierdza się, że w prezydenckim i pół-prezydenckim systemie rządów nie ustanowiono wyjątkowego, właściwego dla nich, modelu kontroli konstytucyjności prawa.

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I. Introductory issues

Both in the countries that adopt the classical presidential system (US), the countries based on presidentialism[4] (Mexico, Brazil or Chile), and the countries classified as semi-presidential[5] (France, Romania, Portugal or Turkey), organs and procedures are established, the purpose of which is to examine

[4] On the specifics of presidentialism see M.L. Mezey, *Presidentialism: Power in Comparative Perspective,* Lynne Rienner Publishers 2013; *Presidentialism and Democracy in Latin America,* eds. S. Mainwaring, M. Soberg Shugart, Cambridge University Press 2012.

[5] More on the subject of the semi-presidential system of governance, see О.И. Зазнаев, *Полупрезидентская система: теорические и практические аспекты,* Казань 2006 (O.I. Zaznaev, *Semi-presidential system: theoretical and practical aspects,* Kazan 2006); *Semi-Presidentialism and Democracy,* eds. R. Elgie, Y. Wu, Palgrave Macmillan UK 2011. Critically on the use of the term "semi-presidential system of government" see В. Литвин, *Критика классического и постклассического определения полупрезидентализма и ее роль в построении синтетического концепта полупрезидентской системы правления: теоретико-методологический анализ и верификация на примере стран Центрально-Восточной Европы* (V. Lytvyn, *Criticism of the classical and post-classical definition of semi-presidentialism and its role in building the synthetic concept of a semi-presidential system of government: a theoretical-methodological analysis and verification using the example of Central-Eastern Europe*), "Studia Politologiczne" 2017, vol. 44.

the constitutionality of law[6]. This does not mean, however, that the proper feature of presidential and semi-presidential systems must be the existence of legal norms. Moreover, it does not mean that there is a specific model of control of legal norms.

The systems treated as the originals of the semi-presidential system, i.e. the Weimar Republic (based on the 1919 constitution) and Finland (based on the 1919 constitution), did not envisage constitutional jurisdiction bodies. This was due to the fact that such control, on the European ground, was still a theoretical project, consistently promoted by Hans Kelsen[7], and the first constitutions that in general set up the Kelsen model of control of legal norms were constitutions of Austria and Czechoslovakia (both from 1920). Thus, the first model of semi-presidential systems did not anticipate any extra-parliamentary control of the constitutionality of law; the same as the US legal system, which did not know the judicial review from its beginning. It was established by a way of precedent in 1803 and in practice it began to be applicable more boradly only in the second half of the nineteenth century.

The very fact that in the contemporary presidential and semi-presidential systems there are mechanisms of extra-parliamentary control of the constitutionality of law does not necessarily mean any convergence or – even more so – the identity of these mechanisms. In various presidential and semi-pres-

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[6] It also exists in the jurisdictions classified as hyper-presidential, super-presidential or neo-presidential, such as Kazakhstan, Russia, Belarus, Azerbaijan, Uzbekistan and Tajikistan. In this respect, Turkmenistan is the exception, where constitutional judicature has not been established.

Defining the system as presidential or semi-presidential, one should bear in mind that the presidential system is the one that builds an extremely strong presidency, because such systems, contrary to appearances, have little in common with the proper presidential system the matrix of which remains the US system in the form in which it was created at the end of the 18th century. They form the so-called neo-presidential system, which is quite common in Latin America, Africa or in the areas of the former USSR. As far as the semi-presidential system is concerned, it should be treated at a lower level than only the system with the universal and direct election of the president, which is how the system is often perceived – R. Elgie, *Semi-Presidentialism and Comparative Institutional Engineering*, [in:] *Semi-Presidentialism in Europe*, ed. R. Elgie, New York 1999, p. 281.

[7] But also with reference to Poland by Władysław Leopold Jaworski, who already in the work on the March Constitution of 1921, postulated the establishment of a judicial review of the constitutionality of law.

idential systems, there are very different forms of securing the constitution, one of them referring to the American model, others to the European model[8] or to various intermediate solutions, in a smaller or larger extent based on one of the models of control of legal norms.

At the same time, it should be pointed out that while in the USA and Mexico there is a judicial review (in other words, the so-called American model), in other countries in general the constitutional judiciary refers to the so-called European model (Kelsen). The American model (judicial review) provides that: 1) the control of constitutionality is exercised by all common courts, headed by a court of highest instance (Supreme Court); 2) the control is of a concrete nature, which means that the question of constitutionality may appear only when an incidental case of applying a legal norm to a specific case is evoked before a given court, and on this occasion, the allegation of unconstitutionality is raised (in the mode of so-called procedural excesses); 3) the decision taken by a court in relation to a case pending before it is only *inter partes*, which means that it does not bind anyone else; 4) in the event of establishing the unconstitutionality of a legal norm, a norm burdened with constitutional defects remains in the system of sources of law, because a court is not able to remove it (derogate) from this system in the mode of constitutional review. It is worth paying attention to the last of the recalled elements identifying the judicial review, because, first, it contrasts the most with the so-called the European model of constitutional review, and second, it was the direct reason for seeking others, in the assumption better, forms of protection of the constitution. On European soil, especially at the end of the 19th century, the most discussed issue was the so-called relative effect of a judgement made by means of a judicial review (i.e. no possibility of a derogation of a norm in relation to which unconstitutionality was found). To a large extent, this prompted researchers such as Hans Kelsen and Heinrich Triple to seek other solutions.

