Constitutional Courts in Political Turmoil: Who will defend them?

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Abstract

Constitutional courts are not immune to partisan legal reforms launched from the campaign platform. However, when these reforms are saturated with narrow political interests and little room for compromise, oversight or deliberation, constitutional courts are vulnerable to power grabs that endanger the entire political system. In two clear and recent examples, legislative reform in Hungary and Poland attempted to pack constitutional courts with favored judges. The Georgian Constitutional Court faced the same unique test in 2016. Constitutional retrogression is a challenge that deserves urgent analysis of both the political stakes at play in a democratic system and the legal rationales on competing sides of reform. This thesis will consider these dynamics comparatively in Georgia, Hungary and Poland to understand why constitutional courts have been subject to particularly vociferous legislative reform initiatives and how they have responded to weathering challenges to their autonomy.

Introduction

At the end of 2016 the Georgian Constitutional Court made a landmark decision.[1] It declared as unconstitutional a set of Amendments to the "Organic Law on the Georgian Constitutional Court" as well as to the "Law on Constitutional Legal Proceedings". The Amendments introduced several changes to the entire supreme legal institution: the election of the President of the Constitutional Court and his deputy, the tenure of the members of the Court, the competence of the Plenum, the distribution of case assignments among its judges and the promulgation of the judgment of the Court. From the very beginning the legislative bill[2] was controversial, not only among politicians but also within civil society. Several concerns were expressed on the hasty manner of the adoption of the bill. The Public Defender of Georgia criticized the very short period of time for review of the bill by the Georgian parliamentarians.Only one day was spent between the last two readings in scrutinizing it before final voting.[3]Furthermore, he stressed the lack of transparency in the legislative process and, more importantly, the absence of public discussions or engagement during the parliamentary scrutiny of the bill.[4]

At its heart, the bill was a contest between the coalition government- the Georgian Dream-Democratic Georgia (GD), and the main opposition party, the United National Movement (UNM). The government's original aim was to change the configuration of the Constitutional

[1]A Group of MPs (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Levan Bezhashvil*et. al*, 38 MPs in all), the citizens of Georgia-Erasti Jakobia and Karine Shakparoniani, the citizens of Georgia-Nino Kotishadze, Ani Dolidze, Elene Samadbegishvili*et.al*, a group of MPs (Levan Bezhasvili, Giorgi Ghviniashvili, Irma Nadisrashvili, PetreTsiskarishvili*et.al*, 38 MPs in all) v. the Parliament of Georgia, N3/5/768,769,790,792, 29th December,2016.
[2]The bill N07-3/544/8 on the Amendments to the "Organic Law on the Georgian Constitutional Court", initiated by the Parliamentary Committee on Human Rights and Civic Integrity, March 10th , 2016.
[3] "Public Defender's Statement on Adoption of Amendments to Law on Constitutional Court by Parliament - Public Defender of Georgia." Public Defender of Georgia. Available at: http://ombudsman.ge/en/news/public-defenders-statement-on-adoption-of-amendments-to-law-on-constitutional-court-by-parliament.pageAccessed: 06.04.2017.
[4]*Id*.

Court to make it more favorable to their legislation and policies. President Giorgi Margvelashvili, politically independent, was reluctant about the proposed changes and raised objections to several controversial provisions. He requested an Opinion from the Venice Commission[5] and after receiving it, he decided to veto the bill. Following this, Parliament modified the bill. Opponents of the bill did not believe that the presidential veto was the only method for challenging the allegedly detrimental provisions. They decided to challenge these provisions before the Constitutional Court. This building political contestation was the context for the Court's decision at the end of 2016.

This constitutional case illustrates the sensitive boundaries between the Parliament's discretion to legislate on the operation of the Constitutional Court and, vice versa, the Court's ability to have a final say on whether the legislation which stems from Parliamentary discretion is valid or not. The question is particularly interesting since the relevant legislation relates to the Court itself. Can the Constitutional Court be an independent arbiter of its own fate? This thesis will analyze the Georgian Constitutional Court's sensitive jurisdictional dilemma through a comparative lens. First, it will consider the context of a complex tug-of-war involving political, legal and non-governmental constituents around the Georgian Constitutional Court. Second, it will turn to the theory of "constitutional retrogression" as well as explore the more general function of constitutional courts in post-communist era. Finally, it will compare and contrast the recent experiences in Hungary and Poland of the political battles for the Constitutional Courts' and also will identify relevant lessons for Georgia which should be learnt for the future.

[5]The Venice Commission Opinion no.849/2016 on the Amendments to the "Organic Law on the Georgian Constitutional Court" and to the "Law on Constitutional Legal Proceedings", CDL-AD (2016)017, Strasbourg 14 June 2016. Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)017-e Accessed: 06.04.2017.

Chapter 1The Georgian Constitutional Court Under Legal Reform

1.1 The Background of the Case

In the late spring of 2016 a political drama was played out among Georgia's political majority, the opposition and the President. The Constitutional Court is the story's final character which at the end of the year by its decision brought the drama to the end. On March 10th, a bill to amend the "Organic Law on the Georgian Constitutional Court"was initiated by the parliamentary Committee of Human Rights and Civil Integrity. After two months ofparliamentary scrutiny and a presidential veto, the bill was passed on May 31st but still remained controversial.

Initially, the official motivations behind the legislation seemed to be balanced, neutral and not driven by narrow political interests. The bill's authors sought to free the judiciary from political influence, promote the legitimacy of the Constitutional Court and increase public trust in the legal system in order to stabilize the country.[6] However, the bill was subjected to many changes before taking its final form. Interestingly, it was not a source of tension only between the ruling party and the opposition. Even a prominent member of the majority coalition, the Republican Party, [7]opposed the adoption of the bill. One of the deputies from this party

[6]"პარლამენტმა „საქართველოს საკონსტიტუციო სასამართლოს შესახებ" კანონში ცვლილებები შეიტანა [The Parliament Amended the "Organic Law on Georgian Constitutional Court"], The comment of EkaBeselia, head of the Committee of Human Rights and Civil Integrity, 16 May, 2016, The Parliament of Georgia, Available at: http://www.parliament.ge/ge/saparlamento-saqmianoba/plenaruli-sxdomebi/plenaruli-sxdomebi_news/parlamentma-saqartvelos-sakonstitucio-sasamartlos-shesaxeb-kanonshi-cvlilebebi-sheitana.page Accessed: 06.04.2017

[7]The Republican Party during legislative debates over this bill was still a member of the ruling coalition.

expressed her concern that the legislative process, above all, would be subject to political manipulation.[8]

The MPs from the ruling coalition vigorously advocating for the bill, promised that before the second hearing they would send it for independent review before the Venice Commission.However, they failed to do this. The opposition was naturally highly critical of their false promise, stressing that the reputation of the state was at stake in the eyes of the international community.Thechair of the bill's initiating parliamentary committee had promised rapporteurs from the Council of Europe[9] that amendments would be sent to the Venice Commission not *post factum* but before adoption.[10]

The Amendments were strongly criticized by Georgian civil society. The legislative reform was regarded as hampering the country's democratization process. Further, it was seen as a tool for weakening the Constitutional Court by introducing complicated procedures intothe decision making process.[11]

However, the most aggressive criticism of the bill came from the political battlefield. The Constitutional Court was regarded by many as the remnants of the former ruling party's political power and influence, now in opposition. The current political majority tried to change the picture. Several sensitive cases, related to pre-detention period of the ex-mayor of capital city of

[8] "Parliament Passes Controversial Bill on Constitutional Court in Second Reading", the statement by Tamar Kordzaia, Deputy from Republican Party, Civil.Ge, Available at: http://www.civil.ge/eng/article.php?id=29148 Accessed 06.04.2017.

[9]They were representing Parliamentary Assembly of Council of Europe.

[10]"საკონსტიტუციო სასამართლო, პრეზიდენტი და ვენეციის კომისია" ['The Constitutional Court, The President and the Venice Commission"],The view of Irakli Verdzuli from the Parliamentary fraction "Free Democrats", Radio Freedom, Available at: http://www.radiotavisupleba.ge/a/sakonstitucio-sasamartlo/27747215.html Accessed: 06.04.2017.

