CEU CENTRAL EUROPEAN UNIVERSITY

The Impact of the Constitutional Court on the Democratization Process

Case of Serbia, Croatia and Slovenia

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LL.M. SHORT THESIS

COURSE: French Constitutional Law and Its Influence Abroad

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1. **Contents**

ABSTRACT

Research claim: Constitutional courts in Slovenia, Croatia and Serbia can be accessed by many authorized subjects - state bodies, territorial autonomies, but individuals as well. The specific feature of these courts is that individuals can not only submit constitutional complaint against state actions, but also initiate abstract review of constitutionality of legislative acts. This "open access'' to the Constitutional court was a concept established in order to establish the rule of law in post–communist countries and enhance citizens' participation in democratic processes. Nevertheless, is it really an efficient mechanism in practice? The jurisprudence of these courts has appeared to be progressive in cases regarding the protection of human rights, but not so much when it comes to solving matters which have strong impact on country's politics or public policies. In those cases, the courts either avoid deciding the issue by denying jurisdiction or they take up strategic approach in regard to the timing of delivering the decision. In this paper I will try to prove that open access in and of itself doesn't contribute significantly to the democratization process if the Constitutional court has a strategic or deferential approach. If the Constitutional court refrains from deciding the "high profile cases", it doesn't really matter how many initiators can request the review of constitutionality – the constitutional jurisprudence will remain within status quo.

Introduction

1.1. The origins and transplantation of the constitutional review in Europe

Original idea of an independent state body specialized for the constitutional review was introduced with the Kelsenian model in the first half of 20th century. According to the Kelsen's positivist approach and its theory on hierarchy of laws, ordinary judges are only supposed to apply the law, but not question its legitimacy. In order to ensure the institutional restrain on legislator and the conformity of legal acts with higher normative order of the constitution, Kelsen thought a new specialized body needed to be introduced. Although named a court, this body was designed to have different composition and competencies than the ordinary courts. Constitutional court would share the power with the Parliament as it would act as a 'negative legislator', thus, only strike out the legislation which is not compatible with the Constitution.[1] Kelsenian model envisioned an abstract constitutional review. Constitutional review *in abstracto* doesn't require a specific legal interest from the petitioner's side and the constitution or a constitutional act defines who has the right to initiate a proceeding before the Constitutional court. Courts can review and set aside unconstitutional provisions of statutes, subordinate legal acts but international agreements as well, if the constitution is at the higher hierarchical level than the international legally binding documents.

[1] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 134–135 <http://www.oxfordscholarship.com/view/10.1093/0198297718.001.0001/acprof-9780198297710> accessed 28 March 2019.

According to the first constitution which adopted abstract control of constitutionality in Europe, which was Austrian constitution of 1920, abstract control was closely related to the federal organization of the state: only members of the political branches of the government could initiate the procedure of review and only if the matter was the conformity of the *länder* statutes with the federal laws and constitution. Thus, the role of the constitutional court as *a guardian of the constitution* in whole wasn't what the drafters of the Austrian constitution had in mind – its purpose was only to supervise the state legislation.[2] The constitutional review started developing with the Kelsen's proposal to give the power to the Constitutional court to review legislation ex officio. In addition, the amendment of 1929 entitled the Supreme and Administrative court to refer the constitutional question which enhanced the protection of fundamental rights within the jurisprudence of the Constitutional Court. Only then the constitutional review transformed to the model which was later adopted in other countries across the Europe after II World War, firstly in Germany and Italy.[3] After 1989, Eastern European countries followed the trend and adopted almost the same procedure in regard to the initiation of the assessment of the constitutionality, relaying mostly on the post-war German model. The peculiarity of these three countries is that they adopted constitutional review much earlier, when former Yugoslavia still existed. Nevertheless, the constitutional court of Yugoslavia wasn't a proper example of the Kelsenian model.

[2] Theo Ohlinger, 'The Genesis of the Austrian Model of Constitutional Review of Legislation' (2003) 16 Ratio Juris 206, 2014 <http://doi.wiley.com/10.1111/1467-9337.00233> accessed 28 March 2019.
[3] Tom Ginsburg, 'The Global Spread of Constitutional Review' [2008] The Oxford Handbook of Law and Politics <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199208425.001.0001/oxfordhb-9780199208425-e-6> accessed 28 March 2019.

1.2. Beginnings of the constitutional review in Slovenia, Croatia and Serbia

Slovenia, Croatia and Serbia belong to the European countries which have shifted to the liberal democratic form of government in the third wave of democratization, after the breakup of Yugoslavia.[4] Although Slovenia and Croatia officially declared independence in 1991, Croatia adopted a new constitution already in 1990 which represented a clear departure from the Yugoslavian constitutional design.[5] Slovenia followed up with the Constitution of 1991. Serbia, on the other hand, underwent major constitutional, political and territorial changes after the formal dissolution of the Yugoslavian federation. The communist state was replaced with another form of authoritarian regime introduced with the Constitution of 1990, during the mandate of Slobodan Milosevic.[6] First, together with Montenegro, it constituted the Federal Republic of Yugoslavia which was later in 2003. transformed into the State Union of Serbia and Montenegro. Not much after that, in 2006. Montenegro declared its independence which led to the adoption of a new Serbian constitution which is still valid.