Searching for other forms of protecting a constitution, which resulted in the so-called European (Kelsen, less often called the Austrian) model of constitutional control of the law, was not determined exclusively by the inability of the American court to derogate the norm (although this issue was raised

[8] L. Favoreu, *Modèle européen et modele américain de justice constitutionnelle,* "Annuaire International de Justice Constitutionnelle" 1988, vol. IV, p. 51.

as one of the elementary ones). It was also recognized that the adjudication activity in terms of establishing the unconstitutionality of a legal norm is not strictly related to the typical activities of courts and therefore it should not be entrusted to courts, but to separate bodies, albeit, at least to some extent, similar to courts. Undermining the usefulness of the American model of constitutional review of law was also caused by the desire to centralize this control and recognize that the procedure in which each court (from the lowest court to the Supreme Court) is empowered to assess the lawfulness of the constitution is a defective solution. It should be noted that this solution is indeed possible to be implemented, in principle, under the highly specific conditions of the common law system, where courts, including through precedents, play a different role than in the European model of law. This is the reason why (apart from Mexico[9] and, to a limited extent, Brazil[10]) Latin American countries, although they usually strongly refer to the American presidential system, in the field of constitutional judiciary derive patterns from the Kelsen model[11]. This model, although in practice, as in Brazil, can be modified differently, in principle corresponds to the European culture of law. Hence, it is easier to install in countries where there is no common law tradition.

Created on the basis of European law, the model of constitutional jurisdiction referred to as the Kelsen model is, in essence, the opposite of judicial review. It is: 1) centralized (concentrated) judicature, which means that the competence to control the constitutionality of norms is detained by one, separate, special body of state; 2) the judiciary implementing – as a rule[12] – ab-

[9] Which, however, also in terms of the constitutional review of law, does not refer in a full and faithful manner to the American model of judicial review. As a rule, it refers to the US model, but also uses European solutions. J.M. Serna de la Garza, *The Constitution of Mexico...*, p. 113. More on the subject, see R.D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit*, Austin 2015, p. 90; A.A. Клишас, *Конституционная юстиция в зарубежных странах* (A.A. Klishas, *Constitutional Justice in Foreign Countries*), Moscow 2004, p. 77.

[10] However, Brazil is not a faithful reference to the judicial review model, mainly because the audit is of an abstract nature and takes place at the request of certain entities and it is constructed on the basis of the typical Kelsen model.

[11] J. Ríos-Figueroa, *Institutions for Constitutional Justice in Latin America*, [in:] *Courts in Latin America*, eds. G. Helmke, J. Ríos-Figueroa, New York 2011, p. 27.

[12] Exceptions in the form of a specific check (triggered by a legal question asked by common courts and a constitutional complaint lodged by individual entities) do occur, but they always constitute the margin of the activity of the Kelsen's constitutional court.

stract control, i.e. detached from incidental cases of the application of a constitutionally challenged legal norm; 3) the judiciary, the decisions of which are addressed to everyone (*erga omnes*), and not only to the participants of a specific proceedings concerning the assessment of the challenged norms; 4) the judiciary, which, following the recognition of the defectiveness of a controlled standard, removes it from the system of applicable law (the so-called absolute effect of the ruling)[13].

The very existence of two opposite models of control of the constitutionality of law does not, however, end the possible variants of this control, especially if it corresponds to the Kelsen model. This is because this model is only a contradiction of the judicial review system, opening the possibility of various arrangements of the constitutional jurisprudence bodies[14]. As a consequence, it is possible to treat a constitutional court (also called a constitutional tribunal or possibly a constitutional council) as an organ of the judiciary (despite the different character of a constitutional court compared to the "appropriate" courts) or as a separate authority, the so-called constitutional guarantee (this solution is statistically the most frequently met), or finally as an evidently political body with a clear indication that it has little to do with the third power. This solution is mainly relevant for France and Kazakhstan, where the "non-judicial" nature of the body of constitutional jurisprudence is already underlined by its very name, i.e. the "council", not the court or tribunal.

II. The mode of appointment of constitutional judges

As regards the methods of appointing judges of constitutional courts, in both their basic models, i.e. American and European, there are many solutions, although at the same time there is a clear participation of the president in these procedures (sometimes even dominant). In the US, nine members of the Su-

[13] More on the features of the European system of constitutional review see Г.Х. Нуриев, *Европейская модель конституционного судопроизводства* (G.H. Nureyev, *The European model of constitutional justice*), Moscow 2015.

