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## Constitutional Court in the Process of Building of a Rechtsstaat

### Abstract

In this paper the author examines the role the constitutional court plays in the democratization process. The constitutionalization of the polity is one of the core elements of the democratic transformation in which the institutional framework for the coupling of the law and the politics is set, and the boundaries of the state's intervention in the individual freedoms and liberties are defined. Yet the constitution as a legal text is not sufficient for the establishment of a substantive constitutionalism, but it can serve as a façade for a pseudo-democratic order. In order to underpin the rule of law, to prevent the concentration of (political) power, and to protect human rights, most states that have undergone the democratization process have established a constitutional court. Subject to the condition that the constitutional court enjoys sufficient guaranties for institutional stability, legitimacy, and political neutrality, it can be a progressive and stabilizing player in the democratization process. Yet the court must attain a balance with respect to the political effects of its decisions, and not to intervene in the discretionary areas of policy-making. Ultimately the implementation of the constitutional court's decisions depends on the political elite for a rationale for why court acts strategically and with self-restraint. In Serbia the power of the constitutional court to influence the democratization process is burdened with some difficulties. There have been constant blocks and delays in the appointment of the court's judges, with the court becoming fully operational not until 2010. Given the low degree of legitimacy and authority of the Serbian constitution, it is very difficult for the constitutional court to impose the authority of the constitution to the political players. Yet the constitutional court occasionally delivers decisions that influence the transformation process. Nevertheless, the implementation of the court's decisions is selective.

Keywords: constitution, democratization, constitutional court, Serbian Constitutional Court.

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## Introduction

The breakup of an autocratic regime provides an opportunity for a comprehensive democratization process with the aim of establishing a Rechtsstaat in which the political actors accept the democratic rules of the game. Since democratization should lead to the institutionalization of political power and to the setting of institutional links between a legal order and a political process, a constitution is a key legal framework and a guideline for the democratic transformation. Because of the importance of the constitution and of the need to create additional safeguards for protection of a democratic order, most states that have engaged in the democratization process have established a constitutional court. By resolving constitutional disputes a constitutional court (usually) acts as a guardian of the constitution, maintaining democratic legal and political order and protecting individual human rights, which are essential for a democratic Rechtsstaat.

Since a constitution is the decisive parameter for the constitutional court's activity, the first part of the paper deals with the general position of the constitution in the democratization process. In every phase of this process the impacts of the constitution on the political process and vice versa are different, and thus the circumstances for the court's activity also differ. The second part of the paper deals with the role of a constitutional court in the democratization process. This role is two-fold. On the one hand, the constitutional court goes through the institutional build-up and is itself an object of the democratization. On the other hand, the constitutional court reviews the activity of other actors with regard to the constitution and, thus, can influence the democratization process. In this respect, the paper deals with the instruments the constitutional court has at its disposal to influence the democratization process. The third and final part of the paper outlines some of the central aspects of the position of the Serbian constitutional court in the democratization process.

## Constitution in the Democratization Process

The term "democratization" refers to the transformation of a totalitarian or an authoritarian regime into a democratic political order

(Merkel and Puhle 1999: 13). The transformative processes that have taken place in south Europe (Spain, Portugal, and Greece), in the former communist countries in Central and Eastern Europe, as well as in Latin America, indicate that democratization has two main phases: the democratic transition and the democratic consolidation. The transitional phase begins with the breakup of the totalitarian or the authoritarian regime followed by the institutionalization of a democratic order. This is followed by the second phase, democratic consolidation, which aims to ensure the long-lasting functionality and the sustainability of institutions and rules established in the democratic transition. Consequently, democratic processes should be irreversible and the restoration of the authoritarian system less probable (see Merkel and Puhle 1999: 13; Merkel, Sandschneider and Segert 1996: 13; Rüb 1996: 47f.; Pridham 1996: 2).

The breakup of the authoritarian regime is the first step in the democratization process. This can occur because of an agreement (bargain) between the government and the opposition by which they arrange both the tempo and the outreach of the change (Sandschneider 2003: 28). This was often the case in the former communist states because at least a part of the communistic elite was involved in the regime change (Merkel and Puhle 1999: 95). The breakup of the regime can also occur as a chaotic, uncoordinated process in which the authoritarian regime simply collapses and the opposition takes political responsibility (Sandschneider 2003: 28). The way the old regime breaks up can be of importance for the constitutionalization of the emerging democratic order. If the breakup is a result of a bargain between the old and the new structures, the future legal arrangements of the polity will take into the account the interest of the authoritarian elites. The people are in such cases rarely the *pouvoir constituant* but the constitution as an act of the consensus reflects the arrangements with the old elites. The more revolutionary breakup is more likely to lead to a legal (constitutional) framework for the new democratic polity *ab novo*, with the possibility to use the new constitution plausibly as an act of discontinuity. The breakup of the *ancien régime* opens the gate for political and social liberalization, but the level of democratic institutionalization will remain low (Merkel and Puhle 1999: 106; Rüb 1996: 47). The legal regulation in this phase focuses on the issues of elections, political parties, approach to the media and the guaranties of equal opportunities in the electoral campaign (Rüb, *ibidem*).