Through these constitutions, all the three independent countries aimed to implement the proclaimed values of liberal democracy – rule of law, higher protection of human and minority rights, separation of powers, independence of the judiciary and review of constitutionality and legality. In this new institutional setting, constitutional review was supposed to be one of the countermajoritarian mechanisms which would ensure the stability of democratic order and

[4] See generally Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1. paperback print, Univ of Oklahoma Press 1993).
[5] See Preamble of the 1990 Constitution of the Republic of Croatia
[6] Violeta Beširević, '"Governing without Judges": The Politics of the Constitutional Court in Serbia' (2014) 12 International Journal of Constitutional Law 954, 954 <https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mou065> accessed 28 March 2019.

prevent the revival of authoritarian tendencies. Nevertheless, constitutional review wasn't a new concept introduced in this post-Yugoslav period.

Constitutional court as an independent and specialized institution was a feature of Yugoslavian constitutional order already in 1963, therefore, familiar to Serbia and Croatia even before the transition in the 90s.[7] Yet, the nature and the significance of this court in Yugoslavian constitutional frame to a great extent differed from the role which constitutional courts of these three countries have today. Most of the cases brought before the Yugoslavian federal constitutional court dealt with the rights to self-management.[8] As Miroslav Cerar, Slovenian legal scholar, observed: "the functioning of these courts remained within the confines of the communist system and ideology".[9] The federal constitutional court didn't have an opportunity to develop rich jurisprudence in regard to the human rights protection due to the changes on legislative competences introduced with the Yugoslavian constitution of 1974: except for the questions of foreign affairs and national defense and the interests of a united market which were still within the jurisdiction of federal legislator, the rest of the legislative competency was given to the states. Consequently, national Yugoslavian constitutional courts gained more power and established national jurisprudence of each country. Nevertheless, the nature of the constitutional court in communist regime largely differs from the concept of "guardian of constitution" emerged from liberal theories. As Garlicki noted "in many of those European countries in which the judicial review was adopted as one of the democratizing measures following a period of authoritarian rule, the existing courts were unable to offer adequate guarantees of structural

[7] Dimitrije Kulić, 'Constitutional Control: The Function and Jurisdiction of Yugoslav Courts' [1983] Faculty of law in Nis 43.
[8] Dimitrije Kulić, 'The Constitutional Court of Yugoslavia in the Protection of Basic Human Rights' 11 Osgoode Hall Law Journal 275, 276.
[9] Wojciech Sadurski, *Rights Before Courts* (Springer Netherlands 2014) 6 <http://link.springer.com/10.1007/978-94-017-8935-6> accessed 18 November 2018.

independence and intellectual assertiveness."[10] In Yugoslavia, the lack of safeguards and independence was obvious in the work of the constitutional court, ever more because this institution was perceived just as a specialized branch of the judiciary whose function was to legitimize the communist regime. Nevertheless, after Yugoslavia fell apart, the constitutional courts of succession countries finally began to resemble the Kelsenian model.

2. The role of Constitutional court in transition countries

Transition to liberal democratic constitutionalism in Croatia, Slovenia and Serbia shouldn't be perceived as identical process, although all the three countries departed from communist state regime in relatively similar time. Firstly, Slovenia and Croatia accessed EU (in 2004 and 2013), which constituted various obligations on behalf of these states in regard to adjustment of their legal framework with the values of European Union. This meant that their liberal constitutions were to be put into practice and the rule of law needed to be strengthened with the introduction of vast number of legislative acts in the name of "harmonization". The problem with the transition and compliance with EU rules, as Bugarič notes when discussing the democratic development of Slovenia, was the fact that it was a case of "Potemkin" harmonization, "characterized by the coexistence of Europeanized formal rules on the one hand and informal practices on the other, with the latter often subverting and substituting ad hoc informal arrangements for the rule of law."[11] This phenomenon of "formal liberal democracy" has been much more present in Serbia even today, which is rather problematic, considering that

[10] L Garlicki, 'Constitutional Courts versus Supreme Courts' (2007) 5 International Journal of Constitutional Law 44, 44 <https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mol044> accessed 18 November 2018.
[11] Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism' (2015) 13 International Journal of Constitutional Law 219, 228 <https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mov010> accessed 28 March 2019.

this country is still in its EU accession process. As the author explained, these countries did a lot of "copy-pasting" of formal European institutional mechanisms which were the pillars of democratization process, but the establishment of the rule of law hasn't gone further than the surface, due to informal practices and lack of transparency on different levels of government. This "shallow institutionalization" reflected in the work of all branches of government, but the pressure for a change was put mostly on judiciary: as the independence and impartiality of judiciary is one of the essential elements of rule of law in a liberal democracy, the judges were supposed to shift completely from a formalistic approach they had in their communist jurisprudence. Yet, the constitutional courts had a slightly different trajectory. The constitutional court, unlike ordinary courts, is in constitutional theory perceived as a "veto player" and one of the leading actors in the process of constitutional democracy-making.[12] Prerogative of the constitutional court to decide what falls within competencies of other branches and what not according to the constitutional principle of separation of powers was an unknown concept in the communist regime. In the beginning, Slovenian constitutional court was one of the most progressive ones in post-communist Europe, along with the Hungarian and Polish court.[13]