[14] On the various solutions adopted in this area in Europe, see: S. Grabowska, *Sądy i trybunały konstytucyjne w wybranych państwach europejskich*, Rzeszów 2008.

preme Court[15] are appointed by the president following the "counsel and consent" of the Senate. It is worth noting that the judges of the US Supreme Court are appointed for life, which means that the very possibility of appointing a judge of the Supreme Court opens up rarely and is always a remarkable moment in American political life[16]. It is worth noting that the procedure of the "counsel and consent" of the Senate is perceived as a systemic brake in balancing mechanism (checks over balances), which is intended to restrain the divided authorities and not lead to a situation where any of them would cumulate any entitlement (and it would be the case, if, for example, the president would appoint alone the Supreme Court judges or if the right to appoint them was the exclusive power of the Senate). On analogous terms, i.e. by the president with the consent of the Senate, twenty-one "ministers"[17] of the Supreme Court of Justice of Mexico, which also acts as a constitutional court, are appointed. The Mexican Constitution clearly stresses that a person who has not received the Senate's approval can not be appointed as a minister of the Supreme Court of Justice. The Supreme Court, similarly to the US and Mexico, is also a constitutional court in Brazil. It is worth noting that the Brazilian constitution perceives the checks of the constitutionality of law as the most important task of this court. The art. 102 of the Constitution stipulates *expressis verbis* that the competence of the Federal Supreme Court should primarily consist in upholding the Constitution. All other tasks, including judiciary supervision over the case law of lower courts, are therefore secondary to the control of constitutionality of law, which makes the Brazilian solutions mix both control models: American and European. The Supreme Court of Brazil is composed of eleven members[18]. As befits an American model, all of them are appointed for an indefinite period (lifetime) by the president, after

[15] It is worth noting that in the USA, as befits the right model of judicial review, the control of the constitutionality of law is exercised by all courts, while the Supreme Court only crowns the system of centralised, distributed control of the constitutionality of law.

[16] It can be proved by the situation that arose after the death of judge Antonin Scalia, who died in February 2016, after thirty years of sitting in the Supreme Court. More on the subject see P. Laidler, *Prawno-polityczny spór wokół wyboru sędziego Sądu Najwyższego USA po śmierci Antonina Scalii*, "Przegląd Sejmowy" 2016, No. 3, p. 21.

[17] This name (*los ministros*) is used by the Mexican Constitution.

[18] The Constitution does not call them "judges", but "members".

obtaining a senate approval of their candidacies. The Senate's consent must be expressed by an absolute majority.

In turn, in Chile, constitutional control, referring directly to the Kelsen model, is entrusted to the Constitutional Tribunal. Ten members[19] are appointed in various ways, which is intended, first, to prevent the dominance of any of the organs that would invoke the entire composition of the Tribunal and, second, to guarantee the plurality of the Court's personal composition. The pluralism of the Court's personal composition is to be ensured by the fact that its members are appointed by various bodies that may have different political and party provenance. Three members are appointed by the president. The next four members of the Tribunal are elected by the parliament, but in a very complex way, namely the first two are appointed directly by the Senate (the second chamber of the parliament), while the next two are proposed by the Chamber of Deputies (the first chamber of parliament), but finally approved by the Senate. Each decision of the parliament (regardless of whether it is the Senate's own appointment or approval by the Senate of the recommendation of the Chamber of Deputies) requires a two-thirds majority of votes. Finally, the last group of members of the Constitutional Tribunal, i.e. three members, are elected by the Court itself on the way of co-optation. All members of the Chilean Constitutional Court are appointed for nine years, whereas every third year it renews one third of its composition, which is supposed to increase the chances of obtaining pluralism in the Constitutional Tribunal.

In semi-presidential systems, constitutional review is carried out accordingly to the principles of the European model. This means that a specialized body, other than the Supreme Court, is established which, on an exclusive basis, controls the compliance of the law with the constitution. It is worth mentioning, however, the French Constitutional Council (*Conseil constitutionnel*)[20] is the most original body of jurisprudence in this group of countries. It

[19] It is pointed out that the Chile constitution calls them "members" and not judges.

[20] On the other hand, the Kazakh Constitutional Council is modelled on the French Constitutional Council. See И.Ю. Остапович, *Конституционный совет Республики Казахстан: вопросы теории и практики: дис.... докт. юрид. наук: 12.00.02.* (I.Yu. Ostapovich, *Constitutional Council of the Republic of Kazakhstan: Theory and Practice: Dis... Dr. legal Sciences: 12.00.02*) Tomsk 2005, p. 62; А. Куртов, *Конституционное правосудие в Республике Казахстан и институт выборов*, „Сравнительное конституционное обозрение" (A. Kurtov, *Constitutional Justice in the Republic of Kazakhstan and the Institute of Elections*, "Compar-

was constructed in opposition to the Kelsen model as a thoroughly political body that was to verify whether the parliament does not go beyond the limits of the legislation laid down in the constitution of 1958. The Constitution of 1958 was largely conceived as a form of limiting exuberant parliamentarism. Thus, it is also considered an extreme manifestation of the so-called rationalization of parliamentarism[21].

