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The Role of the Constitutional Court of Serbia in the Times of Transition

Tatjana Papić and Vladimir Đerić

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Introduction

This paper explores the role of the Constitutional Court of Serbia (hereinafter: CC) in the process of democratic transition in Serbia, examining the impact of the CC's decisions on the development of democratic society. It is written within the framework of the research project 'Courts as Policy-Makers? Examining the Role of Constitutional Courts as Agents of Change in the Western Balkans'.[1] Specifically, it considers the CC's impact on democratic transition after the adoption of the 2006 Constitution of Serbia.

There are several reasons for choosing this time frame. Although Serbia adopted a new Constitution and held its first multiparty elections in 1990 (as part of the former Yugoslavia), the decade that followed was marked by the authoritarian rule of Slobodan Milošević. Democratic transition started in earnest only when the Milošević regime was deposed on 5 October 2000. The 1990 Constitution was replaced by a new one in 2006.[2] The 2006 Constitution envisaged a constitutional court with a different composition and competences than that under the 1990 Constitution. Although there is institutional continuity between the two constitutional courts, it seems justified to focus on the new court in the light of these changes, particularly because the present study is not only a study of the court's case-law but also a case study of the court itself. Moreover, in the period between the democratic change of 2000 and 2008 (when the CC was constituted and began to function under the 2006 Constitution), the court had long periods of inactivity.[3] It is also not without significance that, in 2006, Serbia as a state found itself outside the (con)federal frameworks of which it was previously part (the former Socialist Federal Republic of Yugoslavia, Federal Republic of Yugoslavia

1 Supported under the Regional Research Promotion Programme for Western Balkans 2014-2016 of the Swiss Agency for Development and Cooperation SDC and University of Fribourg.

2 *Official Gazette RS*, 98/06. The 1990 Constitution was subject to much criticism, including that it provided a blueprint for Milošević's authoritarian regime; see Lidija Basta et al, *Ustavne pretpostavke za demokratsku Srbiju* [Constitutional Preconditions for a Democratic Serbia] (Belgrade Centre for Human Rights 1997), 8-9. 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 Zoran Lutovac, (ed), *Predlozi za novi ustav Srbije* [Proposals for New Constitution of Serbia] (Friedrich Ebert Stiftung 2004). However, the 2006 Constitution was adopted hastily, without substantial public debate, which is also reflected in the poor quality of some provisions; see European Commission for Democracy Through Law (Venice Commission), 'Opinion on the Constitution of Serbia', CDL-AD(2007)004 (19 March 2007), paras. 4-5, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e> accessed 15 May 2015. The 2006 Constitution was adopted in the procedure for constitutional change under the 1990 Constitution.

3 See notes 20-21 *infra*.

(Serbia and Montenegro) and the State Union of Serbia and Montenegro). For all these reasons, this paper will primarily focus on the CC formed under the 2006 Constitution and its performance and impact on the still on-going democratic transition in Serbia.

In that respect, we are particularly interested to see if and to what extent the CC exercised judicial activism, as set by the joint analytical framework of the research project,[4] which adopts value neutral position towards the notion of judicial activism. Accordingly, the paper relies on the notion of judicial activism suggested by Wojciech Sadurski – as the action in which constitutional courts alter the preferences of the parliamentary majority or depart from the views of the constitution makers[5] in cases that pertain to fundamental political choices on central public issues.[6] Thus, judicial activism implies a setting in which there is a collision between the views of the political majority and the court on the articulation of the meaning of a constitutional provision and a possibility for the court to either uphold or strike down the view of the majority embodied in a legal provision.[7] The paper also follows Sadurski's criteria for the inquiry into judicial activism: (1) the importance of the invalidated law and (2) the nature of the reasoning leading to such invalidation.[8] These criteria lead us to focus on abstract constitutional review cases before the CC, and for this reason our analysis does not deal in detail with individual constitutional complaint cases. However, we do consider cases concerning the prohibition of associations, because they have raised questions that are important in the context of transitional democracy. This reflects our general approach of focusing on cases that concerned controversial political issues in Serbia, and also raised issues related to the country's compliance with European standards of parliamentary democracy and human rights, since democratic transition is a process that brings a country in conformity with these standards.[9]

Moreover, we considered the impact of internal and external factors on the performance of the CC in general and in the context of the cases we selected for analysis. Broadly speaking, internal factors relate to the institutional design of the CC, in particular its competences and the selection and position of its judges.

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4 See n 1.

5 Wojciech Sadurski, 'Postcommunist Constitutional Courts in Search of Political Legitimacy' (2001) European University Institute Law Working Paper No. 2001/11, 27 <http://law.wustl.edu/harris/conferences/constitutionalconf/Constitutional_Courts_Legitimacy.pdf> accessed 25 May 2015.

6 ibid 27-28 and Wojciech Sadurski, *Rights before Courts – A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd ed, Springer 2014) 131.

7 ibid 131.

8 ibid.

9 For more, see section 2.1.

External factors relate to political and social factors influencing the work of the CC in general and its decisions in the selected cases.[10]

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.[11] Further, they integrate findings from semi-structured interviews with sixteen relevant actors and observers,[12] academic writings discussing the performance of the CC and media reports on the implementation and reception of the CC's rulings.

The first part of the paper deals with the CC's institutional structure. It provides an overview of its composition (including the procedure for selection and eligibility criteria for its judges) and competences. This chapter also contains an account of other constitutional and legal provisions relevant for the work of the CC (i.e. those pertaining to guarantees of judicial independence, decision-making and transparency). On the basis of these we will provide a setting in which the internal factors influencing the performance of the CC and its input legitimacy[13] can be assessed. Further, we provide a summary of the output of the court, i.e. the statistics of its work, in order to provide a fuller picture of the extent and nature of its activity.

The second part explores how the CC dealt with selected cases that involved thorny constitutional and political issues. It analyses these decisions in an attempt to identify and evaluate the approaches and strategies employed by the CC in deciding the cases under consideration and the quality of the reasoning offered in the decisions. In this part we also try to ascertain the impact, if any, of various factors affecting the role and performance of the CC during democratic transition in Serbia. Finally, we discuss the effects of these CC decisions by assessing their implementation and the reactions they received from the general public, politicians and experts. On the basis of such an analysis, we will be able to assess the legitimacy of the CC in sociological and normative terms.[14] While the former reveals actual respect of the CC by the general public, the latter concerns the independence of judgment, reasonableness and consistency of the CC in the

[10] As set in the Project's (n 1) framework.

[11] i.e. Progress Reports on Serbia issued by the Venice Commission.

[12] These included eight academics, three CC 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.

[13] Wojciech Sadurski, 'Constitutional Courts in Transition Processes: Legitimacy and Democratization' (2011) Sydney Law School Legal Studies Research Paper 11/53, 4-5 <http://ssrn.com/abstract=1919363> accessed 20 February 2015.

[14] ibid 2-3.

eyes of independent expert observers.[15] Moreover, we provide an insight into the CC's output legitimacy that pertains to the results of court's work. These will be evaluated on the basis of the consequences of decisions of the CC in respect to dominant political values in the society.[16]

On the basis of this analysis, we hope to be able to provide, in the third part of this article, findings on the positioning, legitimacy, and overall performance of the CC in 'times of transition', to be followed by our concluding remarks.

[15] ibid 3.

[16] ibid 5.

1.

The Institutional Setting of the Constitutional Court of Serbia

Constitutional courts were introduced in the Yugoslav federation and in its respective republics in 1963 by the federal and republican constitutions. Until the end of the 1980s, the Constitutional Court of Serbia, along with its counterparts, did not play a significant role in resolving constitutional disputes.[17] The CC became more active in the period after the adoption of the constitution of Serbia in 1990, but without any real impact. Insiders observed that during the 1990s the court showed willingness to compromise and reluctance to use its powers, especially in cases that were politically or economically important for the regime of Slobodan Milošević.[18] For example, the CC decided about the constitutionality and legality of a large number of decrees adopted by the government while the National Assembly was dissolved, only after these decrees were no longer in force.[19]

After the democratic changes in Serbia in October 2000, the CC underwent a period of institutional instability with long periods of inactivity. From February 2001 to June 2002, it was prevented from working as there was no quorum for making decisions because the National Assembly failed to elect replacements for judges who retired.[20] Again, when the CC's president retired in 2006 and was not replaced by the National Assembly, the remaining judges took the position that no one but the president could convene a session, so the court's work was effectively suspended until early 2008.[21]

In the meantime, a new constitution was adopted in Serbia on 8 November 2006,[22] introducing major changes in the composition of the court and endowing

[17] For an assessment of the role of constitutional courts in the former (Socialist) Yugoslavia, see Matej Acceto, 'On Law and Politics in the Federal Balance: Lessons from Yugoslavia' (2007) 32 Review of Central and East European Law 191, 207-215.

[18] See Svetozar Čiplić and Ljiljana Slavnić (eds), *Ustavni sud Srbije: četrdeset godina postojanja* [Constitutional Court of Serbia: Fourty Years of Existence] (2003), 28, and, generally, 27-30. Ms Slavnić was on the court's staff and later its secretary.

[19] ibid 28.

[20] ibid 30. See Violeta Beširević, 'Governing without Judiciary: The Politics of the Constitutional Court of Serbia' (2014) 12 International Journal of Constitutional Law 954, 964, note 42.

[21] See Momčilo Grubač, 'Constitutional Judiciary in Serbia' in Violeta Beširević (ed), *Public Law in Serbia: Twenty Years After* (Esperia Publications 2012), 87-88.

[22] Constitution (n 2).

it with new competences which are discussed below. A 'new' CC was constituted in 2008, following the procedures set out in the 2006 Constitution.[23] From that moment onwards, the CC became more active and its work more visible to the public. This is probably due to several factors. First, the CC was able to work in continuity and, as such, it was unavoidable that various constitutional disputes would end up before the court. Also, the 2006 Constitution broadened its jurisdiction to include constitutional complaints by individuals, which raised its visibility among practicing lawyers and ordinary people.

1.1. Composition

Under the 2006 Constitution, the CC is an autonomous and independent state body, which protects constitutionality and legality as well as human and minority rights and freedoms.[24] It is composed of fifteen judges with a mandate of nine years, which may be renewed once.[25] The judges elect the president of the CC among themselves for a period of three years.[26]

1.1.1. Selection of Judges

The Constitution provides for a hybrid system of selection of the CC's judges, wherein two thirds of the judges of the CC are *appointed*, while one third is *elected*.[27] All three branches of government take part in the process of the selection: five constitutional court judges 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

[23] This also took considerable time, see section 2.1.1.

[24] Constitution (n 2) Art. 166.

[25] ibid Art. 172(1) and (6).

[26] ibid Art. 172(6).

[27] ibid Art. 172(2).

and the State Council of Prosecutors.[28] Each list of candidates must include one candidate from each autonomous province.[29]

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.[30]

The procedure and criteria for the selection and nomination of judges of the CC have not been regulated in detail either by the Constitution or by the Law on the Constitutional Court.[31] This has left the selecting bodies with broad discretion over the process for their selection of constitutional court judges.

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 judges. For this reason, the CC worked with only ten judges from 2008, when it was constituted, until 2010, when the remaining five judges were appointed.[32]

Moreover, the process of nomination and selection of judges for the CC was conducted in a non-transparent procedure wherein substantial criteria for election/appointment were largely neglected. The following account of such practices is based on the evidence provided in a book by the CC judge and former president, Bosa Nenadić.[33]

The selection of candidates had not been conducted through any contest, so it remained unclear how the candidates were chosen for nomination by the three nominating bodies.[34] For example, the National Assembly drafted its

[28] ibid Art. 172(3). This mirrors the procedure for the election of judges of the Italian Constitutional Court. It should be noted that the Supreme Court of Cassation decides on the nominations for 5 constitutional court judges put forward by the High Judicial Council, which, in turn, elected the judges of the Supreme Court of Cassation and, furthermore, decides on the promotion of judges, their accountability, termination of their office etc. This procedure was criticized by some commentators, for more see Bosa Nenadić, *O jemstvima nezavisnosti ustavnih sudova – sa posebnim osvrtom na Ustavni sud Srbije* [On Guarantees of Independence of Constitutional Courts – with a Special Reference to the Constitutional Court of Serbia] (Službeni glasnik 2012) 92, fn. 163.

[29] Constitution (n 2) Art. 172(4). These are designated by the Constitution as Vojvodina and Kosovo and Metohija (Art. 182(2)). This was interpreted as a requirement for candidates to have a residence on the territory of the autonomous provinces in the moment of the nomination and appointment/election. See Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 88-89. On this issue there was a dispute between the Constitutional Court and the Supreme Court of Cassation in 2010 in respect of the fulfilment of this requirement in a case of the appointment of one of the judges. See more in ibid 89, n 157.

[30] Constitution (n 2) Art. 172(5).

[31] *Official Gazette RS*, 09/07, 99/11, 18/13 (decision of the CC), 40/15 and 103/15 (hereinafter: Law on the CC).

[32] See Ana Jerosimić (ed), *Human Rights in Serbia 2007* (Belgrade Centre for Human Rights 2008) 106-107 and Vesna Petrović (ed), *Human Rights in Serbia 2010* (Belgrade Centre for Human Rights 2011) 21.

[33] Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28).

[34] This practice has existed since the establishment of the constitutional judiciary in Serbia. Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 102.

nomination list in the following manner: party groups proposed an agreed number of candidates, out of which the speaker compiled a list of ten candidates for nomination and put each name from that list to a vote by the National Assembly.[35] This list was then sent to the president, who appointed five constitutional court judges from the names on the list. During the nomination procedure in the National Assembly, only the party groups, not the individual deputies, could propose candidates for nomination.[36] Thus, the National Assembly in fact just confirmed the nominees proposed by the political party groups and compiled by the speaker, without any formal process of selection and without providing any criteria or reasons for the selection of individual candidates, and without holding a public hearing on the candidates. Thus, as noted by Nenadić, the National Assembly simply confirmed the nominees, instead of selecting them.[37] In reality, they were selected by the political party groups, i.e. the political establishment, in a completely non-transparent manner and on the basis of unclear or non-existent criteria.

The candidates nominated by the president were also selected in a non-transparent procedure, where the criteria for selection were never revealed. Since there is no information available, one can only speculate that these candidates were probably selected through an unofficial interaction between the presidential office, formal and informal presidential advisors, ministers and party leaders. The rumour goes that the candidates nominated by the president were in fact candidates of his Democratic Party (then the largest in the ruling majority coalition). This rumour is supported by the fact that Democratic Party apparently took no part in selecting candidates for the list of nominations in the National Assembly, which was left to their coalition partners.[38]

It also remains unknown how the process of selection and nomination was conducted in the case of candidates for judges on the list jointly proposed by the High Judicial Council and the State Prosecutor Council. The Supreme Court of Cassation appointed five CC judges from that list by a simple majority.[39] Later on, the independence and impartiality of the judges appointed from that list was put into question by certain complainants in the constitutional complaint proceedings before the CC, because they were 'appointed on the basis of political and other arrangements and criteria'.[40]

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35 ibid 102-103 and 177.

36 ibid.

37 ibid 102-103.

38 ibid 103.

39 ibid.

40 The CC received requests for the recusal of the judges appointed by the Supreme Court of Cassation in the constitutional complaint proceedings initiated by judges and prosecutors who had not been re-elected in the process of the reform of judiciary. See more in Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 103, n 178.

