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ON THE MARGINS OF CONSOLIDATION: THE CONSTITUTIONAL COURT OF SERBIA

Tatjana Papić[*] and Vladimir Djerić[**]

INTRODUCTION

The current academic debate about constitutional democracy in the Balkans enquires into the role and impact of constitutional courts on the democratic transition and consolidation in some countries of the former Yugoslavia.[1] This might seem too rudimental in contrast to the debate about constitutional adjudication in the Central and Eastern European (CEE) in the current times of multifaceted illiberal trends.[2] However, the fact that transition process from communism to constitutional democracy in the former Yugoslavia was delayed due to the wars[3] makes this inquiry timely. This was especially true for Serbia, which underwent an additional substantial delay of democratic transition caused by the authoritarian rule of Slobodan Milošević. Only when his regime was finally deposed on 5 October 2000, one could truly speak of the start of the democratic transition.

While the former Yugoslav counties were late in the transition processes, they were early birds in introducing constitutional adjudication in comparison to other CEE countries (except for Poland). Namely, constitutional courts were introduced in

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[1] See http://www.rrpp-westernbalkans.net/en/research/Completed-Projects/2016/Courts-as-Policy-Makers.html. Accessed 11 May 2017.

[2] See for e.g. Bugarič 2015, Rosenfeld et al. 2015

[3] See more in Beširević 2014, pp. 957-958

the Yugoslav federation and its respective republics in 1963 by the federal and republican constitutions. Until the end of the 1980s, the Constitutional Court of Serbia (SCC), along with its counterparts, did not play a significant role in resolving constitutional disputes.[4] They were there chiefly to provide a "legal" legitimacy to the communist rule.[5] Thus, the fact that former Yugoslav countries already had constitutional courts at the time when the rest of CEE was at the beginning of transition did not provide any head start.[6]

In 1990 Serbia adopted new Constitution and held first multiparty elections. The decade that followed was marked by Milošević's regime, for which this Constitution provided a blueprint.[7] During that period, the SCC did not have any real impact. Moreover, it showed willingness to compromise and reluctance to use its powers, especially in cases that were politically or economically important for the regime.[8]

When Milošević was overthrown in 2000, the constitutional setting stayed unchanged for a while. Namely, the "constitutional moment" was lost due to quick polarization over the values (of collective interests and rights-based liberalism) and the reform implementation methods within the new government.[9] Moreover, the process of transition was taken hostage by this polarization, while some progress has been made especially in the field of human and minority rights protection.[10]

During this stage, the SCC went through a period of institutional instability, with long spans of inactivity. From February 2001 to June 2002, it was prevented from working as there was no quorum because the National Assembly failed to elect replacements for retired justices.[11] Again, when the SCC's president retired in 2006 and was not replaced by the National Assembly, the remaining justices took the position that no one but the president could convene a session of the court, so its work was effectively suspended until early 2008.[12]

In the meantime, a new constitution was hastily adopted in Serbia on 8 November 2006.[13] The sense of urgency was created by external circumstances – Montenegro leaving the joint state with Serbia and international pressure for resolving

[4] For an assessment of the role of constitutional courts in the former (Socialist) Yugoslavia, see Acceto 2007, pp. 207-215.

[5] Beširević 2014, p. 962. On other reasons for the establishment for the constitutional court in the former Yugoslavia and their positioning see ibid, pp. 962-964. For different roles constitutional courts play in authoritarian regimes, see Ginsburg 2012

[6] Moreover, some claim that this fact may be detrimental for their active role in the process of democratic transition and consolidation. Beširević 2014, p. 979

[7] See Basta et al. 1997, pp. 8-9

[8] See Čiplić and Slavnić (eds) 2003, pp. 27-30

[9] Beširević 2014, p. 959

[10] For more detailed overview of political constellation in this period see Beširević 2014, p. 959-960.

[11] See Čiplić and Slavnić (eds) 2003, p. 30. See Beširević 2014, p. 964, note 42

[12] See Grubač in Beširević (ed) 2012, pp. 87-88

[13] *Official Gazette RS*, 98/06. Already during the Milošević regime, democratic opposition insisted on the adoption of a new constitution. After the democratic change in 2000 various constitutional proposals and ideas about procedure of constitutional change were put forward by political parties, non-governmental organizations and academics; see Lutovac (ed) 2004. The 2006 Constitution was adopted in the procedure for constitutional change under the 1990 Constitution.

status of Kosovo[14] – where the government at the time thought it would create a "constitutional barrier" against Kosovo's secession, especially by a preamble mentioning that this "autonomous province" is part of Serbia. While the 2006 Constitution provided the basis for a modern democratic state, it was an imperfect arrangement. In general terms, it was based on conflicting values of collective interests and rights-based liberalism.[15] In more concrete terms, the Constitution provided a foundation for functional democracy and contained comprehensive catalogue of fundamental rights,[16] but at the same time suffered from the lack of legitimacy (since it was not subject to public debate),[17] incoherent solution in respect to, *inter alia*, separation of powers (both horizontal and vertical),[18] excessive power vested in political parties and convoluted provisions on the restriction of fundamental rights.[19] Nevertheless, the Constitution introduced major changes in the composition of the constitutional court and endowed it with new competences, most importantly the power to decide constitutional complaints. A "new" SCC was constituted in 2008.

After the adoption of the 2006 Constitution, two of its conflicting cornerstones – collective interests and rights-based liberalism – have continued to shape Serbian political and social space, despite persistent EU membership aspirations of every government since 2001. Thus, the "new" Court continues to function in a polarized political landscape, which – under fragmentation thesis[20] – presumably gives it more power and an opportunity to influence the process of democratic consolidation by adjudicating politically charged cases, which will ultimately have to end up before it.[21]

Conversely, there are circumstances which reduce such an opportunity for the SCC. Specifically, the practice of governance in Serbia shows significant illiberal tendencies, which arguably prevents the SCC from making significant contribution to the process of democratic consolidation.[22] As Schwartz noted, only when a state has already made a good start in the direction of liberal constitutional democracy, constitutional courts are able to influence the process.[23]

Against such political and polity setting in Serbia, the main research question of this paper is: what is the role (if any) and positioning of the SCC in the process of democratic consolidation in Serbia? Complementary to this, we attempt to assess the Court's legitimacy in input, output, normative and sociological terms.[24]

The first part of the paper deals with the SCC's institutional structure. It provides an overview of its composition, competences and substantial constitutional

[14] Beširević 2014, p. 960
[15] Ibid, p. 960-961
[16] Venice Commission 2007, p. 22, para. 105
[17] Ibid, para. 104
[18] Beširević 2014, p. 960-961
[19] Venice Commission 2007, pp. 12 and 22, paras. 53 and 105
[20] Judicial power grows under divided politics. See Helmke and Rois-Figueroa 2011, pp. 15-16 and 21-22
[21] Ibid, p. 21
[22] Schwartz 2000, p. 226
[23] Ibid
[24] Sadurski 2011, pp. 2-5

framework relevant in the context. Further, it provides a summary of the statistics of the courts' work, in order to provide a fuller picture of the extent and nature of its activity. These institutional features will provide the basis for assessing the SCC's input legitimacy.