It is during the institutionalization of democracy that the basis and the institutional framework for a new democratic order will be set. The founding elections and the adoption of a new constitution are the milestones of this phase of the democratization process. The breakup of the old regime opens “the window of constitutional opportunity” and the possibility to set the constitutional framework for the new democratic order. The constitutionalization of the new polity can go through the reinforcing of the old constitution, or its extensive amending, or through adoption of an entirely new constitution (Merkel, Sandschneider and Segert 1996: 13). As mentioned above, the nature of the breakup of the old regime will affect the constitutional change that can emerge either in line with the rules of the old order or fully ignoring the previous legal order. The constitutional continuity is not per se an obstacle for the transition from an authoritarian to a democratic order. The ratio of such continuity lies in the will to perform a radical transformation in line with the legal procedures of the breaking legal order. It mirrors the principle of the rule of law: a society that aims to build a polity on this principle cannot break the binding law despite its defects. However, constitutional continuity does not imply the maintenance of the old system. The necessary changes to the old system will be implemented within the scope of the legal norms of this system. Even though the transformation in this case is evolutionary, its outreach should be revolutionary. Constitutional continuity should be short and dynamic, and the delegitimation and annulment of the old order needs to be followed by the immediate creation of a qualitatively better system. It is only in this manner that constitutional continuity can lead to the fast and in-depth change of the old constitutional order (Dimitrijević 2004: 61f.)

The new constitution sets legal grounds for the institutionalization of a new democratic order. It should reflect the deepest values of the society and the basic grounds for the democratic process (Schwartz 2004: 13). It sets the legal framework for human rights protection and the model for organization and legitimation of political power. Furthermore, the new constitution should communicate with the society and offer effective mechanisms for peaceful conflict resolution. The enforcement capacity of the new constitution depends not only on legal instruments set to ensure its implementation, but also on its legitimacy. The phase of the adoption of a new constitution can underpin its legitimacy threefold: through the procedures in which the constitution is adopted, the perception of the constitution as an act of a consensus, and the wide acceptance of values and rules enacted in it. The new constitu-

tion sets a legal framework in which the democratic structure gradually becomes routine, and the political elites become accustomed to adjusting their behavior to the democratic principles (Pridham 2000: 3). It is with the establishment of new essential institutions or the adjustment of old institutions to democratic principles that the democratic order becomes institutionalized (Rüb 1996: 47).

The phase of democratic consolidation brings strengthening, legitimization, and stabilization of the democratic structures, and leads all politically relevant groups to perceive political institutions of the regime as legitimate and to respect the democratic rules of the game (Merkel and Puhle 1999: 135, 136). A result of a democratic consolidation is “a political regime in which democracy as a complex system of institutions, rules, and patterned incentives and disincentives has become, in a phrase, ‘the only game in town’ (Linz and Stepan 1996b: 15). The democratic consolidation does not address just the political institutions, but it presupposes the consolidation of diverse social segments: economic stability and development, political parties, civil society, deeper national integration (inclusion of national minorities and of regions), and a diffuse support for democracy (Merkel and Puhle 1999: 138). According to the theory of Juan J. Linz and Alfred Stepan, consolidated democracy must have five interconnected and mutually reinforcing arenas. These arenas are civil society that functions on the principle of freedom of association and communication; political society that is based on free and inclusive electoral contestation; the rule of law based on the constitutionalism; the state apparatus that is organized on rational-legal bureaucratic norms, and the economic society which rests on an institutionalized market (Linz and Stepan 1996a: 7-15). As a special precondition for democratic consolidation, but also the entire democratization process, these authors emphasize the existence of a functional state. According to Linz and Stepan, all significant actors, especially the democratic government and the state, must respect and uphold the rule of law (Linz and Stepan 1996a: 10). As they note, a spirit of constitutionalism “entails a relatively strong consensus over the constitution and especially a commitment to ‘self-binding’ procedures of governance that require exceptional majorities to change” (*ibid.*). Further, constitutionalism requires “a clear hierarchy of laws, interpreted by an independent judicial system and supported by a strong legal culture in civil society” (*ibid.*).