Furthermore, it seems that all the bodies selecting future CC judges neglected the substantive constitutional requirement that the judges must be prominent lawyers.[41] This is illustrated by the reasoning of the decisions on the nomination and election/appointment of candidates which did not contain any standard on the basis of which their prominence was to be established.[42] Routinely, they only included a general observation that the nominated candidates possessed professional and personal qualities that made them suitable for the judgeship in the CC.[43] Also, the nominations, as a rule, were not supplemented with standardized biographical data of the candidates that could show them to be truly prominent lawyers.[44]

The result of such practice was that the composition of the CC raised doubts about the professional standing and expertise of some of its judges.[45] Moreover, the fact that certain lawyers unknown to the general public and within the legal profession had been elected/appointed over their colleagues whose prominence was unquestionable added insult to injury.[46]

The current composition of the CC stands as follows: out of fifteen judges, only one came from the former CC, five from academia[47] and five from the judiciary (two of them were judges of the Supreme Court, three came from lower courts).[48] The remaining four judges lacked any significant judicial or academic background at the time they entered the CC.[49] Out of these four, two became judges of the

[41] ibid 148.

[42] ibid.

[43] ibid. The list of the National Assembly of 24 November 2007 did not even have this statement, but only included the names of the nominees. Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 148, n 267.

[44] ibid 148.

[45] During the election of the candidates (who were nominated by the president) in the National Assembly, some opposition parties claimed that the nominees were not prominent lawyers and did not possess the expertise to be elected to the CC. See more in: 'Tadićevi kandidati uvreda za Ustavni sud?' [Tadić's Candidates an Insult for the Constitutional Court?] *Vesti*, 10 July 2010 <www.vesti-online.com/Vesti/Srbija/64441/Tadicevi-kandidati-uvreda-za-Ustavni-sud> accessed 9 October 2015.

[46] Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 150.

[47] All of them are tenured professors. One was elected by the National Assembly (professor of Family Law), three were appointed by the President (two professors of Constitutional Law and one of the Theory of State and Law) and one was appointed by the Supreme Court of Cassation (professor of Criminal Law). See 'Sudije' [Judges of the Constitutional Court] <www.ustavni.sud.rs/page/view/113-100018/sudije> accessed 13 October 2015.

[48] See ibid.

[49] See ibid accessed 30 June 2015. See also Tanasije Marinković, 'Politics of Constitutional Courts in Democratizing Regimes' in Miodrag Jovanović and Kenneth Einar Himma (eds), *Courts, Interpretation, The Rule of Law* (Eleven International Publishing 2014) 105. See also media reports about alleged involvement of a CC judge in abduction and fraud, 'Slučaj sudije Ustavnog suda Srbije' [The Case of a Judge of the Constitutional Court of Serbia] *Peščanik*, 27 July 2012 <http://pescanik.net/slucaj-sudije-ustavnog-suda-srbije/>; see, also, 'Ima li sudije za sudije' [Is There A Judge for Judges] *Peščanik*, 19 February 2013 <http://pescanik.net/ima-li-sudije-za-sudije/> accessed 24 June 2015.

CC after holding high posts in state administration,[50] while the other two were a former Public Attorney of Serbia and an attorney at law,[51] respectively.

The non-transparent procedure of selection of constitutional court judges, coupled with the neglect of prominence in the profession as the main substantive criterion for the election/appointment, left the general public and legal community with the impression that the future CC judges were close to the political parties, which, in one way or another, placed them on the court.[52] According to academic commentators, political institutions (the National Assembly and the president) 'appointed mostly poorly qualified but "amicable" judges who would not put the politicians' short-term interests at risk'.[53] According to judge Nenadić, the process 'did not secure adequate composition of the Court nor did it strengthen its independence and reputation; instead, it demonstrated the influence of politics, i.e. of other interests, on the selection of judges, and crossed the line that would be tolerable and acceptable in a constitutional democracy based on the rule of law and the Constitution'.[54] It is of equal importance that such a nomination and selection process was likely to result in the selection of certain number of judges whose main quality was that they were connected to the party elite, instead of reflecting their professional qualifications and standing. This, in turn, made them less prone to challenge the political powers in the course of their work.

In conclusion, it is clear that the non-transparent process in which the CC judges were nominated and selected, as well as the neglect for the material criteria of prominence for election/appointment, had a negative effect on the legitimacy of the CC. This was also stressed in most of the interviews, including those conducted with two CC judges.[55] It certainly did not provide a 'fresh start' for the CC once it was constituted under the 2006 Constitution. Of course, this could have been remedied afterwards by the court's performance. Whether this was so will be discussed below.

1.2. Guarantees of Judicial Independence

The constitutional guarantees for the independence of the CC judges are embodied in the provisions on their tenure, immunity, conflict of interest and termination of mandate.

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50 One was assistant minister while the other was a deputy minister and later state secretary. See 'Sudije' (n 47) accessed 12 October 2015.

51 This person was allegedly implicated in cases of abduction and fraud. See media reports 'Slučaj sudije Ustavnog suda Srbije' (n 49) see, also, 'Ima li sudije za sudije' (n 49).

52 See Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 103.

53 See Beširević, 'Governing without Judiciary' (n 20) 973.

54 Our translation. Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 150.

55 On file with the authors.

As mentioned earlier, the mandate of the judges in the CC is nine years and can be renewed once. The tenure of nine years should prevent the influence of changes of political majorities due to periodic election cycles on the composition of the CC and strengthen the institutional independence of the CC and the personal independence of its judges. However, it is doubtful whether the possibility of renewal of their mandate contributes to the same goals. Namely, as there is substantial influence from the political parties on the selection of candidates, the possibility that the mandate of the sitting judges of the CC may be renewed could mean that their reasoning and decision making will be more driven by the need to satisfy those who will re-elect/re-appoint them than by interest in the protection of the Constitution.[56]

The Constitution provides immunity for the judges of the CC of the same nature as provided to the deputies in the National Assembly.[57] There are additional constitutional guarantees for judicial independence that pertain to the issue of conflict of interest. Firstly, the Constitution prohibits judges of the CC to be members of political parties.[58] Secondly, it prevents a judge of the CC from exercising any other public or professional function or work,[59] except for the professorship at a law faculty in the Republic of Serbia, in accordance with the law.[60]

The judges' tenure expires after nine years, but it can be terminated before its expiry in the following situations: (1) upon the judge's request, (2) if a judge meets the requirements for pension, or (3) in case of removal from office in the CC.[61] In turn, removal is possible if a judge becomes a member of a political party, violates provisions on the prohibition of conflict of interest, permanently loses the ability

[56] Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 154. This was also mentioned by some interviewees (on file with the authors).

[57] Constitution (n 2) Art. 173(2). Judges of the CC enjoy absolute immunity from legal proceedings for an opinion expressed or a vote cast in the exercise of their functions. During their mandate they cannot be detained or prosecuted for crimes for which one can be sentenced to prison, without previous approval of the CC. The exception to this rule is if the CC judge is found in the act of committing a crime for which a prison sentence longer than five years is envisaged. In that case he/she may be detained without previous approval of the CC. See Articles 103 (2) & (3) and 173 (2) of the Constitution.

[58] This prohibition also stands for judges of ordinary courts, public prosecutors, the Ombudsman, members of the police force and military personnel. See Constitution (n 2) Art. 55(5).

[59] See ibid Art. 173(1). The Law on the CC (n 31) excludes *pro bono* work in cultural, artistic, humanitarian, sport or other organizations from the notion of the 'public function and work' (Art. 16 (2)).

[60] See Constitution (n 2) Art. 173(1). The Law on the CC (n 31) further regulates this issue by defining the 'professorship at a faculty of law' only to include the teaching of those with academic titles of full or associate professors (Art. 16 (4)) of the Law on the CC (n 31). However, the Law does not stipulate that the function in the CC has precedence over professorship, so some of the judges coming from academia continued working full time at their law faculties, see Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 160. Although this practice does not raise questions in respect to the independence of these judges, it can arguably undermine the efficiency of their work and consequently influence the efficiency of the CC, see ibid.

[61] See Constitution (n 2) Art. 174(1).

to exercise his/her function, or is sentenced to imprisonment or convicted for a criminal offence which makes him/her unsuitable for the office.[62]

The National Assembly decides on the termination of a mandate, upon the request of the bodies authorised for the election/appointment of a judge to the Constitutional Court. In the case of removal, the CC is authorized to establish whether the conditions for removal have been fulfilled.[63] Only after the CC has established the existence of grounds for removal, may authorized bodies proceed with submitting the request for removal to the National Assembly.[64]

In the history of the CC, there was only one case of a removal of a CC judge. In 1999, Judge Slobodan Vučetić was removed due to his membership in two non-governmental organizations, the removal obviously having been engineered by the Milošević regime. In 2001, he again became a judge of the CC and held the position of its president from 2002 to 2006.[65]

1.3. Competences of the CC

The CC has the competence to perform control of constitutionality and legality,[66] which includes deciding on whether laws and other 'general acts'[67] 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.[68] This is *ex post* abstract control of constitutionality and legality. It may be instituted by at least 25 members of the parliament, by any state authority, by local authorities and authorities of autonomous provinces, and by the CC itself, upon a decision taken by two thirds of its judges.[69] 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 CC), but is done by submission of an abstract

[62] See ibid Art. 174(2).

[63] Law on the CC (n 31) Art. 15(2). The CC may give (non-binding) initiative for the commencement of the procedure for removal to the body which was authorized to elect/appoint the judge in question. See Constitution (n 2) Art. 174(2).

[64] See more in Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 166-167.

[65] See more in ibid 168, n 308.

[66] Constitution (n 2) Art. 167(1).

[67] For more on 'general acts' see section 3.2.1.2.

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

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

proposal for control to the CC. 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.[70] In the period 2009-2014, the CC received over 300 new cases of control of constitutionality and/or legality each year.[71]

The CC also has jurisdiction to control the constitutionality of laws *ex ante*, after the law was adopted and before it is promulgated by the president. The proceedings are instituted by one third of members of the parliament, and the CC must take decision within seven days from the beginning of the proceedings. If the constitutionality of a law was established in this procedure, it may not be challenged again in *ex post* control.[72] The CC has not so far had the opportunity to conduct *ex ante* constitutional review.

One important competence of the CC, which was introduced by the 2006 Constitution, is deciding on constitutional complaints against individual acts/decisions or actions of state authorities or organizations with delegated public powers that violate (*povređuju*) or deny (*uskraćuju*) human or minority rights guaranteed by the Constitution.[73] A constitutional complaint may be lodged by an affected person if all other legal remedies have been exhausted or do not exist.[74] Constitutional complaints represent the bulk of the CC's caseload – up to ten thousand new cases per year[75] – and apparently take up most of its time.

Finally, the CC has competence to resolve conflicts of jurisdiction between various authorities[76] and decide other matters provided in the Constitution,

[70] ibid Art. 168 (2).

[71] See *Pregled rada Ustavnog suda* [Annual Reports of the CC] for 2008-2013 (in Serbian) <www.ustavni.sud.rs/page/view/137-101100/pregled-rada> accessed 20 January 2016.

[72] Constitution (n 2) Art. 169 (1)&(2).

[73] 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 Vesna Petrović (ed), *Human Rights in Serbia and Montenegro 2005* (Belgrade Centre for Human Rights 2006) 41-42.

[74] Constitution (n 2) Art. 170.

[75] See annual reports of the CC (n 71). The number of constitutional complaints filed per year has been as follows: 1567 (2008), 2842 (2009), 5555 (2010), 6928 (2011), 1069 (2012), 11654 (2013), 9355 (2014). The number of constitutional complaints has been declining due to the introduction of a new procedure for prior resolving of the length-of-the-proceedings complaints by ordinary courts from mid-2014, see Arts. 2 & 33 of the Law on Amendments to the Law on Organisation of Courts [Zakon o izmenama i dopunama Zakona o uređenju sudova], *Official Gazette RS*, 101/13 (as of 1 January 2016, this procedure is regulated by the Law on the Protection of the Right to Trial within Reasonable Time [Zakon o zaštiti prava na suđenje u razumnom roku], *Official Gazette RS*, 40/15. On its part, the CC has been able to increase the number of resolved constitutional complaint cases over the years: 363 (2008), 1225 (2009), 3067 (2010), 2844 (2011), 7328 (2012), 8013 (2013), 10854 (2014). The steep rise in the number of decisions on constitutional complaints from 2012 onwards is due to the introduction of the chamber system, see section 1.4.

[76] Constitution (n 2) Art. 167(2), points 1-4.

including electoral disputes and prohibition of political parties, unions, and civic associations.[77]

The CC's competence to prohibit civic associations was criticized by some authors.[78]

It should also be noted that the interviewed CC judges thought that the CC has too many competences.[79]

1.4. Decisions of the CC

The CC decides by a majority of votes of all judges, while the court's decision to start abstract review of constitutionality and legality at its own initiative requires a majority of two-thirds of judges.[80] Initially, the CC operating under the 2006 Constitution was taking all its decisions at plenary sessions, which slowed down its work, but this was subsequently modified so that chambers now take most decisions. Substantive decisions (*odluke*) in cases of abstract review of constitutionality and legality are still taken by a plenary, as are decisions on whether the president has violated the Constitution, on prohibition of political parties, trade unions, associations or religious communities, and certain other decisions.[81] The grand chambers (*veliko veće*) decide constitutional complaints, electoral disputes and some other matters.[82] There are two grand chambers, each composed of the president of the CC and seven judges. The grand chambers decide by unanimity, failing which the plenary will decide. Finally, a chamber of three judges (*malo veće*) dismisses inadmissible constitutional complaints and other inadmissible submissions to the CC.[83] This chamber also decides by unanimity, failing which the grand chamber decides the matter.

[77] Constitution (n 2) Art. 167(2), points 5 and 6, & 167(3-4).

[78] See Vladan Petrov, 'Zabrana političkih stranaka i udruženja' [Prohibition of Political Parties and Associations] in Bosa Nenadić (ed), *Uloga i značaj Ustavnog suda u očuvanju vladavine prava* [The Role and Significance of the Constitutional Court in the Preservation of the Rule of Law] (Constitutional Court of the Republic of Serbia 2013) 212.

[79] However, another interviewee was of the opinion that the broad competences of the CC were not an issue and that they corresponded to the comparative practice and theory of constitutional adjudication. On file with the authors.

[80] Constitution (n 2) Art. 175(1) and (2).

[81] Law on the CC (n 31) Art. 42a(1)(2). The plenary has certain other competences such as to adopt general acts of the CC.

[82] ibid Art. 42b.

[83] ibid Art. 42v.

1.5. Transparency of the Work

According to the Law on the Constitutional Court, the work of the CC is public. In particular, the CC publishes its decisions and holds public debates and hearings.[84]

The CC is under an obligation to publish its substantive decisions (*odluke*) in the Official Gazette,[85] with the exception of decisions on constitutional complaints, which are published only if they are deemed to be of 'broader importance' for the protection of constitutionality and legality.[86] In such cases, the CC may also publish its procedural and admissibility decisions (*rešenja*).[87] It is unclear, however, on the basis of which criteria the CC (or its staff) decides which constitutional complaints or procedural decisions are of broader importance for the protection of constitutionality and legality.[88] CC decisions are published integrally, together with separate or dissenting opinions.[89]

The CC does not have a general obligation to hold public hearings. Such an obligation exists in cases of proceedings on constitutionality and legality, electoral disputes and prohibition of work of a political party, trade union organisation, citizens' association or religious community.[90] In proceedings on constitutionality and legality the CC may decide not to hold a public hearing if certain conditions have been fulfilled.[91] In other types of proceedings, the CC has discretion whether to hold public hearings and may do so when it deems it necessary, especially if a case raises a complex constitutional issue or an issue of constitutionality or legality on which the CC does not have a position.[92]

Apart from these provisions, the 2007 Law on the Constitutional Court, which was amended in 2011, provided for a broad notion of transparency by guaranteeing 'public deliberations in the proceedings before the CC'.[93] The 2008 Rules of Procedure further regulated this issue to allow the presence of the

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84 ibid Art. 3.