On the other hand, Serbian and Croatian constitutional courts developed gradually, in different political and social conditions. Serbian Constitutional court had a backsliding due to civil war and authoritarian political setting during and after Milosevic regime. In the period of 2001-2002 and 2006-2008, the Court's work was suspended due to internal problems with the

[12] See generally Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015).
[13] Bojan Bugarič and Tom Ginsburg, 'The Assault on Postcommunist Courts' (2016) 27 Journal of Democracy 69, 71 <https://muse.jhu.edu/article/623608> accessed 28 March 2019. Also go to the library for the Sadurski's book

election of judges.[14] Other than external factors, major impact on the new institutional setting of the Serbian court had the fact that the Constitution of 2006 introduced constitutional complaint. This significantly affected the work of the court and shifted its role from being a powerful veto player to almost becoming a "fourth instance" court. In Slovenia, constitutional complaint was introduced already in 1991, as well as in Croatia, with the amendment of Croatian Constitutional act on Constitutional court (CACC). Constitutional complaint shouldn't be confused with the individual proposal for constitutional review of a legislative act (actio popularis), although the difference between them may get blurred in practice.[15] Actio popularis can be lodges along with the constitutional complaint when the petitioner claims that the state action which violated his rights is actually based on unconstitutional law. In those situations the court can decide on the constitutionality of the law as a preliminary question. For this reason, former judge of the SCC stated that the initiative for the constitutional review is "an obsolete institution".[16]

The right to lodge a constitutional complaint in all the three country is guaranteed to anyone who considers their constitutional rights and freedoms have been violated by an individual act of a state body, a body of local or regional self-government, or a legal person with public authority, which made a decision about their rights and obligations.[17] Proposal for the constitutional review is, on the other hand, abstract and it serves for challenging legislative acts, not state actions.

[14] From 2001 to 2002, the National Assembly couldn't get a quorum for election of new judges and after the President of the Court retired in 2006, the other judges held that the sessions could not be convened before the Assembly elects the replacement, which happened only in 2008.
[15] Sadurski, *Rights Before Courts* (n 9) 16.
[16] Stojanović Dragan, Petrov Vladan and Vučić Olivera, *Ustavni Sudovi Bivsih Jugoslovenskih Republika [Constitutional Court of the Former Yugoslavian Countries]* (Dosije 2010) 2016.160
[17] Article 174 of the Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, no.98/2006; Article 62 of the Croatian Constitutional Court Act, Official Gazette of the Republic of Croatia, No. 49/02 , Article 50 of the Slovenian Act on Constitutional court, Official Gazette of the Republic of Slovenia, No. 64/07 and 109/12

Constitutional complaint did make the work of courts unwieldy, but on the other hand, it contributed to development of relatively wide jurisprudence in regard to protection of human rights and liberties. In addition, this procedure helped the courts to adjust their jurisprudence to the ECtHR standards. Another problem which Sadurski noted was that these courts, by deciding on constitutional complaints more promptly than to the requests and proposals for the constitutional review, became "guardians of rights" rather than "guardians of separation of powers".[18] As the author explains, the jurisdiction on human rights led to the liberalization of these countries, but not so to democratization. Since these courts were often reluctant to decide on political cases, their impact on the institutionalization of these countries in accordance with the rule of law has been relatively low so far.

3. Abstract constitutional review in Slovenian, Croatian and Serbian constitutions

Slovenian, Croatian and Serbian constitutions regulate the institute of constitutional review in a similar normative manner. All the tree countries accepted centralized constitutional review, thus, only the Constitutional court can review the constitutionality of legislation and annul unconstitutional legal acts. When it comes to the question of constitutional review, there are a few questions to be posed: 1.Is it an apriori or aposteriori review?; 2. Is it an abstract or concrete review?; 3. Who are the initiators of the proceedings before the constitutional court?

Besides the constitutional review of the national legislative acts, Slovenian and Serbian constitutional court have the authority to review the conformity of international treaties with the constitution before the ratification, while Croatian court doesn't.[19] In addition, Serbian constitutional court has the authority to review the legislation *apriori*, thus, after it was passed,

[18] Sadurski, *Rights Before Courts* (n 9) 54.
[19] Article 45 of the Serbian Constitutional Court Act and article 70 of the Slovenian Constitutional Court Act

but before it was promulgated.[20] Other than abstract review, all the three countries recognize the concrete review as well, although it is not much present within their constitutional jurisprudence.

