"*Governing* without *judges*": *The politics of the Constitutional Court in Serbia*

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This article deals with judicial irrelevance in democratic consolidation, on the basis of the Serbian example. It surveys the politics of the Constitutional Court in post-Milošević Serbia, and shows that the Court has failed to become a significant veto player or an important mechanism for facilitating the transition to democracy. To explain this conclusion, this article turns to the play-it-safe strategy the Court applied in the most controversial political cases, in which it would have been possible to initiate changes in public policy, including cases concerning constitution-making, the state of emergency, judicial reform, and political decentralization. The analysis will demonstrate that the roots of judicial dormancy in political disputes derive from deferential ideology, the anti-politics approach and institutional insecurity. In addition, an approach from legal culture perspective will indicate that the Court's latent incapacity to contribute to democratic consolidation also stems from judges' past habits and extensive ideology of legal formalism. For this argument, militant-democracy cases will provide a good illustration. Finally, from a more theoretical perspective, the article suggests that the passive role to which courts are consigned in authoritarian regimes may decrease the probability for the judges to play an influential role in the transitional phase, and casts doubt on the thesis that an environment of highly divided politics generates robust constitutional review, at least in absence of "insurance thesis" and in societies where sham constitutional courts existed in the previous authoritarian regime.

1. Introduction

Ever since *Marbury*[1] proclaimed that judges are authorized to adjudicate constitutional issues as part of their mandate to decide legal disputes, much ink has been spilt

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[1] Marbury v. Madison, 5 U.S. 137 (1803).

over how to reconcile (constitutional) judicial review with democracy and over the related role of (constitutional) courts in the democratic systems of governance. In the constitutional law literature, these issues have been theorized in a variety of ways, ranging from the notions of "negative legislator" and "the countermajoritarian difficulty," to "the theory of judicialization" and the "majoritarian thesis."[2]

The troubling feature of constitutional review is not only the morally disputed power of the courts to set aside laws enacted by democratically elected representatives, but also the sobering fact that, in all constitutional democracies where courts have the power to interpret the fundamental law, either the (constitutional) courts sooner or later inevitably align themselves with the majoritarian views on the most politically contested issues, or the ruling majority attempts—and occasionally manages—to use the courts to enhance its own power. These problems are hardly limited to a particular jurisdiction. Thus, the latest example of the classical "countermajoritarian difficulty" is the US Supreme Court's *Citizens United* decision.[3] Elsewhere, the success of the Hungarian ruling majority at remodeling and shrinking the powers of the country's Constitutional Court through the recently adopted Hungarian Fundamental Law and in the Fourth Amendment to that Law, provides a rude reminder that the mandate of constitutional tribunals can wax and wane according to the wishes of the currently most influential or powerful political forces.[4]

The paradoxes of constitutional review are vividly displayed in the ongoing reconceptualization of the separation of powers, which departs from the legislative-supremacy model by emphasizing the potential of constitutional courts to act as significant veto players. Constitutional courts are undeniably political actors. The simple fact that they are empowered to reject legislation drafted and adopted by political institutions, confirms that their decisions have political consequences, and that constitutional law is political law.[5] However, the issue remains whether the decisions issued by these "super-legislators" are constrained by the power of other policy-makers or by the public to the extent that constitutional court decisions, far from being autonomous, largely mirror the revealed preferences of non-judicial actors.[6]

Even though the political dimension of constitutional review raises many general issues about the conventional model of political democracy, the relationship between

[2] The notion of "negative legislator" is the invention of Hans Kelsen in his *La garantie juridictionnelle de la Constitution* [The Jurisdictional Protection of the Constitution], 45 Revue du droit public 197 (1928); in his seminal work, The Least Dangerous Branch (1962), Alexander M. Bickel speaks about "countermajoritarian difficulty"; "the theory of judicialization" is offered by Alec Stone Sweet in Governing with Judges: Constitutional Politics in Europe (2000); for an analysis of "majoritarian thesis," *see* Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, Sup. Ct. Rev. 103 (2010).

[3] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

[4] The Fundamental Law of Apr. 25, 2011 (Hung.); The Fourth Amendment to the Fundamental Law, Mar. 25, 2013 (Hung.). For a critical reading on the Hungarian 2011 Fundamental Law, *see, e.g.*, Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law (Gábor Attila Tóth ed., 2012).

[5] Along the same lines, *see, e.g.*, Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 Int'l J. Const. L. 69, 72 (2007); *see also* Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Party and Politics* (Feb. 1, 2011), at 4, *available at* http://ssrn.com/abstract=1800260.

[6] For a detailed discussion, *see* Pildes, *supra* note 2.

democracy and law comes into particularly sharp focus in emerging democracies, where the rules of the political game are in flux and where the constitutional courts are exposed not only to uncompromising party struggle, corruption, and political manipulation, but also to naïve public support for unrestricted majoritarian democracy. For some, the exceptional features of the transition offer good reasons for supporting robust constitutional review as an alternative to more politicized uses of the law.[7] Others find that an argument from transition cannot refute the objections otherwise leveled at strong judicial review.[8] Allegedly, constitutional courts in transitional countries themselves resist the argument from transition, or when they do accept it, they do it largely to strengthen the idea of deference to national legislatures.[9] Whichever argument prevails, one cannot deny that in emerging democracies the creation of constitutional courts has served to prevent new political leaders from wholly neglecting the terms of the founding political balance.[10]

More recently, the debate on constitutional review in transitional countries has focused on the concrete effects of constitutional review on the development, stabilization and maintenance of democracy. The concepts of judicial independence or judicial empowerment are the points most commonly invoked for assessing this issue. However, as Tom Ginsburg explains, the constitutional courts' contribution to democratic consolidation can be best measured by assessing the particular role assumed by such courts in the process of political transformation, including the roles of regime supporters or opponents, leaders or followers in democratization, or marginal players who neither facilitate nor hinder a transition to democracy.[11]

Despite some recurring doubts about the democratic legitimacy of strong constitutional review in post-communist countries, constitutional review in Hungary, Poland, and the Czech Republic has managed to produce not only some clear breaks with the troubled illiberal past, but also to cultivate ideas of the rule of law and legal development, particularly in cases where legislators have failed to display any discernible devotion to such principles or ideas. Thus, at least during its first term, the Hungarian Constitutional Court figured as a successful "countermajoritarian" court, while the Czech Constitutional Court is known as a court that made clear breaks with the country's authoritarian past.[12] Although it does not function as a constitutional court, the

[7] Ruti Teitel, *Transitional Jurisprudence*, 106 Yale L. J. 2009, 2019 (1997); Aharon Barak, *Foreword: A Judge on the Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 17, 63 (2002); Kim Lane Scheppele, *Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)*, in Rethinking the Rule of Law in Post-Communist Europe 25 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005).

[8] Wojciech Sadurski, *Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?*, 42 Israel L. Rev. 500, 513, (2009).

[9] *Id.* at 513–514.

[10] On this point, *see* Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 Geo. L. J. 961, 1012 (2011).

[11] Tom Ginsburg, *Courts and New Democracies: Recent Works*, 37 Law & Soc. Inquiry 720, 729 and 738–739 (2012).

[12] The Czech Constitutional Court is famous for its "lustration" decision. *See* Decision of the Constitutional Court of Nov. 26, 1992—PL. ÚS 1/92 (Czech).

Ukrainian Supreme Court has also been a success story as it helped encourage the emergence of democracy during the "Orange Revolution."[13]

Such promising examples do not tell the whole story, however. Elsewhere, including in Chile and Serbia, judicial review has been discouragingly irrelevant to the struggle for democratic consolidation.[14] Explaining, on the basis of the Serbian example, how and why such judicial failure occurs is the principal aim of this article. Following Ginsburg's suggestion about the strategic, ideational, and historical approaches to the study of judicial politics,[15] I will assess the Serbian Constitutional Court's contribution to political transformation after the democratic change in 2000. The strategic approach will show that, despite a strong independent position it occupies in the constitutional space as well as its broad jurisdictional authority, the Court has neither facilitated nor encouraged the democratization process. It has been uninterested in challenging current ruling majorities or even carving out any significant role for itself in post-Milošević politics. To explain these conclusions, I will examine a calculation and submission strategy that the Court applied in the most controversial political cases, namely cases in which it would have been possible to initiate changes in public policy, including cases concerning constitution-making, the state of emergency, judicial reform, and political decentralization. The ideational approach will show that the Court's latent incapacity to contribute to democratic consolidation in Serbia also stems from its failure to build transformative jurisprudence due to inherent legal-cultural resistance to the very idea of judge-made law. Militant-democracy cases will provide the clearest illustrations of this argument.

However, the discussion requires me, first, to provide a short summary of transitional democracy in Serbia and an introduction to the basic institutional features of the Serbian Constitutional Court.

2. A note on transition in Serbia

The fall of the Berlin Wall in 1989 did not signal a substantial political rupture in Serbia, in the sense of liberalization from sham constitutionalism, as it did in the countries then governed by the Soviet-style communism. Long delays or obstructions in the transition from communism to constitutional democracy were caused by the tragic war in the Balkans; more than a few pressing needs to rethink the state, the territory, and the people; as well as a long period of frustration with the international pressure to deal with the war's legacy.[16]

Admittedly, what significantly hindered Serbia from making progress towards political liberalization was the country's plunge into civil wars and successive state transformations, including the politically stressful experience of territorial amputation.

[13] For a discussion, *see* Ginsburg, *supra* note 11, at 726.

[14] For the Chilean experience, *see* Lisa Hilbink, Judges Beyond Politics in Democracy and Dictatorship (2007).