85 ibid Art. 49(1).

86 ibid Art. 49(2).

87 ibid.

88 For some reason, the CC regularly publishes similar constitutional complaint decisions on the right to a fair hearing.

89 Poslovnik o radu Ustavnog suda [Rules of Procedure], *Official Gazette RS*, 103/13, Art. 60(6).

90 Law on the CC (n 31) Art. 37(1).

91 Public hearings may not be held when the CC (1) deems the matter has been sufficiently clarified in the course of proceedings and that, on the basis of evidence collected, it can take a decision; (2) has already decided on the same matter with no new reasons provided for making a different decision and (3) the conditions for discontinuation of the proceedings have been fulfilled, see Law on the CC (n 31) Art. 37(2).

92 Law on the CC (n 31) Art. 37(3).

93 See *Official Gazette RS*, 109/07, Art. 3.

public and media not just in the CC's public hearings but in *all regular sessions of the CC.*[94] Thus, the Rules allowed for public presence even in the phase of deliberation (većanja sudija) in regular sessions of the CC, while it was excluded only in the final phase when judges were casting their votes.[95] Such provision was viewed as unacceptable by some CC judges.[96] Therefore, in 2009, the CC adopted a conclusion to exclude the public from its regular sessions.[97] In 2011, when the new president of the CC was installed, the CC confirmed this conclusion that stipulated that regular sessions of the CC be held *in camera*, except when the court was considering cases in which the contested general act or constitutional issues are of broader importance for society.[98] Soon thereafter, in December 2011, the Law on the Constitutional Court was amended to exclude the possibility of interpreting the transparency requirement as to allow media to be present in all regular sessions of the CC,[99] as was the case with the 2008 Rules of Procedure. Both the conclusions and the amendments escaped the public radar – there was virtually no reaction to them – until November 2013.[100] At that time, the media picked up an opinion of the former president of the CC, expressed in her book published in 2012, where she criticised the 2011 conclusion to exclude the public from regular sessions as contrary to the requirement of the transparency and democratic responsibility of the CC.[101] Numerous media reports portrayed the CC as a non-transparent institution, while the conclusion was said to violate the Constitution.[102] In December 2013, the CC adopted new Rules of Procedure of the CC[103] which, in accordance with the amended Law on the Constitutional Court, do not provide for the presence of the media at its regular sessions.

There are different opinions among experts on the matter. While some claim that the public does not have a place when the judges contemplate disputed

[94] *Official Gazette RS*, 24/08, Art. 95. Similar provision existed in the Rules of the Procedure of 1991 and 1995, see Marija Draškić, 'Javnost sednica Ustavnog suda Srbije – kako je bilo i kako je sada?' [Publicity of the Sessions of the Constitutional Court of Serbia – how was it and how is it now?] Foundation Public Law Centre, 6-7 and references <www.fcjp.ba/templates/ja_avian_ii_d/images/green/Marija_Draskic2.pdf> accessed 16 November 2015.

[95] Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 81.

[96] Draškić (n 94) 8. Dragiša Slijepčević, 'Javnost rada u praksi Ustavnog suda Srbije' [Publicity of Work in the Practice of the Constitutional Court of Serbia] Foundation Public Law Centre, 2 <http://fcjp.ba/templates/ja_avian_ii_d/images/green/Dragisa_B_Slijepcevic.pdf> accessed 16 November 2015.

[97] ibid.

[98] Transcript of the regular session of the CC of 10 February 2011, as referred to in Draškić (n 94), 9.

[99] As was the case with the former version of Art. 3(2) providing that 'the transparency is guaranteed by *public deliberations in the proceedings before the CC*' [emphasis added]. Cf. See Art. 1 of the Law on the Amendments of the Law on the CC, *Official Gazette RS*, 99/11.

[100] See more in Draškić (n 94) 1-3.

[101] Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 82.

[102] Draškić (n 94) 2.

[103] *Official Gazette RS*, 103/13.

constitutional issues,[104] others view this as unacceptable from the standpoint of securing the public nature of the CC's work, as set by the Constitution.[105] No one questioned that votes should be cast *in camera*.

Finally, an important tool for ensuring transparency is the Court's website. However, although the CC's (substantive) decisions are published on its website, its search tool is not particularly sophisticated. To explain the scale of its lack of sophistication, we offer the following example: an informed lawyer in pursuit of a concrete decision of the CC can face serious challenges even if armed with the specific number assigned to a particular case.[106]

1.6. The Substantive Constitutional Framework

The 2006 Constitution proclaims its supremacy over ratified international treaties, laws and other legislation.[107] In addition, ratified international treaties and generally accepted rules of international law have supremacy over laws and other legislation enacted in the Republic of Serbia.[108]

The Constitution stipulates that ratified international treaties are an integral part of the domestic legal order[109] and are directly applicable.[110] The Constitution also provides that its 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.[111] In its decisions, the CC relies on the ECHR and the jurisprudence of the ECtHR.[112]

Historically, Serbian courts applied international law standards only exceptionally.[113] This observation also held true for the CC working under the

[104] Draškić (n 94) 8, Slijepčević (n 96) 6-9.

[105] See opinions reproduced in Draškić (n 94) 2.

[106] This was also mentioned in one of the interviews. On file with the authors.

[107] Constitution (n 2) Arts. 16(2) and 194(4).

[108] ibid Art. 194(5).

[109] ibid Art. 194(4).

[110] ibid Art. 16(2). Direct application of human and minority rights is also provided in the Art. 18(2).

[111] ibid Art. 18(3).

[112] For more, see Violeta Beširević and Tanasije Marinković, 'Serbia in 'a Europe of Rights': The Effects of the Constitutional Dialogue between the Serbian and European Judges' (2012) 24 European Review of Public Law 401, 428-429. See also Vesna Petrović (ed), *Human Rights in Serbia 2011* (Belgrade Centre for Human Rights, Belgrade 2012), 57.

[113] Vojin Dimitrijević et al, *Osnovi međunarodnog javnog prava* [Foundations of Public International Law] (Belgrade Centre for Human Rights, 2007), 68.

1990 Constitution of Serbia.[114] Such practice of the Serbian judiciary slowly started to change after the adoption of the 2006 Constitution. This was in part due to numerous training programmes for judges conducted after 2000, aimed at raising awareness on the existing international obligations, especially the protection of human rights. 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 CC under the 2006 Constitution, as it started applying the ECHR and its case-law more frequently.[115]

Although the CC relies on the ECtHR's standards, their application in its jurisprudence has not been systematic.[116] As Beširević and Marinković note, although the CC has chosen to defer to the ECHR and the jurisprudence of the ECtHR,[117] in some cases the CC followed[118] but in others ignored[119] the case law of the ECtHR.

[114] Moreover, that CC had the dubious practice of applying non-binding international documents, while refusing to apply the binding ones (viz. international treaties). See more in Dimitrijević et al, ibid and references therein.

[115] Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 72.

[116] See Beširević and Marinković (n 112) 428-429.

[117] See ibid and Petrović, *Human Rights in Serbia 2011* (n 112).

[118] Beširević and Marinković (n 112) 409-413.

[119] ibid 417-422.

2.
Selected Cases

2.1. Introduction

According to Sadurski, the cases that make the Court truly 'activist' are those in which it reverses fundamental choices on central public issues.[120] In line with this, it is not the ambition of this paper to review a large number of decisions of the CC in order to evaluate its performance and measure its activism. The CC cases that are analysed here have been selected on the basis of 'the most difficult case' design,[121] meaning that the social transformative performance of the CC will be tested on cases that have been 'the most challenging and least favourable to it'.[122] This general approach was however complemented by the following elements.

Firstly, the cases considered had to raise difficult political or controversial social issues in Serbia and provide the CC with an opportunity to go against or with the prevalent socio-political attitudes in Serbia. We consider that the situations in which the CC had to position itself against or with the political majority in Serbia on a concrete issue or rule on a controversial legal provision provide insights on how the Court understands its role in Serbian society and can be indicative of the existence, extent, and nature of its judicial activism.

Secondly, we were keen to look at cases that raised issues related to the country's compliance with European standards of parliamentary democracy and human rights protection, since, in our view, democratic transition as a process should, at a minimum, aim to bring a European country closer to these standards. Indeed, these standards provide some substance to the abstract notion of 'transition' and help focus the analysis on the role of the CC in that particular context. It is also relevant that functioning parliamentary democracy and respect for human rights are requirements for admission of a state to the European Union, which brings into play an external factor that we have identified as having impact on the court – importance of an issue in the context of Serbia's relations with the EU. However, it should be noted that the CC's case law on individual constitutional complaints concerning violations of human rights is outside the scope of our

[120] Sadurski, 'Postcommunist Constitutional Courts' (n 5) 27-28; Sadurski, *Rights before Courts* (n 6) 131.

[121] As set in the project's (n 1) Analytical Framework.

[122] ibid.

analysis because these cases do not usually open up the possibility of the CC's collision with the interests of the political majority. As already mentioned, the present study covers the time period starting from 2008, when the CC began to function under the 2006 Constitution.

Following our general approach, our analysis will consider the position taken by the government or political majority vis-à-vis the issue under consideration, whether this issue had any prominence in the context of Serbia's relations with the EU considering Serbia's aspirations to membership in the organization and, finally, the broader public perception of the issue in question. Furthermore, we are also interested to see how the CC decided to answer dilemmas raised by these cases, and whether it adopted a strategy of avoidance or a head-on approach. Finally, we looked into whether the CC was interested in promoting certain values of a democratic society through interpretation, or whether it constrained itself to textual interpretation of constitutional provisions.

On the basis of the foregoing criteria, we have selected the following CC decisions for an in-depth analysis. Firstly, we consider decisions in which the CC struck down as unconstitutional provisions of the Law on Election of National Deputies and the Law on Local Elections, which gave political parties excessive control over parliamentary and local representatives. As such, these cases were of considerable importance not only for the ruling majority but for all political parties. Moreover, the challenged legislative provisions that were struck down stemmed from express constitutional provisions giving the political parties control over the mandates of their parliamentary deputies. Nevertheless, the CC decided to strike them down, with reference to broader principles of democracy and the rule of law. Importantly, these provisions, as well as their constitutional counterparts, were subject to considerable criticism from the Council of Europe's Venice Commission and the EU.

The second case that we analyse concerned the constitutionality and legality of the so-called Brussels Agreement on the normalization of relations between Serbia and Kosovo. The signing of the Brussels Agreement was a major foreign policy step of the Serbian government and, as such, was of high political importance for the ruling majority, in particular as a prerequisite for further progress towards Serbia's EU membership. At the same time, the question of Kosovo and its independence, including relations with its government, was and remains one of the most sensitive political and social issues in Serbia.

Finally, we also consider the CC's decisions on the prosecutor's requests to ban certain citizens' organizations on the basis that they violated human rights and caused national and religious hatred. These cases provided the CC with an opportunity to articulate its views on the nature of the constitutional system and democratic society in Serbia and, in turn, become a real factor in Serbia's democratic transition.

2.1.1. Constitutionality of the Provisions of the Law on the Election of National Deputies and the Law on Local Elections

2.1.1.1. Relevant Background

Constitutional democracy in Serbia suffers from an excessive concentration of power in the hands of political parties.[123] Since the collapse of communism, when Serbia at least formally revived the institutions of liberal democracy in the 1990s, political parties were constantly conceiving and improving ways in which they could control their deputies in the Parliament,[124] both by virtue of legal provisions which allowed such control and by informal practices. In trying to suppress such actions, the CC on several occasions ruled legislative provisions that afforded excessive control to political parties to be unconstitutional.[125]

Here we will discuss two recent decisions that were rendered in the abstract review of the constitutionality of the Law on Local Elections[126] and the Law on the Election of National Deputies,[127] on 20 April 2010 and 14 April 2011, respectively. The proceedings originated from several initiatives submitted to the CC,[128] except in relation to one provision of the Law on Local Elections (Art. 43) whose constitutionality the CC considered *proprio motu*.[129]

[123] Tanasije Marinković, 'Fighting Political Corruption in the Serbian Constitutional System' (2012) *Corruzione contro Costituzione - Percorsi Costituzionali*, 123, 132.

[124] See more in ibid 135.

[125] For e.g. see Decision IU-197/2002, *Official Gazette RS*, 57/03 and Decisions IU-66/2002, IU-201/2003 and IU-249/2003, *Official Gazette RS*, 100/03. See more in Bosa Nenadić, 'O parlamentarnom mandatu: primer Republike Srbije' [About Parliamentary Mandate: The Example of the Republic of Serbia], (2008) 56(1) Anali Pravnog fakulteta Univerziteta u Beogradu 5, 10-13, <http://anali.ius.bg.ac.rs/A2008-1/Anali%202008-1%20str%20005-025.pdf> accessed 22 April 2015, See also Marinković, 'Fighting Political Corruption in the Serbian Constitutional System' (n 123) 136-138.

[126] Decision of the CC, IUz-52/2008, 21 April 2010, *Official Gazette RS*, 34/10, 38 <www.ustavni.sud.rs/page/jurisprudence/35/> accessed 14 April 2015 (hereinafter: Decision *LLE*).

[127] Decision of the CC, IUp-42/2008, 14 April 2011, *Official Gazette RS*, 28/11, 22 <www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/3838/?NOLAYOUT=1> accessed 14 April 2015 (hereinafter: Decision *LEND*).

[128] In relation to the Law on the Elections of National Deputies, the proceedings were initiated by the 81 MPs of the Serbian Radical Party (in respect to the provision from the Instruction on the implementation of this Act), the NGO 'Za bolji život' [For Better Life] (in respect to the provision from Art. 80-92 of the Act), the Serbian Radical Party from Padinska Skela, Dragan Dragin from Čurug and Andraš Agošton from Temerin (in respect to the provisions from Arts. 43 and 81-84 of the Act). Decision *LEND* (n 127) 22. In relation to the Law on Local Elections, there was no record in the decision as to who initiated the proceedings in respect to the provisions of Arts. 18 and 47. On Art. 43 the CC decided to act *proprio motu*. Decision *LLE* (n 126) 38.

[129] Decision *LLE* (n 126) 38.

The most important part of the decisions[130] related to the legislative provisions that gave substantial control to political parties over the mandates of national deputies and local councillors, by enabling the parties to arbitrarily appoint them instead of following the order of candidates from electoral lists.[131] The review of the provisions of the Law on Local Elections raised an additional issue as the Law on Local Elections (Art. 47) 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). 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.[132]

It needs to be stressed that the 2006 Constitution not only fails to expressly regulate the nature of the representatives' mandate but also sends mixed messages concerning it. Namely, from the provisions on the principle of citizens' sovereignty (Art. 2(1) and (2)), free and direct elections at central and local levels of government (Arts. 3, 52(3), 176(1) and 180) and prohibition of direct exercise of power by political parties (Art. 5(4)), it can be inferred that a representative's mandate is free. On the other hand, Art. 102(2) of the Constitution provides that the national deputy is 'free to irrevocably place his/her mandate at the disposal of the political party upon whose proposal he/she has been elected a deputy'. This provision was a reaction of parliamentary political parties to the 2003 decisions[133] of the CC, which had ruled certain provisions of previous electoral legislation unconstitutional because they provided for overbroad grounds for the termination of the mandate.[134] Art. 102(2) implies that a representative's mandate

[130] These decisions also deal with the protection of members of national minorities, equality of women and the right to local self-government. Due to limited space, these aspects will not be discussed in this paper.