In the second part, after an analysis of the selected cases that involved thorny constitutional and political issues in the context of the democratic consolidation, we report our findings concerning the role, positioning and legitimacy of the SCC. These are the cases that afforded the Court an opportunity to go against or with the prevalent socio-political attitudes in Serbia and, consequently, position itself against or with the political majority on a concrete issue, or rule on a controversial legal provision. Therefore, they serve as litmus test for our assessment of the SCC's positioning and inquiry about its activism.[25]

We also take a special look at cases that have raised issues related to the country's compliance with European standards of parliamentary democracy and human rights protection. Not only is their fulfilment a requirement for admission to the EU, but they provide some substance to the abstract notions of "transition" and "consolidation" and focus the analysis on the role of the SCC in that particular context. In our view, democratic transition and consolidation as a process should, at a minimum, aim to bring a European country closer to these standards.

Apart from assessing the Court's positioning towards political majority and its activism, we have made an attempt to identify and evaluate approaches and strategies employed by the SCC in deciding these cases and the quality of its reasoning. Also, we look into whether the SCC was interested in promoting certain values of democratic society through interpretation, or whether it limited itself to textual interpretation of constitutional provisions. Moreover, we will discuss the court's output legitimacy as regards the results of its work. We will do it on the basis of the implementation of the SSC's decisions and their consequences in relation to the dominant political values in the society.[26] We will also discuss how the general public, politicians and experts react to the court's decisions. On the basis of such an analysis, we will deliver the findings on the SCC's legitimacy in sociological and normative terms.[27] While the former indicates to what extent the general public actually respects the SCC, the latter concerns the independence of judgment, reasonableness and consistency of the SCC in the eyes of independent expert observers.[28] Finally, we will try to determine factors, both internal and external, which affect the court's performance.

The third part will provide concluding remarks on the role of the SCC in the process of democratic consolidation in Serbia.

[25] With a value neutral position towards it, we adopt the notion of judicial activism suggested by Sadurski – as the action in which constitutional courts alter the preferences of the parliamentary majority or depart from the views of the constitution makers. Sadurski 2001, pp. 27-28 and Sadurski 2014, p. 131

[26] Sadurski 2011, p. 5

[27] Ibid, pp. 2-3

[28] Ibid, p. 3

The research methodology of this paper is multifaceted. It is based on qualitative analysis of information from the sources relevant for the assessment of the performance of the CC. These sources incorporate constitutional and legal provisions, decisions of the CC and other legal and political documents pertinent to the CC's rulings.[29] Further, they integrate findings from semi-structured interviews with sixteen relevant actors and observers,[30] academic writings discussing the performance of the CC and media reports on the implementation and reception of the CC's rulings.

1. THE INSTITUTIONAL DESIGN

1.1. Composition

Under the 2006 Constitution, the SCC is an autonomous and independent state body, which protects constitutionality and legality as well as human and minority rights and freedoms.[31] It is composed of fifteen justices with a mandate of nine years, which may be renewed once.[32] The justices elect the president of the SCC among themselves for a period of three years.[33]

Apart from the provision on justices' tenure, there are other constitutional guarantees of the institutional independence of the SCC and personal independence of its justices, which are embodied in the provisions on immunity,[34] conflict of interest[35] and termination of mandate.[36] While we consider the guarantees of the judicial independence[37] an important aspect of the institutional design that influences the role of the SCC, detailed discussion on their normative features is beyond the scope of this paper. Moreover, these provisions do not raise any issues that would intrinsically influence the discussion on the role of the SCC.[38]

[29] I.e. Progress Reports on Serbia issued by the European Commission and opinions of the European Commission for Democracy through Law (Venice Commission).
[30] These included eight academics, three SCC judges, one Court of Appeal judge, two MPs (one former and one incumbent) and two independent experts. The interviews were conducted in April, May and November 2015; their transcripts are on file with the authors.
[31] Constitution (n 13), Art. 166
[32] Ibid, Art. 172(1) and (6)
[33] Ibid, Art. 172(6)
[34] Ibid, Arts. 103(2-3) and 173(2).
[35] Ibid, Arts. Art. 55(5)), 173(1) and The Law on the CC, Art. 16.
[36] Ibid, Art. 174(1) and (2)
[37] See Peerenboom 2010. The same stands for judicial empowerment, see Ginsburg 2003; Hirschl 2004.
[38] However the possibility of renewal of their mandate could mean that justices would be more driven by the need to satisfy those who would re-elect/re-appoint them than by interest in the protection of the Constitution. Nenadić 2012, p. 154. This was also mentioned by some interviewees (on file with the authors).

1.1.1. Selection of Justices

The Constitution provides for a hybrid system of selection of the SCC's justices, wherein two thirds of the justices of the SCC are *appointed*, while one third are *elected.*[39] All three branches of government take part in the process of selection: five constitutional court justices are elected by the National Assembly among ten candidates nominated by the president of the Republic; five are appointed by the president among ten candidates nominated by the National Assembly; finally, five are appointed by the plenary session of the Supreme Court of Cassation among ten candidates nominated jointly by the High Judicial Council and the State Council of Prosecutors.[40]

The Constitution provides that the candidates must be prominent lawyers who are at least forty years old and with fifteen years of experience in the legal profession.[41]

The procedure and criteria for the selection and nomination of justices of the SCC have not been regulated in detail either by the Constitution or by the Law on the Constitutional Court.[42] This has left the selecting bodies with broad discretion over the process of selection.

After the adoption of the 2006 Constitution, there was a delay in the forming of the judicial institutions charged with the appointment of five constitutional court justices. For this reason, the SCC worked with only ten justices from 2008, when it was constituted, until 2010, when the remaining five justices were appointed.[43]

Moreover, the process of nomination and selection of justices for the SCC was conducted in a completely non-transparent manner by all three branches. There was no public call for applications and no contest, so it remained unclear how the candidates were chosen for nomination by the three nominating bodies. [44] Furthermore, it seems that all the bodies selecting future SCC justices neglected the substantive constitutional requirement that the justices must be prominent lawyers.[45] Certain lawyers unknown to the general public and within the legal profession had been elected/appointed over their colleagues whose prominence was unquestionable.[46]

Such an approach indicated that political actors did not consider (or were not aware) that a strong constitutional review could become their "insurance" in the case of electoral defeat.[47] Instead, preference was given to "weak" candidates who would make a court that would be sympathetic to the government, while the perpetual hold on power remained the main "insurance" for political actors.