[15] Ginsburg, *supra* note 11, at 738–739.

[16] I explain the nature of the Serbian transitional constitutionalism in more detail in Violeta Beširević, *Transitional Constitutionalism in Serbia: Is the Glass Half-Full or Half-Empty?*, *in* Public Law in Serbia: Twenty Years After 23 (Violeta Beširević ed., 2012). Here I offer an abbreviated and slightly amended version.

Before regaining the status of an independent state in 2006,[17] the country went through several wars and territorial remodeling. At the beginning of the Balkans conflicts in 1991, Serbia was a constitutive part of a large ex-Yugoslav federation.[18] Following the dissolution of this original federation, Serbia emerged as a part of the Federal Republic of Yugoslavia formed by Serbia and Montenegro in 1992. To mitigate growing Montenegrin secessionist claims, and with a significant push from the EU, Serbia's political leaders compromised on the formation of the State Union of Serbia and Montenegro in 2003. This turned out to be a wrong strategy, and the short-lived Union collapsed when Montenegro declared its independence in 2006. Nor did the formation of an independent Serbian state bring political stability, since another wave of secessionist claims, this time coming from Kosovo,[19] also proved to be successful and, in 2008, resulted in Kosovo's unilateral declaration of independence and the amputation of a significant part of the country's territory. In other words, the pressing need to solve basic foundational questions about the borders and about membership in the community, famously unanswerable via democratic procedures, occasioned major delays in Serbia's political transformation.

For many years, running parallel to the wrenching territorial reconfigurations, Serbia underwent a process of "illiberal social transformation."[20] Approximately at the same time when the Central and Eastern European countries began to build their functional or semi-functional democracies, a Yugoslav-style communism in Serbia was replaced by another type of authoritarian rule, installed by the adoption of the 1990 Constitution, at the peak of Milošević's rule. Tyranny, unaccountability, instability, and corruption can all be associated with this regime, which maintained its authority by reflecting and exacerbating radical Serb nationalism.[21]

In October 2000, after years of façade democracy, the country finally entered a genuine process of democratization.[22] Instead of framing a new constitution, which would have introduced a new fabric of politics, the first years of the transitional process brought what Stephen Holmes and Cass Sunstein call the "collapse of

[17] For the first time, Serbia was declared an independent state at the Berlin Congress in 1878.

[18] The former Yugoslav federation was a "soft" communist State based on "self-managing socialism." Marxism was the official state ideology and the communist party had the monopoly of political decision-making. No separation of powers existed. All state institutions were dependent on the party leadership, which personally and functionally intertwined with the formal state structures. Yet, there are authors who argue that the former Yugoslavia was not a totalitarian state. *See, e.g.*, Sergej Flere, *Da li je Titova država bila totalitarna?* [Was Tito's Yugoslavia Totalitarian?], 2 Političke Perspective 7 (2012).

[19] The official name used in Serbia is "Kosovo and Metohija."

[20] The characterization came from Sorensen. *See* Jens Stilhoff Sorensen, *War as Social Transformation: Wealth, Class, Power and an Illiberal Economy in Serbia*, 6(4) Civil Wars 55 (2003).

[21] The road to wars and nature of Milošević's rule is well explained in The Road to War in Serbia: Trauma and Catharsis (Nebojša Popov ed., 2000).

[22] In July 2000, the then President of the Federal Republic of Yugoslavia (FRY), Slobodan Milošević, decided to amend the FRY Constitution despite a clear disapproval of the ruling parties in Montenegro. Federal elections were called for Sept. 24, 2000. A coalition of eighteen Serbian parties, under the name of Democratic Opposition of Serbia (DOS), emerged as his most serious opponent. The DOS candidate, Vojislav Koštunica defeated Milošević. *See further* Human Rights in Yugoslavia 2000, at 21–30 (Vojin Dimitrijević ed., 2001).

constitutional politics into ordinary politics."[23] The winning democratic forces did not catch the "constitutional moment," but kept Milošević's constitution alive, and opted for selective, imperfect, and compromising reforms. Moreover, the selective reforms were undertaken with a considerable participation of the old cadre not only within the state administration, police and army, but also at the high political level. For example, former president of Serbia, Milan Milutinović, appointed during the Milošević era and then accused before the International Criminal Tribunal for the former Yugoslavia (ICTY) (later acquitted), retained his position until 2002 when his mandate naturally expired.

Yet, resistance to democratization came predominately from certain forces among the political winners. In the early 2000s, the elected branches of the government were the primary source of the new policy and the direction of the state, but none of the coalition parties that had won the elections had sufficient power, on their own, to consolidate their grip on the transition process. A clash of values and the management of the reform agenda caused excessive polarization between the so-called "legalists," led by the former president Koštunica, and the "reformers," led by the then Serbian prime minister Đinđić.[24] The progressive veneer of the post-Milošević regime very soon wore off. Political campaigns stressing patriotism and the collective interest in preserving the country's territorial integrity occupied the successors' attention as much as did the institutionalization of democracy and the market economy. The dynamic of transition became largely dependent on these competing issues.

The major reason for delaying progressive reforms, however, was the difficulty faced when dealing with the past. First, international emphasis on the prosecution of crimes committed during the conflicts in ex-Yugoslavia completely reshaped the transitional priorities and caused a bitter polarization among the winners. On the one hand, the "legalists" insisted on marginalizing all efforts towards historical justice and mitigating "our crimes" by upholding the memory of the crimes committed by Serbia's enemies. On the other hand, the late Serbian prime minister Đinđić, who led the "reformers," saw the country's troubled past as an obstacle to the implementation of robust reforms and any progress towards "normalcy." This confrontation between the reformers and the intransigents culminated in Milošević's transfer to the ICTY and the assassination of Prime Minister Đinđić. Second, the polarization among the political winners was also produced by the very hesitation to offer any remedies for the repressive past. To this date, Milošević's successors have not managed to define any

[23] *See* Stephen Holmes & Cass Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment 275 (Sanford Levinson ed., 1995).

[24] Taking into consideration that both the former communist regime and the Milošević regime have failed to provide a meaningful rule of law, the "legalists" wanted to achieve political legitimization by overemphasizing the importance of legalism. As exclusive promoters of the rule of law, "legalists" had a reasonable ground to believe that the installation of the communitarian values they supported (e.g., patriotism/national loyalty) would obtain massive support in the reform process. *See further* Nenad Dimitrijević, *Srbija kao nedovršena država* [Serbia as an Unfinished State], *in* Između autoritarizma i demokratije (Srbija, Crna Gora, Hrvatska): Civilno društvo i politička kultura [Between Authoritarianism and Democracy (Serbia, Montenegro, Croatia): Civil Society and Political Culture] 63 (Dragica Vujadinović et al. eds., 2004).

meaningful strategy, nor did they succeed in striking a balance between retribution and deterrence. For instance, the Responsibility for Human Rights Violations Act of 2003, drafted for the purpose of vetting political figures from the former regime, has never been implemented. What's more, it is no longer in force. Equally unsuccessful were attempts to open secret State Security Service files, while long-lasting efforts to adopt a general restitution policy addressing former property injustice came to fruition only three years ago.

Nonetheless, this is not to deny that the first years of political transformation managed to produce some clean breaks with the past. The abolition of capital punishment, the closure of military courts, and the adoption of a modern Criminal Procedure Act with fair trial guarantees and defendant's rights, are cases in point. In addition, the adoption of national minority rights legislation, religious communities legislation (although not a masterpiece), and amendments to the Criminal Code, which eliminated the discriminatory approach in conceptualizing certain crimes related to sexual assaults, showed that these substantial changes were meant to protect from both totalitarianism and unfettered majoritarianism.

The second stage of the democratization process began with the adoption of the new constitution. In the summer of 2006, the dissolution of the State Union of Serbia and Montenegro, fear of further secession, and increasing international pressure to resolve the status of Kosovo, combined to create sufficient urgency, and prompted political actors to put aside subsidiary matters and to draft a new constitution. In less than two months, the draft constitution was, first, adopted in the National Assembly by a vote of all 242 members present in favor, and then endorsed by a referendum organized for this occasion two days later.[25] Although a referendum is usually seen as helping to legitimize the adoption of constitutions, this time it served only as a rubber stamp, and could not counteract the illegitimacy of the constitution-making process. The hand of the past could not have a more conspicuous hold on the present: constitution-making was pursued by conspiratorial means, by secretly conspiring party elites, and the draft enjoyed a dubious legitimacy under the authority of the old constitution, which had itself been weakened by the illegitimacy of the original constitution-making procedure.

The new constitution served three purposes: first, it reasserted sovereignty over Kosovo; second, it established a sovereign Serbian nation state; and, third, it confirmed the constitutional culture of the Republic of Serbia. On the one hand, the 2006 Constitution clearly represents a departure from the authoritarian past and endorses, to a significant degree, a new model of democratic politics.[26] On the other hand, some constitutional solutions demonstrate that the constitutional order in Serbia is still caught between the past and the future. For example, the Constitution reflects the tendency of the legislature, executive, and judiciary to blend together and overlap. It also institutes the *mandate imperative*, severely curtailing the freedom of members

[25] The National Assembly proclaimed the Constitution on Nov. 8, 2006.

[26] European Commission for Democracy through Law (Venice Commission), Opinion No. 405/2006 on the Constitution of Serbia, Strasbourg, Mar. 19, 2007, ¶¶ 5 and 23.

of parliament (MPs) to exercise their representative function as they see fit (always anticipating the need to face the electorate again in the next election) and undermining the idea of parliament as a forum for debate, where representatives can learn from each other. Finally, the 2006 Constitution speaks incoherently on the vertical division of powers, thereby bringing further polarization to an already divided Serbian society.