[131] See Art. 84 of the Law on the Election of National Deputies [Zakon o izboru narodnih poslanika], *Official Gazette RS*, 35/00, 69/02, 57/03, 72/03, 18/04, 85/05 and 101/05, and Art. 43 of the Law on the Local Elections [Zakon o lokalnim izborima], *Official Gazette RS*, 129/07.

[132] See Nenadić, 'O parlamentarnom mandatu' (n 125) 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 CC ruled these grounds unconstitutional in 2003, 'blank resignations' came back into fashion in the National Assembly. See more in ibid 13.

[133] See Marinković, 'Fighting Political Corruption in the Serbian Constitutional System' (n 123) 138.

[134] For more details see Nenadić, 'O parlamentarnom mandatu' (n 125).

can in fact be imperative.[135] As such, it presented the greatest challenge in finding the true meaning of the constitutional provisions pertaining to the nature of the deputies' mandate.[136] According to Judge Nenadić, 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.[137]

It is also important to mention that Art. 102(2) was a subject of concern of the Venice Commission,[138] due to the fact that 'it concentrates excessive power in the hands of political parties'.[139] Moreover, this provision and the legislation based on it were criticized by the EU Commission, which stated that constitutional and legislative provisions that give political parties control over mandates of deputies needed to be brought into accordance with the European standards.[140]

For the sake of clarity, we will primarily present the rulings of the CC on arbitrary appointment in respect to the provisions of the Law on the Election of National Deputies,[141] while its rulings on this issue in relation to the provisions of the Law on Local Elections[142] will be referred to in the footnotes except when they raise important issues relevant for the assessment of the work of the CC.

The decision on the constitutionality of the Law on Local Elections was delivered a year before the decision on the Law on Election of National Deputies. This is peculiar since the latter constitutionality review started first, more than a year before.[143] In the cases of the Law on Local Elections, the CC held a public hearing, which was attended by the initiators of the review, representatives of the National Assembly and other state bodies and some members of the academic community.[144] However, in its decision the CC only superficially referred to the

[135] Ratko Marković, 'Ustav Republike Srbije od 2006. – kritički pogled' [Constitution of the Republic of Serbia of 2006 – A Critical View] (2006) 54(2) Anali Pravnog fakulteta Univerziteta u Beogradu 5, 16-17 <http://anali.ius.bg.ac.rs/A2006-2/Anali%202006_2%20005-046.pdf5> accessed 29 June 2015; Marinković, 'Fighting Political Corruption in the Serbian Constitutional System' (n 123) 138; Nenadić, 'O parlamentarnom mandatu' (n 125) 16; Vojislav Stanovčić, 'Ustavni sud i vladavina prava' [Constitutional Court and the Rule of Law] in Nenadić (ed), *Uloga i značaj Ustavnog suda* (n 78) 26.

[136] Nenadić, 'O parlamentarnom mandatu' (n 125) 15.

[137] ibid 20.

[138] European Commission for Democracy through Law (Venice Commission) is an advisory body on constitutional matters of the Council of Europe. See <www.venice.coe.int/WebForms/pages/?p=01_Presentation> accessed 10 June 2015.

[139] Venice Commission (n 2) 12 and 22, paras 53 and 106, respectively.

[140] European Commission, 'Serbia 2010 Progress Report' (Commission Staff Working Document) COM(2010) 660 <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/sr_rapport_2010_en.pdf> accessed 12 June 2015 (hereinafter: 'Serbia 2010 Progress Report') 7.

[141] See n 127.

[142] See n 126.

[143] On 8 April 2008 (decision No. IUp-42/2008), while the decision to decide on the constitutionality of the provisions of the Law on Local Elections was adopted 2 July 2009 (decision No. IUz 52/2008).

[144] In accordance with Art. 37(1) of the Law on CC (n 31). Decision *LLE* (n 126) 38.

opinions expressed at the public hearing, not even attributing specific opinions to concrete individuals. It should be noted that this was not an isolated example but a method common in the CC jurisprudence.[145]

2.1.1.2. Rulings Pertaining to the Legislative Provisions on the Appointment of Representatives

The contested Art. 84 of the Law on the Election of National Deputies regulated the appointment of national deputies by providing deadlines for the submitter of the election list to provide the Central Election Commission with names of deputies to be appointed; if this deadline was not met, the Election Commission would follow the order from the election list in the appointment of deputies. This provision implied that political parties could arbitrarily appoint national deputies and local councillors instead of following the order of candidates from electoral lists.[146]

The CC ruled that this provision violated constitutional provisions on the principle of citizens' sovereignty (Art. 2), free and direct elections (Art. 3(2)) and the prohibition of direct exercise of power by political parties (Art. 5(4)).[147]

The CC was of the opinion that the constitutional provisions did not give unlimited power to the legislator to regulate the issue of the appointment of deputies. It considered that the said provision of the Law enables a political party to be the one to elect national deputies, which 'not only violates the principle of direct elections but also makes the idea of the representation of citizens meaningless'.[148] In the CC's view the principle of direct elections in the proportionate electoral system with closed electoral lists required that the choices citizens made in the elections be personalized to the largest possible extent. If the political party were not obligated to follow the order of candidates from the electoral list that would completely negate the personalization of the voters' choice at the elections.[149] Finally, the CC ruled that the contested provision from Art. 84 of the Law on the Election of National Deputies, also violated the constitutional provision which prohibited direct exercise of power by political

[145] This was also noted in the interviews (on file with the authors). See also in relation to the Brussels Agreement decision, below section 2.1.2.4.

[146] Similar provision was also provided in Art. 43 of the Law on Local Elections, on which the CC decided to deliberate *proprio motu*.

[147] Decision *LEND* (n 127) 26 and 27. The same conclusion was reached in respect to Art. 43 of the Law on Local Elections. See Decision *LLE* (n 126) 40.

[148] Decision *LEND* (n 127) 26. The same conclusion was reached in respect to Art. 43 of the Law on Local Elections. See Decision *LLE* (n 126) 40.

[149] Decision *LEND* (n 127) 26-27.

parties (Art. 5(4) of the Constitution)[150] because they 'completely subjected to themselves a public power that only belonged to citizens'.[151]

2.1.1.3. Ruling Pertaining to the Legislative Provision on 'Blank Resignations'

The Law on Local Elections provided that a submitter of the electoral list and a candidate for councillor might conclude an agreement to regulate their relations and give the right to the submitter of the list to submit a resignation to the position in a local assembly in the name of the councillor (Art. 47). In this way it introduced the institute of 'blank resignations', which was further regulated in detail in the said provisions. The CC ruled that this provision was unconstitutional on several grounds,[152] of which two are crucial.

Firstly, the CC considered that Art. 47 of the Law on Local Elections contravened the constitutional provisions which prohibited direct exercise of power by political parties (Art. 5(4)).[153]

Secondly, the CC considered that Art. 47 violated constitutional provisions on the principle of citizens' sovereignty (Art. 2), free and direct elections (Art. 3(2)) and the right of citizens to local self-government (Arts. 176(1) and 180(3)).[154] The CC was of the opinion that these provisions set the nature of the mandate for all citizens' representatives, which included councillors.[155] Its view was that the provisions on local self-government provided that 'citizens were holders of sovereign power, and that they exercised their right to local self-government through their freely elected representatives, i.e. councillors'.[156] Since the Constitution did not set a limit to this right, gained at the direct elections for the local-government assembly, the CC concluded that a councillor 'had a guaranteed freedom to represent those who elected him/her'.[157] The CC continued its

[150] Decision *LEND* (n 127) 27. The same conclusion was reached in respect to Art. 43 of the Law on Local Elections. See Decision *LLE* (n 126) 41-42.

[151] Decision *LEND* (n 127) 27. In the Decision on the constitutionality of the Law on Local Elections, the CC deliberated on the issue of arbitrary appointment of councillors (provided in Art. 43 of this Act) also with respect to Art. 52 of the Constitution that regulates the electoral right. It concluded that the provision in Art. 43 violated the said constitutional provision. See Decision *LLE* (n 126) 40.

[152] Decision *LLE* (n 126) 42.

[153] Decision *LLE* (n 126) 41. Namely, by the way of an agreement allowed by Article 47, a political party 'gained the right to decide on the mandate of the councillor, [and therefore] strip the councillor of the mandate and, in case of 'disobedience', [...] replace him/her with another councillor'. Therefore, the political party could 'change the composition of the local assembly and consequently influence the decision-making process in it' and in this way obtain for itself a decision that only an electorate could make. ibid 41-42.

[154] Decision *LLE* (n 126) 41.

[155] ibid.

[156] ibid.

[157] ibid.

reasoning by emphasizing that the modern democratic state was based on the principle of free mandate of representatives, which included both councillors in the units of local self-government and deputies in the National Assembly. It then emphasized that Art. 1 of the Constitution provided, *inter alia*, that the Republic of Serbia is based on the principles of civil democracy and commitment to European principles and values.[158] The CC stated that the contested provision in Art. 47 'indirectly changed the constitutionally set nature of the representatives' mandate and *de facto* introduced the implied imperative mandate'.[159] Hence, the CC implied a representative's mandate to be free. Significantly, the CC refused to take into consideration Art. 102(2) of the Constitution – which gave the freedom to national deputies to put their mandate irrevocably at the disposal of their political party – due to the fact that it only applied to national deputies and not councillors.[160] However, it quoted the opinion of the Venice Commission,[161] which viewed Art. 102(2) as problematic due to the fact that it gave excessive control to political parties over deputies, even stressing that the ECtHR viewed the Commission's opinions as source of law.[162] This clearly shows that the CC adopted the Venice Commission's negative attitude towards Art. 102(2).

2.1.1.4. Commentary of the Decisions

These decisions are significant for several reasons. Firstly, the CC substantially contributed to the protection of the principle of parliamentary democracy,[163] embodied in constitutional provisions on sovereignty of citizens and direct election of their representatives. Secondly, in doing so, the CC showed activism[164] by acting *proprio motu* with respect to Art. 43 of the Law on Local Elections. The CC's implied opposition to Art. 102(2) of the Constitution may also be viewed as a sign of its activism.

In its decision on the Law on Local Elections, the CC provided a general interpretation of the nature of the representatives' mandates, both in relation to national deputies and local councillors, going beyond a purely textual

[158] ibid.

[159] ibid. Furthermore, the CC ruled that the relationship between the voters and representatives falls within the domain of public law, so it could not be a subject of an agreement. Moreover, the CC said that such an agreement would be against public order and therefore, null and void.

[160] Decision *LLE* (n 126) 42.

[161] In explaining its reference to the Venice Commission, the CC said that 'the European Court of Human Rights viewed the documents of [this] Commission as a source of law [referring in brackets to some cases in which the ECtHR took into consideration its opinions]' Decision *LLE* (n 126) 42.

[162] Decision *LLE* (n 126) 42.

[163] On the importance of the ruling for the protection of the principle of separation of power see Irena Pejić, 'Načelo podele vlasti i ustavno sudstvo' [The Principle of the Separation of Powers and the Constitutional Judiciary] in Bosa Nenadić (ed), *Uloga i značaj Ustavnog suda* (n 78), 68.

[164] This was also noted in some interviews, on file with the authors.

interpretation of the Constitution, which did not expressly regulate the nature of their mandate. The CC took the position that the representatives' mandate was free. According to some commentators, in this way the CC was not only showing judicial creativity but also introducing elements of 'the idea of a 'living' Constitution'.[165]

Other commentators consider that the CC also 'took the given opportunity to express its position with regard to Article 102(2) of the Serbian Constitution [...] thereby challenging indirectly the validity of the given constitutional provision'.[166] However, one must note difficulties inherent to the idea that the CC has the authority to challenge the validity of any constitutional provision. Nevertheless, this seems to be the way the CC chose to act against the political majority and, moreover, the constitution makers. While these decisions went against the immediate interest of the political majority (and, for that matter, of political parties in general), they correspond to the major long-term political goal adopted by the same political majority: Serbia's accession into the EU. In fact, these CC rulings were in line with the opinion of the European Commission that it was necessary to bring contested provisions of electoral legislation in accordance with the European standards.[167] It seems that this allowed the CC to be more assertive.

This also explains why these decisions were nevertheless welcomed by political majority,[168] although it largely corresponded to the political majority that adopted the contested legislative provisions and included Art. 102(2) in the Constitution (which was a direct reaction to the CC's ruling of 2003). Thus, the welcoming of these CC decisions cannot be solely interpreted as a genuine change of heart and a sign of respect for the court's rulings. It is more likely that this was viewed as a necessary evil to be accepted as part of the EU integration process. The

[165] Pejić (n 163) 67.

[166] See Marinković, 'Fighting Political Corruption in the Serbian Constitutional System' (n 123) 139. See also Beširević and Marinković (n 112) 416. A judge of the CC expressed the opinion that the electoral legislation decisions are a rare example of the CC adopting a doctrine in the interpretation of the Constitution, see Dragan Stojanović, 'Premise ustavne kontrole prava i njihovo ostvarivanje u praksi Ustavnog suda Srbije' [Premises of the Constitutional Control of Law and Their Implementation in the Practice of the Constitutional Court of Serbia] in Bosa Nenadić (ed), *Uloga i značaj Ustavnog suda* (n 78), 127. Although the view of the CC on the nature of representatives' mandates corresponds to the views on this issue adopted by academic authors (see n 135), the decisions do not contain any reference to them.

[167] See n 138 and 140.

[168] *Radio televizija Vojvodine*, 'Marković: Značajna odluka Ustavnog suda o blanko ostavkama' [Marković: Important Decision of the Constitutional Court on Blank Resignations], 22 April 2010 <www.rtv.rs/sr_ci/drustvo/markovic-znacajna-odluka-ustavnog-suda-o-blanko-ostavkama_185181.html> accessed 23 June 2015. The same attitude is expressed by the opposition parties, except in the case of the Serbian Radical Party which claimed that the decision on Law on Local Elections was problematic. ibid.

same goes for the implementation of these decisions, which was done through subsequent amendments to the electoral legislation.[169]

It seems that these amendments have been perceived more as a consequence of the opinion of the European Commission[170] than a result of the CC decisions. Namely, the election legislation amendments were primarily explained by the political majority as a requirement of the EU integration and not as something warranted by the decisions of the CC.[171] Media reported that the adoption of the amendments to the Law on the Election of National Deputies was one of the conditions posed by Brussels for Serbia to obtain candidate status for the EU.[172]

2.1.2. Case Concerning Constitutionality and Legality of the Brussels Agreement

2.1.2.1. General

As is well-known, Kosovo, as an autonomous province of Serbia, became a UN governed territory in 1999, on the basis of Security Council resolution 1244 (1999). The resolution brought to an end the NATO intervention in the Federal Republic of Yugoslavia (Serbia and Montenegro) and the conflict between Serbian armed forces and the Kosovo Liberation Army. Kosovo proclaimed independence on 17 February 2008, which Serbia strenuously opposes. The EU mediated in

[169] Firstly, the National Assembly adopted amendments to the Law on Election of National Deputies on 25 May 2011, although the decision of the CC on the constitutionality of its provisions was rendered a year after the decision on provisions from the Law on Local Elections (see n 126 and 127). See *B92,* 'Ukinute blanko ostavke' [Blank Resignations Abolished], 25 May 2015, <www.b92.net/info/vesti/index.php?yyyy=2011&mm=05&dd=25&nav_id=514350> accessed 23 June 2015. The National Assembly did not use the possibility provided by Art. 102(2) of the Constitution: to regulate requirements under which a deputy could put its mandate at the disposal of the political party on which list he/she was elected. The amendments to the Law on Local Elections were then adopted on 20 July 2011, with a delay of more than a year. See 'Ukinute blanko ostavke i u lokalnim skupštinama' [Blank Resigations Also Abolished in Local Assemblies], *Blic*, 20 July 2011, <www.blic.rs/Vesti/Politika/267115/Ukinute-blanko-ostavke-i-u-lokalnim-skupstinama> accessed 23 June 2015. During 2010, the political majority explained the failure to make amendments to the Law on Local Election required by the CC decision by the lack of political will (*sic!*). See the statement of the then Minister of State Administration and Local Self-Government, Milan Marković, in *Večernje novosti*, 'Neko namerno štiti blanko ostavke' [Someone Is Deliberately Protecting Blank Resignations], 3 December 2010 <www.novosti.rs/vesti/naslovna/aktuelno.289.html:310099-Neko-namerno-stiti-blanko-ostavke> accessed 23 June 2015.