The goal of the democratization process is the establishment of a Rechtsstaat in which political power is limited and accounted for by ob-

jective legal (constitutional) rules. Political power is set in democratic institutions wherein there is an institutional connection between a legal order and a political process. Law sets legal rules for democratic governance and constitutes a political process, yet lawmaking is politicized and interconnected with political action. It is in such an arrangement that a constitution gains significance for the submission of politics to law. However, a constitution is a necessary precondition for the establishment of constitutionalism<sup>2</sup>, but rarely is it a sufficient condition. It is not always the case that constitutions are taken seriously or that constitutional norms always prevail in cases of conflict with political interventions (Grimm 2010: 3). Some constitutions lack serious intention to limit the rulers powers, or in some cases constitutional rules do not enjoy full primacy over the acts of government, but are legally superseded by political decisions (*ibid.* 11, cp. Jovičić 1995: 168). The quality of a democratization process in respect to the successful constitutionalization of the political order can be measured by whether a constitution has effective power to frame the political process. The democratization process can lead to the establishment of a liberal democratic order or it can be stuck in some form of semi-democracy or façade democracy. The rule of law supported by an independent judiciary and other institutions of accountability that check the abuse of power and protect civil and political freedoms is immanent to a liberal democracy (Diamond 2002: 7). Façade democracies show some aspects of a democratic political order: a political space for opposition parties and civil society, regular elections, and democratic constitutions (Carothers 2002: 9). However, “they suffer from serious democratic deficits, often including poor representation of citizens’ interests, low levels of political participation beyond voting, frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions, and persistently poor institutional performance by the state” (*ibid.* 9f.). The central weakness within a façade democracy is the politicization and inefficiency of key institutions of a “horizontal accountability” (judiciary, the audit agency, and even the electoral commission). This often results from the lack of political will by political leaders to build and maintain institutions that constrain their own power, whereby a civil society is too weak, or too divided to compel them to do so (Diamond 2002: 9). Within a liberal democracy, then, a constitution adopted in the phase of democratic transition is a base for

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2 There are exceptions to this rule, e.g. United Kingdom, Israel and New Zealand are constitutional democracies with established *Rechtsstaat* but lack a constitution.

development of constitutionalism in the phase of democratic consolidation. However, in a façade democracy, a constitution has no power to produce constitutionalism. Constitution as such is a façade and the stakeholders are not inclined to submit themselves to legal norms but pretend to be exercising their power within the constitutional framework (Grimm 2010: 3).

### **Constitutional Court as a Guardian of a Constitution in a Democratizing Polity**

Democratization processes in the world indicate a specific position of a constitutional court in democratization and establishing of a Rechtsstaat following a breakup of authoritarian or totalitarian regimes. Interesting enough, Samuel P. Huntington's theory of three waves of democratization (Huntington 2004: 22) leads to some parallels in the development of the institution of the constitutional court. The first wave of democratization led to the first ever constitutional court being established in Austria, the second wave brought about the constitutional courts of Germany and Italy, and the third wave resulted in the constitutional courts of Spain and Portugal and in the flourish of constitutional courts in the democratization processes in the 1990s<sup>3</sup>. The establishment of constitutional courts was to a large extent the result of the "trauma" of totalitarianism/authoritarianism that shaped the need to create additional safeguards for the protection of democratic order. Since the legal system of autocratic regimes is subordinated to the political system and more or less abrogated in favor of it (Hein 2011: 7f), a constitutional court's primary function is to protect constitutionally set legal boundaries of politics. The establishment of a constitutional court in newly formed democracies reflects a worry that the principle of majoritarian rule may (as their autocratic past shows) lead to a tyranny. The principles set out in the constitution should be protected from the arbitrary intrusion, and eventually violation, from the parliamentary majority. All new democracies have rejected the Westminster model of complete parliamentary sovereignty, and provided checks against the power of the dominant legislative coalition (Issacharoff 2010: 6). This general course shapes the main tasks of the constitutional court in the

3 All post-communist Central and East European states, except for Estonia, have established a constitutional court. Constitutional courts were also established in South Africa, and numerous Latin American and Asian states.



democratization process, i.e., to prevent the concentration of (political) power and to protect human rights. A constitutional court's institutional position and legal competences are crucial for it to successfully perform these tasks, which in turn support the democratization process.

The constitutional court is a part of the institutional framework of a new democratic order set in the phase of the democratic transition. As such, the constitutional court goes through a build-up process and is itself an object of democratization. However, in most new democracies the constitutional court is a newly established institution, one not burdened with the authoritarian past<sup>4</sup>. Consequently, the institutional build-up of a constitutional court did not emerge as a reform but as a new beginning. In the initial phase of democratization the institutional position and the identity of a constitutional court is set. A constitutional court can effectively support the democratic Rechtsstaat only if institutional arrangements guarantee its independence and neutrality. The formal level of the court's independence depends on a diverse group of legally set instruments: sufficient financial and organizational resources, appointment procedures, professional requirements and age-limits for the judges, terms of office, limited impeachment possibilities (Grabenwarter 2011: 3, para. 13; Hein 2011: 18; Sadurski 2009: 4-8). Formal safeguards are essential but eventually not sufficient to prevent the influence on constitutional court and judges that can occur at the informal level<sup>5</sup>. Informal influence depends on the political and constitutional culture of a state and can occur through subtle mechanisms of influencing or even pressing judges. The position of a constitutional court in the democratization process is not static or separated from the democratization developments in other state institutions. For example, if the appointment of constitutional court's judges is entrusted to the president and the parliament, the bad collaboration between the president and the parliamentary majority can lead to a standstill in the process of appointing new judges and eventually block the work of a court. Similar results can occur if a state body does not exercise the right to appoint a judge in cases where the power of appointment is divided between a few bodies that act independently from one another (cp. Sadurski 2009: 4f). The main challenge for a constitutional court lays in