The peculiarities of the French Constitutional Council are as important as they actually create a separate French model for the control of the constitutionality of law[22]. It is determined in the greatest extent by such elements as: 1) clear separation of the Constitutional Council from the courts and emphasizing its non-judicial character (which is manifested in the fact that it is a "council", not a "court", its members are not "judges" but "members", decisions of the Constitutional Council are referred to as "decisions" and not "judgments"); 2) recognition of its decidedly political significance (which is reflected by the fact that the members of the Council do not even have legal education, and include politicians, such as MPs, ministers or prime ministers like Laurent Fabius or Lionel Jospin), and that all former presidents of the Republic are members of the Constitutional Council *ex officio*. Nine members of the Constitutional Council holding office for nine years are appointed in a complex manner. Three of them are appointed by the president, three by the president of the National Assembly (the first chamber of the parliament), and three by the chairman of the Senate (the second chamber of the parliament). It is worth noting that until 2008, the president had appointed three members of the Constitutional Council quite freely. However, after the changes from July 2008, the nomination rights of the president are carried out only after the opinion of the permanent committees of both chambers of the parliament that are competent for organic (i.e. systemic) laws. The President can not appoint a member of the Constitutional Council if the total number of votes against the nomination is at least three-fifths of the votes cast in both committees. It should be mentioned that the composition of the Constitutional Council is renewed in one third every three years. In addition, as

ative Constitutional Review") 2003, No. 2, pp. 171–174; J. Szymanek, *Ustrój konstytucyjny Kazachstanu*, Warsaw 2013, p. 189.

[21] P. Lauvaux, *Parlementarisme rationalisé et stabilité du pouvoir exécutif*, Brussels 1988, p. 30.

[22] H. Roussillon, P. Esplugas-Labatut, *Le Conseil constitutionnel*, Paris 2015, p. 7.

has already been mentioned, the Council consists of all former Presidents of the Republic lifelong (unless they do not give it up).

The judges of the Romanian Constitutional Court are elected on strictly similar principles. This is due to the fact that Romania, while adopting its constitution, based generally on the French constitution of 1958. Therefore, the Romanian Constitutional Court has nine judges elected for nine years, and it renews every third year one third of its composition. The appointment procedure also looks similar, i.e. three constitutional judges are appointed by the president, three others by the first chamber of the parliament (the Chamber of Deputies) and the three last by the Senate.

Portugal is also seen as a semi-presidential system[23]. The thirteen judges of the local Constitutional Tribunal are elected for nine-year terms. Out of thirteen, ten judges are selected by the Assembly of the Republic (unicameral parliament), by a two-thirds majority in the presence of more than half of deputies. The other three constitutional judges are co-opted by the Court itself. The group of co-opted judges is chosen in such a way that to be elected, the candidate must obtain at least seven of all ten votes.

The group of countries with the semi-presidential system also includes Lithuania[24] (though, which should be emphasized, it is not an orthodox semi-presidentialism). In this case, as in France, Romania and Portugal, constitutional judges are elected for nine years, with one-third of the Court's composition is renewed every three years. The Lithuanian Constitutional Court has nine judges. All of them are officially appointed by the parliament (Sejmas), but candidates are submitted in equal parts (i.e. three) by: the president, the chairman of the parliament and the chairman of the Supreme Court. It should be noted that the act of appointment by the parliament is official, which means that only entities equipped with the right to nominate candidates (i.e. president, chairman of the parliament and chairman of the Supreme Court) will decide on the composition of the Constitutional Court[25].

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[23] This was especially so until constitutional reforms from the mid-1980s that tempered the edge of the Portuguese presidency. Nevertheless, despite the reforms, Portugal is included in the group of semi-presidential systems.

[24] D. Urbanavicius, *Lithuania*, [in:] *Semi-Presidentialism in Europe...*, p. 150.

[25] More on the subject, see M. Giżyńska, *Sąd Konstytucyjny Republiki Litewskiej*, Olsztyn 2009, p. 37.

Turkey also is the state which, especially after the constitutional reforms of 2007, clearly transitions to the semi-presidential system (especially in the dimension of practice, which is always a key element when assessing the characteristics of the government system). The procedure for selecting members[26] of the body of constitutional jurisdiction is complicated. Seventeen members[27] are elected for twelve years. The Grand National Assembly (the unicameral Turkish Parliament) elects two judges in a secret ballot from among three candidates presented by the Court of Auditors and one candidate proposed by the Bar Council. In the first ballot, an effective two-thirds majority of the total number of parliamentarians is required to select members of the Constitutional Court (regardless of the quorum). In the second vote, an absolute majority of all parliamentarians is enough. If the election is not successful, a third vote is held, in which a majority vote is required. The remaining fifteen members of the Turkish Constitutional Court are appointed by the president. However, he does not act on his own, but appoints members from among candidates nominated by specific entities or from certain other state authorities, which narrows the possibility of a choice. And so the president appoints three members from among the judges of the Supreme Court; two members from the Council of State, one from the Administrative Court and the Supreme Military Court, while the candidates of these bodies are presented by their general assemblies in the number of three candidates for each vacant post; one of three candidates proposed by the Higher Education Council, four of senior administration employees and judges, prosecutors and practising attorneys. It should be noted that, as in France, there is no absolute requirement in Turkey for having legal education as a prerequisite for acquiring membership in a constitutional court.

III. The apolitical nature of constitutional judges

While the mode of selecting persons, who are members of the constitutionality control bodies, has been regulated in various ways, their apolitical character is predicted in a uniform manner. Everywhere members of bodies of constitution-

[26] The Constitution does not define them as "judges" but just members.