[170] 'Serbia 2010 Progress Report' (n 140).

[171] See 'Kolundžija: Izmene u cilju ulaska u EU' [Kolundžija: Changes in Order to Enter the EU], *Blic*, 11 May 2011, <www.blic.rs/Vesti/Politika/253187/Kolundzija-Izmene-u-cilju-ulaska-u-EU/print> accessed 23 June 2015. See also the statement of then president of the National Assembly, Ms. Slavica Đukić Dejnović, 'Đukić Dejanović: Treba ukinuti blanko ostavke' [Đukić Dejanović: Blank Resignations Should Be Abolished], *Politika*, 2 December 2010 <www.politika.rs/rubrike/Politika/Dukic-Dejanovic-Treba-ukinuti-blanko-ostavke.lt.html> accessed 23 June 2015.

[172] See e.g. *B92* (n 169).

negotiations[173] between Serbia and Kosovo and the Brussels Agreement was a major step in that process.[174] An agreement on normalization of relations between Serbia and Kosovo was adopted in Brussels on 19 April 2013 by the prime ministers of Kosovo and Serbia (Brussels Agreement).[175]

The Brussels Agreement and the accompanying documents of the Government and the National Assembly were challenged before the CC by 25 members of the Serbian Parliament, as not being in accordance with the Constitution and laws of Serbia. 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. The government had a major political stake in the survival of the Brussels Agreement, as its adoption and implementation were the top political priority for the EU and the United States and were identified as a precondition for the further progress of Serbia towards EU membership.[176]As such, the Brussels Agreement was politically supported not only by the government and its coalition majority but also by most opposition parties.[177] The political opposition to the agreement came only from smaller (anti-EU) political parties, in particular the Democratic Party of Serbia, whose deputies (as well as some others[178]) challenged its constitutionality and legality.

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[173] On the basis of the Resolution 64/298 of the General Assembly of the UN (13 October 2010) UN Doc. A/RES/64/298 <www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/298> accessed 23 June 2015. See more in Tatjana Papić, 'The Political Aftermath of the ICJ's *Kosovo* Opinion' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion*, (OUP 2015), 240.

[174] For more, see Tatjana Papić, 'Fighting for a Seat at the Table: International Representation of Kosovo' (2013) 12 Chinese Journal of International Law 543, 559-567, para. 27-45.

[175] 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. For Serbia's copy of the agreement see <www.rts.rs/upload/storyBoxFileData/2013/04/20/3224318/Originalni%20tekst%20Predloga%20sporazuma.pdf> accessed 16 April 2015. 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.

[176] For the political incentives and motives to reach an agreement, see Papić, 'The Political Aftermath of the ICJ's *Kosovo* Opinion' (n 173), 257-265.

[177] See, e.g., statement of the president of the Democratic Party to Radio-Television Serbia, 'Briselski sporazum znači budućnost' [Brussels Agreement Means Future], 29 April 2013 <www.rts.rs/page/stories/sr/story/9/Politika/1315176/Briselski+sporazum+zna%C4%8Di+evropsku+budu%C4%87nost.html> accessed 20 January 2016.

[178] See 'Slijepčević: Ocena ustavnosti Briselskog sporazuma u toku' [Slijepčević: Assessment of Constitutionality of the Brussels Agreement Is Ongoing], *Večernje novosti*, 27 October 2013 <www.novosti.rs/vesti/naslovna/drustvo/aktuelno.290.html:460856-Slijepcevic-Ocena-ustavnosti-Briselskog-sporazuma-u-toku> accessed on 20 January 2016.

Their petition raised a number of constitutional challenges to the Brussels Agreement, including that the conclusion of an agreement with the so-called Republic of Kosovo constituted its *de iure* recognition and was, as such, unconstitutional, given that the Constitution only accepts the existence of the Autonomous Province of Kosovo and Metohija and not of an independent Kosovo.[179]

The CC dismissed the challenge as being outside its jurisdiction, by a majority of eleven to four judges.[180] The decision was published on 2 February 2015, almost two years after the challenge.[181] Two general themes can be discerned from the CC's opinion. The first was the question of whether the Brussels Agreement was an international treaty. The second theme was whether the agreement itself and the decision of the Government and National Assembly endorsing it were general legal decisions that could be reviewed by the Court.[182]

2.1.2.2. Was the Brussels Agreement an International Treaty?

The CC considered the nature of the Brussels Agreement and whether it was a political agreement or an international treaty.[183] Starting from the definition of international treaties in the Vienna Convention on the Law of Treaties (hereinafter: VCLT),[184] according to which an international treaty is an international agreement between two *states*, the Court concluded that the Brussels Agreement was not an international treaty, but a political agreement, since Kosovo was not a state in relation to Serbia. This conclusion was supported by a lengthy discussion of Kosovo's status *vis-á-vis* Serbia, its legal status under UNSC resolution 1244, the advisory opinion of the International Court of Justice concerning Kosovo's

[179] Conclusion of the CC, IUo-247/2013, 10 December 2015, *Official Gazette RS*, 13/15, 9 (hereinafter: '*Brussels Agreement* decision' – note that the page numbering of the decision refers to the page numbers of the Official Gazette in which it was published).

[180] ibid 13, 22.

[181] The CC decision does not indicate the date when the challenge was filed, but it mentions that the CC requested a copy of the Brussels Agreement from the National Assembly on 31 May 2013, which means that by that time the proceedings had already commenced. The decision itself states that it was adopted on 10 October 2014, but the date of its publication was 2 February 2015, ibid. According to media, the challenge was filed on 23 April 2013. The Democratic Party of Serbia, whose deputies filed the challenge, criticized the CC for delaying, which was denied by the president of the CC, see *Večernje novosti* (n 178).

[182] The CC has jurisdiction to decide *inter alia* on conformity 'of laws and other general acts with the Constitution, generally accepted rules of international law and ratified international treaties' and on conformity of 'of other general acts with law', Constitution (n 2) Art. 167(1), points (1)&(3).

[183] *Brussels Agreement* decision (n 179) 13. The CC further raised a number of other issues related to this main question, see ibid 15-16.

[184] Entered into force on 27 January 1980, United Nations, *Treaty Series*, 1155, 331.

declaration of independence,[185] and questions of recognition of states.[186] The CC also concluded that Serbia clearly expressed its intention not to recognize the independence of Kosovo,[187] and that it had not done so by implicitly concluding the Brussels Agreement.[188]

The CC reached its conclusion without any substantive analysis of the content of the Brussels Agreement. Rather, its conclusion was supported by a simplistic application of the definition of international treaty contained in Article 1 of the VCLT (and the Serbian Law on Conclusion and Execution of International Treaties), in this sequence of steps: 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 CC does not have jurisdiction to assess its constitutionality.

There are many problems with the CC's reasoning. For example, in order to exclude an agreement with Kosovo from the VCLT's definition of international treaty, the CC concluded that Kosovo was not a state, which immediately raised the question what to do with the fact that many states recognized Kosovo as an independent state. The CC tried to resolve this issue by stating that Kosovo was not a state in relation to Serbia, which never recognized it as an independent state (i.e. that Kosovo *in relation to* Serbia does not exist as a state). But this means that not only recognition, but also the existence of statehood of an entity, become a bilateral affair between that entity and the recognizing state. In this way, the CC collapsed the notions of recognition and statehood, which are related but clearly separate. This does not seem to be the correct position from the point of international law.[189] Further, 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

[185] The CC criticized the ICJ for its position that the authors of Kosovo's declaration of independence were representatives of Kosovo's people and not provisional institutions of self-government in Kosovo. The problem was that the critical remarks were made in passing and without offering any legal arguments, while they were probably unnecessary for resolving the case before the CC.

[186] *Brussels Agreement* decision (n 179) 16-19.

[187] ibid 18.

[188] ibid 18-19.

[189] According to Crawford, '[t]he conclusion must be that the status of an entity as a State is, in principle, independent of recognition…' James Crawford, *Creation of States in International Law* (2nd ed, OUP 2006) 28. Moreover, this leads to additional complications. The understanding of statehood (rather than recognition) as a bilateral affair would mean that Kosovo's agreements with states that recognized it would be international treaties within the meaning of the VCLT, while the agreements having the same substance concluded with the non-recognizing states would not. Even more problematic would be the application of this view on multilateral treaties to which Kosovo would be a party, as these would be international treaties in relations between Kosovo and recognizing states, and something else in relations between Kosovo and non-recognizing states.

existence of international legal agreements other than international treaties, including with subjects of international law other than states.[190]

Moreover, the CC could have reached the same conclusion without entering into the thorny issue of whether Kosovo was a state and whether Serbia recognized it. It could have analysed the substance of the Brussels Agreement and the circumstances of its conclusion and interpreted the nature and meaning of this document by applying well-known international law customary rules of interpretation, also reflected in the VCLT.[191] There was an even easier path – to determine that the Brussels Agreement was never ratified and to dismiss the challenge on this basis as being outside the CC's jurisdiction which extends only to assessing the constitutionality of *ratified* international treaties.

Instead, the CC chose the harder (and legally more questionable) way of dealing with this issue – as if its decision not to strike down the controversial agreement (which many thought constituted an unconstitutional 'giving up' of Kosovo and its recognition) had to be compensated by a long discussion demonstrating that, for Serbia, Kosovo was not, after all, a state at all.

2.1.2.3. General Legal Acts

The second theme of the CC's decision was whether the Brussels Agreement and the domestic decisions endorsing it were general legal decisions, because as such they could be reviewed by the CC for their constitutionality and legality.[192] After quoting a scholarly definition of legal acts, the CC concluded that the National Assembly's decision on acceptance of the Government's report, the report itself, or its parts, including the Brussels Agreement, could not be considered as general legal acts and that it did not have the jurisdiction to consider their constitutionality and legality. According to the CC, since 'a general legal act is actually a source of law, while the source of law in the formal sense is where generally binding legal norms are found…', neither the National Assembly decision nor the conclusion of the Government endorsing the Brussels Agreement were generally binding legal norms because 'they were not accepted in the procedure and form which would provide them with such legal force'. Rather, they

[190] See Art. 3 of the VCLT (n 184). The CC does not discuss why the notion of international treaty (*međunarodni ugovor*) contained in the Constitution is identical to the definition contained in VCLT. The CC only notes that the definition of international treaty contained in Article 1 VCLT is identical to the definition contained in the Serbian Act on Conclusion and Execution of International Treaties (*Brussels Agreement* decision (n 179) 17.

[191] VCLT, Art. 31-32 (n 184).

[192] See Constitution (n 2) Art. 167(1), points (1) and (3). The Decision reveals that the proceedings to assess constitutionality and legality started by the 25 deputies related to the Brussels Agreement, while there was a separate 'initiative to assess constitutionality and legality' which concerned the related decisions of the Government and the National Assembly. The CC decided to consider the two in separate proceedings (*Brussels Agreement* decision (n 179) 10). However, the Decision dismissing the constitutional challenge to the Brussels Agreement extensively discussed the said decisions as well, thereby disposing of another case for all practical purposes.

were political acts.[193] Only if these political acts were transformed into legal acts by adoption of legislation, would 'the political activity of the Government directly start to penetrate the legal order of the Republic of Serbia'.[194]

It seems that the reasoning of the CC was almost exclusively concerned with the form of the decisions under consideration and with the formal authority of the relevant bodies to issue them. For example, when considering whether these decisions were general legal acts, the CC emphasized that 'they were not accepted in the procedure and form which would provide them with such legal force'. Although in the same paragraph it invoked a definition of general legal acts which was also concerned with their content (they 'create or contain' legal norms which are generally binding), the CC failed to analyse the content of the challenged acts, but was exclusively concerned with the questions of their form and authority to issue them.

2.1.2.4. Commentary of the Decision

It is important to view this decision of the CC in its political context. The conclusion of the Brussels Agreement was a crucial moment in the normalization of relations between Serbia and Kosovo. At the same time, improvement and normalization of relations with Kosovo has been one of the crucial items of the US and EU policy towards Serbia and one of the preconditions for progress in Serbia's accession to the EU. In turn, the accession to the EU is one of the top priorities of the Serbian government led by the Serbian Progressive Party. When seen in this context, the constitutional survival of the Brussels Agreement was of significant political importance to the government. In addition, the Brussels Agreement has been supported not only by the governing majority, but also by a large part of the opposition made up of pro-EU political parties, which recognized its importance for EU accession. Therefore, by taking this decision the CC was deferential to the political majority and, at the same time, it was furthering the country's goal of accession to the EU. If EU membership signifies completion of democratic and economic transition, and if the EU accession negotiations are one of the main instruments to bring about this transition, then it may be concluded that the court's lack of activism in this case was actually beneficial for Serbia's transition.

However, it is important to note that, in the circumstances where many thought that the Brussels Agreement amounted to recognition of Kosovo as a separate state (at least politically), the CC's decision in effect went against the long-standing sentiment and deeply held conviction of a large majority of Serbs that

[193] *Brussels Agreement* decision (n 179) 21.

[194] The CC also considered the authority of the prime minister to initial the Brussels Agreement, as well as the authority of the Government to endorse this, and concluded that he acted in his political capacity as representative of the Government, while the Government endorsed his actions as a collective body charged with the formulation and conduct of policy, see *Brussels Agreement* decision (n 179) 21-22.

Kosovo must be part of Serbia. For many years this sentiment has been reinforced by the media, so it comes as no surprise that the prevalent reaction to the Brussels Agreement decision was negative. Some media commentators accused the CC's majority of failing their moral and professional duties as lawyers, and hailed the dissenting judges as 'saving' the dignity of the profession.[195]

It should also be mentioned that most experts who took part in the proceedings before the CC and/or subsequently commented on the decision, for various reasons thought that the Brussels Agreement was unconstitutional.[196] The dissenting judges criticized the CC for its failure to deal with, or even mention, the opinions of those invited experts that were not in line with the decision. For example, according to the dissenting judges, all invited constitutional law experts thought that the challenged acts were general legal acts (and thus could be subject to review of legality), but the court avoided to mention their opinions. This was described as its powerlessness to deal with their arguments.[197] At the same time, the CC was criticized for reproducing, as its own and only with minimal changes, the 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.[198] This gave rise to accusations about the court's deference to the government.[199]

Therefore, the Brussels Agreement decision brought the CC into line with the political majority, both the government and most of the opposition, but went against the long standing sentiment in the society and, in particular, the views of most constitutional law experts. Although the decision was adopted by a large majority of judges, the widespread (but admittedly not so vocal and persistent) opposition in the media and within the legal community obviously affected its legitimacy and that of the CC. The CC could arguably have approached the prevalent views head-on and responded to them in its reasoning, thereby strengthening its position. However, it did exactly the opposite. When examining the constitutionality and legality of the Brussels Agreement, the CC mainly relied on purely textual interpretation of the Constitution and the relevant international treaties, while its reasoning was poor and formalistic. Moreover, it failed to respond adequately or even to mention the arguments of those holding opposing views, despite the fact that these views were voiced at the public hearing and

[195] See Zoran Ivošević, 'Nemoć zauzdanog suda' [Powerlessness of a Bound Court], *Politika*, 27 March 2015 <www.politika.rs/scc/clanak/322897/Nemoc-zauzdanog-suda> accessed 14 January 2016.