Other than constitutional review, these courts have a wide range of competencies which won't be discussed further in thesis as the focus will be put on the constitutional review of legislative acts. The constitutional review procedure is the most suitable research example when examining the position of the constitutional courts towards other branches of government and political majority, as the court, acting like negative legislator, has the power to strike down legal acts and constrain the will of political majority. Thus, constitutional review shows how and if the court acts like a counter-majoritarian body. Procedure upon the constitutional complaint, on the other hand, has had an important impact on the protection of individual human rights and liberties and it indeed made constitutional courts more accessible to citizens. Nevertheless, as the constitutional complaint in these countries is used against individual state actions, and less often against the legislation itself, it won't be discussed in detail.

3.1. Who is authorized to initiate the constitutional review?

Article 168 section 1 of the Serbian constitution prescribes that the authorized initiators of the assessment of the constitutionality are state bodies, bodies of territorial autonomy or local self-government and at least 25 deputies.[21] "State bodies" is a quite broad term which was never further specified by any constitutional act or legislative act so the actual bodies which are authorized to start the proceedings were to be determined by the jurisprudence of the Constitutional court and the legal scholarship. Nevertheless, although it seems like the Constitution of 2006 broadened the access to the constitutional court by not determining which

[20] Article 66 of the Serbian Constitutional Court Act
[21] Article 168 of the Constitution of the Republic of Serbia, clause 1

state bodies have the right to request the review, it actually restricted it in comparison to the previous constitution.[22] The current constitutional provision would imply the general authorization of all state bodies to initiate the constitutional review but that interpretation is to be questioned: state bodies are defined and limited by their competencies within the constitution and for some of them, challenging the constitutionality of laws would be against the mere nature of that institution.[23] For example, the Parliament as an institution in whole surely wouldn't exercise this power if the current composition of the Parliament passed the law which is to be reviewed. Besides, the Constitution gives the authorization to 25 members of the Parliament to raise the question of constitutionality, regardless of their party membership. Usually, those 25 members belong to the opposition block but theoretically, they can be members of the party or coalition which has the majority in Parliament as well. It would also be unlikely that the Government would use this right as well since it has the monopoly on legislative initiative. As for the courts, they never used their right to initiate the abstract control and it's unlikely that they will used it in the future because they are also authorized to refer a constitutional question to the Constitutional court during the ordinary proceeding (which they rarely do). Thus, the authorized state bodies include the President of the Republic and other state bodies such as National Banks, state agencies and ombudsmen. These bodies haven't used this right much in the past but there have been some recent improvements, especially in regard to requests of Ombudsman, Commissioner for the Protection of Equality and Commissioner for Information of Public Importance and Personal Data Protection.

[22] Article 127 of the 1992 Constitution of the Federal Republic of Yugoslavia ("Sl. list *SRJ*", br. 1/*92)* prescribed that the right to initiate the constitutional complaint also had "artificial persons if they believe that a right or interest has been violated by an act whose constitutionality and legality are in question".

[23] Stojanović Dragan, 'Pokretanje Normativne Kontrole Prava u Evropskom Modelu Ustavnog Pravosuđa [Initiating the Judicial Review in the European Model of Constitutional Justice]' (2014) 67 Nis Law Review 59, 69.

Procedure of constitutional review in Croatia and Slovenia is regulated in details by constitutional acts.[24] Provisions which regulate the process of constitutional review in these two countries are much more detailed than the Serbian constitutional provisions and the initiators are explicitly enlisted, as well as the conditions in which they can exercise their right to request the review. In Croatia, abstract constitutional review can be initiated by one fifth of the members of the Croatian Parliament, a committee of the Croatian Parliament, the President of the Republic of Croatia and the Ombudsman.[25] The Government can initiate the proceedings as well but only in regard to the review of constitutionality and legality of regulations.[26] Slovenian relevant provision on the initiators of constitutional review is interesting to compare to the Serbian one because it differs the abstract review which is initiated by "political branches of the Government" (the National Assembly, one third of deputies of the Parliament, the National Council and the Government) from the review which is initiated by other state bodies. In Slovenian legal scholarship, the procedure which is initiated by, for example, Ombudsman for human rights, Information commissioner and National bank is perceived as a concrete constitutional review.[27] Thus, the political branches can initiate the review whenever they hold that a certain legislative act is in discordance with the higher legal acts and the Constitution and the other state bodies (e.g. ombudsman, commissioner for information) only when the question of constitutionality arises in the connection with the procedure they are conducting.[28] In Serbia, there is no such a request and all the state bodies can request the review of constitutionality *in abstracto*.

[24] Article 35, 36 and 37 of the Croatian Constitutional Court Act and article 23, 70 of the Slovenian Constitutional Court Act
[25] Article 35 of the Croatian Constitutional Court Act
[26] *Ibid.*
[27] Arne Mavčič, *Slovenian Constitutional Review: Its Position in the World and Its Role in the Transition to a New Democratic System* (Nova revija 1995) 65 <http://books.google.com/books?id=3HqdAAAAMAAJ> accessed 28 March 2019.
[28] Article 23a clause 5-11 of the Slovenian Constitutional Court Act

All the three countries' constitutions contain similar provisions in regard to two specific initiators of the review. Firstly, in all the three countries Constitutional court is *ex offo* authorized to start the procedure of the constitutional review. Secondly, all the three constitutions provide ordinary citizens with the possibility to access the Constitutional court.