[11]*Id*. The lawyer SopoVerdzuli expresses the views of one of the authoritative NGOs "Human Rights Education and Monitoring Center" on this issue.

Georgia (member of the opposition party) and a pro-opposition TV channel[12] had emerged with the potential to damage the leading party's prestige. How could the ruling party remove this threat? The answer is simple: by removing constitutional judges, appointed by the previous government, from their positions. This desire to replace judges can be seen as strongly connected with one of theproposed legislative changes. Before the Amendments, judges could stay in office until finishing pending cases. According to the change, a strict end of mandate for the members of the Court was defined. Since there were judges who were about to retire, they would not get to finish their pending cases before retiring from the benches. One has to decide for oneself whether the claims of malevolent political calculations behind the Amendment were accurate or not. However, what it is apparent is that the judiciary can be "attacked" for political motivations under the cover of judicial reforms.

1.2 The Venice Commission's Opinion[13]

As mentioned before, the opposition urged the ruling party to fulfill its promise before the international community and send the bill to the Venice Commission for assessment. Instead, the bill was sent to the Venice Commission after its adoption but before it was entered into force and signed by the President Margvelashvili. Parliamentarians argued that the bill had already been subjected to revision many times and it incomplete state precluded review by the Commission yet the issue remained.

The Georgian President sent the bill to the Venice Commission himself. In response and somewhat comically, the Georgian Parliament finally turned to the Venice Commission and asked it to provide review as well. In its Opinion, the Venice Commissionremarked on how

[12]Giorgi Ugulava v the Parliament of Georgia, 16 September, 2015; "LTD Broadcasting Company Rustavi 2" and "LTD Telecompany Sakartvelo" v Parliament of Georgia, 30 September, 2016.
[13]Venice Commission Opinion on the Amendments to the "Organic Law on the Georgian Constitutional Court" and to the "Law on Constitutional Legal Proceedings", *op.cit.*

unusual the situation was: to receive a request on the same issue by two different constitutional institutions, the President and the Parliament, independently of each other.[14] The President asked the Venice Commission to provide its opinion in a quick manner because he had to decide whether to veto the bill or not. After receiving its Opinion, President Margvelashvili decided not to sign the bill.

The Venice Commission, *inter alia*, criticized the strict cut-off of judges' terms limits proposed by the Amendments and called for the bill's authors to modify it accordingly. The argument for this recommendation was ensuring "the effectiveness of the constitutional court"[15] which could be hampered if relevant constitutional bodies did not appoint judges on time. According tothe Venice Commission Opinion, this was a challenge which had been experienced by other countries.[16] It introduced two kinds of solutions: extending the tenure of judges until they finished pending trials or ensuring that new judges had already entered into office before a current judge's tenure had expired.[17]Georgian legislators did not take this opinion into account.

The Venice Commission was also critical of a proposal to give the Court's Plenum[18] of the sole authority to suspend the challenged provision. For the Commission, it was too vague that if the Board of the Court could make a decision on the constitutionalityof the challenged provision, why the mere interlocutory measure of suspending the provision should be out of its

[14]*Id*. para.1, p.2.
[15]*Id*. para. 19, p.4.
[16]*Id*. para 20, p.4.
[17]*Id*. para.25, p.5.
[18] The Constitutional Court of Georgia consists of the Plenum and 2 Boards. The former unites all members of the Court, nine in all and latter includes 4 judges in each. See the "Organic Law on Constitutional Court of Georgia", art. 11, cl.1-2.

competence.[19] Such a solution is questionable since this measure, in of its nature, should be urgently taken.[20]

Furthermore, the Venice Commission was highly critical of proposals to increase the quorum to seven judges (out of nine) as well as a requiring a qualified majority for taking a decision to the Plenum. It found thatsuch a change puts the core task of the Court-"to identify and remove unconstitutional provisions" at risk.[21]The Commission refers to the experience of European counterparts and gives a recommendation to refuse such a solution.[22]

In its Opinion, the Commission also invokes a set of Amendments which were strongly welcomed. One of these was the automatic distribution of cases among judges.[23] On the basis of this change, the President of the Court is no longer authorized to fulfill this duty. The Commission regards that such a system promotes the independence of judges and a process that should solely occur within the judiciary.[24]

Additionally, the Commission welcomed the new promulgation of Court judgment texts on the Court's website for public dissemination, and then publication inofficial journal, the Legislative Herald.[25] In particularly sensitive cases, it reasoned this would prevent any executive interference when the latter was reluctant to publish a judgment.[26]

The recommendations of the Commission regarding the controversial issues of constitutional jurisdiction, which were not adopted by the Parliament, were finally subjected to

[19] The Venice Commission Opinion no.849/2016 on the Amendments to the "Organic Law on the Georgian Constitutional Court" and to the "Law on Constitutional Legal Proceedings", para 32-34, p.6.
[20]*Id*.
[21]*Id*.para.47, p.8.
[22]*Id*. para. 48, 50 p.8.
[23]*Id*. para 35, p.6.
[24]*Id*.
[25]*Id*.para.60, p.10.
[26]*Id*.

judicial scrutiny by the Constitutional Court. The following section introduces the analysis of this case by the Constitutional Court on the validity of the provisions dealing with its own affairs.

1.3 The Casebefore the Constitutional Court: A Group of MPs and A Group of Citizens v the Parliament of Georgia

At the final stage, the Georgian Constitutional Court itself has emerged as a last resort to check the validity for a set of controversial rules that deals with the arrangement of the Court. The MPs who opposed the adoption of the Organic Law on Amendments, were not totally frustrated because of the defeated legislative battle: they would be able to challenge the provisions from the Organic Law before the Constitutional Court and this was what happened. The following rules where challenged before the Court: the tenure of the constitutional judges, theelection of the President of the Court and his deputy, the competence of the Plenum, the process for passing cases from the Board of the Court to the Plenum, publication of the acts of the Court and the Plenum's decision making process.

The Court's position on these issues deserves careful consideration. The proposal for the strict end of tenure of the Court's members was one of the most contentious provisions challenged. As mentioned earlier, this provision was the most suspicious in terms of its hidden, narrow political interests motivating the bill's authors. Before the Amendments were adopted, judges were not restricted from staying in their offices until finishing pending trials; on the basis of the amendment, they are allowed to perform their duties not less and not more than 10 years.[27] This provision finds its legal basis in the Constitution, which prescribes a ten-year tenure for the

[27]"The Organic Law on the Constitutional Court of Georgia", art.18.

members of the Constitutional Court.[28] In this case, the Court checked the constitutionality of the norm in the light of the aforementioned constitutional provision as well as the right to a fair trial, guaranteed by the Constitution.[29] It reviewed all the major principles which are prerequisites for a fair trial and can be achieved through the system which is effective, namely the system equipped with all necessary tools to ensure the legal remedy to injured parties.

The Court could not ignore the constitutional provision on judges' 10-year terms, because the language of the Constitution, which left no room for exercising the discretion of the Parliament to legislate otherwise. Hence, seeking interpretations beyond this scope did not make any sense to the Court.[30] But it pondered over a scenario, where the constitutional bodies, responsible for appointing the judges, could hamper the process of appointment. The risk of delaying the appointment process and subsequently, dropping the quorum below the threshold, would emerge.[31]The Court found such a scenario incompatible with the right to a fair trial. It stressed on the paralysis of the institution which is incapable of performing such crucial constitutional function and being a bulwark of fundamental rights and freedom of individuals. However, the Court indicated the fact that before making a judgment, a case requires necessary time in order to be thoroughly examined. There are a set of steps of the entire process-analyzing the normative basis of the case, cross-researching relevant international approaches, inviting and questioning witnesses or experts-which can cause a prolonging period for deciding the case, but one should be regarded as reasonable.[32] Therefore, the potential time for a case to be much longer than anticipated cannot be excluded and the argument invoked by the claimant that the transition period could paralyze the Court did not seem to be acceptable to the Court itself.