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4 In the initial phases of the democratic process full with euphoria this circumstance to some extent put an aureole of nobility and "democratic purity" to constitutional courts in contrast to parliaments and ordinary courts.

5 Yet a high degree of formal independence does not suppress but paradoxically encourages a certain degree of politicization at an informal level (Hein 2011: 4, 18).



the danger of its politicization. The politicization degrades a constitutional court as an institution and jeopardizes its role in the democratization process. If the constitutional court's adjudication reflects the party sympathies and it is incapable to act as a neutral player, then the whole idea of the constitutional review is perverted. The politicization of a constitutional court indicates weakness in the democratization process and states with a highly politicized constitutional court usually get stuck in the democratic transition. The safeguards against politicization of the constitutional court address the parliamentary majority and the executive branch, but also require the constitutional court to strict obedience of rules of conduct and to use the legal methods when interpreting the constitution.

The extent of the influence of the constitutional court on the democratization process depends on the court's competences laid down in the constitution. The constitution regulates the scope of the constitutional dispute and which (political) players can bring it to the court, and thus it sets field and also the limits for the constitutional control over politics. The main goal of the establishment of a constitutional court is the safeguarding of the democratic legal and political order and protecting individual freedoms and liberties (Schulz 2010: 1). Reflecting the violations of some basic values and perverting the majoritarian principle in the period of authoritarian past the constitutional law makers set the constitutional court as an impartial guardian of the constitution and its values. If in the earlier phase of the democratic transition the established political players (in the post-communist countries these were the socialist government and the opposition) face the uncertainty about their political future after the first democratic (founding) elections, they both advocate for a (strong) constitutional court as one of the institutional guaranties that would protect them if the other side win a decisive victory (Boulanger 2006: 270f.) Both sides have had the interest that for the case they lose the founding elections they have an option to correct the governmental policy or even block the reforms using the constitutional court. Parties are forever uncertain as to who will rule and seek to limit the ability of the other to exploit momentary political favor (Issacharoff 2010: 26). Thus, it is not surprising that numerous new democracies have established a powerful constitutional court.

The very core of the constitutional court's activity is to settle constitutional disputes by giving the "final word" on the interpretation of the

constitution. Since the constitutional norms are often vague programmatic clauses on basic values of the polity, the content of the constitution depends on its interpretation and cultural, social, and political environment in which the constitution lives and is applied (Maruste 2007: 11). In new democracies where no stable consensus is reached on diverse issues, the way the different political actors read the constitutional text can vary and, thus, produce constitutional disputes. In situations of “triadic dispute resolution”, when two parties in the political arena cannot solve their conflict over the interpretation of the constitution, a constitutional court acts as a “neutral third” party, an arbiter. Involvement of the constitutional court can stabilize the situation, yet an overly extensive constitutionalization can produce the opposite effects. If the competences of the constitutional court are too widely set, it can lead to an over-juridification of political processes and call into question the ability of the political system to function properly (Möllers 2012: 2).

The central instrument for the constitutional court to legally channel the democratization process is the abstract, usually ex-post, review of legislation adopted by the parliament. In line with the principle of the separation of powers the parliament is entrusted with the competence to enact legislation and set the legal framework for governmental policy. The democratic legislator is not only bound by the constitution, but is the first interpreter of the constitution (Kirchof 1997: § 221, para. 77). By adopting laws that shape the constitutional order and practice itself, the parliamentary majority determinates its vision of the “real meaning” of the constitution (Boulanger 2006: 269). Yet by involving the constitutional court into the institutional framework, the constitution limits the parliamentary sovereignty with regard to the interpretation of the constitution. The extent of the leverage the constitutional court has on the democratization process via abstract review depends generally on two issues: the number of subjects empowered to bring the case before the constitutional court, and the scope of and boundaries for the court’s intervention.

The abstract review is initiated by political actors. It is an instrument against the parliamentary majority and can be used by the opposition when there is a disagreement about what law or policy is best for the society under general and indeterminate constitutional provisions (Sadurski 1999: 22). The president is often empowered to initiate the abstract review and in cases of cohabitation the president can use this power to eventually block the decisions of the parliamentary majority.