On the whole, Serbia today closely resembles those political systems that are commonly classified as democratic but non-liberal.[27] Remarkably, none of the illiberal tendencies discernible in Serbian politics is connected to the election process. Since 2000, Serbia has held six sets of presidential elections and six parliamentary elections and all were free, fair, and well administered throughout the country. If anything, electoral democracy is now firmly entrenched in the country's constitutional culture.

However, the culture of electoral democracy does not have much influence on the actual practice of governance, which can deviate significantly from the governance ideal cherished by the liberal tradition. This is the case in Serbia. Apart from imperfect constitutional arrangements, authoritarian tendencies stemming from the political parties have stimulated further departures from the liberal path. "Partocracy" is a phenomenon that explains the behavior of all the coalition governments in the country since 2004. These coalition governments have been, and continue to be, run on the basis of agreements in which the ruling parties divide up the spheres of interest as "fiefdoms" among themselves.[28] The parties' interests are recast for the public, while ministers act in the name of their political party to protect its authority against outside challenges. Moreover, the four-year-long tendency of the former president Tadić (2008–2012) to disregard the provisions of the constitution, his low regard for the separation of powers, the inclination of the political elite to affiliate with the Serbian Orthodox Church on many politically and socially divided issues, and still persisting (either transparent or non-transparent) discriminatory public policy towards ethnic minorities, the LGBT community, and other vulnerable groups, confirm the predominance and persistence of non-liberal constitutionalism in Serbia.

Besides being patently illiberal, transitional constitutionalism in Serbia is also highly communitarian. From the very beginning of the transition, highly prioritized collective interests—retaining sovereignty over Kosovo and bolstering national loyalty—have become co-equal to, if not dominant over, rights-based liberalism. Additionally, in the aftermath of Kosovo's independence, the Constitution has been brandished as a tool of control aimed at furthering another proclaimed collective, but arguably rival, interest: the country's accession to the EU, which arguably favors rather than constrains political liberalization.[29]

[27] For a similar view, *see* Timothy Edmunds, *Illiberal Resilience in Serbia*, 20(1) J. Democracy 128 (2009). However, if one accepts that liberalism also includes the consent, then arguably, Serbia can be classified as a liberal state but only to the extent it permits the dissent.

[28] In each ministry, the minister and the state secretary belong to the same party. Even if, following a scandal, some minister should be dismissed, the replacement always comes from the same party. However, there are some signals that in the mandate of the present government this practice will be changed.

[29] At present, Serbia is an official candidate for EU membership. The negotiations officially started in January 2014.

Finally, the general elections held in spring 2012 brought a full-scale return of Milošević's former allies to power, for the first time since the democratic change in 2000. Thus, the leader of the Serbian Progressive Party (SNS), Tomislav Nikolić, won in the presidential election. The SNS was formed only several years earlier (2008), when Nikolić decided to distance himself from the Serbian Radical Party, notorious for its extreme politics during and after Milošević's governance. Following the presidential elections, the Progressive Party won parliamentary elections as well, but, due to political calculations, another former ally of Milošević, Ivica Dačić, got a mandate to form a new Serbian government with only a 14.51 percent vote. However, he was defeated in the early elections held on March 16, 2014, organized—in the words of the leader of the Progressive Party Aleksandar Vučić—"to win a stronger majority so that vital economic reforms can be undertaken in the country." Vučić, another former prominent figure of the Serbian Radical Party, with his current Progressive Party won a remarkable electoral victory, to be transformed into 158 seats in the 250-seat parliament.

These points suggest that a highly polarized political environment, such as Serbia's, where no government can be simultaneously representative of society and coherent enough to govern, motivates the Constitutional Court to take on an active role in the democratic consolidation and to protect, at all occasions, individual liberties and the supremacy of the Constitution over parliamentary enactments and governmental regulations. The suggestion becomes even more plausible if one takes into consideration the Court's broad jurisdictional authority and the formal judicial autonomy that I am going to present in the following section.

3. Constitutional Court: establishment and institutional features

Serbia belongs to a set of countries that have adopted the centralized European model of constitutional adjudication, characterized by the existence of a constitutionally established independent state body (usually a Constitutional Court) entrusted with the powers of judicial review. It inherited such a model from the former Yugoslavia, where a centralized Constitutional Court was first established in 1963.[30]

Why might authoritarian regimes want to establish constitutional courts?[31] There are several reasons. In the case of the former Yugoslavia, the communist regime opted for a sham system of constitutional review basically for two purposes. First, constitutional courts were created to strengthen the regime's claim to "legal" legitimacy and to serve as guarantors of its authoritarian ideology. Although they provided some democratic window-dressing, constitutional courts were not established to interfere with public policy. The fact that from 1963 to 1990 the Serbian

[30] In addition to the Constitutional Court that operated at the federal level, constitutional courts existed in the each of the former Yugoslav republics. The relationship between them was not hierarchical; rather, they were considered equal and were invested with comparative competences.

[31] *See* Ginsburg, *supra* note 11, at 722–724. *See also* Rule By Law: The Politics of Courts in Authoritarian Regimes (Tom Ginsburg & Tamir Moustafa eds., 2008).

Constitutional Court ultimately declared only eight statutes unconstitutional, well illustrates this point.[32] The second reason was propaganda-oriented: the establishment of the constitutional courts was a tool to show that former Yugoslavia, after its split from the former Soviet Union, had moved more towards the West.[33] According to some sources, Tito himself largely supported the establishment of the constitutional courts for resolving disputes in ex-Yugoslav society by means of "an objective and legal arbitration."[34]

Although judicial review is traditionally associated with federalism, paradoxically, the constitutional judiciary in the former Yugoslavia was not established to resolve conflicts between the different levels of power or to secure the primacy of federal law.[35] From the very beginning of its establishment, the federal Constitutional Court was deprived of the possibility to issue binding rulings on the consistency of the member states' constitutions with the federal constitution, or to invalidate the laws of member states for failing to comply with federal law. In the first case, the federal Court could only give an advisory opinion on the issue to the Federal Assembly, which meant that any possible conflict had to be resolved politically.[36] In the second case, the initial power to review a possible inconsistency of republic-level law with federal law was soon amended so as to include a much looser standard according to which the federal Court could review only whether the republic-level law conflicted with the federal law.[37] Moreover, in the case of a conflict, a classical principle—*Bundesrecht bricht Landesrecht* (federal law supersedes state law)—was codified in the last ex-Yugoslav Constitution (1974) with one minor alteration: it was reversed. It now read: *Landesrecht bricht Bundesrecht*, meaning that until a decision was handed down by the federal Court (which could take years), in most cases, the republic-level law prevailed.[38] Therefore, in the communist system of unified powers that existed until 1990, the constitutional courts were conceived "more as a

[32] *See* Slobodan Vučetić & Ljiljana Slavnić, Ustavni Sud Srbije: Četrdeset Godina Postojanja [The Constitutional Court of Serbia: Forty Years of Existence] 15–19 (2003). One should keep in mind that the constitutional courts could not immediately repeal a legislative act if they found it to be unconstitutional, but were required to ask the relevant parliamentary assembly to remove the unconstitutional provision(s); if the parliamentary assembly did not act within six months, the courts would issue a declaratory judgment finding the unconstitutional provision(s) inoperative.

[33] For a similar view, *see* Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice*, 35 Cath. U. L. Rev. 1, 8 (1985).

[34] Matej Accetto, citing highly positioned constitutional lawyer of the communist time, Jovan Đorđević. *See* Matej Accetto, *On Law and Politics in the Federal Balance: Lessons from Yugoslavia*, 32 Rev. Cent. East Eur. L. 191, 208 (2007).

[35] The issue of whether former Yugoslavia was a real federation is controversial. Over time, the state order shifted from centralized to decentralized. For a discussion, *see* Miodrag Jovičić, Putevi I Stranputice Jugoslovenske Ustavnosti [The Paths and Aberrations of Yugoslav Constitutionality] (1988).

[36] For example, as early as 1965, the federal Constitutional Court found a provision of then-valid Croatian Constitution to be inconsistent with the federal Constitution, but neither the Croatian Assembly (that could have amended the Constitution) was informed of the opinion, nor was there a reaction from the Federal Assembly. *See* Accetto, *supra* note 34, at 209.

[37] *Id.*, at 208.

[38] *See* former SFRY Constitution 1974, art. 207(3).

part of the parliamentary system than a traditional judicial institution,"[39] while the assessment of "socialist constitutionality" served exclusively to confirm the constitutional courts' docile obedience to the regime.

Similarly, although formally entrenched, constitutional review was equally inconsequential in the Milošević era of façade democracy. Under his rule, the Court was more concerned with political suitability than constitutionality. Although it restrained itself from challenging the majority, it did not have the mandate to protect human rights, and, in particular, it avoided adjudicating election disputes, declaring them to fall beyond its jurisdiction.[40]

In 2002, the Serbian Constitutional Court began to function as the only constitutional court in the country.[41] Yet, from the very beginning of its first exclusive term, it lacked the institutional stability necessary to perform a role of transformative force in the transition. By 2010, its work had been repeatedly interrupted, severely challenging the Court's mission. The interruptions occurred due to an insufficient quorum of judges to make binding decisions, the absence of political will to appoint new judges in a timely fashion, as well as the Court's own misinterpretation of its internal regulations regarding the authority to convene a session.[42] Since the period of institutional instability coincided with the period of major political disputes brought before the Court, this partially explains the insignificant role played by the Court in Serbia's troubled democratic consolidation. As I will show later on, however, the lack of institutional stability was not the major reason for a deficit of robust constitutional review in Serbia.