[39]Constitution (n 13), Art. 172(2)
[40] Ibid, Art. 172(3). This mirrors the procedure for the election of justices of the Italian Constitutional Court. See more in Nenadić 2012, p. 92
[41] Constitution (n 13), Art. 172(5)
[42] *Official Gazette RS*, 09/07, 99/11, 18/13 (decision of the CC), 40/15 and 103/15.
[43] See Jerosimić (ed) 2008, pp. 106-107; Petrović (ed) 2011, p. 21
[44] For detailed account of the practice of selecting bodies see Papić and Djerić 2016, pp. 11-15
[45] Nenadić 2012, p. 148
[46] Ibid, p. 150
[47] See Ginsburg 2003, p. 22-33. On this and Sadurski's general view on the approach of post-communist countries in selecting constitutional court justices, see Beširević 2014, p. 973

This resulted in the selection of certain number of justices whose main quality was that they were connected to the party elite, [48] instead of reflecting their professional qualifications and standing,[49] which, in turn, made them less willing to challenge the political powers in the course of their work. Furthermore, such deficiencies in selection of justices certainly did not provide a "fresh start" for the SCC once it was constituted under the 2006 Constitution. They had a negative effect on its legitimacy. This was stressed in most interviews, including those conducted with two SCC justices.[50]

It should be noted that the same practice, as described above, was repeated in the recent election of SCC's justices (in December of 2016), by the President and the National Assembly.[51] The political majority was different then in 2008, when the first justices were elected by these bodies, but the pattern of non-transparency and disregard for the material criteria for election remained.

The composition of the SCC whose role is evaluated in this paper was the following: out of fifteen justices, only one came from the former SCC, five from academia and five from the judiciary (two of them were judges of the Supreme Court, three came from lower courts).[52] The remaining four justices lacked any significant judicial or academic background at the time they entered the SCC.[53] Out of these four, two became justices of the SCC after holding high posts in state administration,[54] while the other two were a former Public Attorney of Serbia and an attorney at law,[55] respectively. All but one of justices attained their law degree under Socialism,[56] while majority did not have significant exposure to foreign legal education. None of justices have been known for professing strong ideological positions.

1.2. Competences of the SCC

The SCC has broad competences. First, it exercises *ex post* abstract control of constitutionality and legality,[57] which includes deciding on whether laws and other 'general acts' are in accordance with the Constitution, the generally accepted rules of international law and the ratified international treaties, and whether ratified international treaties are in accordance with the Constitution.[58] The procedure may be

[48] Justice Nenadić had a similar position. Nenadić 2012, pp. 103 and 150
[49] See similar conclusion in Beširević 2014, p. 973
[50] On file with the authors.
[51] *Večernje novosti*, 12 December 2016. The mandate of those justice appointed by the Supreme Court of Cassation in 2010 will expire in 2019
[52] Papić and Djerić 2016, pp. 14-15
[53] Ibid. See also Marinković 2013, p. 105. See also media reports about alleged involvement of a SCC justice in abduction and fraud, See *Peščanik* of 27 July 2012
[54] See Papić and Djerić 2016, p. 14, n. 50
[55] This person was allegedly implicated in cases of abduction and fraud. See *Peščanik* of 27 July 2012 and 19 February 2013
[56] In 2008 this was inevitable due to the minimum age requirement for justiceship (forty years).
[57] Constitution (n 13) Art. 167(1)
[58] This type of control also includes control of whether other 'general acts' are in accordance with laws; whether statutes and general acts of autonomous regions and municipalities are in accordance with the Constitution and laws; and, finally, whether general acts of organizations with delegated public powers,

instituted by at least 25 members of the parliament (MPs), by any state authority, by local authorities and authorities of autonomous provinces, and by the SCC itself, upon a decision taken by two thirds of its justices.[59] Although courts, as state authorities, may also commence procedure for assessing constitutionality and legality, this is not a type of concrete control (e.g. through referral of a case to the SCC), but is done by submission of an abstract proposal for control to the SCC. Finally, it should be noted that any legal or natural person has the right to submit (non-binding) initiative for commencement of proceedings for control of constitutionality and legality.[60] In the period 2009-2014, the SCC received over 300 new cases of control of constitutionality and/or legality each year.[61]

Second, the SCC controls the constitutionality of laws *ex ante* (on the initiative of one third of MPs), after the law was adopted and before it is promulgated by the president. If the constitutionality of a law was established in this procedure, it may not be challenged again in *ex post* control.[62] The SCC has not so far had the opportunity to conduct *ex ante* constitutional review.

Third, the SCC has competence – introduced by the 2006 Constitution – to decide on constitutional complaints against individual acts/decisions or actions of state authorities or organizations with delegated public powers that violate human or minority rights guaranteed by the Constitution.[63] A constitutional complaint may be lodged by an affected person if all other legal remedies have been exhausted or none exist.[64] Constitutional complaints have made the bulk of the SCC's caseload – up to 10,000 new cases per year[65] – and apparently take up most of its time.

Finally, the SCC has competence to resolve conflicts of jurisdiction between various authorities[66] and decide other matters provided in the Constitution, including electoral disputes and prohibition of political parties, unions, and civic associations.[67] It also has a competence in the part of the proceedings for the impeachment of the President.[68]

The SCC decides by majority of votes of all justices.[69]

1.3. The Substantive Constitutional Framework

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of political parties, unions, associations, as well as collective agreements, are in accordance with the Constitution and laws.