[196] See Dissenting opinion of Judge Stojanović, *Brussels Agreement* decision (n 179) 23-24; see, also, Zoran Ivošević, 'Ustavni pogled na Briselski sporazum' [A Constitutional View on the Brussels Agreement] *Danas*, 20 April 2014 <www.danas.rs/danasrs/drustvo/pravo_danas/ustavni_pogled_na_briselski_sporazum_.1118.html?news_id=280181> accessed 20 January 2016.

[197] See Dissenting op. of Judge Vučić, *Brussels Agreement* decision (n 179) 32.

[198] See ibid and Dissenting op. of Judge Stojanović, *Brussels Agreement* decision (n 179) 25.

[199] See Dissenting op. of Judge Stojanović, *Brussels Agreement* decision (n 179) 25. Also, for a hint about the CC's deference to the Government, see Dissenting op. of Judge Vučić (n 179) 32.

in submissions to the Court. Finally, it took the CC almost two years to decide this case, despite its high importance, which is yet another example of the court's customary delaying tactics. All this further undermined the legitimacy of this decision and made it open to charges of political complicity with the government.

2.1.3. Decisions Concerning Prohibition of Certain Associations

2.1.3.1. General

The CC has the competence to ban political parties, trade unions, and associations of citizens (Constitution, Art. 167, para. 2). Under the Constitution, an association may be banned if its activity is directed at violent destruction of constitutional order, violation of guaranteed human and minority rights, or causing racial, national or religious hatred (Art. 55, para. 4). The CC has so far decided four cases concerning prohibition of associations,[200] and all were initiated by the public prosecutor of Serbia.[201] Three of them concerned organizations of militant far-right nationalists, while one involved groups of militant soccer fans who were also far-right extremists.

The period of democratic transition after 2000 was also characterized by the rising prominence of far-right, nationalistic organizations and groups of soccer fans. They took part in, often violent, demonstrations such as those against the independence of Kosovo, surrender of the indictees to the Hague War Crimes Tribunal and against the Pride parades in Belgrade.[202] Soccer fans were also involved in violent, sometimes lethal street attacks.[203]

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[200] In the fifth case, concerning association *1389* (*Pokret 1389)*, the public prosecutor withdrew its request and the proceedings were terminated, see CC's ruling (*rešenje*) no. VIIU 250/2009 of 4 December 2011 <www.1389.org.rs/ustavni-sud-oslobodio-pokret-1389.html> (this ruling has not been published on the CC website, where there is only a press release about it, see <www.ustavni.sud.rs/page/view/156-101514/obustavljen-postupak-za-zabranu-radaudruzenja-graana-pokret-1389>) both accessed 12 June 2015.

[201] 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 CC (n 31) Art. 80. Note that the Act on Associations [Zakon o udruženjima], *Official Gazette RS*, 51/09, stipulates that the prohibition may be requested by, in addition to these authorities, the ministry competent for administration matters and the ministry dealing with the area in which the goals of the association in question are realized. The Constitutional Court has not yet had a chance to resolve the difference between these two laws.

[202] For an overview of Obraz and SNP Nasi/1289 activities, see Isidora Stakić, *Odnos Srbije prema ekstremno desničarskim organizacijama* [Attitude of Serbia towards Extreme Right-wing Organisations] (Beogradski centar za bezbednosnu politiku 2013) 5-7 <www.bezbednost.org/upload/document/odnos_srbije_prema_ekstremno_desniarskim_organizac.pdf> accessed 3 June 2015.

[203] Especially against LGBT persons and foreigners. The well-known case was the 2009 beating of French football fan Brice Taton, who later died of injuries, see 'Umro pretučeni Francuz Bris Taton' [Beaten Frenchmen Brice Taton Died] *B92*, 29 September 2009 <www.b92.net/info/vesti/index.php?yyyy=2009&mm=09&dd=29&nav_id=383878> accessed 20 January 2016.

The CC first dismissed the case concerning several groups of militant soccer fans in 2011[204] taking the position that unregistered groups or associations cannot be banned in the procedure under Article 55(4) of the Constitution. Then, also in 2011, it decided the case against an organization called 'Nacionalni stroj' ('National Rank'), by declaring *inter alia* that this was a secret association whose activity was directly prohibited by Article 55, para. 3, of the Constitution.[205] In 2012, the CC banned an association called 'Obraz' due to its activity which it considered as directed at violation of human and minority rights and causing national and religious hatred.[206] Finally, in 2012, in the case that was brought against three nationalist associations ('Srpski narodni pokret 1389', 'Srpski narodni pokret Naši' and 'SNP Naši 1389'), the CC refused to ban two associations, while dismissing the request related to the third, on the basis that it had ceased to exist.[207]

One notes that the length of proceedings in these cases varied from just over one year, in the case of *1389/Naši*, to almost three years in the *Obraz* and *Nacionalni stroj* cases. It is also notable that the CC did not decide the cases as they were received but first rendered the *Soccer fans* decision although this was the third case to be introduced by the public prosecutor.

These cases raised several important questions, such as whether unregistered associations could be prohibited, what was the standard of proof, what was the nature of the procedure for prohibition and which procedural guarantees were due.[208] For the present purposes, however, we focus on the substantive factors that the CC took into consideration when deciding on prohibition.

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[204] Conclusion of the CC, VIIU-279/2009, 17 March 2011, *Official Gazette RS*, 26/11, 68 (hereinafter: '*Soccer fans* decision'). The proceedings were initiated on 16 October 2009.

[205] Decision of the CC, VIIU-171/2008, 2 June 2011, *Official Gazette RS*, 50/11, 320 (hereinafter: '*Nacionalni stroj* decision'). The proceedings were initiated in 2008. The contentious issue in this case was whether the CC had jurisdiction to rule on secret organizations, which were prohibited by the Constitution itself; for a negative view see dissenting opinion of Judge Vučić, ibid, whose arguments are repeated by Petrov (n 78) 216.

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

[207] Decision of the CC, VIIU-482/2011, 14 November 2012, *Official Gazette RS*, 6/13, 4 and 12 (hereinafter: '*1389/Naši* decision'). The proceedings were initiated on 18 October 2011.

[208] The nature of the proceedings for prohibition of an association was extensively discussed in dissenting opinions, some judges being of the opinion that guarantees of fair trial had not been met. The cases however reveal that the associations in question had ample opportunity to participate in the proceedings. All cases were handled as contradictory proceedings in which the representatives of the association whose ban was under consideration also had a chance to participate and provide arguments. For example, in the *Obraz* case, the representatives of the organization participated at the public hearing before the CC, and afterwards were invited to provide their written submissions, which they did not do, see *Obraz* Decision (n 206) 90-92. In another proceeding, concerning association '1389', there were also exchanges of written submissions and a public hearing, see ruling VIIU 250/2009 (n 200).

2.1.3.2. *Obraz* Decision

The first case concerned the prominent militant nationalistic organization 'Obraz' and, as mentioned above, it took almost three years to decide. In the decision, the CC considered official documents of the association, public statements of its leaders, as well as activities of its members. In its view, some documents openly expressed intolerance towards those who did not share the same opinions and worldview, in particular atheists, LGBT individuals, and certain national groups, which amounted to 'discrimination through hate speech'.[209] Further, the CC considered that public statements of the association's statutory representative confirmed the views contained in its documents, in particular intolerance towards the LGBT population. The statements also revealed the association's position that the use of violence was permissible in the attainment of its goals.[210] Finally, members of the association took part in numerous incidents (some were reported on the organization's website), where they hacked gatherings of other groups (such as those of an anti-war NGO or a minority church), uttered racist and chauvinist slogans, and propagated the violent breaking up of the Pride march in Belgrade, etc. Although representatives of 'Obraz' denied at the public hearing that the association itself was behind these incidents, the CC noted that neither the association nor its members denounced these activities, and concluded that this confirmed that they approved of them.[211]

On this basis, the CC determined that there was a connection between the activities of the members and the activities and goals of the association and that the association not only tolerated but also supported the activities of its members in the incidents involving violations of constitutionally guaranteed rights as well as discrimination.[212] The CC concluded that 'from documents and activities of this association flow attitudes which substantially discriminate against citizens on the basis of their personal traits, the discrimination being conducted by hate speech, harassment and humiliating behaviour,' all of which was 'directed at' violation of constitutional rights, the rule of law, and the principles of democracy.[213]

Once it had established that the activity of the association fulfilled the requirements for prohibition stipulated in the Constitution, the CC considered whether a ban would be necessary. In this context, it assessed whether there was a pressing social need for such a measure and whether the measure would

[209] *Obraz* Decision (n 206) 99. For example, one of the documents told the members of LGBT groups that they would be 'punished most severely and uprooted!', quoted in ibid 93.

[210] *Obraz* Decision (n 206) 99.

[211] ibid 99-100.

[212] ibid 100-101.

[213] ibid 101.

be proportionate for the protection of 'a legitimate goal'.[214] The CC identified the pressing social need in the fact that the association promoted 'a model of a society based on discrimination of certain ethnic, religious, sexual and other groups, by the use of hate speech, harassment and humiliating behaviour, and because it approve[d] of violence as an instrument to attain goals'.[215]

When discussing the proportionality of prohibition, the CC firstly pointed out that Serbia had recently undergone 'a difficult historical period', fraught with wars incited by national and ethnic conflicts, and that its society was still burdened by prejudice. It was thus particularly important to protect the most important social values and prevent destruction of 'efforts through which the democratic tradition of the Serbian people is expressed', 'especially by the creation of an environment of insecurity and fear for members of entire social groups'.[216] Secondly, the CC pointed out that, despite various measures undertaken by the state authorities against the illicit activities of the association, it continued with its activities aimed against human rights and at provoking national and religious hatred. Since the measures undertaken by the state authorities were unsuccessful, it was compelling and necessary (*postoji nužnost i neophodnost*) to prohibit the organization.[217]

2.1.3.3. *1389/Naši* Decision

In the next case, *1389/Naši*, the CC seemingly used a similar approach as in *Obraz*. However, it in fact changed the applicable standards in several crucial ways. In *1389/Naši*, the CC considered official documents of the organizations in question, public statements of their leaders and actions of their members, and finally considered the measures undertaken by the state authorities and their effectiveness. After analysing the documents of these associations, the CC concluded that they did not set as their goals or principles of activity, activities aimed at the violent overthrow of constitutional order, violation of human rights or other reasons for prohibition of an association. However, as the documents stated that these associations had as one of their goals the struggle against *inter alia* gay movements, which they regarded as 'deviant', the CC had to admit that this raised the question as to whether such statements were an attack on the integrity

[214] These requirements apply on the basis of Art. 20 of the Constitution, which stipulates conditions for limitations of constitutional rights. They also apply on the basis of Art. 18 of the Constitution, which provides that constitutional provisions on human and minority rights shall be interpreted in accordance with applicable international standards of human rights protection, and the practice of international bodies that apply them.

[215] *Obraz* Decision (n 206) 101.

[216] ibid. For a strong criticism of the CC's reliance on the 'democratic tradition of the Serbian people' which is seen as a contribution to the 'culture of phantasmagorias', Slobodan Beljanski, 'Militantna demokratija u praksi Ustavnog suda Srbije' [Militant Democracy in the Practice of the Constitutional Court of Serbia], in Violeta Beširević (ed), *Militantna demokratija – nekada i sada* [Militant Democracy – Now and Then] (Službeni glasnik 2013) 245.

[217] *Obraz* Decision (n 206) 101.

of certain categories of citizens. Although it considered that the statements in question could indirectly incite anti-constitutional activities, the CC concluded that this could not be a sufficient or direct basis to conclude that they initiated or incited such activities of their members or other individuals, in the absence of a 'confirmed factual anti-constitutional activity of an association on a scale that would require its prohibition'. The CC further emphasized that prohibition of an association must be based on indisputable determination that the *activities* of the association constituted misuse of rights which had been sanctioned by other state authorities without success.[218] However, the CC noted that simple data on initiated criminal and misdemeanour proceedings, without information about their outcomes, could not be considered as legally relevant proofs.[219]

Finally, the CC outlined its general position that prohibition of an association was a measure of a democratic society to be used in situations of absolute necessity (*mora predstavljati nužnu meru demokratskog društva*).[220] In the view of the CC, it could order prohibition of an association only when it established, in a reliable fashion, that all previously undertaken measures of state authorities were not successful in the prevention of the association's unconstitutional activities, and this was not so in the case at hand. In addition, prohibition would not be justified considering the number and weight of the breaches of law presented in the prohibition proceedings. Thus, the CC denied the request of the public prosecutor to prohibit the two associations in question.[221]

The *1389/Naši* case marked a departure from the *Obraz* decision in several important respects: (1) the content of the standard for prohibition, (2) the standard of proof, (3) the weight given to certain activities of an association.

Firstly, as regards the standard for prohibition,[222] in *Obraz* the CC gave equal weight, on the one hand, to the fact that other measures undertaken by the authorities were unsuccessful, and, on the other hand, to the fact that Serbia's democracy was fragile, burdened with prejudices and recent history of ethnic wars, where it was particularly important to prevent attempts to create an environment

[218] *1389/Naši decision* (n 207) 13-14. Here, as elsewhere, one cannot fail to mention the convoluted language used by the CC in this decision. For a criticism of the language (and logic) used in the *Obraz* decision (n 206); Beljanski (n 216) 260.

[219] *1389/Naši decision* (n 207) 14-15.

[220] '[i]t is a last defensive action of a democratic society when activities of the association and its members absolutely seriously (*krajnje ozbiljno*) and profusely (*intenzivno*) violate rights and freedoms guaranteed by the Constitution so that they undoubtedly strive to attain violent overthrow of the constitutional order, violation of guaranteed human and minority rights or cause racial, national and religious hatred'. *1389/Naši decision* (n 207) 16.

[221] *1389/Naši decision* (n 207) 16.

[222] It should be noted that the Serbian Act on Associations provides some criteria for prohibition by stipulating that it 'may be grounded on activities of members of an association if there is a link between these activities and the activities of the association or its goals, if these activities are based on the organized will of the members and it can be considered, based on the circumstances of the case, that the association tolerated the activities of its members' (Art. 50(2)). In *Obraz* and *1389/Naši*, the CC noted this provision but its analysis did not expressly follow these criteria and was not based on them.

of insecurity and fear for certain social groups. In the *1389/Naši* decision, the latter consideration was completely absent. At the same time, proportionality was assessed exclusively by focusing on whether other state measures, apart from prohibition, had failed to prevent unconstitutional behaviour. While the CC was obviously presented with insufficient evidence of criminal behaviour (especially convictions) of the associations in question and their members by the public prosecutor, a perceived inadequacy of criminal law measures cannot be the only criterion for the prohibition of an association, as will be discussed further below.