The Constitution of 2006 defines the Constitutional Court as an autonomous and independent state institution. Like many constitutional courts in transitional regimes, it has a broad jurisdictional authority.[43] For a significant period of time abstract review was by far the most important function of the Court. In addition to a legislative act, abstract review has been extended by the Constitution to international treaties as well, but in a way which may possibly conflict with international law.[44] Apart from the "subsequent review," the 2006 Constitution introduces the possibility of a "preliminary review," thereby empowering the Constitutional Court directly to influence the adoption of legislation.

As interesting as these developments may be, a genuine breakthrough in the constitutional review system in Serbia came with the practice of the individual constitutional

[39] Accetto citing Edvard Kardelj, the most prominent communist ideologist in the former Yugoslavia. *See* Accetto, *supra* note 34, at 208.

[40] For more *see* Momčilo Grubač, *Constitutional Judiciary in Serbia*, *in* Public Law in Serbia, *supra* note 16, at 77.

[41] From 1992 to 2002, the Court functioned simultaneously with the Constitutional Court of the Federation (former Socialist Federal Republic of Yugoslavia (SFRY) and FRY).

[42] The problem occurred after the retirement of the Court's president in 2006. Although from October 2006 to early 2008, there were enough judges serving in the Court to continue with the work and render decisions, according to the Court's interpretation, in the absence of the president, no one on the Court had the authority to convene a session. For a critique, *see* Grubač, *supra* note 40, at 87–88.

[43] *See* Const., art. 167 (Serb.).

[44] Subsequent evaluation opens up the question of the relation between international and national law. Under international law, a state is obligated to meet the international obligations in good faith.

appeal. Although all Serbian judges are constitutionally obliged to protect constitutional rights and freedoms, the last resort for any individual is to file a petition claiming a violation of rights by different state authorities to the Constitutional Court. Rights adjudication dominates in its present term; but a significant backlog of cases has prevented the Court from becoming an active rights promoter in Serbia.

Finally, the Court also has jurisdiction over disputes relating to conflicts of jurisdictions; over electoral disputes in the absence of other judicial proceedings; and over requests to ban a political party, trade union organization, or civic association. The Court also has a role in the proceedings concerning the impeachment of the president of the Republic and the termination of tenure of the various members of the judiciary.[45]

The proclamation that its decisions are final, enforceable, and generally binding serves as a general warning against relapsing into the sham position that the Court occupied under communism.[46]

Now, in a number of studies that deal with the judicialization of politics and the politicization of the judiciary, there is a shared assumption that those who appoint judges influence their decisions.[47] Although, generally, one cannot assert that constitutional courts ever interpret the constitution in a partisan way, there is nothing in its appointment mechanism signaling that the Court was deliberately established just to be another form of partisan policy-making. In fact, the appointment mechanism minimizes the chance that any political institution should dominate the Court: the president of the Republic appoints five judges from among ten nominated by the Parliament; another five are elected by the Parliament, from among ten proposed by the president of the Republic; finally, the last five judges are appointed at a general session of the Supreme Court of Cassation from among ten candidates proposed by the High Judicial Council and the State Prosecutor Council, which are (arguably) independent bodies with judicial appointment powers.[48]

Judges of the Court do not enjoy lifetime tenure—they serve a nine-year term, renewable once. Only prominent lawyers, over forty years of age, who have at least fifteen years of experience in the legal profession, can be nominated to be constitutional judge. [49]

To give a more complete picture, some statistical data is quite telling. According to recent figures, 21,343 cases were pending before this court in 2012.[50] A large portion

[45] Rules of standing depend on the types of proceedings. The Court has the right to initiate the legislation review proceedings itself. Unlike the Hungarian Constitutional Court, which has delivered a number of decisions in the self-initiated proceedings, the Serbian Constitutional rarely uses this opportunity. *See* Vučetić & Slavnić, *supra* note 32, at 30–31. The Court renders decisions by majority of votes of all judges, except for the decisions on instituting proceedings on assessing constitutionality and legality of legislation at the initiative of the Court itself, when a two-thirds majority is required (Constitution, art. 175).

[46] Const., art. 166 (1) (Serb.).

[47] For a discussion, *see, e.g.*, Siri Gloppen et al., Courts and Power in Latin America and Africa 28–29 and 160–162 (2010).

[48] Const., art. 172 (Serb.).

[49] *Id.* art. 166.

[50] The president of the Constitutional Court mentioned this number in his recent address to the press. He also added that, in 2012, the Court rendered the decisions in 8653 cases. *See Predsednik Ustavnog suda predstavio rezultate rada Sudu u 2012.godini*, Ustavni sud republike Srbije (Jan. 24, 2013), *available at* http://www.ustavni.sud.rs/page/view/156-101767/predsednik-ustavnog-suda-predstavio-rezultate-rada-suda-u-2012-godini.

of the backlog is due to cases of excessive length of proceedings.[51] Since the Court has been flooded with an incredible amount of cases per year, the absence of a filtering mechanism is a persistent reason why it continuously rules with significant delays.

A broad jurisdictional authority has brought the Court into the very center of political controversies. However, despite the implicit promise, formal judicial autonomy has not transformed the Court from being a passive, rubber-stamp institution into a more active institution willing to hold political power to account. It is tempting to think that the interruptions in its functioning and lack of a filtering mechanism regarding in coming cases are substantial reasons for judicial irrelevance in the consolidation of democracy in Serbia. However, a deeper analysis will show that the negligible role played by the constitutional judiciary in Serbia's political development can be best explained if one focuses on judicial behavior. Below, I will explain why.

4. Judicial behavior on trial

4.1. Strategic calculations and judicial submissiveness in high profile political cases

According to Martin Shapiro, in countries where judicial review has turned out to be successful, the courts increased their legitimacy and achieved significant political credibility principally by resolving political controversies involving the division of powers and inter-branch disputes. Rights adjudication came second in their portfolio, and appeared possible only due to the political capital earned in reviewing high profile political cases.[52]

This does not apply to Serbia. The Constitutional Court's formal constitutional position as an independent institution and its broad jurisdictional authority has not turned it into "a dog that barks and bites." On the contrary, after the regime change in 2000, the constitutional judges have started (but have not fully managed) to enhance their legitimacy through rights adjudication, while in resolving separation of powers and emergency regulations disputes they have stayed strikingly inactive. For the Court to voice its opinion in rights adjudication required that it make minimal strategic calculations since, on the one hand, this action coincided with the priority of the country's political élites to promote Serbia's integration into the European Union, while, on the other, it was backed by the authority of European human rights law.[53] This made attacks from the political majority less likely, and the Court grew more assertive. In contrast, in cases involving political struggles, only clear political preferences or previously resolved political disputes moved the Court to intervene. To a discouragingly

[51] *Id.*

[52] For the elaboration of this thesis, *see* Martin Shapiro, *The Success of Judicial Review*, in Constitutional Dialogues in Comparative Perspective 193 (Sally Kenney, William Reisinger, & John C. Reitz eds., 1999).

[53] However, one should keep in mind that the Court has not yet been asked to rule in "hard cases" such as abortion, euthanasia, same-sex marriage, etc. For the time being the rights adjudication is reduced mostly to procedural aspects of due process rights, personal freedom, discrimination and to a lesser extent media freedom. A decision in favor of transsexual rights is a notable exception.

large extent, the Court was quiescent, it did not serve as a "countermajoritarian device," nor did it exploit the opportunity of divided politics to expand its power and influence. At the same time, it has displayed a consistent tendency to deliver decisions with an eye on the incoming majority. Consider the following.

Due to already mentioned interruptions in its work, the Court, between 2001 and 2007, was closed nearly one third of the time. Yet, already at the beginning of the transition, the Court was called upon to resolve disputes about the rules of political game. Thus, one of the pivotal issues dividing Milošević's successors, concerned constitution-making. Paradoxically, a decision to break with the former authoritarian culture was made by the "reformers" in 2003, during the state of emergency,[54] when the Act on a Manner and Proceedings for Amending the Constitution of the Republic of Serbia was adopted.[55] This Act envisaged a departure from a stringent amending formula foreseen in the then-valid Milošević constitution. It envisaged a mere majority requirement in the National Assembly and subsequent recourse to popular referendum with a low-turnout requirement for ratification. Precisely for that reason, it was immediately challenged before the Constitutional Court, which, in the presence of strong animosity among the ruling political parties, extended the time frame for review and declared the Act unconstitutional after the authoritarian interlude was over, when the preferences of the new ruling majority became sufficiently clear.[56] The Court's decision did not come as a surprise because the Act was manifestly unconstitutional. What is crucial is the fact that the Court delivered the decision a year after the case had been initiated, following the political change in 2004, when "the legalists," who from the very beginning of the democratic transition insisted on legal continuity in making a new constitution, formed the new government.

The Court's calculating approach is even more apparent in the case involving emergency regulations adopted to govern the state of emergency proclaimed in 2003, a few hours after the assassination of Prime Minister Đinđić.[57] Among several regulations issued by the government, the Instruction on Special Measures Applicable during the State of Emergency attracted a lot of attention.[58] Although the measures embodied in the Instruction were generally in compliance with international standards and a legitimate means to preserve a democratic order, some were contrary to the domestic and international law, in particular a thirty-day police detention not subject to a judicial review. Efficient remedies to challenge the application of other special measures

[54] The state of emergency was proclaimed on Mar. 12, 2003. It lasted 42 days and was abolished on Apr. 22, 2003.