[28] The Constitution of Georgia, art.88, cl.2.
[29] The Constitution of Georgia, art.42, cl.1.
[30] A Group of MPs and A group of Citizens v The Parliament of Georgia, *op.cit*. para.70, p.44.
[31]*Id*. para. 75, p.44.
[32]*Id*. para.83-84, p.48-49.

Finally, it decided to invalidate the normative content of the provision and according to its interpretation, two factors should be exercised cumulatively in order for a judge to be allowed to stay in office until finishing a pending trial. These factors work in such a way: the judge who is about to leave office shall maintain the post if the relevant constitutional body has not appointed a new judge *and* such a composition does not create quorum that makes the Court ineffective.[33]

In summary, the Constitutional Court decided the circumstances under which judges can remain in office. The reasoning- proper exercise of the right to a fair trial and the maintenance of an effective judicial institution- is convincing, but what is disputable is the fact that the Court, in the name of protecting rights of individuals, can write the rules for its own members.

Another challenged provision, tackled by the Court, does not prescribe a technical matter as the previous issue. On the contrary, it deals with a quite substantive issue: the eligibility of members of the Court to be chosen as the President or the deputy of the President. The matter decided by the Court might be disputable, because we can fairly regard the imposition of the restrictions and defining the eligibility criteria as the domain of the legislative.

The challenged amendment [34]excluded the reelection of the President of the Court and as his deputy. The Court checked the constitutionality of this provision in the light of Article 29 of the Constitution of Georgia, which guarantees the right of citizens to occupy an office in Georgian public service. According to the Court's ruling, the provision was declared unconstitutional and therefore was invalid.

[33]*Id*. para 89,p.50.
[34] "The Organic Law on Constitutional Court" Article 10, para.5[3].

The Court deemed the post of the President of the Constitutional Court as an office which "needs high constitutional protection."[35]It reached such a conclusion in light of the functions that the President fulfils.[36] The role of the President of the Court in operating the system is crucial. The same goes to his deputy, therefore such a restriction cannot override the constitutional interest for the smooth and effective operating of the Court.[37] According to the Court, the restriction, prescribed by challenged provision, has a mutual adverse effect: it prevents members of the Court from being elected, as well as preventing them from electing the candidate they regard as acceptable.[38] The Court was concerned by the improper measure used- limiting the will of the members- which cannot be justified as a measure, which promotes a proper working environment for the judiciary.[39] Judges, it ruled, should not be rotated on the basis against their will.[40]

The court ignored the argument of the respondent, which invoked the legitimate aimto grantall members of the court equal opportunities to occupy the position of the President or his deputy. The Court found no connection between the restriction imposed and a legitimate aim indicated by the Parliament.[41]The next example illustrating the Court's response to the constitutional challenge considers the procedure on suspending the challenged provision before the Court.

[35] The Case: A Group of MPs and A group of Citizens v The Parliament of Georgia, *op.cit*. para.29, p.32.
[36]The President of the Court, among other things, distributes cases among the judges, convenes the Plenum sittings, ensures the functioning of the Staff of the Court and also is involved in budgetary matters. With regard to his deputy, he performs the duties of the President, when the latter is unable to do so. See: "The Organic Law on the Constitutional Court of Georgia", art.12 and art.13.
[37]The Case: A Group of MPs and A group of Citizens v The Parliament of Georgia, *op.cit*..para.33, p.33.
[38]*Id*. para. 31, p.33.
[39]*Id*.para.39, p.35
[40]*Id*.
[41]*Id*. para.40, p.35.

The aforementioned provision gave the authority for suspending the challenged provision solely to the plenum of the Court. The claimant argued that shifting this power to the Plenum makes the decision difficult to make, from the temporal point of view, given the urgency in such cases for protecting the public interest is vital.[42] The claimant stuck to the argument that since the Board of the Court operates equally to the Plenum of the constitutional Court, it need not have an exclusive right to the power to suspend or challenge such provisions.[43] The Court, as in the previous case, ruled on the unconstitutionality of the provision in the light of a right to fair trial. Within this context, the Court expressed its concern in terms of how the existing procedure can be suspended in the provision- initially the question regarding the suspension should be answered by the Board; if it decided the suspension of the provision positively, it should send the case for ruling to the Plenum.[44] This takes considerable time and puts the public interest at risk.[45]

However, this is not the only concern. The court stressed the importance of the qualified majority which is required for the Plenum for making a decision. Since suspending the challenged norm is not a "constitutional matter with systemic meaning", it deemed such a deviation from the ordinary decision-making process of the Court as exaggerated and unnecessary.[46] After all, the provision itself was declared unconstitutional.

Finally, we must consider the provision dealing with the necessary majority by the Plenum of the Court to make a decision. According to the proposed changes, the Plenum would be authorized to make a decision if seven members (out of nine) were present on the hearing.[47]This rule was challenged before the Court. The latter would pay attention to the entire context around

[42]The case-A Group of MPs and A group of Citizens v The Parliament of Georgia, *op. cit*. para.136, p.66.
[43]*Id*.
[44]*Id*. para 159. P.71-72.
[45]*Id*.
[46]*Id*. para.163, p.73.
[47] "Organic Law on the Constitutional Court of Georgia", art.44, cl.2.

the rules regulating the operation of the Court and decided that this rule alone could not be a justification for paralyzing the institution, since other guarantees can ensure its smooth operation.[48]But the Court could not find any logic in the provision according to which the Plenum rules on the constitutionality of the laws by the qualified majority as well as a decision on the unconstitutionality of the organic laws if it was supported by at least six members of the Court.[49]

The Court assumed that the qualification for members of the Court leads us to a "correct decision". Therefore, there is a strong likelihood that the majority and not minority of judges would be favorable to such decision. Imposing a high threshold would give a minority the opportunity to block the decision. As a result, the Court faces an "incorrect decision".[50] The Court said that such an "unreasonable threshold" limits the rights of an individual to his/her fair trial. The value of higher legitimacy, stressed by the respondent in their case, cannot overweigh the more important responsibility to ensuring a fair trial.[51]

In this decision, an interesting approach emerged towards reconceiving a new threshold for annulling organic laws by the Plenum. As was explained, annulling such laws would require support from 6 members of the Plenum. This change's proponents argued thatorganic laws require a higher majority within legislature for their adoption, and that therefore annulling the same laws would require a high degree of judicial legitimacy. The Court rejected this argument and made a clear distinction between legislature and judiciary. Since the former one is a political branch, mandated by the Constitution, a high consensus on passing any organic law would be regarded as fair. But when the law goes before the judiciary, a high majority does not depend on

[48]The case-A Group of MPs and A group of Citizens v The Parliament of Georgia, *op. cit*. para.106-107, p.55
[49]Organic Law on the Constitutional Court of Georgia", art.44, cl.3-4.
[50]The case-A Group of MPs and A group of Citizens v The Parliament of Georgia, *op. cit*. para.112, p.57.
[51]*Id*.para118.p.57.

the political legitimacy of organic laws. Instead, the aforementioned test should be used- whether the law has a "constitutional matter of systematic meaning" or not.

This was precisely what the Venice Commission discouraged the Parliament from adopting. It is should be mentioned that this provision was one of the objections made by President Margvelashvili and sent to Parliament. His general attitude towards the bill was mainly driven by the spirit of the Venice Commission's Opinion. However, according to his version, it would be better if the Plenum would be entitled to making a decision if six judges were presented and the decision would be taken by a qualified majority. But if the Court had to check the constitutionality of a specific class of laws, the quorum would be seven out of nine judges and decisions would require support of six judges. That objection was accepted by the Parliament and the bill adopted according to this version, though the Court deemed them unconstitutional.

As has been shown, the Georgian Constitutional Court has made considerable decisions on the rules governing its own operation, amidst a stormy political climate. How can the Court's self-governing powers be justifiable, given its talk about parliamentary discretion to legislate regulations the Court's functioning? This remains a particular riddle that will be resolved in the following discussions.