3.2. Ex officio assessment of constitutionality

Authorization of the Constitutional court itself to initiate the constitutional review is rather controversial for several reasons. First of all, this power is subject to potential misuse which could easily transform the court from a negative legislator to a positive one. Theoretically, members of the Constitutional court aren't popularly elected and don't have the mandate to represent the people's will, thus, the court as an institution doesn't have the legitimacy to decide which law should or should not be reviewed. However, the practice shows that courts do have a discretionary power to choose whether they will decide on a case or not. The other problem is, if the Constitutional court itself is the initiator of the process because it doubts the constitutionality of a certain legal act, the outcome of that proceeding would be already predetermined.[29] Overuse of this power by the Constitutional court would politicize the court and de facto turn it into a political branch of the Government. Luckily or not, constitutional courts of Serbia, Slovenia and Croatia didn't use this power much in the past to go against the public opinion or ruling majority. The most important case in which the Serbian Constitutional court used this prerogative was to review the Law on the Constitutional Court in 2012. This law implied that Constitutional court cannot annul the ordinary court decisions even if it finds a violation of fundamental rights of citizens in the procedure upon the constitutional complaint. For the Serbian Constitutional court,

[29] Stojanović Dragan (n 21) 69.

this was a major limitation to its role of the protector of the human and minority rights and, as such, unacceptable under Serbian Constitution.

3.3. The individual access to the constitutional court

Serbian, Croatian and Slovenian Constitution, apart from state actors, also authorize individuals to access the Court and raise the question of constitutionality of a certain legal act. In legal theory, this individual petition for the abstract review is called "actio popularis". Actio popularis entails that ordinary citizens can access the Constitutional court and request the review of constitutionality without proving any legal interest. One of the first post-communist countries in which this procedure had a major impact on the democratic transition was Hungary. Hungarian Constitutional court was perceived to be one of the most progressive courts in this part of Europe because in the first two years of its work, it took up the citizens petitions and annulled a big chunk of the previous regime legislation.[30] Those cases radically changed not only legal but also political frame of Hungary since they dealt with, for example, questions of death penalty, abortion and compensation for communist expropriation.[31] Changes of Fundamental law of Hungary in 2012 deprived citizens of this possibility.

In Serbia and Croatia, provisions which regulate the individual access to the Constitutional court are very similar and have the same effect in practice. Article 168 of the Serbian constitution prescribes: "Any legal or natural person shall have the right to an initiative to institute a proceedings of assessing the constitutionality and legality" while the article 38 of the Constitutional act on the Constitutional court of the Republic of Croatia imposes that "Every

[30] Georg Brunner, 'Development of a Constitutional Judiciary in Eastern Europe' (1992) 18 Review of Central and East European Law 535, 539 <https://heinonline.org/HOL/P?h=hein.journals/rsl18&i=549> accessed 28 March 2019.
[31] Brunner (n 28).

individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations." These provisions indicate that any individual or legal entity can suggest to the Court that a certain legal act should be reviewed which is in theory called "open access" to the Court. Open access to the Constitutional court was introduced in order to advance citizens' participation in democratic processes and reinstate the legitimacy of the Constitutional court as an institution. The idea behind this feature is that if people as individuals can easily seek constitutional justice, the Court will develop rich jurisprudence, gain authority over time and contribute to the democratization process. Still, the notion of free access to the CC as a tool of enhancement of the democratization process in a liberal democracy isn't widely accepted, nor in theory or practice. In many countries such as France or Italy, citizens have to litigate their way to the highest instance (constitutional or supreme court), which entails complex, expensive and long procedures.

Just like constitutional complaints, citizens' proposals can overburden the court which may have various negative effects: Firstly, it can disable the court from issuing decisions timely, which ultimately undermines the court's authority in public sphere. Secondly, under the pressure of the workload, the Court might start assessing the proposals with less scrutiny, which could lead to the dismissal of a great number of cases without giving detailed justification of its decision. Article 34 of the Serbian law on the Constitutional court enlists specific grounds on which a proposal can be dismissed (for example, if the Court doesn't have jurisdiction to review the case, if proposal is anonymous, if it's manifestly ill-founded).[32] Croatian constitutional provision is even broader: "The Constitutional Court shall by its ruling reject a request, a proposal or a constitutional complaint if it is not competent for deciding upon it or if they have

[32] Article 34 of the Serbian Law of 2007 on Constitutional court, Official Gazette of the Republic of Serbia, No. 109/07

been late and in all other occasions when there exist no conditions to decide on the merits of the case."[33] These requirements seem pretty standard in the European context (and similar to requirements for lodging an application to the European Court of Human Rights). Still, the court has a wide discretion in deciding whether there are conditions to decide on a case, although they have to present their reasoning within the decision on inadmissibility. When a case is clearly under the jurisdiction of the court and well-founded, but still hard to decide on (for example, because of its political implications) the court can use other tactics in order to avoid deciding. For example, the court might use the workload as an excuse to postpone deciding on important cases or to dismiss them on formal grounds, without proper legal argumentation.