[27] The original Constitutional Court had fifteen members and five deputies.

al jurisprudence can not belong to political parties or conduct activities that can not be reconciled with the function exercised (both in its material and formal dimension). Therefore, all members (judges) of constitutional courts are additionally covered by the incompatibility principle (*incompatibilitas*) with specific positions and offices (e.g. in the executive, legislative and local self-government bodies, often, as in Chile or Turkey, the members of the bodies of constitutional jurisprudence can not practice legal professions, such as lawyers, prosecutors or legal advisers). The only exception is the possibility of conducting scientific work as an academic lecturer. Generally, as is the case in Portugal, judges of constitutional courts are subjected exactly to the same regulations, in terms of incompatibility, responsibility, independence, apoliticality, impartiality and immunities, like all other judges (regardless of whether they are called judges or not). In other countries, such as the US or Brazil, they are additionally protected by the principle of life-long exercise (unless they retire themselves).

Nevertheless, it is worth noting that the requirement of apolitical character and independence refers to members of constitutional jurisdiction bodies and not to candidates for these positions. In the US (the classical presidential system) or in France (which is the matrix of the semi-presidential system), these positions are, at least occasionally, clearly political, and, for understandable reasons, it mainly concerns the French Constitutional Council[28]. This is evidenced by the fact that the former president of the Council, Jean-Louis Debré, was an active politician and, moreover, the son of the former French prime minister Michel Debré[29]. Before becoming a member of the Constitutional Council, he had been for five years (2002–2007) the chairman of the National Assembly (the first chamber of the parliament) and even before that he had been the minister in the government of Alain Juppé. The current chairman of the Constitutional Council, from March 20116, Laurent Fabius, is a politician of flesh and blood. He had a career as a MEP, chairman of the National Assembly (twice, first in 1988–1992 and in 1997–2000), minister and the prime minister (1984––1986). Also, the current member of the Council, Lionel Jospin, is a politician. In the years 1984–1988 he was MEPs, in the years 1997–2002 Prime Minister, in

[28] In other government systems, like Poland, por. A. Młynarska-Sobaczewska, *Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review,* "European Public Law" 2017, vol. 3, No. 23.

[29] The closest collaborator of General de Gaulle.

2002 a candidate of the Socialist Party for the presidency of France. In addition, the strong, political inclination of the Constitutional Council also results from some of its institutional solutions, including from the fact that members of the Constitutional Council, *ex officio*, are all former presidents of the Republic (if they do not give it up). The political biographies of the members of the French Constitutional Council, which should be emphasized, are the result of treating the Council as a political, and at the same time highly politicized body. But in turn, in the Kazakh Constitutional Council, the politicization of its members does not occur in such intensity as in France. Its members are primarily professors of legal sciences, as well as experienced lawyers-practitioners.

Also, the US Supreme Court is not free from politicians. William Taft is an old but probably the best-known example. This former US president (1909–1913) was later (in 1921) appointed chairman of the Supreme Court, which he held until his death in 1930. Another president of the US Supreme Court, Fred Vinson, also had political activity. Before becoming a judge of the Supreme Court and its president (in 1946–1953) he was a Congressman and secretary of the treasury in the administration of President Harry Truman. The successor of F. Vinson as the president of the Supreme Court, Edd Warren, was also a politician. In 1948, E. Warren was a candidate for the post of vice president of the United States, having previously been strongly associated with the Republican Party and acting on behalf of the Governor of the State of California. E. Warren's successor, Waren Earl Burger, had also a clear political past. For most of his life, he was associated with the Republican Party, holding, among others, Prosecutor General's office in the administration of Dwight Eisenhower. Recently it is worth pointing to the judge Elena Kagan, appointed by President Barack Obama as a judge of the Supreme Court, who has actively work in the presidential administration, which is not free from political and party arrangements. In turn, some other Supreme Court judges, such as Samuel Alito, John Roberts (current President of the Court) or Anthony Kenndey, before they became judges, were active party activists. It is worth mentioning that in the case of the US Supreme Court, the political divisions within the Court are extremely clear[30]. Presidents from the Democratic Par-

[30] Especially that some judges do not hide their political views. Judge Elen Kagan may be an example. Before her appointment to the Supreme Court, she began to criticize the American army for not adopting homosexuals, the policy known as do not ask, do not tell.

ty appoint for judges people who are either directly members or active party activists or at least sympathize with it. The same happens at the moment when the White House tenant is a representative of the Republican Party (as evidenced by the extreme, evidently party candidates who eventually did not pass. Robert Borek's candidature nominated by Ronald Regan and Harriet Miers by George Bush are the most relevant cases). Hence, within the Supreme Court there is a clear division into democratic and republican judges, which makes that, especially in politically controversial matters, the distribution of the judges' votes is known in advance. This is precisely what caused in 2016 a sharp dispute after the death of Judge A. Scalia (formerly an activist of the Republican Party). Well, after the death of A. Scalia, out of eight judges of the Supreme Court, four are "republican" and four are "democratic". The appointment of a fifth judge by a democratic president would cause the majority of the Supreme Court being Democrats, which caused the opposition of the Republican Party, which always had a "controlling stake" in the Supreme Court. The dispute was even greater because it was widely expected that controversial issues (such as abortion, access to weapons, homosexual marriage or a package of surveillance legislation and emigration issues) would be soon to be heard by the Supreme Court, hence the political system of the Supreme Court will determine its exponential line (and that for many years, if to consider the lifetime of the function of the Supreme Court's US judge)[31].