Chapter 2 Threats to Constitutional Democracy-Theoretical Perspectives

In the first chapter, this paper carefully considered how the Georgian Constitutional Court was subjected to organizational reform from both political and legal stakeholders. This Georgian example was not chosen randomly. Rather, it is similar to other efforts at reforming constitutional courts in post-communist countries, the very institution that was established to play a vital role in balancing governmental powers and defending individuals from governmental intrusions. For this vital function, constitutional courts were thought to ensure the transition of these countries from a communist totalitarian regime towards democratization. The Georgian Constitutional Court declared as unconstitutional rules which could make it believed would make it weak and ineffective. What does this recent legislative initiative in Georgia suggest for the constitutional and political systems in the long run? This chapter will tackle these questions from a more theoretical perspective. Further, it will identify an increasing number of political incursions into the judicial sphere and therefore a general tendency towards democratic backsliding.

2.1 "Constitutional Retrogression"

In their recent work scholars Aziz Huq and Tom Ginsburg have identified the phenomena of democratic backsliding as constituted by two forms-"authoritarian reversion" and "constitutional retrogression."[52] They both have been conceived as enemies of constitutional liberal democracy. The latter has been seen from the prism of a set of principles:

[52]Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy", Chicago Law School, 17 January, 2017.p.5-6.

the democratic electoral system, as well as the standard liberal rights to free speech, free association and the rule of law.[53]In its typical interpretation, backsliding results in the collapse of a democracy, immediate legal and political changes, namely a military coup or the use of emergency powers.[54] Since this thesis focuses on upon the gradual decay of constitutional democracy, discussion of 'constitutional retrogression' is more relevant than such scenarios of direct and immediate reversion to authoritarian power.

The concept of constitutional retrogression refers to contain a set of incremental institutional changes.[55] This tendency of institutional changes which happen "under the mask of law" should be analyzed together in order to get a clearer sense of political motivations, incentives to change the orientation of the political status quo towards the existing institutions. What is the most dangerous retrogression, according to this theory, is when legislators place their personal incentives into the laws they draft and, as a result, takes out "the substance of democracy, albeit without losing its form."[56] Constitutional Courts have become part of this strategy from illiberal forces as it happened in Poland and Hungary. Through legislative changes they face institutional impotence. The reason why specifically constitutional courts are targets of such regimes will be discussed later.

Much of the relevant scholarly literature in political theory and comparative constitutional law observes that the deviation of a regime from democratic to authoritarian increasingly does not occur through outright aggressive or violent methods (e.g. military coup). Rather, it is increasingly more frequently achieved by gradual, "strategic" and "sophisticated"

[53]*Id*.pp:8-9.
[54]*Id*.13-14.
[55]*Id*.17-18.
[56]*Id*.p.39.

means.[57]The *unique feature of this modern form of de-democratization is that it uses democratic forms and procedures -constitutional amendments as well as other pieces of legislation from "within the rule of law framework," in order to undermine constitutionalism.[58]This process is labeled by Professor David Landau as "abusive constitutionalism" and defined as a set of mechanisms which strives towards weakening democracy through constitutional changes.[59]The resulting illiberal polity may have a well-constructed constitution or legal system but resorts to several pragmatic and duplicitous tactics to defend and expand its own political interests.

` Professor Ozan Varol labels this phenomenon "stealth authoritarianism.[60]" In this form of regime, politicians' rhetoric is saturated with values like democracy, rule of law and constitutionalism themselves, ironically, in order to justify institutional reforms for their power grab. [61] The author of this theory suggests that politicians resort to this method in order to avoid attracting international criticism and domestic activism.[62] Further, he finds that this "covert" strategy is characterized by a vicious, self-constitutive cycle, in which actors invoke legal rules to neutralize criticism.[63] Comparative law is thus not only politicized but employed as a political tactic to obscure deeper changes.

In the context of constitutional judiciaries, these tactics constitute a multi-front assault on prevalent institutions and include picking favored judges, actively courting their support;

[57] Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy", *op.cit*. p.34.
[58] Norman Dorsen, *et. al*. "*Comparative Constitutionalism Cases and Materials*", (The US, West Academic Publishing, 2016), p.72.
[59] David Landau, "Abusive Constitutionalism", *UC Davis Law Review*, no.189 (2013), p.4.
[60]Ozan O.Varol, "Stealth Authoritarianism", *Iowa Law Review*, vol. 100, no. 4, (2015), pp:1673-1742.
[61]*Id*,p.1715.
[62] *Id*.
[63]*Id*.p.1717.

controlling media coverage and discrediting political opposition at all costs.[64]In this respect, the modern tendency of the shift towards covert authoritarianism can happen not only by accurate legislative changes which for instance shape democratic institutions which work in a way which lets authoritarian incentives being accomplished, but also through more institutionally-embedded strategies. Packing courts with loyal judges through constitutional mechanisms is particularly attractive to a political authority already in government.

The difficulty in analyzing this general slide towards illiberal / authoritarian constitutional rule is that, taken individually, such institutional changes do not appear to cause a serious threat to democracy. However, when it happens across the entire spectrum of a given polity's democratic institutions, it paves the way for a nearly unshakable consolidation of power within supposedly democratic, impartial constitutional institutions.[65]Professor Landau suggests that a constitutional change should be conceived as a "core part of authoritarian projects" and that building new rules cannot be viewed separately from suspicion of self-interested motives and authoritarian aspirations.[66]Further, this form of "abusive constitutionalism" is adaptive and flexible.[67] As we have seen in the Georgian example, it can be achieved through legislative initiative accompanied with some kind of incentives, declared by authors themselves, while remaining difficulty is to capture as a concerted attempt on its surface.

In recent scholarship, the process of decay of democracy has been termed as "democratic backsliding". Scholar Nancy Bernmeo defines this phenomena as the "state-led deliberation or elimination" of institutions that makes democracy function.[68] The pace of

[64] David Landau, "Abusive Constitutionalism", *op.cit*. p.18.
[65]*Id*. p.19
[66]*Id*.
[67]*Id*.p.21.
[68] Nancy Bermeo, "On Democratic Backsliding", *Journal of Democracy*, Vol.27, N1 (2016) , p.5.

"democratic backsliding" can be rapid or gradual, with different outcomes.[69] In the first case the breakdown of the democratic regime is apparent, the opposite can happen in the second case. It leads the process to uncertain and ambiguous future.[70]Another difficulty is that it is hard to identify the real incentives behind changes to institutions.[71]

Having reviewed recent theoretical attempts to understand the erosion of liberal constitutionality, it is clear that covert and gradual strategies appropriating constitutional institutions pose a serious threats to modern democracies. Before directing our focus towards the comparison of similar situations in Hungary and Poland, it is necessary to examine why constitutional courts have become subject to legislative attacks from illiberal governments.

2.2 Why Constitutional Courts- What are they good for?

Constitutional justice emerged as a central element of post-communist world in Eastern and Central Europe. Constitutional courts were established to fulfill this project, whose goal was the implementation of democratic values like rule of law and human rights by ensuring checking the will of the political majority against constitutions. Constitutional courts are generally regarded as key players in the transition process towards democracy after 1989, what was heralded as a project-"shaping the new constitutional order."[72] In this important period of democratization courts were given a vital task: to remove unconstitutional provisions and prove their status of guardians of constitutional democracy.[73] They function as the only governmental

[69]*Id*.p.6.
[70]*Id*.
[71]*Id*.16.
[72]Wojciek Sadurski, "Post *Communist Constitutional Courts in Search of Political Legitimacy*", (San Domenico: European University Institute, 2002),p.1.
[7373] The Venice Commission, International Conference on "Constitutional Justice in Transitional Democracy: Success and Challenges of Constitutional Review in Georgia and Eastern Europe", Batumi-Georgia, 11-11 September, 2016,CDL-JU(2016)014.

body which defends rule of law during this period.[74] With support from the Council of Europe and more precisely the Venice Commission constitutional courts became significant "veto-players" in Post-communist political era.[75]It was hoped that the departure from totalitarian systems embodied by constitutional juridical reform would be accompanied by similar ideological and institutional shifts. Two decades later, constitutional courts are prime targets of populist governments across the region seeking supplant un-democratic consolidation of their political and ideological power.