[59] Constitution (n 13) Arts. 168 (1) and 175(2)

[60] Ibid, Art. 168 (2)

[61] See Papić and Djerić 2016, p. 18, n. 71

[62] Constitution (n 13), Art. 169 (1)&(2)

[63] The constitutional complaint procedures existed before the Constitutional Court of the Federal Republic of Yugoslavia and the Court of the State Union of Serbia and Montenegro, but were never truly operational. Consequently, constitutional complaints to these courts were not considered as effective legal remedies, see Petrović (ed) 2006, pp. 41-42

[64] Constitution (n 13) Art. 170

[65] For the detailed account of the caseload see Papić and Djerić 2016, p. 18, n 75

[66] Constitution (n 13**Error! Bookmark not defined.**) Art. 167(2), points 1-4

[67] Ibid, Art. 167(2), points 5 and 6 and 167(3-4)

[68] Ibid, Art. 118(3)

[69] Ibid, Art. 175(1)

The 2006 Constitution proclaims its supremacy over ratified international treaties, laws and other legislation,[70] while ratified international treaties and generally accepted rules of international law have supremacy over laws and other legislation enacted in Serbia.[71]

The Constitution stipulates that ratified international treaties are an integral part of the domestic legal order[72] and are directly applicable.[73] It also provides that the provisions on human and minority rights are to be interpreted pursuant to international human rights standards and the practice of the international bodies that supervise their implementation.[74] In its decisions, the SCC relies on the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR).[75]

Historically, Serbian courts applied international law standards only exceptionally, [76] which also holds true for the SCC working under the 1990 Constitution. [77] This slowly started to change after the adoption of the 2006 Constitution, in part due to numerous human rights training programmes for judges conducted after 2000. There are opinions that more frequent references to the international human rights standards – especially those articulated by the ECtHR – have also been the consequence of the work of the SCC under the 2006 Constitution, as it started applying the ECHR and its case-law more frequently.[78]

Although the SCC relies on the ECtHR's standards, their application in its jurisprudence has not been systematic.[79] As Beširević and Marinković note, although the SCC has chosen to defer to the ECHR and the jurisprudence of the ECtHR,[80] in some cases the SCC followed[81] but in others ignored[82] the Strasbourg case law.

2. THE SCC AT WORK

As noted in the introduction, the assessment of the SCC's performance will be conducted after analysis of several cases which raised difficult political or controversial social issues in Serbia, and/or concerned application of European standards of parliamentary democracy and human rights protection. Since these cases afforded the Court with an opportunity to position itself towards the political majority and/or exercise judicial activism, they provided us with a background against which

[70] Ibid, Arts. 16(2) and 194(4)
[71] Ibid, Art. 194(5)
[72] Ibid, Art. 194(4)
[73] Ibid, Art. 16(2). Direct application of human and minority rights is also provided in the Art. 18(2)
[74] Ibid, Art. 18(3)
[75] For more, see Beširević and Marinković 2012, pp. 428-429. See also Petrović (ed) 2012, p. 57
[76] Dimitrijević et al. 2007, p. 68
[77] Moreover, the SCC had the dubious practice of applying non-binding international documents, while refusing to do so with binding ones (viz. international treaties). Ibid
[78] Nenadić 2012, p. 72
[79] See Beširević and Marinković 2012, pp. 428-429
[80] See ibid and Petrović (ed) 2012, p. 57
[81] Beširević and Marinković 2012, pp. 409-413
[82] Ibid, pp. 417-422

we could assess the role and evaluate the positioning of the SCC in the process of democratic consolidation.

Following this approach, we focus primarily on abstract constitutional review cases before the SCC, and leave aside ones dealing with individual constitutional complaints, because the latter usually do not create a possibility of the collision between the SCC and interests of the political majority. Nevertheless, constitutional complaint cases may be taken into consideration, when this is warranted.

Further, we will discuss cases concerning prohibition of associations, because they have raised questions which are important in the context of democratic consolidation.

As indicated in the introduction, on the basis of these cases we discuss the positioning of the SCC from different points: attitude towards political majority, including strategies it employs in deciding cases, its activism and quality of its decisions. Against this background, we examine effects of the Court's work and general and expert public's perceptions of the Court in order to provide findings on its legitimacy in output, sociological and normative terms.[83] Finally, we will try to determine factors, both internal and external, which affected the SCC.

2.1. Positioning Towards Political Majority

The main conclusion of the analysis of the cases that raise controversial political or legal issues is that the SCC defers to the political majority in power and its interests. In that, it used two strategies which we call delaying strategy and avoidance strategy. They are complementary and frequently overlap.

As for the *delaying strategy*, in many cases involving disputed political issues or important government interests, the SCC was stalling to rule until the political majority was about to change or had changed, or until the political issues became moot.[84] This was also noted in the interviews.[85]

The delaying strategy is not new in the practice of the SCC. In the 1990s, the SCC waited to rule on the legality of certain government decrees until after the government itself repealed them.[86] There are other examples: in 2004, it repealed emergency decrees adopted after the assassination of Prime Minister Đinđić in 2003, only after the political majority that adopted them changed and the new government was in place;[87] in 2012, it repealed the provisions of the Law on Government which introduced the office of the deputy president of the government, as well as the Law on Jurisdiction of Autonomous Province of Vojvodina (Serbia's northern province),[88] only when it became clear that the political majority which adopted these laws would

[83] Sadurski 2011, pp. 2-3
[84] See also Beširević 2014, pp. 966-971, 974
[85] On file with the authors.
[86] See Čiplić and Slavnić 2003, p. 28
[87] See Beširević 2014, p. 967
[88] Decision of the CC, IUz-353/2009, 12 July 2012, *Official Gazette RS*, 67/12. See also in Beširević 2014, pp. 968-969

not form the new government after the elections.[89] The same goes for the proceedings (both abstract review and constitutional complaint proceedings) which concerned reform of the judiciary and re-election of judges,[90] or dealt with prohibition of extreme-right organisation *Obraz*[91] (prohibition of association proceedings).

One of the more recent examples of the delaying strategy is the case concerning constitutionality and legality of the Brussels Agreement.[92] This agreement dealt with relations of Kosovo and Serbia and was reached between Belgrade and Pristina with the facilitation of the EU.[93] Its conclusion was crucial for the EU integrations of Serbia. The challenge raised a number of constitutional issues, including that the Brussels Agreements constituted *de iure* recognition of Kosovo and was unconstitutional as such,, given that the Constitution only accepts the existence of the Autonomous Province of Kosovo and Metohija as part of Serbia.[94]

The government had a major political stake in the survival of the Brussels Agreement, as its adoption and implementation were a precondition for further progress of Serbia towards EU membership.[95] The case attracted a lot of attention in the general public and among experts, and was of considerable political importance, bearing in mind the symbolic and political significance of the Kosovo issue in Serbia. However, the SCC's delivered its decision only when this case was no longer at the forefront of the political debate, almost 2 years after the initiation of the proceedings.[96] The SCC dismissed the challenge on formal grounds as being outside

[89] See decision IUz-231/202 of 3 July 2012, *Official Gazette RS*, 68/12, 27. Parliamentary and presidential elections were held on 6 May 2012, with no party winning the overall majority in the National Assembly. On 20 May 2012, the opposition presidential candidate Tomislav Nikolić won the second round of presidential elections. After it became clear that the Democratic Party, which previously led the government coalition, could not secure parliamentary majority, the president gave the mandate to form the government to the leader of the Socialist Party of Serbia on 28 June 2012, who had the support of the hitherto opposition Progressive Party of Serbia. The above SCC decision was adopted on 3 July 2012, when it was clear who would form the new government. It is interesting that the SCC was not able to take decision on this matter at its previous session held on 19 June 2012 (when it was still unknown who would form the new government), because, according to the SCC press statement, there was not a sufficient majority for the proposal of the justice rapporteur, see Press Release of 19 June 2012