The constitution can entrust some other actors, such as courts, government, units of federal or local government, etc. with the right to call the constitutional court for an abstract review. Some constitutions provide a mechanism for individuals to initiate an abstract review of statutes. Some constitutions allow for the constitutional court to initiate an abstract review *ex officio*<sup>6</sup>. For an abstract review to be effective it is important that the constitution finds a right balance when regulating the circle of subjects empowered to initiate the abstract review. If the right to initiate an abstract review is restricted to only a few actors, there is a danger that the possibility of abstract review is severely reduced or even eliminated (Marković 2008: 551). On the other hand, if the circle of the empowered subjects is too widely set then almost every dispute can be brought before the constitutional court, thereby perverting the abstract review process.

The other central issue determining the effects of the abstract review is the degree to which a constitutional court is engaged in activism and, hence, the extent of its intervention. This highly controversial issue is the result of the blurred boundary between law and politics in constitutional disputes. Since the constitutional court model does not accept the political question doctrine<sup>7</sup>, the constitutional court can deal with diverse highly politicized cases. Yet the fact that the constitutional court faces politics at every turn does not mean that its decisions are necessarily political (Maruste 2007: 10). The parameter for a constitutional control is a constitution as a legal act; the constitutional court is driven by legal logic, argumentation, and methodology; and its due process is legal. Furthermore, the abstract review is limited to the legality (constitutionality) of the statute whereas the legislature's political margin of discretion remains except from the control (cp. Nikolić 1995: 181). However, a problem arises because the constitutional norms are often vague and the decision if the attacked legal provision is constitutional-conform relies on the interpretation of the court. Although this interpretation primarily rests on legal argumentation (cp. Vučić and Stojanović 2009: 98ff.), the constitutional court takes general and abstract legal theories as well as a wider social context into account. In

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6 This is somewhat controversial because it violates the principle "*ne procedat iudex ex officio*" and questions the impartial position of the constitutional court.

7 The political question doctrine is immanent for the US Supreme Court under which it will refuse to hear cases dealing with questions that are in their nature fundamentally political and not legal. Such cases are ruled as no justiciable.

such cases there is a great risk for political criteria and preferences to intrude into the court's decision (Galič 2002: 218). The constitutional court can reduce the politicization risks by following a coherent system of principles and by developing certain values that underlay the provisions of the constitution.

The role of the constitutional court in the abstract review is one of veto-player. If the court finds that the disputed statute (or statutory provision) collides with the constitution, the court will nullify it. It is for this reason that constitutional theory labels constitutional courts as "negative legislators". However, even though the competence of "positive legislation" is still reserved for the parliament, the division line between positive and negative legislation is not always strict. So when a parliament enacts legislation to comply with the constitutional court's decision, it will usually follow the court's argumentation though it is not obliged to do so. In many legal systems, constitutional courts can decide not to nullify the law in the process of the abstract review but to interpret it in a way that makes it conform to the constitution, thereby making such an interpretation a binding one. Also, constitutional courts can sometimes present guidelines for future legislation or even supplement the parliament when the needed legislation is missing (Grabenwarter 2011: 2, para. 9). Yet the principle of judicial self-restraint limits judicial activism. An overly activist constitutional court would give the impression that the court attempts to act as a political player and that its decisions rely not on legal argumentation but rather on political preferences (Galič 2002: 218).

Although abstract review is the key competence of the constitutional court, it is not the only one that influences the political processes in a democratizing society. In disputes on the horizontal separation of powers, the court can have a significant role in establishing the boundaries of power and limiting its concentration. This is especially the case in periods of cohabitation when the president and the government have different political colors. Moreover, the constitutional court can affect the democratization process through adjudicating disputes concerning vertical separation of powers, electoral disputes, ban of political parties, as well as through its involvement in the impeachment process. And when it comes to fundamental rights, some cases are initiated with the constitutional complaint in which the court not only decides about violations of rights of respective individual but also sets objective standards for the human rights protection.

The previously cited democratization processes indicate the significant role the constitutional courts have played in the democratic transition. In the first years of the post-WW II period, for example, the Italian constitutional court was a crucial actor in eliminating the old fascist legislation that was at odds with the constitution. The Spanish constitutional court was the arbiter and the leading actor in the territorial distribution of competences. Also, constitutional courts of many post-communist states in Central and East Europe have established themselves “as powerful, influential, activist players, dictating the rules of the political game” (Sadurski 2009: 3). The constitutional courts in these countries have dealt with diverse issues and nullified important aspects of laws on abortion, the death penalty, lustration, criminal prosecution of former communist officials responsible for crimes against the people during the communist period, economic austerity measures, fiscal policy, citizenship requirements, personal identification numbers for citizens, and indexation of pensions (Sadurski 1999: 2f). Frequent interventions of the constitutional court in the transitional phase of the democratization process are indicative of the unstable consensus in the polity, as well as the imperfections within the legislative process<sup>8</sup>. They also indicate the readiness of the political actors to settle disputes through formal (institutional) channels<sup>9</sup> and that the constitutional court has gained certain level of authority to act as an impartial arbiter. Yet it is not always the case that the constitutional court is proactive in the initial stages of the transition to a constitutional democracy. If a court has to establish its own independence, legitimacy, or authority, it will be in no position to resolve basic constitutional questions effectively (Epstein, Knight and Shvetsova 2001: 156). Under such circumstances a new constitutional court will reluctantly get involved into the issues about which there is a greater disagreement, and limit its activity to reinforcement of those features of the constitutional system about which there is already substantial agreement (Epstein, Knight and Shvetsova 2001: 156). In the initial transitional phase, the court needs to