Secondly, the standard of proof required by the CC had in fact changed. In *Obraz*, the CC required 'sufficient evidence' (*dovoljni dokazi*), while in *1389/Naši* this was changed to 'undoubted existence of convincing evidence' (*nesporno postojanje uverljivih dokaza*) or 'convincing evidence which undoubtedly shows' (*uverljivi dokazi koji nesporno pokazuju*), which is a higher standard of proof. It appears that the new standard is also higher than the standard used by the European Court of Human Rights in similar cases, which required 'plausible evidence'.[223] The new standard meant that in *1389/Naši* the CC refused to give weight to information about criminal and misdemeanour proceedings against members of the organization, asking instead for evidence of criminal and misdemeanour *convictions*.

Finally, in *1389/Naši* the CC in fact made the documents and statements of an association almost irrelevant in the prohibition proceedings, although it continued to insist that they remained a factor to be considered. In reality, however, what counted in the *1389/Naši* decision were primarily two factors: (1) activities of an association and its members that gave rise to legal proceedings and convictions and (2) whether other state instruments to counter such activities proved unsuccessful.

All this shows that in the *1389/Naši* case the CC changed the criteria for prohibition of an association adopted in *Obraz*. In the latter, in addition to assessing the effect of other state measures, the CC also took into account the social and political context of the case, in particular the fragile nature of Serbia's democratic society and its recent history, which was completely ignored in *1389/Naši*. In addition, even with regard to the sole factor it chose to consider - whether the authorities had exhausted other measures apart from prohibition – the CC modified its approach from *Obraz* by refusing to take into account information of commenced but unfinished criminal and misdemeanour proceedings against members of the organization.[224] However, in the context of proportionality

[223] *Refah Partisi v. and Others v. Turkey* App nos 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR [GC], 13 February 2003), para. 104.

[224] This approach differs from the practice adopted in Germany, Spain, and Hungary, for more see Violeta Beširević 'Institucionalizacija i 'devitalizacija' militantne demokratije u Srbiji: slučaj zabrane udruženja' [Institutionalization and 'Devitalisation' of Militant Democracy in Serbia: the Case of Prohibition of Association], in Milan Podunavac and Biljana Đorđević (eds) *Ustavi u vremenu krize: postjugoslovenska perspektiva* [Constitutions in the Times of Crisis: Post-Yugoslavian Perspective] (Univerzitet u Beogradu – Fakultet političkih nauka 2014) 169-170. According to Beljanski (n 216) 256, prior commission of a criminal offence should not be a condition for prohibition of an association.

analysis these very facts could be used in support of prohibition as evidence that other legal measures against the organization and its members had failed to bring results.

The CC's approach is at odds with the practice of the European Court for Human Rights. As already mentioned, Article 18, para. 3 of the Constitution requires the CC to interpret human rights provisions in accordance with international standards and the practice of international institutions supervising their implementation. In other words, the CC is bound to take into account the position of the ECtHR. In *Refah partisi*, the European Court took the position that analysis of a 'pressing social need' in the case of the prohibition of a political party, which is also applicable in the present context,[225] must concentrate, *inter alia*, on 'whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a 'democratic society'.[226] However, as has been discussed, it is exactly this 'whole' – which consists of 'the acts and speeches' – that the CC failed to consider.

2.1.3.4. Commentary of the Decisions

The CC's decisions in these cases show that the court was rather inconsistent in its approach towards prohibition of associations.[227] However, while the decisions are mutually inconsistent and contradictory, they share the same convoluted language and obscure reasoning.

The decisions attracted considerable scholarly attention[228] with abundant references to the concept of 'militant democracy'.[229] In contrast to that, the CC did not show any interest for the relevant theoretical concepts, although it could find support for this in the practice of the ECtHR, which recognized that a state is entitled to take measures to protect itself in order to guarantee the stability

[225] Particularly as the organizations in question pursued political aims and engaged in political activity, see *Vona v. Hungary* App no 35943/2010 (ECtHR, 9 July 2013), para. 58.

[226] *Refah Partisi* (n 223); see also *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania* App no 46626/99 (ECtHR, 3 February 2005), para. 48.

[227] See also Tanasije Marinković, 'Wrestling with Political Extremism – Closure of Associations in the Case-Law of the Serbian Constitutional Court' (2012) 24 European Review of Public Law 1599, 1634 .

[228] See, e.g., Beljanski (n 216); Beširević, 'Institucionalizacija i 'devitalizacija' militantne demokratije u Srbiji' (n 224); Marinković, 'Wrestling with Political Extremism' (n 227); Petrov (n 78).

[229] See Marinković, 'Wrestling with Political Extremism' (n 227) 1603-1604; Beširević, 'Institucionalizacija i 'devitalizacija' militantne demokratije u Srbiji' (n 224) 153-155. The concept of militant democracy was first introduced by Karl Löwenstein, who argued that democracy should become militant in order to combat fascist movements. One of the strategies he proposed, that democracy should restrict political rights to prevent fascist movements from exploiting democratic freedoms to undermine democracy, was subsequently identified with the concept of militant democracy, see Giovanni Capoccia, 'Militant Democracy: The Institutional Bases of Democratic Self-Preservation' (2013) 9 Annual Review of Law and Social Sciences, 207, 208.

and effectiveness of a democratic system.[230] It also failed to follow the standards developed by the ECtHR (as it was bound by the Constitution) when assessing the need for the prohibition in *1389/Naši*.

In fact, the CC at first tried to avoid entering into the substance of the matter, and disposed of the two cases on procedural or formal grounds. In *Football Fans,* it decided the case by invoking procedural grounds that the associations or groups in question were not registered, while in *Nacionalni stroj* it declared that the organization was prohibited by the Constitution itself as a secret organization. However, it took the CC three years to decide the case of *Obraz*, where, for the first time, it addressed the substantial issues. This is a clear example of its strategy of avoidance of hot political and legal issues.

The government was the political force behind the prosecutor's decision to initiate the proceedings to ban the organizations in question.[231] It seems that the government primarily acted for pragmatic purposes, to show that it was doing *something* against the extremists. Against this context, the CC's decision in *Obraz* to accept the public prosecutor's request to ban the organization in question indicates its eventual accord with the political majority. At the same time, however, the delaying strategy employed by the court indicates that, at least initially, it was reluctant to go along with the political majority and was waiting for the political and media focus on the cases to pass.

The question of activism should perhaps also be considered by comparing, on the one hand, the position(s) the CC took in these cases and, on the other hand, a widespread tolerance for discrimination in Serbian society, where the extremist organizations may even have attracted some sympathy.[232] The tolerance for

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[230] *Ždanoka v Latvia* App no 58278/00 (ECtHR, 16 March 2006), para. 100. According to the Court in *Refah Partisi* (n 223), para. 100: 'a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent'. (also quoted in *Ždanoka v Latvia*, ibid para. 101).

[231] See Irena Pejčić and Bojan Cvejić, 'Inicijativa Ministarstva pravde i Republičkog javnog tužilaštva: Sledi zabrana Obraza i organizacije 1389' [Initiative of the Ministry of Justice and Republican Public Prosecutor's Office: Prohibition of Obraz and association 1389 to Follow] *Danas*, 21 September 2009) <www.danas.rs/vesti/drustvo/sledi_zabrana_obraza_i_organizacije_1389.55.html?news_id=172364> accessed 22 January 2016.

[232] The EU Progress Report on Serbia issued in 2012, the same year when the *Obraz* and *1389/Naši* decisions were rendered, states that 'discrimination based on ethnicity, gender, and sexual orientation remains widespread' in Serbia, see European Commission, 'Serbia 2012 Progress Report', (Commission Staff Working Document) COM(2012) 600 final, 51 <http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf> accessed 2 June 2015. Opinion polls examining attitudes towards discrimination in the Serbian public reveal discriminatory attitudes, especially significant social distance towards members of other ethnic groups, in particular Albanians, as well as towards sexual minorities. These attitudes had not changed significantly between 2009 and 2012, see CESID, *Izveštaj o istraživanju javnog mnenja. Odnos građana prema diskriminaciji u Srbiji* [Report on Survey of Public Opinion. Attitude of Citizens Towards Discrimination in Serbia] (2012), 26-30 <www.ravnopravnost.gov.rs/jdownloads/files/izvestaj_diskriminacija__cpe_cesid_undp_decembar_2012.pdf> accessed 26 January 2015. For changes in the period 2009-2012, see ibid 28.

discrimination has also been shared by the political class,[233] while the political regimes after the democratic change in 2000 have regarded the right-wing extremist groups as legitimate actors in political life.[234] Against this context, the *Obraz* decision, in which the CC dealt with the merits of the case for prohibition for the first time and eventually decided to ban an organization, should perhaps be regarded as one careful activist step forward. By banning *Obraz*, the CC in fact took a position which differed from the prevalent position of *toleration* of extremist nationalist organizations among the Serbian public in general and among the political class in particular. It also reasoned outside its usual box, by taking into account various factors relevant in the context of (Serbian) democratic society. But soon afterwards, the CC took a quick step back and again found itself in accord with the opportunistic majority, for which it used its well-known formalistic approach in deciding constitutional cases.

As far as the effects of the *Obraz* decision, they have been extremely limited. Not only were the legal standards the CC adopted effectively overruled after less than six months, but the organization re-established itself as 'Srbski Obraz' and continues to function, although with a significantly lower public profile.[235] As far as the public reactions are concerned, they were quite limited. Human rights personalities in both governmental and non-governmental sector welcomed the decision,[236] while some mainstream legal commentators questioned the merits and usefulness of a decision to ban an association.[237]

[233] A survey examining attitudes of public officials in Serbia has found that although discrimination is widely regarded as a negative phenomenon, 48% of those questioned consider that discriminated groups do not do enough themselves to rectify their position. Further, of those who witnessed discriminatory behaviour only 4% actually reported it (although over 50% claimed that they verbally opposed it), see Ipsos, *Odnos predstavnika organa javne vlasti prema diskriminaciji u Srbiji* [Attitudes of Representatives of Public Authorities Towards Discrimination in Serbia], (survey conducted between 3 and 30 October 2013), 19, 52-54 <www.ravnopravnost.gov.rs/jdownloads/files/izvestaj_odnos_predstavnika_javne_vlasti_prema_diskriminacijiji_u_srbiji_final.pdf> accessed 2 June 2015.

[234] See Stakić (n 202) 8.

[235] See <www.obraz.rs> accessed 3 June 2015. Apparently there have been some modifications in its public appearance, for example, its 'Proglas neprijateljima' [Proclamation to Enemies] which, in the view of the CC, showed its discriminatory nature, is not reproduced on the web site, but the organization clearly continues to function.

[236] The Ombudsman said that the decision to ban 'Obraz' was not a matter for rejoicing but was necessary to protect constitutionality and human rights, while Gay-Straight-Alliance welcomed the decision, see 'Ustavni sud zabranio pokret "Obraz"' [Constitutional Court Prohibited "Obraz" Movement], *Blic*, 12 June 2012 <www.blic.rs/Vesti/Hronika/327977/Ustavni-sud-zabranio-pokret-Obraz>. The decision was also welcomed by the Commissioner for Equality, see 'Zabrana "Obraza" podelila stručnjake' [Prohibition of "Obraz" Has Divided Experts], *Politika*, 14 June 2012 <www.politika.rs/rubrike/Hronika/Zabrana-Obraza-podelila-strucnjake.lt.html> both accessed 3 June 2015.

[237] ibid.

3.
Findings

3.1. (No) Judicial Activism in the Work of the CC

As a general conclusion, it can be said that the CC predominantly acts with *judicial restraint* rather than as an activist court.[238] This has also been noted in a study by Beširević, which analysed the performance of the CC in other cases involving contested political issues,[239] and is the view shared by most interviewees.[240]

The cases that we have analysed show that the CC's approach is implemented mainly through the strategies of delaying and avoidance. In the case of the CC, they have been used in order to dodge conflict with important political interests of the political majority. These strategies are further supplemented by additional elements, *viz.* the CC's formalism and the poor quality of its decisions. In our view, the formalism and poor quality of CC decisions, as well as the fact that one third of its judges come from the judiciary, indicates that the CC remains an integral part of the Serbian judicial tradition, which is not a fertile ground for judicial activism.

Rare instances of the CC's judicial activism can be found in the cases that focused on issues which are related to Serbia's fulfilment of the political criteria for EU membership, namely respect for human rights and representative democracy. Specifically, judicial activism was found in the selected decision on local election law. There, the Court not only implemented a European standard of democracy but its decision was in line with the position taken by the EU Commission, which presumably made the CC more comfortable when going against the political majority.[241] On its part, the political majority complied with the decision, because it ultimately favoured the goal of EU integrations over the (repealed) electoral rule it had produced.

Instances of judicial activism can also be found in decisions rendered under the constitutional complaint competence of the CC, which fall outside the

[238] This was also stressed in two interviews.

[239] Namely, the decisions on the emergency regulations, decentralization (autonomy of Vojvodina) and judicial reform. See Beširević, 'Governing without Judiciary' (n 20) 966-971. She also analysed the cases concerning prohibition of certain associations that we discuss in detail, see ibid 974-976.

[240] On file with the authors.

[241] 'Serbia 2010 Progress Report' (n 140).

scope of this study but are nevertheless worth mentioning here. An example is the CC's decision on the rights of transgender persons, in which the CC decided to rule on the action of administrative authorities although the constitutional complaint was not filed against them, but against the omission of the National Assembly.[242] In this instance, the CC transformed itself, for a moment, into a positive legislator by adopting an interpretation that 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) by virtue of analogous application of other provisions in such instances. In this case the CC went beyond a textual interpretation of the Constitution when it ruled – relying on the ECtHR's jurisprudence – that the constitutional guarantee of the right to the dignity and free development of individuals[243] included the protection of the right to privacy and family life, which was not expressly mentioned in the Constitution.[244] On the other hand, even in that case the CC exercised judicial restraint when refusing to accept to rule on the omission of the National Assembly to regulate legal consequences of the sex reassignment.[245] Here, it should also be noted that in this case there were no direct political interests involved, so the CC 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.

3.2. Strategies of the CC

As already mentioned, one can identify two main strategies used by the CC in order to avoid going against the interests of the incumbent political majority. We call these 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 CC was stalling to rule until the political majority was about to change or had changed, or until the political issues became moot.[246] This was also noted in the interviews.[247] In the case of the prohibition of certain associations, it took three years for the CC to prohibit two extremist associations, which was admittedly a hard decision to make

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

[243] Constitution (n 2), Art. 23.

[244] *Decision Transgender* (n 242) 32, para 6.

[245] *Decision Transgender* (n 242) 31, para 5.1.

[246] See also Beširević, 'Governing without Judiciary' (n 20) 966-971, 974.

[247] On file with the authors.

in the climate of political toleration, if not sympathy, for them.[248] Similarly, the decision on the constitutionality and legality of the Brussels Agreement, which dealt with the contentious issues of relations with Kosovo and was crucial for the EU integrations of Serbia, was issued almost 2 years after the initiation of the proceedings, when this issue was no longer at the forefront of the political debate.[249]

The delaying strategy is not new in the practice of the CC. It was used during the 1990s when the CC waited to rule on the legality of certain government decrees until after the government itself repealed them.[250] There are other examples: the 2004 repealing of the 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;[251] or, in 2012, repelling the provisions of the law on government which introduced the office of the deputy president of the government only when it became clear that the political majority which adopted the law would not form the new government after the elections.[252] The same was the case with the proceedings (both abstract review and constitutional complaint proceedings) related to the reform of the judiciary and re-election of judges.[253]

A possible explanation for this may be that the timings of these rulings were a pure coincidence given the fact that the CC 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

[248] See section 2.1.3.1.