IV. Why is the model of constitutional review of law not dependent on the presidential or semi-presidential system of government?

Both the question of the existence or non-existence, and – if it exists – the specific character of the constitutional review of the constitutionality of law is not related to the system of government. The system of government, on the one hand, and on the other hand the character and form of constitutional judiciary are two completely independent variables, which taken together make up the general specificity of a given political system (both in its constitutional and

[31] Judge Merrick Garland was nominated for a seat in the Supreme Court after President A. Scalia, but the Senate did not put this candidature to vote. The next president, Donald Trump, nominated another candidate – Neil Gorsuch, who took the place of A. Scalia on April 10, 2017.

practical dimensions), but they have independent status. This is mainly because in defining the system of governance, in principle, the judiciary is not considered. The system of government is understood as the bilateral relations between the legislative authority (legislature) and the executive authority (executive). It is recognized, rightly so, that in any democratic system of government the judiciary has the same status and it is determined by the separateness and organizational independence as well as the personal and substantive independence of the third power[32]. Hence, the systemic position of the third power, including the constitutional judiciary (which is not to be classified as a component of the judiciary, as discussed herein), should not (and does not) have any relation to the system of government. Constitutional judiciary, in its various forms and mutations, can exist both in presidential systems and in parliamentary systems (and their various variants), and can also not exist at all.

This is the effect not only of the fact that the judiciary is not taken into account when defining and considering individual government systems (because in each of them it should have identical status, which means that the position of this authority and its organizational and functional shape does not affect the differences between individual systems governments that are set by legislative and executive relations), but also that the very idea of extra-parliamentary control of the constitutionality of law appeared and solidified at a time when the theoretical constructions of individual government systems were already well known and shaped[33]. Constitutional judiciary, especially in its Kelsen (European) edition, is the experience of a relatively recent date, but also its American variety, although in its foundations formulated at the beginning of the 19th century, it was fully formed at the end of the 19th and effectively start working only in the 20th century. Therefore, it should be acknowledged that an extra-parliamentary review of the constitutionality of law, especially in the form of constitutional judgements[34], showed its effects and impact on

[32] J. Szymanek, *Modele systemów rządów (wstęp do analizy porównawczej)*, „Studia Prawnicze" 2005, No. 3, p. 5.

[33] Which does not mean that the practical constructions of these systems were well-formed in the same way. Both the presidential and the parliamentary systems shaped practically at the turn of the 19th and 20th centuries.

[34] Which is not the only form of extra-parliamentary control of the constitutionality of law. It should be acknowledged that when searching for effective mechanisms to protect the constitution, before the concept of constitutional justice was formulated, extra-parliamentary

the system of government only in the 20th century, and from more or less the same moment the growing role of constitutional judiciary has been observed, accompanied by some changes on the entire system of government, which in practice intensifies the discussion on constitutional judiciary and encourages the constant search for its possibly optimal shape. Changes in the constitutional judiciary can be more and more visible. Therefore, discussions about the impact of constitutional review of the law on more general transformations within various regimes and systems of governments are intensifying[35]. While, as it is noted, whereas the genesis and evolution of the judicial control of the constitutionality of law[36] took place independently of the system of government, its present form affects to a large extent this system and significantly modifies it. This is particularly evident in the USA, where opinions are formulated explicitly that it was precisely through the control of the constitutionality of law that the Supreme Court outclassed the remaining authorities (i.e. the legislature and the executive), gaining the role of the first authority in the state. Sometimes slightly fewer clear assessments are made on the grounds of the so-called European (Kelsen) constitutional review, which is becoming an increasingly competitive power, especially for the parliament. As a result, it turns out that regardless of the classical systems of government (i.e. presidential and parliamentary), two equally classical forms of constitutional control of law (i.e. European and American) arose, and independently and for various reasons, both these forms of control indeed nowadays influence government systems, regardless of whether they are included in the presidential or

control entrusted to the head of state was introduced. It was harnessed in the mechanism of control of the constitutionality of law by means of institutions such as promulgation or construction of the so-called off-parliamentary legislation appropriate for the German doctrine of constitutional law. In both cases, i.e. the promulgation and off-parliamentary legislation, it was recognized that the head of state, while allowing the Act, controls it – even to a minimum extent – in terms of compliance with the Constitution.

[35] C. Bacoyannis, *Le débat récent sur nécessité d'une institution de justice constitutionnelle,* [in:] *Renouveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu,* Paris 2007, p. 41.

[36] Especially the evolution that led to the formation of the so-called judicial activism in the bodies of constitutional jurisdiction. More on the subject see B. Ackerman, *Constitutional Politics/Constitutional Law,* "The Yale Law Journal" 1989, vol. 99, No. 3, p. 457. In this context, A.S. Sweet writes about a judicial coup d'état. See A.S. Sweet, *The Juridical Coup d'État and the Problem of Authority,* "German Law Journal" 2007, vol. 8, No. 10.

semi-presidential models. Thus, while at their sources the model concepts of constitutional control of the law abstracted from the systems of government in which they appeared and were embedded, today they significantly affect these systems, and sometimes even dramatically change them, reversing the traditional system of relations between the legislature and the executive and introducing a body of constitutional jurisprudence, which affects the system of governance, becoming its (increasingly) essential element and, by virtue of the jurisprudence and interpretation of the constitution, shaping the status of all other bodies, in particular the legislature and executive.