[90] See Beširević 2014, pp. 969-971

[91] Decision of the CC, VIIU-249/2009, 12 June 2012, *Official Gazette RS*, 69/12, p. 89 (hereinafter: *Obraz* Decision). The proceedings were initiated on 25 September 2009

[92] Conclusion of the CC, IUo-247/2013, 10 December 2015, *Official Gazette RS*, 13/15, p. 9 (hereinafter: *Brussels Agreement* Decision)

[93] The official title of the agreement is 'First agreement of principles governing the normalization of relations', but it is commonly known as the "Brussels Agreement". It was initialled on 19 April 2013 in Brussels. The text was made out in two copies, one initialled by Serbian Prime Minister Dačić and EU High Representative for External Relations Ashton, another by Kosovo Prime Minister Thaçi and Ashton. Despite its official title, the agreement primarily deals with the modalities of integration of Kosovo's northern municipalities with an ethnic Serb majority into Kosovo structures, viz. establishment and competences of an Association of Serb majority municipalities in Kosovo, as well as the integration of north Kosovo's police and judiciary into Kosovo's institutions.

[94] *Brussels Agreement* Decision, p. 9.

[95] For the political incentives and motives to reach an agreement, see Papić 2015, pp. 257-265

[96] Papić and Djerić 2016, p. 35, fn. 181

its jurisdiction, with questionable reasoning[97] by a majority of eleven to four justices.[98]

A possible explanation for this practice may be that the timings of described rulings were a pure coincidence given the fact that the SCC is overburdened with cases, while it usually takes two to three years to render a decision, which is also a timeframe roughly corresponding to the change of political majorities due to periodic election cycles. However, there were simply too many important cases in which the rulings were issued only when the political majority changed or was certain to change. Moreover, the existence of an intentional delaying strategy is implied in a statement by the then SCC president in February 2011, at the time when he assumed his office. He pledged to introduce a "work programme", "that would eliminate a possibility for the Court to avoid ruling on hot political cases or wait until issues resolve themselves".[99] In this way, he implicitly admitted that the delaying tactics was something that had occurred in the SCC's practice. But as our analysis shows, the practice has not changed since that time.

Additionally, our analysis of the selected cases shows that the SCC sometimes exercises a *strategy of avoidance*. The avoidance strategy of the SCC was also detected by some of the interviewees.[100] The Brussels Agreement decision may be regarded as an example of this strategy, since the SCC dismissed the case on seemingly procedural grounds, while it simply ignored the opposing arguments. [101]

This same strategy can be found, for example, in some of the decisions concerning prohibition of associations. As the reason invoked for their prohibition was that they violated human rights and caused national and religious hatred,[102] in these cases the SCC had opportunity to articulate its views on the nature of the constitutional system and democratic society in Serbia and thereby contribute to Serbia's democratic consolidation. Yet, the SCC initially disposed of two cases on formal grounds without entering into the substance of the matter. It dismissed the case concerning several groups of militant far-right extremists soccer fans[103] by invoking

[97] See section 2.2.
[98] *Brussels Agreement* Decision, pp. 13, 22
[99] Our translation. See his interview for the daily *Politika* on 6 February 2011
[100] On file with the authors.
[101] See Dissenting op. of Justice Vučić, Brussels Agreement Decision , p. 32. See also See Dissenting opinion of Justice Stojanović, Brussels Agreement Decision , pp. 23-24; see, also, Zoran Ivošević, *Danas*, 20 April 2014
[102] Prohibition of an association may be requested by the public prosecutor, Government or by the agency maintaining the register of associations, see Law on the Constitutional Court (n. 42), Art. 80. Three of these cases concerned organizations of militant far-right nationalists (*Obraz* Decision, while one involved groups of militant soccer fans who were also far-right extremists. Decision of the CC, VIIU-482/2011, 14 November 2012, *Official Gazette RS*, 6/13, pp. 4 and 12 (hereinafter: *1389/Naši* decision). The proceedings were initiated on 18 October 2011. Decision of the CC, VIIU-171/2008, 2 June 2011, *Official Gazette RS*, 50/11, p. 320 (hereinafter: *Nacionalni stroj* Decision). The proceedings were initiated in 2008. For the latter, see Conclusion of the CC, VIIU-279/2009, 17 March 2011, *Official Gazette RS*, 26/11, p. 68 (hereinafter: *Soccer fans* Decision). The proceedings were initiated on 16 October 2009. In the fifth case, concerning association *1389* (*Pokret 1389)*, the public prosecutor withdrew its request and the proceedings were terminated, see SCC's ruling (*rešenje*), VIIU 250/2009 of 2 November 2011
[103] *Soccer fans* Decision

procedural grounds that the associations or groups in question were not registered, while in another case (*Nacionalni stroj*) it declared that the organization was prohibited by the Constitution itself as a secret organization, so it did not have jurisdiction to ban.[104] Only in two later decisions, the SCC made an attempt to deal with the substance of the matter. The first decision (which it took the SCC three years to render) concerned a far-right organization *Obraz*. There, the SCC for the first time banned an organization. In its analysis, the SCC took into account not only the effect of previous state measures to combat extremism, but also the social and political context of the case, in particular the fragile nature of Serbia's democratic society and recent history.[105] But soon afterwards, in another decision, which concerned another far-right organization, the court took a quick step back, rejected the request, and completely ignored these considerations.[106]

2.1.1. Activism vs. Restraint

In its deference to the political majority in power and its interests, the SCC predominantly acts with *judicial restraint*, rather than being an activist court. This has also been noted in a study by Beširević,[107] and is the view shared by most interviewees.[108]

In this respect, the SCC remains firmly embedded in the Serbian judicial tradition, which does not have any record of judicial activism. The impact of the Serbian judicial tradition is expected, as one third of the SCC's justices came from the judiciary. This impact is also visible in the SCC's formalism and poor quality of its decisions (see below), which are widespread in the practice of regular courts.

Rare instances of the SCC's judicial activism may be found in the cases that focused on issues related to Serbia's fulfilment of the political criteria for EU membership, namely respect for human rights and representative democracy.