Constitutional courts as an innovative institution in a region managed to be bold and found their place in a new political era. They tackled the sensitive legislations and brought legal consequences which made political majorities uneasy. For instance, they tackled legislation on such as abortion, death penalty, "lustration," fiscal policy, citizenship matters and the result was often a confrontation with the majoritarian will.[76]

Considered from a different perspective, the Hungarian Constitutional Court which is regarded as one of the strongest courts not only in the region, but it is also known globally as the most activist constitutional courts.[77] The recent picture in the region gives scholars grounds to conclude that this successful institution now stands "closer to Russia than to the West."[78] In post-communist Russia, the Russian Constitutional Court was suspended in 1993 in response to its ruling in favor of Parliament and this ruling was equalized with the confrontation with

[74]Bojan Bugaric, Tom Ginsburg, "Courts vs Autocrats in Post-Communist Europe," *Journal of Democracy*, (2016), p.3 Available at: https://www.researchgate.net/profile/Bojan_Bugaric/publications Accessed: 06.04.2017.
[74]*Id*. p.2.
[75] Id.
[76]*Id*. pp.2-3.
[77]*Id*.
[78]Bojan Bugaric, Tom Ginsburg, "Courts vs Autocrats in Post-Communist Europe," *op.cit.* p.1.

President Yeltsin.[79] On the contrary, western polities are more immune towards such attacks because of the strength of their democratic institutions[80], from which newly emerged illiberal polities departed.

The focal concern is that constitutional courts have become one of the main targets of democratically elected illiberal regimes and have to deflect legislative blows they receive. The problematic aspect is the populist language used by such regimes. Illiberal political forces urge that "they represent a true voice of the people", which ensures the legitimacy of legislative attacks on rule of law or law institutions.[81] In such situation such forces can justify court packing and limiting their independence. Constitutional courts are "fairly" distrusted by the illiberal governments who permanently reveal disrespect towards the constitutional rights of vulnerable groups, namely different minorities.[82]Unfortunately they talk in the voice of people and can manage to justify the attack on rule of law bastions which are the last legal resort to such vulnerable groups.

As the following chapter will show illiberal governments in Hungary and Poland fit this development, considering constitutional courts as impeding elements to achieve their aimed policies.[83] Precisely because the latter ones were established to restrain excessive majoritarian will, the majoritarian political machine now undermines this institution through failing to supporting it.[84]

[79]Armen Mazmanyan, "Judicialization of politics: The Post-Soviet Way", *Icon-International Journal of Constitutional Law*, (2015) p.206.
[80]Bojan Bugaric, Tom Ginsburg, "Courts vs Autocrats in Post-Communist Europe," *op.cit.* p.2.
[81]*Id*. p.2.
[82]*Id*.
[83]*Id*.p. 5.
[84]*Id*. p.8.

When a rule of law institution- like a constitutional court is undermined, the legitimacy of a polity as a democratic one is thrown into doubt. The Venice Commission has sounded its warning "against the crippling of the Constitutional Courts".[85] These courts are among prominent target of democratic backsliding countries. Illiberal polities face three distinct possibilities-maintaining status quo, sliding towards more authoritarianism or overcoming challenges to achieve a stronger, more mature democracy. [86] The constitutional struggles in Hungary and Poland provide a pessimistic indication of which of these futures lie ahead.

[85]The Venice Commission, International Conference on "Constitutional Justice in Transitional Democracy: Success and Challenges of Constitutional Review in Georgia and Eastern Europe, Batumi-Georgia, *op.cit*. p.4.
[86]Ozan O.Varol, "Stealth Authoritarianism", *op.cit,* p.1739.

Chapter 3: Capture the Constitutional Court: Recent Experiences in Poland and Hungary

3.1 The Background to the Institutional Reforms

What has recently happened in Poland and Hungary is the very illustration of an attempt to eliminate the guarantor of rule of law institutions by democratically elected illiberal forces in Eastern Europe. The reforms introduced in these countries were quite complex. In Hungary, the coalition led by Fidesz who gained constitutional majority in 2010 parliamentary election initiated adoption of new Constitution-Fundamental Law. It considerably altered the landscape of the Hungarian Constitutional Court by limiting broad access to the Court, reducing the Court's jurisdiction for reviewing legislation related to budgetary matters and as a result of the Fifth Amendment initiated later, increased the retirement age of constitutional justices. In Poland the necessity of a legal reform on Constitutional Tribunal was triggered by the *ultra vires* appointment of two justices by the 7th *Sejm* whose term ended in November, 2015, but they removed the judges of the Tribunal whose term would end during the operation of the 8th *Sejm*. The latter, decided to make an entirely new appointment of five justices and introduced the Amendment to Act of the Constitutional Court Tribunal. This section will discuss the legal reform introduced in Hungary and later on in Poland as well as recommendations by the Venice Commission for both reforms.

During the leadership of Chief Justice Solyom (1990-1998) the Hungarian Constitutional Court established strong protection for social and political rights.[87] However, the Court increasingly tended to suffocate and limit its role as a balancing force by Hungarian lawmakers. The roots of confrontations between Polish Constitutional Tribunal also arise in the recent past. In May 2007, the Tribunal ruled on the unconstitutionality of a lustration law when the Prime

[87] *Id*.p.4-5.

Minister at the time, Jaroslaw Kaczynski, threatened judges who would rule against the government. [88] In his speech to the lower house of the Polish parliament, Kaczynskideclared that he and the political forces he was associated with would not give way to anarchy, even if triggered by the courts.[89]Later on, checking the constitutionality of legislation which permitted government wire-tapping as well as to access to phone calls (National Security Bill)[90] was in the agenda of the Tribunal. The PiS (Law and Justice Party) launched a legal nettle against the Tribunal following the 2015 elections, when received an absolute parliamentary majority.

The legal reform on Hungarian Constitutional Court preceded the one which occurred in Poland." In the spring of 2010, the conservative political coalition led by Fidesz won a parliamentary election and gained a constitutional majority in Parliament.[91] Encouraged by this result, the newly elected lawmakers amended the Constitution ten times during their first year in power. What is more, shortly afterwards they introduced an entirely new constitution, the Fundamental Law, which entered into force January 1st, 2012.[92]

The Hungarian Constitutional Court was one of the main targets of this fundamental legal project. When analyzing this issue, the assessment is very radical-that the Court whose main purpose has been to check the legislative power "is now functionally dead"[93]. In this new reality, doubts have been expressed about the illusionism of imagining the Court capable of enforcing

[88]Bojan Burgaric and Tom Ginsburg, "Courts vs. Autocrats in Post Communist Europe", *op.cit.* p.7.
[89] *Id.*
[90] "This is What the Gradual Erosion of Rule of Law Looks in Poland", Monica Nalepa, Washington Post, Available at: https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/23/this-is-what-the-gradual-erosion-of-rule-of-law-looks-like-in-poland/?utm_term=.c75a1fd34082 Accessed: 06.04.2017.
[91]Paul Krugman, "Hungary's Constitutional Revolution", 19 December 2011. Available at: https://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution/?_r=0&module=ArrowsNav&contentCollection=Opinion&action=keypress&region=FixedLeft&pgtype=Blogs Accessed: 06.04.2017.
[92]*Id.*
[93]*Id.*

necessary constraints on political powers.[94] Sweeping institutional changes go into three directions: a) the composition of the members of the Court, extended from 11 to 15; b) the Court's legislative purview, restricted to reviewing legislation, related to budgetary affairs; and c) access to the Court for petitioners, greatly reduced by presenting more hurdles to petitioners willing to challenge the law.[95]

The desire for such an institutional shift was not only triggered by general illiberal sentiments in the Fidesz party, but also by case law established by the Court which increasingly went against governmental initiatives.[96]As an example, reducing the Court's jurisdiction on budgetary legislation was conceived as a response to the Courts negative ruling on the 98 % special income tax with retroactive force.[97] Such curtailment of the Court's jurisdiction was criticized by legal scholars. According to their critiques, this change brought serious "damage to constitutionalism" and limitation of the Court's jurisdiction highlights a general danger to the Constitution-the majority authorized to amend the Constitution, which lacks "legally sound standards".[98]