[55] Zakon o načinu i postupku promene Ustava Republike Srbije, Official Gazette of the Republic of Serbia, No. 39/2003.

[56] *See* Decision of the Constitutional Court of Mar. 4, 2004, 1.U.168/03 (Serb.).

[57] The declaration of the state of emergency enjoyed undivided public support. Interestingly, in spite of the declaration, Serbia was at that time admitted as a full-fledged member to the Council of Europe, the international organization predominantly concerned with the protection of human rights and freedoms. The State Union of Serbia and Montenegro ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols on Dec. 26, 2003.

[58] The Instruction was published in the Official Gazette of the Republic of Serbia, No. 22/03 (Mar. 12, 2003), at 1.

were also lacking. In many cases, non-governmental organizations (NGOs) reported that arbitrary police detention opened the door to a blatant violation of the prohibition against torture.[59]

The opposition political forces and two lawyers challenged the Instruction before the Court, immediately after it had passed into law. Sixteen months after the Serbian Government had lifted the state of emergency and unilaterally abolished the Instruction, the Court announced that the Instruction was unconstitutional because it violated constitutional guarantees regarding certain rights and freedoms.[60] The decision was delivered again after the political change in 2004. The logic of the Court's calculus was basically the same as in the case concerning constitution-making. The ruling was issued after it had become clear which political option was going to prevail, and it coincided with the view of the new parliamentary majority, whose members argued that the state of emergency was unwarranted and accused the former government of using it for settling accounts with its political rivals.[61]

The Court's play-it-safe strategy did not change even after the new Constitution had reinforced its formal autonomy and after a new turbulent phase in transitional politics wrought changes in the political establishment. Namely, from 2008 through the spring of 2012, the country was ruled by "the reformers," while "the legalists," for the first time since 2000, occupied no place in the government.[62] In their four-year-long term, "the reformers" had introduced a number of measures aimed at combating Milošević's authoritarian legacy. However, their tactics were sometimes marked by authoritarian tendencies and showed little respect for the rule of law. The need for a judicial "countermajoritarian" device was greater than ever. Nevertheless, the Court stayed dismayingly dormant. In some hotly contested political cases, however, it woke up from its deep slumber in the summer of 2012, once again after a political change had taken place, when former allies of Milošević—whose legacy had been the target of the reformers' attacks—were about to resume power. To illustrate the pattern, I offer two examples.

The first decision, delivered on July 10, 2012, tackled political decentralization and came just a few weeks after the former hard-core nationalist Tomislav Nikolić had been elected as president. In effect, a coalition government headed by a former Milošević's ally was preparing to assume power. The Court's decision again brought into the spotlight widespread and enduring disagreement about the political autonomy of Vojvodina, the northern province of Serbia.[63] The dispute first arose back in 1974, when the former Socialist Federal Republic of Yugoslavia (SFRY) Constitution

[59] For a detailed discussion, *see* Human Rights in Serbia and Montenegro 2003, at 359 (Vojin Dimitrijević ed., 2004).

[60] *See* Decision of the Constitutional Court of July 8, 2004, IU-93/2003 (Serb.).

[61] Human Rights in Serbia and Montenegro 2003, *supra* note 59, at 369.

[62] True, institutional hindrances were still present. Between 2008 and 2010, the Court operated with ten, rather than fifteen, judges due to the difficulties in the functioning of the Supreme Court of Cassation (vested with the power to elect five constitutional judges). In addition, the number of cases, particularly those concerning rights violations, had increased dramatically.

[63] I have discussed this issue in more detail in Violeta Beširević, *The Rocky Waters of Decentralization in Serbia: The Case of Vojvodina*, 4 Eur. Rev. Pub. L. 1489 (2008).

made the Serbian provinces Vojvodina and Kosovo constituent parts of the federal structure and granted to both a broad autonomy, without any obvious precedent in comparative constitutional practice.[64] In 1990, when Milošević had seized power, Serbia effectively stripped Vojvodina (and Kosovo) of its autonomous status.[65] After the demise of the Milošević dictatorship, his successors clashed over the margins of Vojvodina's autonomy. The culmination came in 2009 when the "reformers" managed to adopt the provincial Statute and the Act on the Jurisdictions of Vojvodina. The Democratic Party of Serbia (DSS), led by former president Koštunica, a zealous opponent of Vojvodina's autonomy, immediately challenged the Statute and the Act before the Court. The Court proceeded to ignore the case for three years. When it had become clear that the "reformers," who were proponents of the contested acts, would play no role in the future Serbian government, the Court finally spoke up and ruled that the key provisions of the law granting certain limited powers to Vojvodina were unconstitutional.[66]

The next case, which concerns judicial reform, clearly shows that the Court's inclination to stand up only to outgoing majorities and to adapt opportunistically with an eye on future political developments, not only contributed to the irrelevance of the Serbian constitutional judiciary to democratic consolidation, but was also a factor in delaying the transition.

Just one week after the ruling on political decentralization, the Court delivered the decision by which it annulled the contested judicial reform initiated by the "reformers."[67] The fact is that judicial reform was badly needed in post-Milošević Serbia. During the decade of his strongman rule, the judiciary managed to become the most flagrantly corrupt branch of the government, and most of the time, judges were pliantly deferential to his will.[68] Yet, the initial intention to adapt the judiciary to post-Milošević democracy produced more than a decade-long polarization between the ruling political forces and the members of post-authoritarian judiciary.[69] In December 2008, this

[64] Except in rare cases defined by the federal constitution, the provinces were completely independent in exercising legislative, executive, and judicial powers. There were no actions constitutionally requiring the consent of the Republic of Serbia regarding provincial policy and legislation, while provincial representatives could influence adoption of legislation valid on the whole territory of the former SFRY, including the Republic of Serbia, even when such legislation did not trigger the provincial policy issues.

[65] Formally, the autonomous provinces were not abolished, but the mainstay of the Serbian Constitution of 1990, was designed to secure transformation to a unitary state.

[66] Decision of the Constitutional Court of July 10, 2012, No. ИУз-353/2009 (Serb.).

[67] Decision of the Constitutional Court of July 11, 2012, No. VIIIУ-413/2012 (Serb.).

[68] The list of mischief conducts the judiciary made in Milošević time is beyond the scope of this paper, but the most detrimental for the Serbian society includes the participation in the electoral frauds during the local elections in 1997 and the presidential elections in 2000, unprofessional investigation and delivery of many dubious decisions in the most contested human rights, criminal and commercial cases. *See further, e.g.*, Zoran Ivošević, *Kriza i obnova sudstva* [The Crisis and Restoration of the Judiciary], *in* Kriza i reforma pravosuđa [The Crisis and Reform of the Judiciary] 43, 43–44 (Jovica Trkulja ed., 2001); Vesna Rakić-Vodinelić, *Pravosuđe i civilno društvo u Srbiji i Crnoj Gori*, *in* Između autoritarizma i demokratije, *supra* note 24, 362.

[69] I explain this in more details in Violeta Beširević, *Dancing with Judiciary? What Went Wrong with Judicial Reform in Serbia?*, 2 Eur. Rev. Pub. L. 1551 (2009).

polarization culminated in the contested reelection procedure.[70] An absence of sufficient guarantees for a fair election opened the door to the intervention by the political parties. The Constitutional Law established a comprehensive and quick reappointment procedure within a very short timeframe, which, combined with the fact that the task was entrusted to the High Judicial Council, completely dependent on the Parliament and the Government, created an additional risk of overly politicizing the appointment process.[71] The High Judicial Council conducted the procedure; and by January 2010, when the task was completed, more than 800 of the 3,000 judges had lost their jobs. At the same time, the State Prosecutor's Council promoted 416 deputy public prosecutors to the permanent performance of this function. Both procedures were riddled with inconsistencies and lack of transparency and were clearly subject to political manipulation.[72] Under strong pressure from EU institutions, in 2011, the government initiated a decision review process, which again amounted to a travesty of justice.[73]

In the meantime, over 1,500 individual appeals alleging the unconstitutionality of the decisions were filed with the Court.[74] The Court reacted inconsistently. By July 2012, it had delivered only two individual decisions supporting due-process rights of non-appointed judges.[75] At the same time, the Court rejected the separate initiative challenging the constitutionality of the Act on Judges, which enacted the judiciary reform, and thus, indirectly, confirmed its constitutionality. Moreover, despite the initiative to declare unconstitutional some clearly disputable amendments to the Act on Judges (those instituting the review proceedings), the Court validated the "reform of the reform," as well.[76]

[70] The Constitutional Law on Implementation of the Constitution, and not the Constitution itself, provided the general reappointment of all judges and prosecutors following the harmonization of the laws on judiciary with the new constitutional solutions. The law is published in the Official Gazette of the Republic of Serbia, No. 98/06 (Nov. 10, 2006), at 29.

[71] As the Venice Commission noted, the composition of the High Judicial Council seemed a recipe for the politicization of the judiciary. *See* Venice Commission Opinion on the Constitution of Serbia, *supra* note 26, ¶¶ 70–79.

[72] For example, the judges, who until that time had permanent tenure, left non-elected and practically dismissed in an opaque selection process, with no interviews carried out and no reasoned decision given in each particular case. *See further* Tanasije Marinković, *Strengthening Judicial Independence in the Process of EU Integration—The Case of Serbia*, *in* Tackling Constitutional Challenges on the Road to the EU: Perspectives from South-East European Accession Countries 140 (2012), *available at* http://www.kas.de/wf/doc/kas_32813-1522-1-30.pdf.