[249] See section 2.1.2.1.

[250] See Čiplić and Slavnić (n 18), 28.

[251] See Beširević, 'Governing without Judiciary' (n 20) 967.

[252] 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 CC decision was adopted on 3 July 2012, when it was clear who would form the new government. It is interesting that the CC 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 CC press statement, there was not a sufficient majority for the proposal of the judge rapporteur, see Saopštenje sa 11. sednice Ustavnog suda, održane 19. juna 2012. godine, kojom je predsedavao dr Dragiša Slijepčević, predsednik Ustavnog suda [Statement from 11th Session of the CC chaired by Dr. Dragiša Slijepčević, president of the CC], 19 June 2012 <www.ustavni.sud.rs/page/view/0-101645/saopstenje-sa-11-sednice-ustavnog-suda-odrzane-19-juna-2012-godine-kojom-je-predsedavao-dr-dragisa-slijepcevic-predsednik-ustavnog-suda> accessed 22 January 2016.

[253] See Beširević, 'Governing without Judiciary' (n 20) 969-971.

certain to change. Moreover, the existence of an intentional delaying strategy is implied in a statement of the former CC president, Dragiša Slijepčević, given in February 2011, at the time when he assumed the position of the court's president. He pledged to introduce a 'program of work', 'that would eliminate a possibility for the Court to avoid ruling on hot political cases or wait until issues resolve themselves'.[254] In this way, he implicitly admitted that avoiding contested political issues and waiting 'until issues resolve themselves' was something that had occurred in the CC's practice. As our analysis shows, the practice has not changed since then.

Additionally, our analysis of the selected cases shows that the CC sometimes exercises a *strategy of avoidance*. This strategy can be found, for example, in the decisions on prohibition of associations, where the CC initially disposed of two cases on formal grounds without considering the real issues.[255] The Brussels Agreement decision may also be regarded as an example of this strategy, since the CC dismissed the case on seemingly procedural grounds, while the CC simply ignored the arguments raised by law experts at the hearing.[256] The avoidance strategy of the CC was also detected by some of the interviewees.[257]

3.3. Quality of the Decisions

Another consideration that is also worth mentioning is that the CC's reasoning is frequently formalistic and mechanical (this was also mentioned in the interviews[258]) 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. Apart from the decisions dismissing requests to ban extremist associations mentioned in the previous paragraph, this is also evident in the Brussels Agreement decision, which is premised on a simplistic application of the definition of international treaties contained in the Vienna Convention on the Law of Treaties.[259]

[254] Our translation. He pledged to introduce a 'program of work' for the Court, in order to secure rulings in cases with the most burning and important current issues both for the citizens and the state. See his interview for the daily *Politika* on 6 February 2011, available on the website of the CCS, <www.ustavni.sud.rs/page/view/sr-Latn-CS/89-101388/razgovor-nedelje-dragisa-slijepcevic-predsednik-ustavnog-suda-srbije> accessed 15 May 2015.

[255] See section 2.1.3.4.

[256] See, e.g., the Brussels Agreement decision, section 2.1.2.

[257] On file with the authors.

[258] On file with the authors.

[259] See section 2.1.2.

In addition, the CC's decisions frequently fail to adequately deal with, or even mention, the opposing arguments expressed in the submissions to the court or voiced at public hearings,[260] which was also pointed out in the interviews.[261] This leaves the impression that the CC chooses to ignore such arguments because it does not have a response to them, which might undermine the legitimacy of the decisions in question.[262]

Moreover, the formalistic and mechanical approach preferred by the CC, complemented by the lack of substantial discussion in its decisions, results in their poor quality, which was also noted in some of the interviews.[263] Only in rare cases does the CC offer a clear line of legal arguments followed by a clear conclusion.[264] It should be noted that experience shows that such formalism and insufficient legal reasoning of decisions are common in ordinary courts in Serbia. This indicates that the CC belongs to the judicial tradition in Serbia, which is also due to the fact that one third of the constitutional court judges come from the judiciary.

Finally, many of those interviewed pointed out the failure of the CC to develop a legal doctrine in its jurisprudence.[265] The lack of interest for doctrinal issues is also illustrated by the failure of the CC to address the question of militant democracy in its cases concerning prohibition of citizens' associations, which was discussed above.[266]

A positive feature of the decisions of the CC is the fact that they have frequent references to ECtHR jurisprudence.[267] However, the application of the ECtHR jurisprudence has not been systematic.[268] There have both been cases in which the CC followed[269] and cases in which it ignored the jurisprudence of the ECtHR.[270]

[260] See, e.g., the Brussels Agreement decision, section 2.1.2.

[261] On file with the authors.

[262] See section 2.1.2.4.

[263] There was one interviewee who was of the opinion that the decisions of the CC are of a higher quality than the decisions of the ordinary courts, which is not a high benchmark. On file with the authors.

[264] The example of such a decision in a transgender case under the constitutional complaint proceedings, see (n 242).

[265] On file with the authors.

[266] See section 2.1.3.4.

[267] See section 1.6.

[268] As noted by Beširević and Marinković (n 112) 428-429.

[269] See *Decision Transgender* (n 242) 32, para 6, see also cases mentioned in Beširević and Marinković (n 112) 409-413.

[270] As was in the cases concerning prohibition of citizens' associations, see section 2.1.3.4. See also Beširević and Marinković (n 112) 417-422.

3.4. Factors that Impact the Position and the Role of the CC

The key factors that impact the position and the role of the CC are both internal and external. The main *internal factor* is the judges' election/appointment procedure and the personal composition of the Court. Firstly, the non-transparent procedure of election/appointment leaves the general public and legal community with the impression that the judges are close to the political parties which select them in one way or another.[271] Secondly, it seems that the expertise and independence of the candidates are not the main considerations in the selection process.[272] One third of the judges come from the judiciary, which traditionally tends to prefer conformism to professional integrity and expertise.[273] In addition, four out of the fifteen judges lack any significant judicial or academic background.[274] It is doubtful whether they fulfil the constitutional requirement of legal prominence for the judicial post in the CC.[275] In conclusion, it seems that the expertise and independence of candidates were not the prime consideration in the selection process, regardless of the selecting authority. This is certainly felt in the court's composition and, consequently, in its work.

Such a process of selection of judges and its results indicate that political actors do not consider that a strong constitutional review could become their 'insurance' in the case of electoral defeat.[276] Instead, preference is given to 'weak' candidates who will make a court that would be sympathetic to the government, while the perpetual hold on power remains the main 'insurance' for political actors.

The non-transparent selection procedure in conjunction with the disregard of the criteria for selection also has a negative effect on the legitimacy and the authority of the CC. This was stressed in most of the interviews, including those conducted with two CC judges.[277]

All this makes the CC as a whole and its judges individually more susceptible to *external factors* affecting their work. The first of these is the incumbent political majority. The tradition of conformism, coupled with the not-so-

[271] Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 103.

[272] See section 1.1.1.

[273] See also Beširević, 'Governing without Judiciary' (n 20) 973.

[274] See text accompanying n 47.

[275] The same position was expressed by Marinković, 'Politics of Constitutional Courts in Democratizing Regimes' (n 49) 105.

[276] See Tom Ginsburg, *Judicial Review in New Democracies – Constitutional Courts in Asian Cases* (CUP 2003) 22-33. On this and Sadurski's general view on the approach of post-communist countries in selecting constitutional court judges, see also Beširević, 'Governing without Judiciary' (n 20) 973.

[277] On file with the authors.

stellar independence and expertise of most of its judges contribute to the CC's deference to the incumbent political majority. This explains why deference and lack of activism are related to any incumbent majority, while the CC is much more 'active' with respect to the legislation adopted by the former or outgoing government. From this angle, the CC'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 CC has nevertheless been prepared to rule on contested political issues when it can secure the support of the political majority.

The second external factor affecting the rulings of the CC 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 CC 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 governing majority but also large parts of the opposition[278]) this activism may also be viewed as deference to a 'broader' political majority.

The third external factor influencing the work of the CC is the ECtHR. As was noted earlier, the CC relies on its jurisprudence. This reliance, however, is not always consistent and apt, but nevertheless makes an important positive contribution to the work of the CC.

3.5. Effects of the CC's Rulings

As far as the *effects* of the decisions of the CC are concerned, there is no mechanism in place that would monitor their implementation (both as regards decisions taken in the abstract review and pursuant to constitutional complaints). More than a third of our interviewees claimed that the decisions of the CC frequently have not been implemented in practice.[279] Some of the judges of the

[278] 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.

[279] On file with the authors.

CC are of the same opinion.[280] However, a former president of the CC stated that there were no particular problems in this regard.[281] There is no reliable statistical data on compliance with the CC decisions, and it appears that the CC does not collect information in this regard. Moreover, since the legislation struck down by the CC automatically ceases to have force when the CC decision is published,[282] decisions on abstract constitutional review are not a useful indicator of compliance.

An important indicator of the respect for the CC decisions may be its communications to the National Assembly. During the proceedings of abstract review, the CC requests from the National Assembly to respond to the challenge. However, in many cases these requests remain unanswered.[283] This was also noted in the interviews.[284] The CC also sends letters concerning the need to make certain changes or fill lacunae in the legislation that the CC has identified in the course of its work.[285] It did so more than sixty times in recent years.[286] However, the effectiveness of such an approach is highly questionable in view of the fact that the National Assembly rarely follows the recommendations of the CC.[287]

[280] See Nenadić, *O jemstvima nezavisnosti ustavnih sudova* (n 28) 67. This was also noted in the interviews with two judges of the CC (on file with the authors). See, also, Lidija Valtner, 'Vlada snosi najveću odgovornost' [The Government Bears Largest Responsibility], *Danas*, 1 August 2011, <www.danas.rs/danasrs/politika/vlada_snosi_najvecu_odgovornost.56.html?news_id=220691> accessed 29 June 2015.

[281] 'Nepoštovanje odluka Ustavnog suda nije kažnjivo' [Disrespect for Constitutional Court Decisions Is Not Punishable], *Politika*, 10 July 2012 <www.politika.rs/rubrike/Hronika/Nepostovanje-odluka-Ustavnog-suda-nije-kaznjivo.lt.html> accessed 29 June 2015.

[282] Law on the CC (n 31), Art. 58(1).

[283] For example, this was the case with the transgender decision delivered in the constitutional complaint proceedings (n 242).

[284] On file with the authors.

[285] This is done pursuant to Article 105 of the Law on CC. For example, this was the case with the transgender decision delivered in the constitutional complaint proceedings. For more, see Agneš Kartag-Odri, 'On Legal Gaps and New Interpretative Techniques of the Court's Decision-Making' in Miodrag Jovanović and Kenneth Einar Himma (eds) (n 49) 212. The CC primarily functions as a negative legislator, in order to avoid violation of the principle of separation of powers, so the CC would usually dismiss the cases (both in the abstract review and constitutional complaint proceedings) that were filed solely on the grounds of alleged existence of a lacuna, claiming that they fell outside of its jurisdiction ibid 208, 212.

[286] ibid 212.

[287] The Belgrade Centre for Human Rights conducted a survey on the implementation of the CC's recommendations to the National Assembly on adoption of new legislation or amendments to the legislation in force. The survey included 25 such recommendations, concluding that in most cases the National Assembly did not act on the information received from the CC. See <www.bgcentar.org.rs/zastita-ljudskih-prava-pred-srbijanskim-sudovimadoprinos-monitoringu-reforme-pravosudja/implementacija-opstih-preporuka-ustavnog-suda-rs-postupanje-narodne-skupstine-ustavnog-suda/> accessed 18 May 2015.

Moreover, there were instances in which the National Assembly was in fact acting against the instructions and decisions of the CC,[288] adopting provisions that in substance were the same as those annulled by the court.[289] Despite all of this, the CC has not been ready to consider taking additional steps. In this way, the Court has not only demonstrated a passive attitude towards the National Assembly and political actors, but has signalled that it is prepared to play only a very limited role in the legal and political life of the Serbian society. This self-imposed limitation, which was also noted in interviews,[290] also transpires from the decisions that have been analysed in this text.

3.6. Perception of the Work of the CC

The general public seems to view the CC as irrelevant, as was mentioned in some of the interviews.[291] 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. ICTY). The fact that the CC does not appear in opinion polls speaks a lot about its relevance in Serbia.

There is an additional issue pertaining to the public perception of the CC, which is a question of the transparency of its work. As already mentioned, the CC does not publish all its decisions. Furthermore, the public has been excluded from the regular sessions of the CC since 2009, except in cases when a contested general act or constitutional issues are of broader importance for society.[292] Also, the question of exclusion of the public from the regular sessions in 2013 resulted in numerous media reports in which the CC was portrayed as a non-transparent institution.

[288] 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 CC. See Vesna Petrović (ed), *Human Rights in Serbia 2013* (Belgrade Centre for Human Rights, 2014), 80 <www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2014/04/Human-Rights-in-Serbia-2013.pdf> accessed 20 May 2015.

[289] 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 CC, also pointed out such practice of the National Assembly. On file with the authors.

[290] On file with the authors.

[291] One attributed this to the inefficiency of the CC. On file with the authors.

[292] See section 1.5.

The issue of the transparency of the CC's work was also mentioned in the interviews,[293] together with the fact that the CC had a poor outreach strategy and that it mainly communicated with the public through short press releases posted on its website.[294] As for the CC'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 CC public outreach policy and the transparency of the work of the CC and consequently influences its perception both by the general and expert public.

[293] On file with the authors.

[294] On file with the authors.

4.
Concluding Remarks

The CC established under the 2006 Constitution has faced difficulties from the very beginning. Due to the non-transparent process and disregard of the selection criteria in the election/appointment procedure of its judges by all competent authorities, its input legitimacy was weak. But this did not have to be detrimental for constitutional justice in Serbia, as this institutional deficiency could have been offset by the performance of the CC itself. Unfortunately, this has not happened. The CC's deference to the political majority in power and, in particular, the delaying and avoiding strategies it employs, mean that the court plays a very limited role in the democratic process and has a very modest impact on the outcomes of that process. The perceptions of the CC by the general and expert public also reveal that it lacks both sociological and normative legitimacy. Moreover, the output legitimacy of the CC measured by the consequences of its decisions in respect to the dominant political values in Serbian society is close to insignificant.

Accordingly, the CC's role in, and impact on, the transition 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 CC demonstrate a more active approach. In this way, it somewhat helped transition towards the European standards of human rights and democracy. But even in these cases, it played safely 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. Therefore, viewed from the perspective of EU integrations, the CC's activist decisions may be understood as in fact not going against the interests of the political majority, but as being aligned with them, since the accession to the EU is a political goal shared by the government and the main parties of the opposition (which have changed places since 2012). Thus, one can claim that the CC paradoxically remained a majoritarian device even when it exercised judicial activism and went against the position of the ruling majority and its imminent interests.

On the other hand, the fact that the CC is 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 make its contribution to the transition seem actually significant. However, this would be a premature conclusion. When one considers the public perception of the CC and the effects of its decisions in general, it appears that even those rare

decisions which were against the wishes of the political majority and in line with the interests of Serbia's integration to the EU have only a very limited effect. This is illustrated by the fact that, in the aftermath of the CC 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.

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