As has already been mentioned, the constitutional amendment impacted the Constitutional Court of Hungary in different ways. It changed the process for nomination of justices in the Hungarian Parliament.[99] Before the amendment they were nominated by a special

[94]Renata Uitz, ed. "The Illusion of a Constitution in Europe: the Hungarian Constitutional Court after the Fifth Amendment of the Fundamental Law" In "*Rights-Based Constitutional Review*", ed. John Bell, Marie-Luce Paris (Cheltenham, Northampton, Edwards Elgar Publishing, 2016), p.377.
[95]Paul Krugman, "Hungary's Constitutional Revolution", *op.cit.*
[96] Renata Uitz, ed. "The Illusion of a Constitution in Europe: the Hungarian Constitutional Court after the Fifth Amendment of the Fundamental Law", *op.cit,* p.380.
[97]*Id*. p.382.
[98] Pal Sonnevend, *et.al*, "The Constitution as an Instrument of everyday Party Politics: The Basic Law of Hungary" In "*Constitutional Crisis in the European Constitutional Era*", ed. Armin von Bogdandy and Pal Sonnevend, (Oxford And Portland, Oregon, Hart Publishing), p.94.
[99]Renata Uitz, ed. "The Illusion of a Constitution in Europe: the Hungarian Constitutional Court after the Fifth Amendment of the Fundamental Law", *op.cit,* p.382.

committee, composed on the basis of parity and nominations were confirmed by the qualified majority of parliamentarians.[100] The amendment introduced a different composition of the committee. It was now based on proportional representation, which meant that opposition parties had much less space to comment on nominees and further concentrated political power of the status quo in the judiciary.[101]

This controversial constitutional amendment was challenged before the Constitutional Court.[102] The Court declined to check the constitutionality of the constitutional amendment which had direct influence over its own affairs.[103]However, it signaled to lawmakers that their intentions to change the Constitution, if pursued further, risked violating fundamental rights as well as the rule of law.[104]

Later in 2013, the Fifth Amendment of the Fundamental Law increased the retirement of Hungary's constitutional judges from 62 to70 and required a change to the Constitutional Court Act.[105] Before introducing the Fifth Amendment the 62 as a retirement age was applicable to all judges. This particular change affected five justices elected after the 2010 parliamentary election. Therefore, they did not have any more to leave their offices.[106] Taken together, entire set of amendments introduced by the Fidesz coalition was criticized by scholars and analysis alike on the ground that they only served "short-term political interests."[107]Furthermore, the concerns are expressed about the announcement of the political opposition on adopting an entire new

[100]*Id*.
[101]*Id*.
[102]*Id*. p.384.
[103]*Id*. based on 61/2011 (VII 13) AB decision, ABK 696, 709.
[104]*Id*.
[105]*Id*.p.384-385.
[106]*Id*.
[107]Pal Sonnevend, *et.al*, "The Constitution as an Instrument of everyday Party Politics: The Basic Law of Hungary", op.cit, p.108.

constitution again, if they gain amending political majority.[108]Therefore, one can assume that the risks of further modification of the Constitutional Court through implementing the narrow political interests could never end and which makes the Court particularly defenseless.

The political capture of the Polish Tribunal is quite a dramatic story and has given way to the reflection that the country is on "the slippery slope towards autocracy."[109]A set of events, which took place from in 2015is called the "Constitutional Tribunal crisis."[110]The crisis began with the refusal of the President of Poland Andrzej Duda to take oaths of five judges of the Constitutional Tribunal, appointed by the 7th*Sejm*, dominated by the Civic Platform Party.[111] Since they expected to lose the general election, held in 2015 they made preventive appointments and along with three judges whose term expired with the 7th*Sejm*they also appointed two judges whose tenure would expire after the election.

Parliamentary election held in September 2015 changed the political configuration of the legislative body, now occupied by the PiS (Law and Justice Party) and supported by the President Duda. Together they attacked two judges whose tenure would not expire during the term of the previous composition of the Parliament (dominated by the Civic Platform).[112]

Later on, the PiS adopted an amendment on the law on the Constitutional Tribunal and paved the way towards dismissal of all the five judges, instead of the two whose early appointments were questionable.[113] Hence, the *Sejm* approved five new judges for the Tribunal

[108]*Id*. p.109.
[109]Tomasz Taduesz, "Constitutional Capture in Poland 2016 and Beyond: What is next?", Verfassungsblog, 19 Monday, 2016. Available at:http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/ Accessed: 06.04.2017.
[110] Sava Jankovic, "Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?" *Baltic Journal of Law and Politics*, (2016), p.50.
[111]*Id*. 50-57.
[112]*Id*.
[113]*Id*.p.52.

and they were sworn in by President Duda.[114] Such an open contestation between two political parties to make an impact on composition of the Constitutional Tribunal was a short-lived victory for the PiS, however, until the Tribunal ruled on the unconstitutionality of the judges' initial election. In this case, the legislative body acted *ultra vires* when electing judges whose term would expire not within the authority of the 7th *Seim*, instead in December, 2015 when it would have finished its term.[115]

After these events, wrangling over the Tribunal shifted between the PiS- controlled Parliament dominated by the PiS and the Court itself. The Parliament did not wait for the decision by the Tribunal on the appointment issue and, through accelerated procedure, appointed five new judges to the Tribunal on December 2, 2016. The following day, December 3 2015, the Tribunal made a decision and ruled on the constitutionality of the election of three judges by the 7th *Sejm*.[116]It brought the two branches of government into direct confrontation. The ruling party did not give up and as a result amended, now for the second time, the Constitutional Tribunal Act by raising the quorum for making a decision to 13 out of 15 judges instead of a simple majority.[117] Such rules which make the determination of judicial decisions hard for the Tribunal can be interpreted as a threat towards the effectiveness of the entire institution and this was one of the major concerns of authoritative European institutions, namely the Venice Commission. It expressed a variety of critiques of this legislation that will be discussed in the following section. Before doing so, the attitude of the Tribunal should introduced.[118]

[114]*Id*.
[115]*Id*.p.54.
[116]*Id*. 55-57.
[117]*Id*.
[118]Decision on The Act of 22 December 2015 amending the Constitutional Tribunal Act by the Constitutional Tribunal Act, No 47/15, Warsaw, 9 March 2016. Available at: http://trybunal.gov.pl/en/hearings/judgments/art/8859-nowelizacja-ustawy-o-trybunale-konstytucyjnym/ Accessed: 06.04.2017.

The Constitutional Tribunal justified the judicial intervention into the procedural selection of its own judges through the logic that there was no other relevant body which would be authorized to do so.[119]Further, the Tribunal could not operate on the basis of legal norms whose constitutionality was questionable. The Tribunal ruled that a bench composed of 12 judges was authorized to make a decision.[120] As a result of an aggressive executive intervention the PiS called this judgment "a meeting over coffee", since it was reached by 12 judges with a simple, not qualified majority. As a result, the President refused to publish the Tribunal's judgment in the official journal, making the judgment unenforceable.[121]

3.2 The Venice Commission's Opinions

The Venice Commission[122] was one of the strongest institutional voices commenting on these sensitive legal shifts. In its Opinions, one encounters several criticisms of issues arising in the Hungarian and Polish legislation submitted for review that also were important in Georgia. This section will explain the rationale behind these criticisms.