8 In new democracies the legislation is qualitatively poor both with regard to the procedure and to the content nomotechnically. The reason thereof lies in the lack of experience and the tradition. Furthermore, the parliament is overburden with adopting of a new legislation during the democratic transition, since it is a necessary instrument for democratic change. In those states that desire membership to the EU, the necessity to adjust the national norms to the *acquis communautaire* further complicates the legislative process (Galič, 2002: 218).

9 However, it should be borne in mind that political actors can address the constitutional court so as to block political processes.

find a fine balance with regard to the political power. If the court is involved in politically colored disputes, then that could compromise its neutrality and public credibility. In still fragile new democracies the constitutional court's decisions unfavorable to a ruling party can in some extreme situations provoke attempts to actually or formally limit the court's independence (Sadurski 2009: 33).

The constitutional court's position can be powerful but the court is not an omnipotent actor. Although the court's decisions are final and binding, the court has no means to enforce its decisions. In fact, the implementation of the court's rulings depends on the political players that are the object of the court's constitutional control. Consequently, the impact the constitutional court has on the democratization process depends not only on the decisions it makes, but also on the degree to which these decisions are implemented. The implementation of the court's decisions depends on the overall development of the legal and political culture in the country, on the court's authority and legitimacy, and on the willingness of the political actors to comply their political action with the legal (constitutional) norms. Since the constitutional court's decision limits the power (at least for the party that lost in the constitutional dispute), it is not surprising that the implementation of court's decisions is not always smooth but confronted with ignorance or delaying. The degree to which the court's decisions are implemented can indicate the quality of democratic transformation: in consolidated democracies the compliance with the constitutional court's judgments is normally fairly high, while it declines as far as the quality of democracy declines (Sadurski 2009: 23).

### **Serbian Constitutional Court and the Establishing of a Constitutional Democracy in Serbia**

Unlike the situation in the post-communist states in Central and East Europe, the Serbian constitutional court was not a new institution established through democratic change, because the Serbian legal order acknowledged the institution of the constitutional court since 1963. Yet neither under the communist regime nor under Milošević's rule did the constitutional court play the role of the guardian of the constitution. Since political power was set beyond the legal order that was just a façade, the constitutional court was not a tool for establishing and promoting constitutionalism but was used for the formal legiti-

mation of the political system. It was because of this that the constitutional court in Serbia entered the democratic transition of 2000 as a weak institution. The court's ability to influence the democratization process and to push the major political players to play by the democratic "rules of the game" was to a great extent limited by the need of the court to strengthen its position in terms of its legitimacy and authority. For many years the main political actors have occasionally blocked the work of the constitutional court because they neglected to appoint the court's judges. After the regime change in 2000 it took almost two years, until mid-2002, for the court to be capable of making decisions. The problem occurred again in 2005 when the President (after a long delay) presented two candidates to fill vacancies on the bench, but the appointments were blocked because the parliamentary fractions could not agree. The adoption of the new Serbian constitution in 2006 did not bring a change in attitude towards the constitutional court that was not constituted before the end of 2007. Yet the appointment procedure was not completed until 2010 because of delays in establishing judicial bodies assigned to appoint five judges to the constitutional court. This perennial seesaw in the appointment of constitutional judges has not only hampered the court's legitimacy and authority, but also occasionally blocked its work and has led to an overburdensome caseload. Given its delicate position, the court was not able to position itself so as to have leverage (at least to the degree conform to a constitutional court's role) for the democratization process. To some extent its actions were constrained, thereby making it incapable of imposing its will as the highest constitutional arbiter and significant player in designing constitutional paths for the elites' arrangements in the transitional phase and, thus, in setting the basis for the constitutionalization of the polity.