One such case is the decision on unconstitutionality of the Law on the Local Elections, which gave political parties excessive control over councillors,[109] by enabling the parties to arbitrarily appoint them instead of following the order of candidates in electoral lists.[110] The same provision existed in the Law on Election of

[104] *Nacionalni stroj* Decision, *supra* n. **Error! Bookmark not defined.**. The contentious issue in this case was whether the SCC had jurisdiction to rule on secret organizations, which were prohibited by the Constitution itself; for a negative view see dissenting opinion of Justice Vučić, ibid, whose arguments are repeated by Petrov 2013, p. 216

[105] *Obraz* Decision

[106] See *1389/Naši* Decision

[107] On the basis of the analysis of different decisions than the ones which were analysed in detail for the purpose of this paper. Namely, the decisions on the emergency regulations, decentralization (autonomy of Vojvodina) and judicial reform. See Beširević 2014, pp. 966-971. She also analysed the cases concerning prohibition of certain associations that we also analysed in detail, see ibid, pp. 974-976

[108] On file with the authors.

[109] Decision of the CC, IUz-52/2008, 21 April 2010, *Official Gazette RS*, 34/10, p. 38 (hereinafter: Decision *LLE*)

[110] See Art. 43 of the Law on the Local Elections, *Official Gazette RS*, 129/07

National Deputies with respect to national deputies,[111] and was also struck down as unconstitutional by the SCC.[112] The repealed provisions were of considerable importance not only for the ruling majority but for all political parties.[113]

Furthermore, the Law on the Local Elections provided that a councillor and the political party (which submitted the election list on which the councillor was elected) could enter into a written agreement on the basis of which the political party could tender resignation to the office instead of the councillor (so-called blank resignations).[114] While there was no corresponding provision in the Law on the Election of National Deputies, the practice of blank resignations existed in the Serbian Parliament since 1990s.[115] The Constitution itself provides, with respect to national deputies, that they are free to place their mandate at the disposal of the political party on whose lists they were elected.[116] Importantly, the legislative provisions were subject to considerable criticism from the EU,[117] while their constitutional counterpart was criticized by the Council of Europe's Venice Commission.[118]

With reference to broader principles of democracy and the rule of law, the SCC decided to strike down these electoral legislation provisions. There, the Court not only implemented European standards of democracy but its decision was in line with the position taken by the EU, which presumably made it more comfortable when going against the political majority.[119] On its part, the political majority complied with the decision, probably because the goal of EU membership was more important to it than the (repealed) electoral rule.

Instances of judicial activism can also be found in decisions rendered under the constitutional complaint competence of the SCC. An example is the SCC's decision on the rights of transgender persons, in which it ruled on the action of administrative authorities although the constitutional complaint was not filed against them, but against the omission of the National Assembly.[120] In this instance, the SCC

[111] See Art. 84 of the Law on the Election of National Deputies, *Official Gazette RS*, 35/00, 69/02, 57/03, 72/03, 18/04, 85/05 and 101/05

[112] Decision of the CC, IUp-42/2008, 14 April 2011, *Official Gazette RS*, 28/11, p. 22 (hereinafter: Decision *LEND*)

[113] In-depth analysis of these decision is Papić and Djerić 2016, pp. 26-33

[114] See n 110

[115] See Nenadić 2008, pp. 8 and 13. The election law in force from 1992 and 1997 secured political parties' control over deputies by providing broad grounds for the termination of their mandate, so 'blank resignations' became obsolete. After the SCC ruled these grounds unconstitutional in 2003, 'blank resignations' came back into fashion in the National Assembly. See more in ibid, p. 13

[116] Article 102(2). This provision was a reaction of parliamentary political parties to the 2003 decisions of the SCC, which had annulled certain provisions of previous electoral legislation as unconstitutional because they provided for overbroad grounds for the termination of the mandate. See Marinković2012, p. 138. On Art. 102(2) see also Marković 2006, pp. 16-17. One of the justices (Nenadić), claimed that it would be best if Art. 102(2) remained dead letter until the first constitutional amendments since it was hard to reconcile it with other provisions and the spirit of the Constitution. See Nenadić 2008, p. 20

[117] Serbia Progress Report 2010, p. 7.

[118] European Commission for Democracy Through Law (Venice Commission) 2007, paras 53 and 106, respectively

[119] See n 117

[120] Decision on constitutional complaint, Už-3238/2011, 8 March 2012, *Official Gazette RS*, 25/12 (hereinafter: *Transgender Decision*)

transformed itself into a positive legislator by adopting an interpretation, based not on the text of law but on analogy with other applicable provisions, which provided a legal basis for administrative authorities to process requests for changes in the birth registry due to sex reassignment (which was not explicitly provided in the Law on the Personal Registries). Further, the SCC went beyond the text of the Constitution when it ruled – relying on the ECtHR's jurisprudence – that the constitutional guarantee of the right to dignity and free development of individuals[121] also protected the right to privacy and family life, which was not expressly mentioned in the constitutional text.[122] In this case, there were no direct political interests involved, so the impression is that the SCC could rule without constraints. At the same time, this ruling implemented the applicable European human rights standard, thereby furthering the cause of integration into the EU.

2.2. Quality of the Decisions

Analysis of the SCC cases reveals that its reasoning is frequently formalistic and mechanical (this was also mentioned in the interviews[123]), in the way that conclusions are simply drawn from given premises with very little, if any, discussion that would explain the logical steps taken by the court. Such approach results in poor quality of the decisions. Only in rare cases does the SCC offer a clear line of legal arguments followed by a clear conclusion.[124] Formalism and insufficient legal reasoning of decisions are common in ordinary courts in Serbia, which reiterates the point already made: the SCC belongs to the judicial tradition in Serbia.

The clear example of formalistic and mechanical reasoning is the Brussels Agreement decision. There the SCC mainly relied on purely textual interpretation of the Constitution and simplistic application of the Vienna Convention on the Law of Treaties (hereinafter: VCLT),[125] to conclude not having jurisdiction to assess its constitutionality. The SCC reasoned in this sequence of steps: starting from the definition of international treaties in article 1 of the VCLT it concluded that an international treaty is an agreement between states – Kosovo is not a state – thus, the Brussels Agreement is not an international treaty – if the Brussels Agreement is not an international treaty, then it is a political agreement – consequently, the SCC does not have jurisdiction to assess its constitutionality. This reasoning is highly dubious from the point of international law.

First, even if the Brussels Agreement were not an international treaty within the meaning of the VCLT, it would not necessarily follow that it was a political agreement, as the VCLT itself also recognized the existence of international legal agreements other than international treaties, including with subjects of international

[121] Constitution (n 13), Art. 23
[122] *Transgender* Decision, p. 32, para 6
[123] On file with the authors.
[124] The example is *Transgender* Decision (n 120)
[125] Entered into force on 27 January 1980, United Nations, Treaty Series 1987, p. 331

law other than states.[126] The nature of the Brussels Agreement, as set by the rules of international law, had to be decided on the substantive analysis of its content,[127] which the SCC failed to do.