Nevertheless, what should be emphasized is the lack of a close relationship between a concrete form of constitutional review of the law and the system of government[37]. In the studied group of countries, there is a lack of such dependence both at the level of models of government systems as well as in systemic practice. This lack is also confirmed by far-reaching diversity as regards the forms of control over the constitutionality of law. It is pointed out that the separation of the two basic models of this control, i.e. American and European, does not exhaust all differences and nuances in the institutional arrangement of this control[38]. It suffices to point out that this control can either be directly entrusted to the judicial authorities or to organs which are at least tacite to the judiciary, but can also be clearly taken out of the judiciary (the vast majority of states). In the latter case, organs of constitutional jurisdiction can be treated as a sui generis negative legislator (the reverse of parliament, as Hans Kelsen wanted, which should make the constitutional court nolens volens be treated as a legislative power) or as organs that carry out a completely separate function incompatible in terms of Montesquieu's separation of powers, or as organs of political power, that, as well as the executive and legislature, are forming a separate branch of political constitutional (or systemic) power separated from the courts and having specific character in every respect, as in the most occurs in France. Therefore, as you can see, there are unexpectedly many variants of institutional arrangement of constitutional jurisprudence bodies[39]. This is due to at least several circumstances.

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[37] A. Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, New Haven–London 1999, p. 216.

[38] L. Favoreu, *Modèle européen et modele américain...*, p. 51.

[39] F. Hamon, C. Wiener, *La justice constitutionnelle en France et à l'étranger*, Paris 2011, p. 24.

First of all, the constitutional judiciary was formed relatively late, when all the other elements of conventionally understood government systems were, more or less, shaped.

Secondly, it was constructed on the basis of practice, remaining a pragmatic (USA) as well as theoretic solution, being a mainly doctrinal construct (European countries). The idea of Hans Kelsen was put into practice only after its detailed elaboration and refinement, while the American model was shaped completely differently. First it was implemented and it was encapsulated with theory afterwards.

Thirdly, it appeared in completely different political contexts, i.e. first on the basis of the American system of government and later in the European legal space, being skilfully matched to these different contexts.

Fourthly, its goals were slightly different, which in turn was determined to a large extent by all other factors. For example, while the purpose of the US audit was to prevent the jurisprudence from becoming a political body (which, as we know, ultimately failed) while respecting the primacy of the constitution and the restrictive understanding of the separation of powers, in the European edition, the primary goal of the audit was to transform the role and importance of the constitution (from political to juridical) and make the adjudication body a political body (in the sense actively participating in the system of government), which H. Kelsen pointed to as a political court (*cour politique*). This goal was, moreover, closely correlated with another objective, namely a significant weakening of the political position of parliaments. The classic doctrine of constitutional law claims that one of the forms of depleting the rank and position of the parliament is an extra-parliamentary review of the constitutionality of law, especially in its Kelsen version invariably associated with the ability to derive defective norms from the system of applicable law.

It should be recognized, therefore, that each constitutional judiciary model that was installed in various countries was derived from many, various factors, which ultimately generated the unexpected heterogeneity of constitutional court institutions. However, it is significant that among them the model of the government system was not the dominant factor.

The most important factor determining the diversity of models of constitutional jurisdiction, apart from the historical factor, is that the judiciary is incompatible with the Montesquieu concept of tripartition of power. This in turn

means that either, as in the USA, the constitutional judiciary is "fitted" into the model of typical judicial power with all its consequences, both positive (in the form of full organizational separation and functional independence) and negative (in the form of lack of possibility of derogation of a norm which the court has declared unconstitutional) or is located outside the typical, normally distinguished authorities, i.e. the legislative, the executive and the judiciary authorities. It generates a dispute over its ontological nature[40]. If the constitutional court is left outside the judiciary, then the obvious question arises, where is its place? Hans Kelsen responded to the question by formulating the concept of "negative legislator", claiming that having the ability to derogate acts (after recognizing their unconstitutionality) the constitutional court acts like a legislative authority, only in its negative form (instead of introducing norms into the system it brings them out)[41]. Kelsen's position, although intellectually attractive, is not universally divisible, although there are concepts of the constitutional court as a kind of "third chamber of the parliament" (which, however, makes the constitutionality control body directly politicised). More often it is proposed to assign to the constitutional court a separate authority, other than the three indicated by Montesquieu, authority and recognition of the area of operation of the body of constitutional jurisdiction as a separate and different area of state activity from all other areas. This area is most often referred to as the "power of guarantee of the constitution" and it is placed next to the legislative, executive and judicial powers[42]. This position is accurate especially today, when European constitutional courts are increasingly equipped also in other functions than the adjudication of the constitutionality and legality of norms, which in general are included in the idea of protection of the constitution[43]. The analysis of their actions clearly shows that they go beyond the activity of a typical court (which questions the placing of them in the tripartition of

[40] This dispute is particularly intensely conducted in France. See J. Meunier, *Le pouvoir du Conseil constitutionnel. Essai d'analyze stratégique*, Brussels 1994, passim.