[73] "The reform of the reform" was stipulated by amendments to the Act on Judges, adopted in Dec. 2010 (Official Gazette of the Republic of Serbia, No. 101/10 (Dec. 29, 2010), at 4). The legislator continued to violate the rule of law by turning a legal remedy filed before the Constitutional Court into a non-existent remedy, to be considered by the High Judicial Council. Put simply, in order to pursue the review proceedings, the legislator overnight turned already filed appeals of non-elected judges before the Constitutional Court into petitions to the High Judicial Council, and empowered the High Judicial Council, which had conducted the re-election procedure, to conduct the review procedure, as well. *See further* Vesna Rakić-Vodinelić, Ana Knežević-Bojović, & Mario Reljanović, Judicial Reform In Serbia: 2008–2012 (2012).

[74] *See* Honor Mahony, *Leaked Report Challenges EU Line on Serbian Judiciary*, EU Observer (Dec. 22, 2011, 7:33 PM), *available at* http://euobserver.com/enlargement/114714.

[75] *See Saveljić*, Decision of the Constitutional Court of May 28, 2010, No. VIIIU-102/2010 (Serb.), and *Tasić*, Decision of the Constitutional Court of Dec. 21, 2010, No. VIIIU-189/2010 (Serb.).

[76] *See* Decision of the Constitutional Court of Dec. 22, 2011, No. ИУз-1634/2010 (Serb.). *See further* Marinković, *supra* note 72, at 154.

However, when the elections in 2012 initiated a new chapter in Serbian politics, the Court took a different approach. It rendered a major breakthrough decision several days prior to the forming of a new government, when it was manifestly clear that former Milošević allies, who were fierce opponents of the judicial reform, would constitute the new parliamentary majority. The Court reinstated 194 judges and 122 prosecutors to their posts, arguing that the High Judicial Council and the State Prosecutor Council had failed to prove that the judges and prosecutors had not met the requirements for appointment.[77] In the months that followed, the Court delivered several other decisions which validated the complaints of unelected judges and prosecutors on the same grounds.[78] Finally, when after almost three years of initiation, it annulled the manifestly unconstitutional article 102(5) of the Act on Judges, for all practical purposes the Court nullified the entire judicial reform instituted only three years earlier.[79] As a result, justice in Serbia is still administered by a highly compromised judiciary. Having significantly contributed to the travesty of justice under Milošević, Serbia's morally compromised judiciary subsequently played a regrettable role in the stymieing of the country's post-Milošević transition.

Looking forward, there is nothing to signal that the Court will act differently in the future. For example, already for some time it has been ignoring requests to consider the alleged unconstitutionality of the executive acts regarding Kosovo. In October 2012, it was asked to review the constitutionality and legality of four governmental regulations stipulating the implementation of all acts and actions that streamed from agreements between Serbia and Kosovo, while in May 2013, some members of the opposition submitted to the Court a motion for reviewing the recently signed "Brussels Agreement" governing the normalization of relations between Serbia and Kosovo. It took the Court two and half years to halt just one governmental decree regarding birth registers, adopted in 2011 when the "reformers" ruled Serbia. With regard to other decrees, and particularly with regard to the "Brussels Agreement" signed by the members of the present ruling majority in Serbia, the Court is still silent.

4.2. The roots of judicial dormancy in political cases

Several factors help explain judicial inactivity in cases involving political controversies. First, historically, constitutional judges in Serbia have never been authorized to challenge the political majority. Instead, they were accustomed to rendering deferential

[77] *See* Decision of the Constitutional Court of July 12, 2012, No. VIIIУ-534/2011 (Serb.); Decision of the Constitutional Court of July 18, 2012, No. VIIIУ-364/2011 (Serb.); Decision of the Constitutional Court of July 18, 2012, No. VIIIУ-570/2011 (Serb.); Decision of the Constitutional Court of July 18, 2012, No. VIIIУ-727/2011 (Serb.); Decision of the Constitutional Court of July 18, 2012, No. VIIIУ-412/2011 (Serb.); and Decision of the Constitutional Court of July 18, 2012, No. VIIIУ-421/2011 (Serb.).

[78] Decision of the Constitutional Court of Oct. 9, 2012, No. VIIIУ-413/2012 (Serb.); Decision of the Constitutional Court of Oct. 24, 2012, No. VIIIУ-420/2012 (Serb.); and Decision of the Constitutional Court of Nov. 22, 2012, No. VIIIУ-486/2012 (Serb.).

[79] Act on Judges, art. 102(5) has omitted one of the requirements of Const. art. 144 (1) (Serb.) regarding the appointment of the President of the Supreme Court of Cassation—the opinion of the General Session of the Supreme Court of Cassation.

decisions. Judges were not supposed to interfere with public policy but only to legitimize the regime's ideology embedded in the communist Constitution. The transition has not brought much change. Some influential constitutional judges in Serbia are still suspicious towards judicial activism in resolving political disputes, although they acknowledge that, in other transitional countries, constitutional courts occupy a different position.[80] Thus, the idea that constitutional courts should serve political elites by reducing the negative externalities of their actions is far from being accepted. No informed observer of Serbia's constitutional jurisprudence would identify today's dominant view with the claim that constitutional review is or should be a form of policy-making that supplements, and at times, rivals the legislature.[81] Hence, after the regime change, a long-standing passive approach and deferential ideology prevented judges from adding inter-branch dispute resolution to their standard portfolio.

In terms of this tendency, the Serbian Court is not unique. The members of constitutional judiciaries in other countries that lived under authoritarian regimes also insisted on claims about judges being non-political and neutral "slaves of the law." Hilbink identifies Chile, Italy, Spain, and Japan, and illustrates the pattern in question. For example, Beirich concludes that in certain periods Spanish judges saw "a questioning of rightness of a law" as "politicization" and believed that "reinterpreting laws passed by the parliament would make [courts] political by involving them in the legislative process."[82] This is exactly what brings me to the second explanatory factor related to apoliticism as an ideal governing the exercise of the judicial function.

Serbian constitutional judges are traditionally committed to the concept of neutrality, to apoliticism based on a strict separation between law and politics. For example, when in 2004 the then-president of the Constitutional Court was asked to explain a long delay in reviewing emergency rules, he routinely answered: "the Court was motivated by the wish to avoid an accusation of being politicized."[83] In the Serbian case, the roots of apoliticism can be traced back to the popular wisdom of the communist time asserting that "it is not a task of a constitutional court to 'say what a constitution is' and thereby to . . . define some sort of its social and political philosophy, or even its legal ideology."[84] Even today the concept of neutrality of Serbian constitutional judges means keeping constitutional courts insulated from politics or disentangled from the jurisdictions of other branches of the government, in particular, far away from the jurisdiction of the legislature.[85] Although anti-political ideology is another

[80] *See* Bosa M. Nenadić, O Jemstvima Nezavisnosti Ustavnih Sudova, s Posebnim Osvrtom na Ustavni Sud Srbije [On Guarantees of Constitutional Courts Independence, with a Specific Reference to the Constitutional Court of Serbia] 19–35 (2012).

[81] Stone Sweet, *supra* note 2, at 199.

[82] Hilbink, *supra* note 14, at 229–239, *citing* Heidi Ly Beirich, The Role of Constitutional Tribunal in Spanish Politics (1980–1995) 233 (unpublished Ph.D. Dissertation, Purdue University, 1998), *available at* http://docs.lib.purdue.edu/dissertations/AAI9939315/.

[83] *See* an interview with Slobodan Vučetić, then-president of the Court: Tamara Pupovac, *Vučetić: Ustavni sud nije politički servis*, B92 (July 16, 2007, 6:10PM), *available at* http://www.b92.net/info/emisije/kaziprst.php?yyyy=2004&mm=07&nav_id=146024.

[84] Jovan Đorđević, Ustavno Pravo [Constitutional Law] 608 (1967).

[85] Nenadić, *supra* note 80, at 29.

feature that Serbian judges share with many constitutional judiciaries, particularly with those in civil law countries, comparative studies show that, in many countries where it once prevailed among judges, this stringent ideology has been subsequently abandoned after being persistently and persuasively challenged, whereas in Serbia, the ideal of a strictly apolitical judiciary lingers on.[86]

Third, the Serbian case confirms the common finding that selection procedures influence the constitutional courts' readiness to hold political power to account.[87] On this point, one should keep in mind that constitutional review in Serbia does not function according to the so-called "insurance theory," which implies that constitutional designers will opt for a strong judicial review as "insurance" in case of electoral defeat.[88] Even if, on paper, this may seem to be valid, the appointments of constitutional judges in Serbia prove Sadurski's claim that politicians in post-communist countries are much less strategic and much more interested in securing as much power as they can.[89] Therefore, although the "split" appointment mechanism and one-time renewable term were established to strengthen political insulation, a non-transparent selection procedure allowed Serbian politicians to discard selection criteria. Instead of selecting prominent lawyers with a proven record of professional quality and integrity, politicians appointed mostly poorly qualified but "amicable" judges who would not put the politicians' short-term interests at risk.[90] Thus, to a large extent, inapplicability of the "insurance thesis" to the appointments process has effected a fundamental institutional insecurity in Serbia's judiciary, whereby judges tend to value their seats more than any particular policy outcome and therefore act strategically in order to avoid threats coming from the incoming majority. Nonetheless, the political institutions do not bear all of the blame. One should not forget that one third of the constitutional judges, elected by their peers from the Supreme Court of Cassation, come from a non-purified Serbian judiciary still in the grip of an unbroken tradition of judicial docility and submissiveness.