In order to identify which impact the individual access constitutionally defined as "right to initiative" or "right to proposal" has, it is important to unravel the nature of this right. Serbian and Croatian Constitution clearly differ the request of state bodies from individual proposals/initiatives because the latter are not binding for the Court. It is true that individuals don't have to show that the law which they deem unconstitutional affects their rights in concreto, but on the other hand, it's completely for the Court to decide whether it will start the procedure upon the initiative or not. In addition, the Court isn't limited by the initiative - it can broaden the review to other parts of the law as well, not just the provisions that the petitioner suggested. The Court can also continue with the procedure of review even when the petitioner withdraws its initiative.[34] Thus, this is another form of *ex officio* initiation of the constitutional review, just prompted by a proposal of citizens. After reviewing the individual application, if the Constitutional court doesn't find necessary to assess the constitutionality of the alleged

[33] Article 34 of The Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette No. 49/02, 2002

[34] Article 54 of the Serbian Constitutional Court Act

unconstitutional act, it will declare application inadmissible. If it goes into the assessment of the constitutionality and finds that there was no violation, it will deliver the decisions on the merits. Slovenian constitution of 1991 also kept the institution of actio popularis but in a slightly more restricted version than the SCC and CCC have. Article 24 of the Constitutional Court Act (along with the Article 162 (3) of the Constitution) prescribes that "anyone who demonstrates legal interest may lodge a petition that the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority be initiated". In order to demonstrate legal interest, the petitioner must prove that the contested legal act directly interferes with his rights, interests and legal position. The design of this legal remedy is in essence similar to the constitutional complaint, with the difference that the constitutional complaint, which also exists in Slovenian constitutional system, can be lodged only against individual state actions.[35]

The design of constitutional review in these three countries shows that the access to the court is significantly open, not only to other branches of government but to citizens as well. Yet, the accessibility of the court doesn't guarantee broader protection of legality and human rights, as the individual proposals for the constitutional review are not binding for the court. Thus, the discretionary power of the court to decide which case will be reviewed and which not is still present to the certain extent. This discretionary power is mostly exercised in the high-profile case, in which the court has to take into considerations not only the legal consequences of the ruling, but also political ones.

[35] Article 50 of the Slovenian Constitutional Court Act

4.Constitutional courts at work

The nature of the competencies of constitutional courts and ordinary courts in common law to review and set aside legislative acts or resolve disputes arising under the principle of separation of powers has been thoroughly analyzed and argued ever since Marbury v. Madison. The judiciary over time has undergone its transformation from the Montesquieu*'s* "la bouche de la loi" and "the least dangerous to the political rights of the constitution"[36] to being an independent branch of government on which work, inter alia, depends the principle of checks and balances. Yet, the judicial power and its competencies in the countries of European legal tradition are still bound by the existing legislative and constitutional framework. On the other hand, constitutional courts, although named courts, have the power which surpasses the law-executing range as it can have far-reaching political consequences.[37] In essence, through the protection of constitutional values, protects the Constitution from the majority and the people from people. Expectation from constitutional courts to decide core political controversies and public policy questions "is arguably one of the most significant phenomena of the late twentieth and early twenty-first century government."[38]

Still, it is disputable how and if this shift of power unfolded in the post-Yugoslavian countries. As previously mentioned, these courts had a specific position in the post-Yugoslavian countries' constitutional design – firstly, the institution itself had to depart from the previous jurisprudence of Yugoslavian constitutional court and then, secondly, through its future

[36] Alexander Hamilton and others, *The Federalist Papers* (Reissue, Bantam Books 2003) 393,394.
[37] Tom Ginsburg holds that constitutional courts are de facto political actors and that the general trend of expanding court's competencies goes well beyond the Kelsenian model of negative legislator. See Ginsburg Tom and Nuno Garoupa, 'Building Reputation in Constitutional Courts: Political and Judicial Audiences' (2011) 23 Arizona Journal of International and Comparative Law 504.
[38] Ran Hirschl, 'The Judicialization of Politics' [2008] The Oxford Handbook of Law and Politics 89 <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199208425.001.0001/oxfordhb-9780199208425-e-8> accessed 15 March 2019.

jurisprudence, implement the values embed in the liberal constitutions they adopted. This meant that the court was supposed to embrace its role in protection of the Constitution, even if that meant going against the policies and acts of other branches of Government, which is the core in the idea of normative model of decision-making. As Marinković noted, "one of the indicators of constitutional courts' commitment to the normative model of decision-making is the degree and nature of their (judicial) activism, understood as a significant number of invalidations of acts of special importance to those with political power and influence (of which legislature and executive are the main source)."[39] In this sense, it should be added that it is not important just to look at the number of invalidations of acts, but also at the number and nature of acts which were pending for a long time before the court or were declared inadmissible.