The Venice Commission analyzed legislation on the reform of the Hungarian Constitutional Court in several Opinions[123] related to the constitutional provisions affected the landscape of the Constitutional Court. In the first case the Venice Commission was invited by the Hungarian Government, while in the second and third cases by the Monitoring Committee of the

[119] *Id*.
[120] *Id*.
[121] Sava Jankovic, "Polish Democracy Under Threat? An Issue of Mere Politics or a Real Danger?", *op.cit*.
[122] The Venice Commission Opinion no.833/2015 on Amendments to the Acct of 25 June 2015 on the Constitutional Tribunal of Poland, CDL-AD(2016)001, Venice, 11 March, 2016; Opinion no.665/2012 on Act CLI of 2011 on the Constitutional Court of Hungary, CDL-AD(2012(009), Strasbourg, 19 June 2012.
[123] The Venice Commission Opinion, no. 614/2011 on Three Legal Questions Arising in the Process of the Drafting The New Constitution, CDL-AD(2011)001, Strasbourg, 28 March, 2011; The Venice Commission Opinion 621/2011 no. on the New Constitution of Hungary, CDL-AD (2011) 016, Strasbourg, 20 June,2011; The Venice Commission Opinion no.665/2012 on Act CLI of 2011 on the Constitutional Court of Hungary, CDL-AD(2012)009, Strasbourg, 19 June 2012; The Venice Commission Opinion 720/2013 no. on the Fourth Amendment to the Fundamental Law of Hungary, CDL-AD (2013)012.

Parliamentary Assembly. And in the final case the Secretary General of Council of Europe turned to the Commission for scrutinizing the Fourth Amendment of the Constitution after the Constitutional Court refused to review the substance of the constitutional amendments.

In one of the Opinions[124] the Venice Commission analyzed one of the elements of the new Hungarian Fundamental law which abolished *actio popularis*- the rule which allows an individual to challenge laws without showing specific legal interest. And also the Court was restricted to review tax, budget and financial legislative issues. The Venice Commission gave a green light to Hungarian lawmakers to abolish *actio popularis*[125], because of the workload of the Court. However, the Venice Commission did not welcome the jurisdictional limitations of the Court, because they would ineffective constraints.

As we observed in Georgian case, the Amendment to the "Organic Law on Georgian Constitutional Court" introduced a shift of a set of competences from Board (3 judges) to Plenum (9 judges). This change does not directly limit access to the Court or its jurisdiction over certain issues. However, taken together the changes which allow a single member of the Board to send a case to the Plenum and if we also take into account the increased majority for the plenary session, one can deem these changes as a scheme for blocking several cases. The Venice Commission criticized these changes[126], but they were not followed by Georgian MPs. The election of the President of the Courts was an issue in both Hungarian and Georgian cases. The Venice Commission criticized the Act on the Constitutional Court of Hungary[127] which prescribes that the President is elected by the Parliament. According to the Opinion, this rule does not resist independence of the judiciary. On the contrary, a step forward was made by the

[124]The Venice Commission Opinion, no. 614/2011, *op.cit*, para.55-69, pp.11-13.
[125]*Id*. para.55-69, pp.11-13.
[126] The Venice Commission Opinion no.849/2016, *op.cit*. para.36-41, pp.6-7.
[127]The Venice Commission Opinion no.665/2012, *op.cit*. para 9. P.4.

Georgian lawmakers to change exactly such a practice. However, they excluded the possibility of re-election of the President of the Court, given that is was finally abolished by the Court in its ruling.

At the end of December, 2015 Poland's Minister of Foreign Affairs Witold Waszczykowski asked the Venice Commission to scrutinize the bill which amended the Act on the Constitutional Tribunal. He was concerned about the controversies surrounding the Tribunal as "essential component of the Polish Republic's institutional governance."[128] In Poland and in Georgia in Georgia, reform to the Constitutional Court was made by amending the law that governed it. In contrast, in Hungary constitutional amendments were designed to reform the institution.

The Venice Commission among other things criticized the amendment that raised attendance quorum of the General Assembly of the Tribunal from 13 out of 15 judges. Its Opinion states that such a high attendance quorum cannot be found in other European jurisdictions and it "carries the risk of blocking the decision making process of the Court and rendering it ineffective."[129] As we have already discussed, changes on the "Organic Law on Georgian Constitutional Tribunal" which introduced by the Georgian Parliament increased attendance quorum of the Plenum of the Court from 7 out of 9 judges, which was criticized by the Venice Commission in its Opinion. Another crucial change in the Act on Polish Constitutional Tribunal is the decision-making majority by the Tribunal, sitting as the full bench. The amendment introduced a qualified majority for making a decision by the Tribunal. The

[128] "Minister Waszczykowski requests Venice Commission's opinion on Constitutional Court", Ministry of Foreign Affairs of Poland, 24 December, 2015. Available at: http://www.msz.gov.pl/en/p/msz_en/news/minister_waszczykowski_requests_venice_commission_s_opinion_on_constitutional_court_ Accessed: 06.04.2017.
[129] Opinion no.665/2012, para. 71, p.13.

Venice Commission warned the Polish lawmakers that such a high threshold would undermine the core of the role of the Tribunal-to remove unconstitutional legislation.[130] The identical critique was provided for Georgian legislators when amendment introduced a qualified majority for decision-making by the Plenum of the Georgian Constitutional Court. It is true, Georgian lawmakers did not accept critiques, but the Court itself declared this new rule as unconstitutional on the basis of high likelihood from minority of the Court membership to block otherwise "correct decision."

As we have already mentioned, among others, one of the changes of the "Organic Law of the Georgian Constitutional Court" was the publication of the judgment of the Court. According to the change, it would be published on the Court website, which means the entire control of the publication process shifted on the Court itself. This was one of the welcomed changes by the Court, because it would prevent any harmful interference from the executive. This particular assessment was inspired by the fact which happened in Poland-the PiS denied to publish the judgment of the Tribunal, which made it impossible to enforce. The Venice Commission called Polish authorities to respect the judgment of the Tribunal, which would be a good start for solving the constitutional crisis.[131]

It is noteworthy that the Venice Commission criticized both Hungary's and Poland's legislative processes, which proceeded in a hasty manner. In the adoption process in Hungary, according to the Venice Commission, opposition forces were excluded from legislative review for several months.[132]The lack of the legislative transparency for civil society was also a related concern of the Venice Commission. It stresses one of the necessities of different voices to be

[130]*Id*. para.79, p.14.
[131]*Id*.para. 143. p.25.
[132]The Venice Commission Opinion, no. 614/2011, *op.cit*. para.15-19. pp. 4-5.

heard for the reason that this can prevent legislative errors, even if parliament does not follow the views of others.[133]As has already been noted from the very beginning, the Public Defender of Georgia indicated the same problematic issue to the Georgian lawmakers.

[133]*Id.*

Chapter 4 Lessons for Georgia in the Light of Foreign Experiences

4.1 The Georgian Constitutional Court-What comes next?

If we consider the Georgian Constitutional Court as a "victim" of constitutional retrogression, we can be optimistic that the Court was ready to use self-defensive legal mechanisms to resist assaults on its power and the wider strength of judicial impartiality. However, are other institutions ready to do the same? An overview of the current Georgian legal and political landscape is necessary in order to fully evaluate the risks posed by constitutional retrogression.

As has been mentioned, constitutional retrogression often occurs through constitutional amendments. This legal phenomenon is not new to Georgia, given that the Constitution of Georgia was already amended considerably in 2010.[134] Executive powers were shifted from President to Prime Minister and this triggered several accusations of political manipulation. Many deemed the changes an attempt of-then-President Saakashvili to remain in power as Prime Minister because he had already filled the presidential term limit.[135] In light of this constitutional history, does Georgia face the same challenge today?

As soon as the Georgian Dream Coalition won parliamentary elections in 2016[136] and gained enough parliamentary seats enough for ensuring constitutional legislation, it made its intention clear to fundamentally revise the constitution. As a result of parliament resolution

[134] "Georgia Constitutional Reform June 2009-October 2010", OSCE Review Conference –Human Dimension Session, Warsaw, RC.DEL/ 28/10, 30 September, -8 October 2010, p.1-3. Available at: http://www.osce.org/home/71611?download=true Accessed: 26.03.2017.

[135] "Georgian Parliament Approves Controversial Constitutional Amendment", Radio Free Europe/Radio Liberty, 15 October, 2010. Available at: http://www.rferl.org/a/Georgian_Parliament_Approves_Controversial_Constitutional_Amendment/2191769.html Accessed: 06.04.2017.