The calculating play-it-safe strategy adopted by the Court does not even support the conventional wisdom that "judges under democracy and dictatorship alike defect from the government once it begins to lose power."[91] However, it partially confirms Hemke's finding that, in the presence of institutional security, judges rule against incumbent rulers not based on any feeling of judicial independence but rather because of fear of being punished by political successors.[92] The Serbian case, however, deviates from

[86] For changes in judicial behavior in Latin American and African countries, *see* Gloppen et al., *supra* note 47. *See also* Cultures of Legality: Judicialization and Political Activism in Latin America (Javier A. Couso, Alexandra Huneeus, & Rachel Sieder eds. 2010)

[87] For a discussion, *see* Gloppen et al., *supra* note 47, at 160–163.

[88] Ginsburg explains this theory in Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (2003).

[89] Wojciech Sadurski, *Constitutional Courts in Transition Processes: Legitimacy and Democratization*, Sydney Law School Research Paper No. 11/53, at 12 (Aug. 30, 2011), *available at* http://ssrn.com/abstract=1919363.

[90] For a similar opinion, *see* Tanasije Marinković, *Politics of Constitutional Courts in Democratizing Regimes*, *in* Courts, Interpretation, the Rule of Law 105 (Miodrag Jovanović & Kenneth Einar Himma eds., 2014).

[91] Helmke Gretchen, Courts Under Constraints. Judges, Generals and Presidents in Argentina 126 (2005).

[92] *Id.* at 20.

Hemke's "strategic defection" theory (generalized from the Argentine case), since unlike judges in Argentina, who regularly challenged the ruling majority once it had started to lose power, Serbian judges had started to rule against the outgoing majority only in the presence of its clear electoral defeat or even after the new majority assumed power.

In sum, the long-lasting culture of judicial deference to political power-wielders and anti-political ideologies, together with the lack of any effort by current incumbents to obtain "insurance" against any harm once they have left office, by granting substantially independent powers to the constitutional court, have produced a passive judicial cadre unwilling to engage in the judicialization of politics.

For a constitutional court to be capable of making an impact on democratic consolidation, however, the judges' willingness to interfere is not enough. Equally important is their ability to produce transformative jurisprudence. This is another "missing virtue" of the Serbian judiciary, as I will now explain.

4.3. A lack of transformative jurisprudence

Recent comparative studies on judicial behavior suggest that the customary distinction between judicial inactivity in the civil law legal tradition, and judicial activism in the common law tradition may no longer be valid. Examples drawn from Hungary, the Czech Republic, Costa Rica, and Colombia demonstrate that hyperactive courts can exist even in civil law legal systems.[93] In these countries, constitutional review grounded in a strong commitment to judicial authority and in higher-order norms assumed to be implied by ordinary legal concepts, proved to be central in the transformation of public policies aligned with democratic values. Viewed against this background, constitutional review in Serbia still appears to be lagging behind. Recently decided militant-democracy cases illustrate this point.

In its transition to a politically liberal regime, Serbia has openly faced right-wing extremism, one of the major risks that might trigger the rise of militant-democracy measures in emerging democracies.[94] In the last two years, the Court delivered four

[93] For the Hungarian Constitutional Court's approach, *see* Constitution for a Disunited Nation, *supra* note 4; Zoltán Szente, *The Interpretive Practice of the Hungarian Constitutional Court: A Critical View*, 14 German L.J. 1591 (2013); Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court (László Sólyom & Georg Brunner eds., 2000). For the Czech Constitutional Court's approach, *see* Adam Czarnota, *Lustration, Decommunisation and the Rule of Law*, 1(2) Hague J. Rule of Law 307 (2009); Radoslav Prochazka, Mission Accomplished: On Founding Constitutional Adjudication in Central Europe (2002). For judicial activism in Costa Rica, *see* Gloppen et al., *supra* note 47, at 63–82; Bruce M. Wilson, *Constitutional Rights in the Age of Assertive Superior Courts: An Evaluation of Costa Rica's Constitutional Chamber of the Supreme Court*, 48(4) Willamette L. Rev. 451 (2012). For the Colombian Constitutional Court's approach, *see* Manuel Jose Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role and Impact of the Colombian Constitutional Court*, 3 Wash. U. Glob. Stud. L. Rev. 529 (2004); Rodrigo Nunes, *Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health*, 52 Latin Am. Pol. & Soc'y 67 (2010).

[94] András Sajó argues that there are at least three major risks to democracy in the transition period that might trigger militant-democracy reactions: return of communism, territorial disintegration because of extreme nationalism, and right-wing extremism. *See* András Sajó, *Militant Democracy and Transition towards Democracy*, *in* Militant Democracy 217 (András Sajó ed., 2004).

decisions upon the Public Prosecutor's motions for banning several informal and formal associations whose members were openly advertising totalitarian ideology. Although the cases revolved around similar facts and issues, the Court missed the opportunity to make an impact by defending Serbia' fledgling democracy and building a culture of binding precedent.

The first case concerned the motion to ban a number of sports fan clubs. After a long history of incidents in sports, marred by hate speech and violence, in 2009 the Public Prosecutor of the Republic of Serbia submitted to the Court a request for banning fifteen "extreme subgroups within the associations of citizens and beyond the associations," because their activities were aimed at the violent overthrow of the constitutional order, violating human or minority rights, or inciting racial, national, and religious hatred.[95] The Prosecutor highlighted in particular the threat to democracy, and stressed: ". . . either the State will favor and protect democracy or democracy will be defeated by a pervasive fear."[96] However, when a year and a half later, the Court decided to consider the motion, it refused to rule on procedural grounds (a lack of registration) and cited the principle of the separation of powers.[97] Leaving all other disputable issues aside, what is striking here is the Court's failure to implement the European Court of Human Rights' ready-made findings on the right to informal association.[98]

Interestingly, when several months later (in June 2011), in another case, it considered the imposition of the same militant-democracy measure, the Court did not find a lack of registration to be grounds for dismissing the request for the prohibition. The case concerned the Public Prosecutor's Office's request to ban "'*Nacionalni stroj*'—a 'secret political organization' whose activities were aimed at inciting of racial and ethnic hatred."[99] The Court established that *Nacionalni stroj* was a secret association, and therefore it issued the ban.[100] Surprisingly, neither the majority nor the dissenting opinion opened up the topic of rights violations, nor did the Court turn to the European Court of Human Rights' extensive jurisprudence on hate speech to decide the case. The ruling was largely technical: starting from a direct prohibition of secret and paramilitary associations in article 55 (3) of the Serbian Constitution, the majority opinion focused on proving that *Nacionalni stroj* was a secret organization.[101]

[95] *See* the Ruling of the Constitutional Court of Mar. 17, 2011, VIIU No. 279/2009, Reasoning, Pt. I (Serb.). The Ruling is published in the Official Gazette of the Republic of Serbia, No. 26/11 (Apr. 15, 2011), at 68.

[96] The Ruling VIIU No. 279/2009, Reasoning, Pt. I.

[97] *See id.*:

> Unregistered organizations, which are not institutionalized, cannot be regarded as legal associations but secret organizations which, according to their activity may represent conspiracy, terrorist, criminal and similar groups. In such a case, prosecution of such groups falls within the jurisdiction of the prosecutor's office and can be undertaken in accordance with the Constitution, which is efficient and regulated by the relevant laws.

[98] *See* Larmela v. Finland, App. No. 26712/95, Eur. Comm'n H.R. Dec. May 28, 1997 (inadmissible). This approach would require the Court to treat sports club fans as "associations" in terms of art. 11 of the European Convention on Human Rights and engage in a balancing process, revolving around freedom of speech, freedom of association and freedom of peaceful assembly.

[99] *See* Decision of the Constitutional Court of July 8, 2011, VIIU No. 171/2008, Pt. I (Serb.).

[100] *Id.* Pt. VI.

[101] *Id.* Pt. V.

A year later (in June 2012), the Court delivered its decision in a third case, in which the Serbian Prosecutor's Office had requested a ban of the extreme-right group "Obraz," whose members had become notorious in 2001 for their attack on the first-ever Belgrade Gay Pride parade, injuring several marchers and police officers.[102] The Court issued the prohibition too, but this time on more substantive grounds.[103] Although the decision was mostly grounded in legal formalism, the Court made some efforts to decide the case under the Strasbourg Court jurisprudence and the principle of proportionality. Given the importance of the case, however, the balance was not as convincing and extensive as it should have been.

Finally, in the last decision, delivered in November 2012, several months after the recent political change brought the former illiberal forces back into power, the Court ruled that constitutional conditions for banning three extremist organizations—one of which had become infamous for drawing up "black lists" of "unpatriotic" NGOs—had not been met either for procedural or substantial reasons, and therefore refused to issue the prohibitions.[104] The Court insisted that it could have banned the organizations only after all other measures, undertaken against its members by other state authorities, had been exhausted and proved to be ineffective.[105]

The Court's failure to bring rights violations to bear on the issue of militant democracy and to embrace an active role in political and social debates traditionally left to the elected branches, further sheds light on my claim about the negligible role played by the Court in the consolidation of Serbian democracy. Admittedly, the cases did not involve routine matters. The idea of militant democracy is not problem-free: it brings the underlying tension between constitutionalism and democracy to a boiling point. Moreover, right-wing extremism does not represent an isolated ideology in Serbia, but is instead an institutionalized political power in some of the local self-governing units.[106] However, given the fact that incidents described in the prosecutor's motions arguably involved abuses of basic liberties, there was room for the Court to engage robustly in constitutional review and deliver rational decisions that would simultaneously endorse and constrain militant democracy in Serbia. Moreover, keeping in mind that Strasbourg jurisprudence offers extensive guidance in adjudicating militant-democracy cases, nothing stood in the way of the Serbian constitutional judges grounding a defense of democracy in substantive standards of justice and rights. Instead, the Court mostly limited itself to delivering simple reports on the facts.