Before the analysis of the selected case law, as a pre-step to defining whether the constitutional court has been activist/restraint, it is important to go back to the question – what does judicial activism stand for, in this particular context? When discussing judicial activism in European context, Smilov argues that this term seems like a "common constitutional mith" which European scholarship borrowed unreflectively from the U.S.[40] In addition, Smilov notes that "in countries with aggressive majorities, and where the authority of the court is not firmly established, constitutional judges tend to focus on conflicts between branches of power, stick to a "literal" interpretation of legal norms, and intervene only to prevent clear abuses of constitutional rules, thus ensuring some "primitive" sense of the rule of law".[41] This seems as a correct observation and the purpose of this thesis is, in essence, supporting this claim. Nevertheless, it is

[39] Tanasije Marinković, 'Politics of Constitutional Courts in Democratizing Regimes' in Miodrag Jovanović and Kenneth Einar Himma (eds), *Courts, Interpretation, the Rule of Law* (Eleven International Publishing 2014) 96.
[40] Daniel Smilov, 'Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective' (2004) 2 International Journal of Constitutional Law 177, 180 <https://academic.oup.com/icon/article/2/1/177/931086> accessed 28 March 2019.
[41] ibid 179.

still useful to have a working definition of the judicial activism, as it can show us not what judicial activism is, but what it is not. For the purposes of this research, I would refer to the Sadurski's notion of judicial activism as "the action in which constitutional courts alter the preferences of the parliamentary majority or depart from the views of the constitution makers".[42] Sadurski also noted that analysis of judicial activism should be based on two criteria: 1. The importance of the laws which are invalidated; 2. The nature of the reasoning which leads to invalidation.[43] I will use this line of reasoning not to trace judicial activism, but the opposite, by following the importance of laws in "high profile cases" which have not been invalidated and the arguments with which the court upheld the reviewed law/denied jurisdiction. The high profile cases in this context are the cases whose outcome has a significant impact on the current politics or tackle some of the commonly accepted values entrenched either in public reasoning or constitution itself. Following Papić and Đerić method of case selection,[44] I tend to explain how the courts, by using strategy of avoidance and delay, resent from grappling with the issues which could put them in a collision with other branches of government or even citizens themselves. It is important to emphasize that the aim of this paper is not to argue for judicial activism, but to show how the court aligns its reasoning with the majority's stand on a certain matter and preserves status quo in the constitutional jurisprudence.

[42] Wojciech Sadurski, 'Rights-Based Constitutional Review in Central and Eastern Europe' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 320 <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199246687.001.0001/acprof-9780199246687-chapter-17> accessed 10 March 2019.

[43] Wojciech Sadurski, 'Postcommunist Constitutional Courts in Search of Political Legitimacy' (European University Institute 2001) Working Paper 27

[44] Tatjana Papić and Vladimir Djerić, 'On the Margins of Consolidation: The Constitutional Court of Serbia' (2018) 10 Hague Journal on the Rule of Law 59, 69–71 <https://doi.org/10.1007/s40803-017-0066-x> accessed 27 March 2019.

3.1. Serbia

Due to previously mentioned political and social conditions during and after the Milosevic regime, in addition to institutional instability in the years prior to 2008, the Serbian constitutional court was rather late in embracing its transformative role in comparison to other post-communist courts. The idea of constitutional court as policy maker and an institution which should challenge the political majority when it seemingly collides with the constitutional values has not been accepted in Serbian jurisprudence or theory.[45] The possible reasons for that can be traced to historical perception of the role of judges in communism, but also to legal positivism which Serbian judges embraced through their education. Thus, the court has been rather reluctant to decide on political and public policy cases, with the aim of preserving its "apolitical" nature.

On the other hand, when it comes to human-rights adjudication and election disputes, this court has been more willing to broaden its jurisprudence and raise the standards of human rights protection in Serbia. The most probable reason for this is Serbia's obligation to harmonize its human rights legislative framework and election procedure with the European standards in the EU integration process. Nevertheless, as Beširević reminds, the delicate human rights issues, such as abortion, same sex marriages or euthanasia haven't yet been brought before the Serbian court and its jurisprudence was developed mostly in regard to procedural aspects of due process rights, discrimination and, to some extent, media freedom.[46] Therefore, the court didn't really have to step out of its comfort zone when it comes to rights adjudication either, with the

[45] As legal theorist Jovan Djordjevic stated "it is not a task of a constitutional court to 'say what a constitution is' and thereby to . . . define some sort of its social and political philosophy, or even its legal ideology", Ustavno pravo [Constitutional Law] , p. 608 For the opinion of judges on the role of constitutional court of Serbia, see Bosa M. Nenadić, O Jemstvima Nezavisnosti Ustavnih Sudova, s Posebnim Osvrtom na Ustavni Sud Srbije Bosa Nenadić, *O Jemstvima Nezavisnosti Ustavnih Sudova, s Posebnim Osvrtom Na Ustavni Sud Srbije [On Guarantees of Constitutional Courts Independence, with a Specific Reference to the Constitutional Court of Serbia]* (The Official Gazette 2012) 19–35.

[46] Beširević (n 6) n 53.

exception of the Gender identity decision.[47] In the cases on separation of powers, this court would usually use the strategy of stalling or strategic timing, which means wait until the shift of government or for a political dispute to be solved in the political arena, without its interference.