Second, the SCC's conclusion that Kosovo is not a state, due to the fact that Serbia never recognized it as such, collapsed the notions of recognition and statehood, which are related but clearly separate.[128] Moreover, this reasoning immediately raised the question what to do with another fact – that many states recognized Kosovo as an independent state. The SCC tried to resolve this issue by stating that Kosovo was not a state *in relation* to Serbia. This means that not only recognition, but also the existence of statehood of an entity, becomes a bilateral affair between that entity and the recognizing state. Moreover, such reasoning leads to absurd results: e.g., multilateral treaty to which Kosovo would be a party, would be international treaty in relations between Kosovo and recognizing states, and political agreement in relations between Kosovo and non-recognizing states.

Furthermore, the SCC failed to respond adequately to or even to mention the arguments of those holding opposing views, despite the fact that these views were voiced at the public hearing and in submissions to the Court.[129] Such an approach leaves the impression that the SCC chooses to ignore such arguments because it does not have a response to them, which might undermine the legitimacy of its decisions and reasoning. At the same time, the SCC reproduced, as its own and only with minimal changes, parts of the opinions of those (international law) experts that were in line with its reasoning, in particular, that of an academic who was also the chief legal advisor in the Serbian foreign ministry.[130] This gave rise to accusations about the court's deference to the government.[131]

Another example of formalistic and poor reasoning can be found in the SCC's decisions on requests to ban extremist associations, which offered rather inconsistent and contradictory approach towards the issue.[132] Despite contradictions, these decisions share a convoluted language and obscure reasoning.

The decisions on ban of extremist organization attracted considerable scholarly attention[133] with abundant references to the concept of "militant democracy".[134] However, the SCC did not show any interest in the relevant theoretical concepts. It also failed to consider practice of the ECtHR, which recognized that a state is entitled to take measures to protect itself in order to

[126] Ibid, Art. 3
[127] Ibid, Art. 31-32, which reflect customary rules of interpretation of international instruments.
[128] According to Crawford, '[t]he conclusion must be that the status of an entity as a State is, in principle, independent of recognition…' Crawford 2006, p. 28
[129] The dissenting justices described this as powerlessness of the SCC's majority to deal with their arguments. See Dissenting op. of Justice Vučić, Brussels Agreement Decision , p. 32
[130] See ibid and Dissenting op. of Justice Stojanović, Brussels Agreement Decision , p. 25
[131] See Dissenting op. of Justice Stojanović, *Brussels Agreement* Decision, p. p. 25. Also, for a hint about the SCC's deference to the Government, see Dissenting op. of Justice Vučić, ibid, p. 32
[132] See also Marinković 2012, p. 1634
[133] See, e.g., Beljanski 2013; Marinković 2013; Petrov 2013
[134] See Marinković 2013, pp. 1603-1604; Beširević 2014, pp. 153-155. On the concept of militant democracy, see Capoccia 2013, p. 208

guarantee the stability and effectiveness of its democratic system.[135] All of this is also indicative of the SCC's lack of interest in developing a legal doctrine in its jurisprudence, which was also pointed out the interviews.[136]

A positive feature of the decisions of the SCC is the fact that they frequently include references to the ECtHR jurisprudence.[137] Such a practice of the SCC gives an important stimulus for the application of the European human rights standards before domestic courts in Serbia. However, the application of the ECtHR jurisprudence has not been systematic.[138] There have been both cases in which the SCC followed[139] and cases in which it ignored the jurisprudence of the ECtHR.[140]

2.3. Effects of the SCC's Rulings

There is no mechanism that would monitor implementation of the SCC's decisions. Moreover, there is no reliable statistical data on compliance with them, and it appears that the court does not collect information about it.

Impressions about the compliance with the SCC's decisions seem to differ. While in 2012 the then president of the SCC stated there were no particular problems in this regard,[141] expert observers and some justices[142] claimed that the SCC decisions were frequently not implemented.[143]

A useful indicator of the attitude towards the SCC decisions may be its communications to the National Assembly. Namely, the National Assembly rarely replies to the SCC's requests to respond to the constitutional challenges to legislation.[144] The same goes for the SCC's letters to the National Assembly which are sent when the SCC, in the course of its work, identifies the need to make certain changes or fill lacunae in the existing legislation.[145] Moreover, there were instances in which the National Assembly was in fact acting against the recommendations and decisions of the SCC,[146] adopting provisions were the same substance as those previously annulled by the court.[147]

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[135] *Ždanoka v Latvia* (2006), para. 100; *Refah Partisi v. Turkey* (2003) , para. 100

[136] On file with the authors.

[137] See section 1.3.

[138] As noted by Beširević and Marinković 2012, pp. 428-429

[139] See *Transgender* Decision, p. 32, para 6, see also cases mentioned in Beširević and Marinković 2012, pp. 409-413

[140] As was in the cases concerning prohibition of citizens' associations. Papić and Djerić 2016, pp. 46-48. See also Beširević and Marinković 2012, pp. 417-422

[141] *Politika*, 10 July 2012

[142] See Nenadić 2012, p. 67. This was also noted in the interviews with two justices of the SCC (on file with the authors).

[143] More than a third of our interviewees had such a claim. On file with the authors. See also *Danas*, 1 August 2011

[144] This was also noted in the interviews. On file with the authors.

[145] It did so more than sixty times in recent years. Kartag-Odri 2014, p. 212

[146] For example, the amendments to the Act on Pension and Disability Insurance and to the Act on the Execution of Criminal Punishments were adopted without taking into account the recommendations of the SCC. See Petrović (ed.) 2014, p. 84

[147] This was the case with the provision of the Law on Privatization, which was described in detail in the interview with the opposition MP. Another interviewee, a former president of the SCC, also pointed out such practice of the National Assembly. On file with the authors.

Nevertheless, the SCC has not been ready to consider taking additional steps in these cases. In this way, the Court has not only demonstrated a passive attitude towards the National Assembly and political actors, but has signaled that it is prepared to play only a very limited role in the legal and political life of the Serbian society.

2.4. Perception of the Work of the SCC

The general public seems to view the SCC as irrelevant, as was mentioned in some of the interviews.[148] There are no publicly available opinion polls that could corroborate these impressions. However, this can be indicative in itself. Opinion polls in Serbia routinely include questions about ordinary courts, the executive and the Parliament, or other institutions that the Serbian public holds dear (e.g. the Serbian Orthodox Church) or in contempt (e.g. International Criminal Tribunal for the Former Yugoslavia). The fact that the SCC does not even appear in opinion polls speaks a lot about its relevance in Serbia.