[102] Several years later, "in April 2011, a Belgrade court jailed Obraz's leader Mladen Obradović for two years for organising riots during the October 2010 Belgrade Gay Pride parade in which about 140 people were injured." *See* Bojana Barlovac, *Serbian Judges Receive Death Threats*, Balkanska Tranziciona Pravda (Dec. 7, 2012), *available at* http://www.balkaninsight.com/rs/article/serbian-judges-receive-death-threats.

[103] *See* Decision of the Constitutional Court of June 12, 2012, No. VIIU-249/2009 (Serb.).

[104] *See* Decision of the Constitutional Court of Nov. 14, 2012, No. VIIU-482/2011 (Serb.).

[105] *Id.*

[106] The list of candidates affiliated with the right wing and Eurosceptic movement "Dveri—for the Life of Serbia" are presently represented in some municipalities in Serbia including Kraljevo, a town in Central Serbia and in Novi Sad, a capital of the Serbian northern province Vojvodina.

The explanation for this judicial abdication is closely connected with the issue of legal culture. Adjudication of constitutional rights based on a balancing process lies at the heart of constitutional politics and requires the judges to step outside the realm of positive law in order to decide particular cases. However, Serbian constitutional judges lack any experience in adjudicating human rights cases. Under communism, the constitutional judiciary was almost exclusively focused on abstract judicial review producing technical decisions based on literal interpretations of the constitution. Although it is true that Serbia belongs to civil law countries in which "the life of the law" has been mostly connected with reason and logic, and not with "experience," as in common law countries.[107] As a consequence, in statutory interpretation, the civil law courts tend to concentrate on grammatical and logical meaning of the text in order to find a textual foundation for their decisions. On a theoretical level, the limited function of civil-law judges, which stems from a stringent version of the separation of powers doctrine, is exemplified in a widespread belief that judges are to apply laws in a neutral way without resorting to their own value judgments. On a practical level, civil law judges are also constrained in their activity by the absence of the *stare decisis* doctrine, which means that judicial decisions interpreting statutes are accorded no precedential weight in subsequent cases involving the same statutory norms.[108] However, unlike in Western Europe—and, since recently, in Central and Eastern European countries which experience a vivid decline in legal positivism in constitutional interpretation—a strong version of legal positivism and an idea that judicial interpretation should under no conditions add anything to the constitution, continues to be the dominant tradition of constitutional interpretation in Serbia. Such an approach resulted in the absence of constitutional doctrines, illustrated already in the following anecdote from 1971. At that time, a young Italian scholar wanted to write his Ph.D. dissertation on *The Case Law and Doctrine of the Constitutional Judiciary in Yugoslavia*. After two months of research, he complained to a Serbian colleague that half of his thesis was missing. When asked which part was missing, he answered: "There is no doctrine."[109] As militant democracy cases indicate, this is still valid today. A long cultivated ideal of apoliticism has produced a cadre of judicial bureaucrats who tend to think mechanically and take the path of least resistance. Apart from former judges and law professors, the present Court is also packed with lawyers who have no judicial or academic background, which additionally highlights the Court's professional incapacity to assume a transformative role in the Serbian transition.

The general impression left by the Court's decisions in militant democracy cases is that, being deprived of professional capabilities to challenge authoritarian tendencies

[107] Oliver Wendell Holmes noted that in the common law "the life of the law has not been logic, it has been experience." *See* Oliver Wendell Holmes, The Common Law 5 (Paulo J.S. Pereira & Diego M. Beltran eds., 2011).

[108] The limited function of the civil-law judge is well explained in Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 Ohio St. L.J. 559, 564–565 (1993).

[109] *See* Kosta Čavoški, *Obraćanje Ustavnom sudu Republike Srbije* [Address to the Constitutional Court of the Republic of Serbia], Democratic Party of Serbia (Nov. 23, 2011), *available at* http://dss.rs/obracanje-ustavnom-sudu-republike-srbije/.

on substantial grounds, constitutional judges in Serbia are incapable of fostering or even supporting the values of constitutional democracy. Although formal autonomy makes room for the Court to become a policy-maker, until now it had mostly ignored this function, except in less controversial rights cases, in which it has shown an occasional, if fleeting, interest in deviating from the "apoliticism of positive jurisprudence."[110] Combined with the fact that most of the constitutional judges are still steeped in the Kelsenian idea of a constitutional court as a "negative legislator,"[111] the past habits and extensive ideology of legal formalism additionally explains why judicial irrelevance is a key feature of democratic consolidation in Serbia.[112]

5. Conclusions

Inspired by the growing influence of judicial bodies on contemporary systems of governance and by the vast debate on the role of the constitutional courts in democratization, this article has surveyed the politics of the Serbian Constitutional Court with the aim of scrutinizing its contribution to the democratic consolidation in post-authoritarian Serbia. The discussion reveals that the Court has thus far failed to catch up with the major trend in the ongoing reconceptualization of the separation of powers and has therefore also failed to become a significant veto player or an important mechanism for facilitating the transition to democracy. Amid a highly fragmented political environment and despite existing normative preconditions, the Serbian Court has missed the opportunity to enhance its reputation and legitimacy by delivering decisions that would make sense of constitutional values. Consequently, the Court has played a subordinate, rather than a counterbalancing, role in democratization. To support this conclusion, I have offered two arguments. First, I have demonstrated that the Court has neither managed to escape the communist-era legacy of dependency nor distanced itself from the strategy of a strict deference to the ruling power, established and brought to the maximum level under communism. Although I do not claim that the Court has completely failed to deliver democracy-enforcing decisions, my scrutiny of the most contested political cases confirms the Court's proclivity to rule only when either its decisions have become politically irrelevant or when the preference of the incoming ruling majority has become manifestly clear. I have identified that, apart for deferential ideology, the roots of judicial dormancy in controversial political cases derive from a long cultivated apolitical ideology and institutional insecurity. Second,

[110] Terence C. Halliday, *The Fight for Basic Legal Freedoms: Mobilization by the Legal Complex*, *in* Global Perspectives on the Rule of Law 218 (James J. Heckman, Robert L. Nelson, & Lee Cabatingan eds., 2010). Along the same lines, Alec Stone Sweet speaks of "judges as slaves of the codes." *See* Stone Sweet, *supra* note 5, at 69.

[111] For this position, *see* Olivera Vučić, Dragan Stojanović, *Ustavno sudstvo na preseku prava i politike*, [Constitutional Judiciary at the Intersection of Law and Politics], 2 Anali Pravnog Fakulteta u Beogradu 89 (2009).

[112] For the similar conclusion, *see* Boško Tripković, *A Constitutional Court in Transition: Making Sense of Constitutional Adjudication in Postauthoritarian Serbia*, *in* Constitutional Courts as Positive Legislators: A Comparative Law Study 735 (Allan R. Brewer-Carías ed., 2011).

I have used militant-democracy cases to demonstrate that the constitutional judges' failure to engage in transformative jurisprudence also contributed to judicial irrelevance in Serbia's faltering democratic transition. These case studies reveal the production of highly technical and inconsistent rulings, the judges' subscription to a narrowly conceived positive jurisprudence, the absence of precedential authority and poor legal reasoning, all of which substantiate the claim that constitutional review in Serbia has not yet emerged as an effective mechanism of governance. The judges' increasing, but still erratic, willingness to construct doctrines and invoke European standards in less contested cases cannot remedy their general failure to develop a constitutional jurisprudence that would legitimize the Court differently than in the past.

From a more theoretical perspective, the case of Serbia suggests that the passive role to which courts are consigned in authoritarian regimes may decrease the probability for the judges to play an influential role in the transitional phase, particularly when the transition to democracy is, on the whole, a stop-and-go process strewn with obstacles and ultimately ineffective. Admittedly, it would be unrealistic to expect a constitutional court to be at the cutting edge of democratization. Nonetheless, the failure to transform the judiciary and the personnel of the constitutional court along with political environment may prove crucial in preventing such a court from adopting some form of activist approach, thus barring it from playing either a triggering or a consolidating role in the process of democratization. Moreover, the case of Serbia casts doubt on the thesis that an environment of highly divided politics generates robust constitutional review, at least in the presence of institutional insecurity and in societies where sham constitutional courts existed in a previous authoritarian regime.

The Chilean experience, however, may point in the opposite direction. There, judges who had proved consistently passive under democracy and dictatorship alike, have recently displayed an increasing willingness to play a more active role.[113] One might therefore speculate that it is only a matter of time before the gradual advancement towards greater liberalization will transform post-authoritarian societies from being "governed without judges" to being "governed with (the active collaboration of) judges." For that to happen, to paraphrase Jefferson, the dead hand of the past has to loosen its grip on the living present.

[113] *See further* Couso Javier & Lisa Hilbink, *From Quietism to Incipient Activism*: *The Institutional and Ideational Roots of Rights Adjudication in Chile*, *in* Courts in Latin America 99 (Gretchen Helmke & Julio Ríos Figueroa eds., 2011).