Furthermore, the position of the constitutional court and its institutional authority have been compromised due to the low degree of legitimacy and authority of the Serbian constitution, which should serve as the central parameter for resolving constitutional disputes. One of the central barriers for the democratization process and the establishment of a Rechtsstaat in Serbia is the confusion within its legal order. The reasons lie in the authoritarian past of the state, as well as in the lack of a clear consensus among the political elites about the course and the basic values of the reforms. Serbia lacks a deep rooted tradition of the rule of law. Although in the past the regimes have changed, the relation between law and politics has remained the same. Politics has never been



functionally subjected to a legal framework; consequently, no power had ever unconditionally respected legality or the law (Belančić 2001: 2008). During the socialist era law was just one of the instruments used to achieve the goals of socialist ideology. The constitutions were adopted not for implementation, but simply to fulfill the formal condition for a state to have a constitution. The “state reason” and even “the party reason” were the primary motive for the action of all state institutions (Jovičić 1995: 174). The law was not comprehensive but it was composed of a set of norms regulating particular state activities and specific behavior of citizens. Some issues were regulated in detail, while there was a lack of minimal regulation of others. The communist party was the source of power and the law was just an instrument for ruling (cp. Dimitrijević 2002: 23ff). The negative tradition of misuse of law for the purpose of governing continued in the 1990s under the Milošević regime. Actually, there was no legal order at that time but only a set of dispersed norms that were arbitrarily and selectively implemented on demand. The breakup of the regime in 2000 neither brought a clear break with the quasi-legal legacy nor a significant change in treating the constitution as a façade. The Serbian political elite showed no willingness to depersonalize governance by channeling it into the legal framework. In so doing it preserved the elements of the legal façade of the previous systems. The way political players have treated (and still treat) the constitution suggests a lack of serious intent to constitutionalize the polity. As noted above, one of the central elements in the phase of the institutionalization of democracy is the adoption of a new constitution. In Serbia it took six years to overthrow the 1990 constitution and to adopt a new one. Although the electoral revolution in 2000 provided a window of constitutional opportunity, there was no consensus on the issue and constitutional reform was blocked. In fact, constitutional continuity preserved the ideological, political, and legal core elements of the old system (Dimitrijević 2004: 61f). Political players perceived the creation of an independent state of Serbia in 2006 as constitutional opportunity, one that led to a new constitution being adopted in November 2006. Yet the adoption of the constitution was neither a result of a comprehensive public debate nor a reflection of a consensus on basic principles and values of the democratic polity. The adoption of the constitution was to a great extent linked to the Kosovo issue so as to constitutionally safeguard the territorial integrity of the state. Unfortunately, the legitimacy of the constitution was very low

from the very start. Both the adoption procedure and the quality of the constitutional norms were perceived as highly problematic. Apart from that, the adoption of the new constitution did not result in political actors submitting all government actions to rules and institutionalizing political decision making. In short, the constitution is perceived as an interim act that does not meet the needs of the polity and the society and thus should be changed<sup>10</sup>. The continuing constitutional debate, and the failure to reach the minimum consensus over the basic values and outlines of the legal and political order capture the democratization process and hamper substantial constitutionalization of the state.

This para-constitutionality places the constitutional court in an unfavorable position: although it gives great latitude for the court's activism, it also sets limitations to it. Since the constitution is not just a text but also a set of values and principles, the constitutional court could play a decisive role in formulating them, thereby addressing the lack of consensus. Yet this could bring the constitutional court into the grey zone of positive activism and turn it into a constitutional-maker instead of a constitutional-interpreter. On the other hand, the general mistrust of institutions, the low legitimacy of the constitution, and the overall position of the constitutional court could limit the outreach of the court's decisions even if the court opts to act less constrained.

Despite these circumstances the Serbian constitutional court has delivered diverse adjudications that have affected some key issues of the democratization process. For instance, the court has played a decisive role in enforcing the principle of the free mandate of the MPs. In 2003 the court had struck down the statutory norm that linked political party exclusion to the loss of a parliamentary seat<sup>11</sup>, and in 2010 the court declared the institution of undated resignations as unconstitutional<sup>12</sup>. Additionally, the court had stroke down the authority of the presenter of a candidate list (usually a political party or a coalition) to arbitrarily assert the mandates to the candidates from the list<sup>13</sup>. Although these decisions have provoked turbulence and disaffection in the political

10 According to the results of one survey performed in 2012, only 10% of citizens and 5% of the members of the political elite expressed their opinion that the constitution should not be changed. The constitution was rated with the average note 2.8 (grading 1 to 5). For detailed results of the survey, see "Zašto Ustav mora biti promenjen", [online]. Available at: <http://www.fosserbia.org/projects/project.php?id=1656> [Accessed March 9, 2013].

11 „Službeni glasnik RS“, no. 57/03.

12 IY3-52/2008, „Službeni glasnik RS“, no. 34/2010.

13 *Ibid.*

arena, they initiated change and compliance with the democratic standard of the free mandate.