There is an additional issue pertaining to the public perception of the SCC, which is a question of the transparency of its work.[149] The SCC is under an obligation to publish its substantive decisions, except decisions on constitutional complaints, which are published only if they are deemed to be of "broader importance" for the protection of constitutionality and legality.[150] In such cases, the SCC may also publish its procedural and admissibility decisions.[151] It is unclear, however, on the basis of which criteria the SCC (or its staff) decides which constitutional complaints or procedural decisions are of broader importance for the protection of constitutionality and legality.[152] Furthermore, the public has been excluded from the regular sessions of the SCC since 2009, except in cases when a contested general act or constitutional issues are of broader importance for the society.[153] This resulted in numerous media reports in which the SCC was portrayed as a non-transparent institution.[154]

Also, the SCC has a poor outreach strategy and it mainly communicates with the public through short press releases posted on its website.[155] As for the SCC's decisions, they are published on the website (and in the Official Gazette), but their accessibility and research are hampered by a technicality – an unsophisticated search tool. All this undermines the SCC public outreach policy and the transparency of its work .

[148] One attributed this to the inefficiency of the CC. On file with the authors.
[149] This was also mentioned in the interviews. On file with authors.
[150] Law on the CC (n 42), Art. 49(2)
[151] Ibid
[152] See more Papić and Djerić 2016, p. 20
[153] Ibid, p. 21
[154] Ibid
[155] On file with the authors.

2.5. Factors that Impact the Role and Positioning of the SCC

The key factors that impact the position and the role of the SCC are both internal and external.

The main *internal factor* is the justices' election/appointment procedure and the personal composition of the Court. As has previously been shown, the expertise and independence of the candidates were not the main considerations in the selection process, which was, moreover, conducted non-transparently. This certainly had an impact on the court's composition and, consequently, on its work. Moreover, it had a negative effect on the legitimacy and the authority of the SCC.

At the same time, this makes the Court and its justices individually more susceptible to *external factors*. The first of these is the incumbent political majority. The tradition of conformism, coupled with the not-so-stellar independence and expertise of most of its justices contribute to the SCC's deference to the incumbent political majority. This also explains why deference and lack of activism are related to any incumbent majority, while the SCC is much more "active" with respect to the legislation adopted by the former or outgoing governments. From this angle, the SCC's delaying strategy appears to be primarily directed at avoiding clashes with the incumbent political majority (as long as it is in power) and not so much at avoiding "hot" political issues due to a coherent philosophy of judicial restraint. This point is also confirmed by the fact that the SCC was nevertheless prepared to rule on contested political issues when it could secure the support of the political majority.

This is also the reason why we have excluded apoliticism, as one of the internal factors influencing the role of the SCC. There are rightful claims that the concept of apoliticism[156] is deeply entrenched among justices in Serbia.[157] As such it can be viewed as an internal factor influencing the role of the SCC, operating as an inhibitor for its active role in the process of democratic consolidation. While we concede that, in principle, apoliticism can insulate the court from the politics, we consider it irrelevant when there is deference of the Court to political majority, which neutralizes possible effect apoliticism can have on the role of the Court. Moreover, very deference toward political majority makes the court political, regardless of the extent of the apolitical pledges its justices make.

The second external factor affecting the rulings of the SCC is the perceived interest of Serbia's accession to the EU. It is noted that in cases which raise issues related to human rights and democracy, especially if these issues have been identified by the EU as relevant in the process of Serbia's accession to this organization, the SCC becomes more activist and somewhat less deferential to the political majority. However, since support for Serbia's EU accession is a common denominator behind the broadest political majority in Serbia (which since 2008 encompasses not only the

[156] On this factor in Chile, see Hilbink 2007
[157] See also Beširević 2014, pp. 971-973

governing majority but also large parts of the opposition[158]) this activism may also be viewed as deference to a 'broader' political majority.

The third external factor influencing the work of the SCC is the ECtHR. As noted earlier, the SCC relies on the Strasbourg jurisprudence, which makes an important positive contribution to the work of the SCC, although the way in which this is done is not always consistent and appropriate.

3. CONCLUDING REMARKS

The Court established under the 2006 Constitution has faced institutional deficiencies from the very beginning. Its input legitimacy is weak due to the non-transparent process of selection of justices and disregard for the selection criteria. But this did not have to be detrimental for constitutional justice in Serbia, as it could have been offset by the performance of the SCC itself. Unfortunately, this has not happened. While the polarized political setting in Serbia provides an opportunity for the SCC to shape the process of democratic consolidation, its deference to the political majority in power and, in particular, the delaying and avoiding strategies it employs, mean that the SCC plays a very limited role in the democratic process and has a very modest impact on the outcomes of that process. Illiberal and communitarian polity setting in Serbia also presented an obstacle to the SCC using this possibility to play a different role.

The perceptions of the SCC by the general and expert public also reveal that it lacks both sociological and normative legitimacy. Moreover, the output legitimacy of the SCC measured by the consequences of its decisions in respect to the dominant political values in Serbian society is close to insignificant.

Accordingly, the SCC's role in, and impact on, the consolidation or, generally, social transformation in Serbia have been extremely limited. Only in cases whose resolution would further the goal of Serbia's integration to the EU, such as the cases concerning electoral laws, did the SCC demonstrate a more active approach. In this way, it somewhat helped consolidation towards the European standards of human rights and democracy. But even in these cases, it played a safe card because it acted in the furtherance of the shared goal of the larger political majority, comprising the government and large parts of the opposition – that is, Serbia's accession to the EU. Thus, one can claim that the SCC paradoxically remained a majoritarian device even when it exercised judicial activism and went against a specific position of the ruling majority and its imminent interests because it was not opposed to the latter's general and long-term interest in EU integrations to which it differed.

[158] All Serbian governments since 2001 have supported accession to the EU. Since the split of the Serbian Radical Party and the creation of the Serbian Progressive Party over the question of support for the Association and Stabilization Agreement with the EU in 2008, most of the opposition has also been pro-EU. Since 2012, the Serbian Progressive Party has been the main party in the government coalition, which continues to be pro-EU, while the Democratic Party, which previously led the government, is in opposition.

Finally, the fact that the SCC is more likely to go against the governing political majority when the interests of the "broader" majority in EU integrations are at stake (as was the case with the decision on electoral legislation) may give the impression that its contribution to the consolidation is substantial. However, this would be a premature conclusion. When one considers the public perception of the SCC and the effects of its decisions in general, it appears that even those rare decisions have had only a very limited effect. This is illustrated by the fact that, in the aftermath of the SCC decisions striking down legislative provisions on the appointment of deputies and municipal councillors, not a single political actor pointed to these decisions as requiring amendments to the electoral legislation – instead, they all indicated that the amendments were necessary due to the findings of the EU Commission.