[136] 8 October, 2016. This was the second time the party had won power after the 2012 parliamentary election.

placed on 15 December, 2016 the State Constitutional Commission was established, chaired by Speaker of the Parliament.[137]

Following these recent events, the ruling party is eager towards inclusive revision process. The State Constitutional Commission includes politicians within and outside parliament, representatives of executive and judicial branches of government, the Public Defender Office alongside other constitutional institutions and, finally, legal experts and non-governmental organizations.[138]Seeking to gain legitimacy is a natural strategy in a democratic polity. However, there are some signs that the constitutional retrogression still floats on the surface. Why did the Georgian Dream Coalition decide to raise this issue after assuring that constitutional majority is its own hands since during the first term of its power, the GDC gave up the idea of adopting a true European Constitution? It stressed the ineffectiveness and indolence of the members of the previous Constitutional Commission as indicative of a lack of enthusiasm for such changes.

The proposed constitutional revisions will affect the direct election of the President of Georgia as well as limitations of his powers, territorial arrangement of the country and simplifying the procedures of declaring no confidence to the government by the Parliament.[139]The leitmotif of this constitutional reform is to ensure a purely parliamentary

[137] "The Parliament Supported Set Up of the State Constitutional Commission",Parliament of Georgia, 15, December, 2016 Available at: http://www.parliament.ge/en/saparlamento-saqmianoba/plenaruli-sxdomebi/plenaruli-sxdomebi_news/parlamentma-saxelmwifo-sakonstitucio-komisiis-sheqmnas-mxari-dauchira.page Accessed: 06.04.2017.

[138] *Id*.

[139] "The Sitting of the Working Group of the Constitutional Commission", Parliament of Georgia, Available at: http://www.parliament.ge/en/media/axali-ambebi/sakonstitucio-komisiis-samushao-djgufis-sxdoma.page Youtube Video: TamtaSanikidze, "Issues which will be discussed by the State ConstitutuonalCommision, Georgian Broadcaster, 27 December, 2016 Available at: https://www.youtube.com/watch?v=tAX2gyqZ3M4&t=41s Accessed 06.04.2017.

model of government.[140]Interestingly, President Margvelashvili and his administration refused involvement in the work because he disagreed with the proposed arrangement of the State Constitutional Commission. Yet his skepticism towards the Constitutional Commission is also based on his suspicions that weakening the presidency is part of the Commission's agenda. If we look at the history of relations between the Georgian parliamentary majority and the President, the latter has been a headache for the Georgian Parliament by exercising its constitutional powers, often in direct defiance of the former.

One of Georgia's constitutional scholars, Davit Zedelashvili, believes that the popular election of the Georgian president creates the "the *appearance* of institutional constraints" upon the parliamentary majority and make the separation of powers more effective.[141] According to him, if the form of the President's election changes, equal balancing constraints should be introduced.[142]

4.2 Future Prospects

After discussing legal capture of Constitutional Courts in Hungary and Poland the important question emerges: what will deter further illiberal attacks on the judiciary on the darkening future horizon of European politics? Since Poland and Hungary are both members of a progressive, supranational body-the European Union- there were several expectations that such an institution would manage to take effective measures against institutional encroachment. This question is also relevant in Georgian case as a potential member of the Union.

[140] *Id.*

[141] "2017 Constitutional Reform in Georgia: another misguided quest or genuine opportunity?", David Zedelashvili, 31 January, 2017, Constitutionnet.org Avialable at: http://www.constitutionnet.org/news/2017-constitutional-reform-georgia-another-misguided-quest-or-genuine-opportunity Accessed: 06.04.2017.

[142] *Id.*

The Treaty of the European Union (TEU) establishes democracy and the rule of law as core values in Article 2.[143] However, the EU appears to lack suitable instruments to tackle the tendency towards democratic backsliding occurring in both several of its member and aspirant states.

The TEU contains enforcement mechanisms against member states that breach its fundamental values, namely the suspension of voting rights in EU forums. However, the political climate in Hungary, for example, complicates punitive or interventionist EU legal options since Fidesz has strong political ties with the European Parliament's majority, the center-right European People's Party.[144]Suspending voting rights appears far from likely and intermediary mechanisms seem absent. The EU has done the following: in Poland, the European Commission adopted the Rule of Law Framework in 2014; in Hungary, the Court of Justice of the European Union ruled on the breach of the Directive on Equal Treatment and in Employment and Occupation[145]when the Transitional Act (supplement of the Constitution) increased the retirement age of judges from 70 to 62. However, its critique were too narrowly focused on the incompatibility of the challenged Act with the EU Directive and it should have focused more on the issue of judicial independence. Given this, the number of the skeptics towards the institution has sharply increased with their discrediting hopes that it can, and will, serve to protect fundamental democratic values amongst its members.

[143] Treaty of the European Union, art.2.
[144]Bojan Burgaric and Tom Ginsburg, "Courts vs. Autocrats in Post Communism Europe". *op.cit*. p.10-12.
[145] Council Directive 2000/78/EC, 27 November, 2008.

Conclusion:

The thesis has sought to demonstrate the complex mechanisms of legal and political struggles over constitutional courts. It has concentrated on fundamental reforms initiated by the ruling political coalition in Georgia that exposed both the clear political characteristics to the process of institutional reform as well as the legal bases used for a juridical counter-attack. The Georgian Constitutional Court declared as unconstitutional legislative provisions which saw as capable of undermining its ability to fulfill its core function of ensuring efficient trial system. The Georgian Constitutional Court used its constitutional powers and overcame legislative provisions that would weaken it, as did its Polish counterpart. In contrast, the Hungarian Constitutional Court refused to check the substantive part of the constitutional amendments designing its architecture.

Analyzing the theoretical context for constitutional courts' particular vulnerability to political intrusion reflects how the dynamics of constitutional retrogression are relevant to the Hungarian, Polish and Georgian examples. Placing Hungarian and Polish experiences alongside Georgia highlights the increasing number of political incursions into the judicial sphere and the general tendency towards democratic backsliding.

Constitutional courts in Europe and beyond have to determine how far they are willing to resist illiberal, populist or simply partisan politicking in order to preserve their autonomy. Threats to the independence of a constitutional court are extremely serious, as these three examples have shown. However, it is equally clear that constitutional courts walk an ethical tight-rope between protecting their structural independence, on the one hand, and functioning as responsive constitutionally-mandated institution that is receptive to democrat legislative

initiatives, on the other. By balancing these occasionally contradictory concerns, constitutional courts have the capacity to make their domestic polities even stronger and transform post-communist liberal reform era into a post-populist epoch of democratic stability. This will not be an easy task and the current political horizon and the visible tendency towards "backsliding' and retrogression-looks to remain extremely challenging for years to come.

In the beginning of this discussion the question emerged on the limits of parliamentary discretion to shape the architecture of constitutional courts. On the basis of the experiences discussed here, one can conclude that constitutional courts in a given democratic system must remain the arbiter of its destiny regardless of the different directions that the present political winds happen to blow. Constitutional courts have the potential to resist narrowly drawn legislation that reflects the political majority at a given time. The legislative changes which fit the short-term interests of politicians in power can damage polities in the long run. Ultimately, limiting constitutional courts opens the way to parliamentary power without the sufficient institutional checks upon which the constitutional democracy depends. Without these checks the constitutionality we expect in democratic polities can no longer be guaranteed.

Constitutional courts stand as the most direct obstacle to political majorities' damaging aspirations. Can one envisage a specific punitive remedy for a supranational body like the European Union? Georgia, unlike Poland and Hungary, strives towards EU membership.[146] Many might believe that such a supranational body as the EU has the capabilities to stop illiberal politicians from destabilizing its members' constitutional integrity. However, as the cases of Hungary and Poland make clear the EU has not yet found any clear steps through which to actively mitigate damaging, retrogressive legal reforms in its member states. It

[146] 3. "EU Council Adopts Regulation on Visa Liberalization for Georgia", 27 February, 2017, Civil.Ge, Available at : http://www.civil.ge/eng/article.php?id=29888 Accessed: 06.04.2017.

appears that Constitutional courts remain the surest place-to defend themselves from short-term political machinations with long-term consequences.

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