Judicial reform is also indicative of the constitutional court's involvement in the democratization process. The Law on Judges adopted in 2008 has stipulated a new appointment of all judges. The law was challenged before the constitutional court but it did not accept the initiative<sup>14</sup>. In 2009 a general appointment of judges was carried out with the majority of appointed judges already having held the position of judge, but some new judges were appointed, and some judges were recalled. The appointment process turned out to be extremely problematic mainly because it was not sufficiently transparent and the selection (appointment) criteria were not precisely set. The reform of the judiciary became a highly controversial political issue and it also hampered its efficiency. The question of the legal remedy arose for the judges who were not (re-)appointed, and a complaint to the constitutional court appeared to be the only way out. Addressing the complaints, the constitutional court declared that the presumption that the applicants meet the appointment requirements was not overturned, leading the court to order that all unappointed judges be appointed<sup>15</sup>. These constitutional court decisions resolved the uncertainties caused by the chaotic appointment procedure and have brought the issue back to square one. Yet the constitutional court's intervention was to some extent hesitant and one could argue that a more activist approach by the constitutional court in regards to judicial reform would have prevented these negative effects.

When it comes to the vertical separation of powers, the court's direction became clear with decision about the unconstitutionality of some norms of the Law on the Competences of the Autonomous Province of Vojvodina<sup>16</sup>. With the complex decentralization issue and the present tensions between the state government and the provincial government as a backdrop, the court's decision led to a live political debate. The decision was heavily criticized in Vojvodina as an indicator of the general intent to narrow the autonomy of the province. Yet the legal effects of the court's decision remained blurred. The court struck down the diverse norms of the law, but it did not provoke any reaction on the republican or the provincial level to adjust the legal framework to the

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14 IV3-43/2009, "Službeni glasnik RS", no. 65/2009.

15 VIIIY-413/2012, "Službeni glasnik RS" no. 105/2012; VIIIY-420/2012, VIIIY-486/2012.

16 IV3-353/2009, "Službeni glasnik RS", no. 67/2012.

court's decision. The national parliament did not amend the respective law and the provincial parliament did not amend the Statute of Vojvodina. It was because of a lack of political agreement on the status of Vojvodina and on the scope of its autonomy that the issue was just set aside.

In addition to ruling on cases dealing with the protection of the democratic order the court also deals with constitutional complaints involving the protection of individual human and minority rights. Indeed, the vast majority of cases brought before the constitutional court are those initiated with a constitutional complaint. These complaints lead the court to decide on individual cases of human rights violations, as well as to develop a comprehensive system of human rights standards and principles which supports the democratization process.

## Conclusion

One of the central goals of the democratization process is the establishment of the rule of law based on a clear hierarchy of laws and the supremacy of the constitution. The constitution reflects the basic values and principles of the polity, sets the institutional framework for the coupling of the law and the politics, and defines the boundaries of the state's intervention in the individual freedoms and liberties. Yet the constitution is merely a legal text and its effects depend on its implementation and authority to generate the commitment to the democratic procedures. To this regard a constitution can serve either as a façade or as a basis for the establishment of a substantive constitutionalism. Most states that have gone through a democratization process have established a constitutional court as a special safeguard of the democratic order. This meant that they opted to soften majoritarian rule, to exclude basic principles and values from arbitrary decision-making by the parliament, and to give the constitutional court the last word on the interpretation of the constitution. The impact that the constitutional court has on the democratization process depends on its institutional position, legitimacy and authority; and on the various legal instruments and competences on its disposal. For an effective constitutional court it is essential that it not become politicized and lose the position of a neutral arbiter. Institutional safeguards must be set in place to protect the court's independence from the influence of the political actors. Additionally, the court must act impartially and respect the legal

standards of procedure and the principles of the legal interpretation and argumentation. And finally, the court needs to find a balance with respect to the political effects of its decisions. The court can be a stabilizing actor only if it limits the review to constitutionality and avoids intervening in the discretionary areas of policy-making. No matter the institutional strength that a constitutional court enjoys in one legal order, it is never an all-powerful institution. The implementation of its decisions depends on the political elite complying with them instead of ignoring them or delaying their implementation. For that reason the degree to which the court's decisions are implemented can be used as an indicator for democratic development.

For the position of the constitutional court in the democratization process in Serbia a few factors are indicative. The constitutional court in Serbia was established before the breakup of the authoritarian regime and, thus, it faced some mistrust and legitimacy deficits as well as the other institutions face. There were constant obstacles and delays in the appointment of the court's judges and it was not until 2010 that the court became fully operational. One of the greatest barriers for the constitutional court's impact on democratization in Serbia has been (and still is) the low degree of legitimacy and authority of the Serbian constitution. Any serious intent to constitutionalize the polity and to limit political power by constitutional norms remains absent in Serbia, thereby making the constitution a façade. These circumstances make it difficult for the constitutional court to impose the authority of the constitution to political players. Yet the constitutional court occasionally delivers decisions that influence the transformation process. Nevertheless, the court's decisions are selectively implemented. The decisions that limit political power or change political practice are implemented only if the issues are politically prioritized, and there is sufficient international (mainly the EU) pressure to comply with the decisions.

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