[41] H. Kelsen, *Istota i rozwój sądownictwa konstytucyjnego*, translated byB. Banaszkiewicz, Warsaw 2009, p. 63.

[42] R.M. Małajny, *Klasyfikacja prawnych sfer działania państwa – próba reinterpretacji*, [in:] *Rozważania o państwie i prawe. Księga jubileuszowa ofiarowana Profesorowi Józefowi Nowackiemu*, Katowice 1993, p. 126.

[43] Although they have very different dimensions, such as adjudicating on the constitutionality of the goals and actions of political parties (Germany), adjudicating on constitutional

power by Montesquieu) and proves that the diversity of various manifestations of their activities has the common denominator, which is the protection of the constitution or the constitutional order (broadly understood).

The variety of forms in which extra-parliamentary control of the constitutionality of law may occur and the lack of a close relationship between constitutional jurisdiction and the system of government cause that while looking for some permanent and repetitive elements in the construction of constitutional jurisdictions, one should rather abstain from the system of government and try to find analogies in the reference to general models (forms) of constitutional judiciary. At the same time, one should depart from the most consolidated, dichotomous division into the American model (judicial review) and European (Kelsen), because, as already mentioned above, they are not uniform or homogeneous, which concerns in particular solutions that fall within the general extremely diverse European model[44].

This is all the more so because in both presidential and semi-presidential systems it is difficult to find a key, according to which constitutional protection mechanisms are constructed. Ultimately, the created procedures derive from very many circumstances that include own historical experience, influence of foreign body patterns, views, often very endemic domestic doctrine of constitutional law or finally the consolidation of certain, more general standards and trends. In many cases it is also the case that one of these factors, which is the most important factor in the final form of constitutional judiciary, clearly dominates. One should point to the example of the USA, where the judicial review model is mainly a result of own native experiences[45]. Another example is Mexico, where the current model of constitutional control of law is a conglomerate of foreign influence, i.e. Spanish and mainly American[46]. Finally, France is an example of a state where the shape of today's form of constitutional judiciary is the result of a very specific, native

torts (Germany, Italy), adjudicating on the correctness of electoral and referendum procedures (France) or adjudicating on disputes over competences (Lithuania).

[44] More broadly on the subject Г.Х. Нуриев, *Европейская модель* (G.H. Nureyev, *The European model of*).

[45] W.E. Nelson, *Marbury v. Madison. The Origins and Legacy of Judicial Review*, Westbrooke 2000, passim.

[46] J.M. Serna de la Garza, *The Constitution of Mexico. A Contextual Analysis*, Portland 2013, pp. 113–114.

doctrine of constitutional law, in which the approach to the constitution and the act created a highly peculiar mechanism of extra-parliamentary control of the constitutionality of law[47].

When it comes to more general trends and processes that affect the form of constitutional jurisdiction, it is also necessary to indicate a quite one-way evolution of various forms of this judiciary, and thus a kind of slow but successive homogenization of constitutional jurisprudence bodies and their passing to an even greater extent to the position of the courts, regardless of the respective initial shape of these bodies[48]. This process is most often referred to as the increase of the court character of the constitutional review of the law. It is based on the fact that the structures different from the ontological point of view have become similar to each other. It is worth noting, however, that this process also raises opposition and fear that it "turns upside down" the traditional constitutional law. It is indicated that, firstly, it excessively raises the position of the judiciary (contrary to what Montesquieu wrote). Further, it strengthens the position of the corporation of judges, which in turn takes the entire process of government away from the citizen and therefore delegitimize on the whole political system. This critical assessment of the increase of the court character of the constitutional review of the law is currently the most visible in the US and is called popular constitutionalism[49].

This is not only about organizational similarities, but above all about functional and substantive similarities between the constitutional review authorities and the courts. Regardless of many, very different factors regarding the different authority of constitutional jurisprudence bodies, they all express themselves (in one form or another, with such or other consequences) regarding the compliance or incompatibility of the law with the constitution, which inevitably makes them similar to each other[50]. Today, France is the best ex-

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[47] A. Laquieze, *Le contrôle de constitutionnalité de la loi vu les penseurs libéraux franais du XX^e siècle*, [in:] *Aux origines du contrôle de constitutionnalité XVIII^e-XX^e siècle*, ed. D. Chagnollaud, Paris 2003, p. 85.

[48] L. Favoreu, *Le modèle européen de la cour constitutionnelle*, [in:] *Le régimes politiques européens en perspective*, eds. A. Delcamp, Y. Léonard, Paris 1994, p. 9.

[49] More on the subject see L. Kramer, *The People Themselves. Popular Constitutionalism and Judicial Review*, New York 2004, p. 73.

[50] L. Garlicki, *Nowe zjawiska w kontroli konstytucyjności ustaw (przyczynek do dyskusji nad legitymacją sądownictwa konstytucyjnego)*, "Przegląd Sejmowy" 2009, No. 4, p. 93.

ample of this kind of trend, especially after the constitutional changes that took place in 2008[51].

In conclusion, it should be stated that in the presidential and semi-presidential systems of government there are organs of constitutional jurisprudence, but their form does not result from the existing system of government, because it does not establish or even suggest any models or solutions in this regard. Secondly, they form a whole range of institutional solutions, among which it is impossible to find some permanent, repetitive, verifiable and always-on tendencies.

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