3.1.1. The delaying strategy

The delaying strategy has not been a novelty in the constitutional jurisprudence of the Constitutional court of Serbia (SCC) and it was present already in 1990.[48] One of the early cases which had wide political implications was the decision on constitutionality of the Instruction on Special Measures Applicable during the State of Emergency, imposed in 2003, right after the assassination of the Serbian Prime Minister Zoran Đinđić.[49] This Instruction was based on the Acting President Nataša Mićić's decision to announce the state of emergency on the territory of Serbia because the murder of the Prime Minister by a criminal organization represented a serious threat to the national security and functioning of the state. The Instruction in general was justified and in accordance with the international standards and human rights conventions Serbia was a contracting member of, but several provisions were clearly disproportionate in restricting human rights and left space for a possibility of degrading treatment and torture by the state officials. The Instruction restricted the right to personal freedom, the right to privacy, the right to the freedom of movement, the right to strike, the right to the freedom of public assembly and the right to freedom of expression and press. The provisions which raised major concerns were the ones which prescribed that a "person who threatens the security of other citizens or the security of the Republic may be forcibly taken into custody by the Minister of Internal Affairs and kept in

[47] For a detailed analysis of this decision, see Tatjana Papić, 'Right to Privacy and Legal Recognition of Gender Identity in Serbia – Constitutional Court of Serbia at Work' (2016) 64 Anali Pravnog fakulteta u Beogradu - Časopis za pravne i društvene nauke <http://ojs.ius.bg.ac.rs/index.php/anali/article/view/198> accessed 28 March 2019.
[48] Papić and Djerić (n 42) 10.
[49] Instruction was published in the Official Gazette of the Republic of Serbia, No. 22/03 (Mar. 12, 2003)

official premises for no longer than 30 days".[50] The problem with this provision was that international standards and constitutional provisions stipulated that a detained person had to be brought to the judge as soon as possible, otherwise, had to be released. The Instruction didn't mention any procedure before the court and the only guarantee it gave was an appeal which a detained person could submit to the Minister of Internal Affairs. Another problem was that the article 2 of the Instruction prescribed that a detained person was not entitled to a defender (legal assistance) as provided by the Law on the Criminal Procedure. All these measures were clearly imposed in order to imprison the assaulters as soon as possible, but the problem was that they could also serve the state as a tool to repress the opponents among politicians and citizens, having in mind the political instability at the time. The members of opposition parties and several lawyers brought the case to the Constitutional court right after the Instruction was enforced. Taking into consideration the nature of emergency measures and the gravity of restrictions, this was a case which should have been decided promptly, in order to prevent the possible misuses of the mentioned questionable provisions. Nevertheless, the SCC delivered the decision only one year after, in 2004, when the Decision and Instruction were already withdrawn and the composition of Government changed.[51] The SCC did find the mentioned provisions unconstitutional and in discordance with the article 15 of ECHR, but the decision, being so late, didn't have a notable effect. It is also important to emphasize that constitutional complaint wasn't yet introduced into the Serbian legal system, therefore, citizens couldn't challenge individual state actions before the constitutional court.

[50] Article 2 of the Instruction
[51] *See* Decision of the Constitutional Court of July 8, 2004, IU-93/2003 (Serb)

Another two cases Beširević proposes as good examples of the delaying strategy were the Vojvodina's political autonomy case and the set of cases initiated in regard to the highly criticized judicial reform which took place in 2009.[52] The former case deals with the constitutional review of the Statute of Autonomous Province of Vojvodina, which was passed at the provincial assembly on 14th December 2009. Vojvodina is Serbian northern province whose status in the Serbian constitutional design was controversial even since it got its autonomy in the 1974 Constitution of the former Socialist Federal Republic of Yugoslavia (SFRY). During Milošević regime, that status was de facto taken away since Milošević had a strong unitarian approach to the territorial organization of the country (yet, there were no constitutional changes in regard to the 1974 provisions). After the political shift and the new Constitution in 2006, the leaders of the province, with an aim to formalize Vojvodina's autonomy, drafted and passed the Statute which gave broad competencies to the provincial authorities. According to some authors, this act would clear the way to the secession, while the others tried to examine how and if this act could fit into the constitutional frame of 2006.[53] Right after it was passed, the politicians who were strongly opposing the idea of having an almost completely decentralized territorial unit within Serbia challenged the constitutionality of the mentioned Statute. It took three years for the Court to deliver its decision on unconstitutionality, only after it was clear that the members of the prospective government wouldn't be in favor of the mentioned Statute.[54] The decision was detailed and thorough, written in almost 140 pages, yet, the fact that it was overdue brings the question of its relevance from the aspect of the court's authority.[55] The Court stroke down five provisions and two clauses of the Statute, clearly stating, for example, that autonomous province

[52] Beširević (n 6) 971.
[53] Beširević Violeta, 'The Rocky Waters of Decentralization in Serbia: The Case of Vojvodina' 2 European Review of Public Law/Revue Europeenne de Droit Public 1489.
[54] Beširević (n 6) 969.
[55] Decision of the Constitutional Court of July 10, 2012, No. ИУз-353/2009 (Serb.)

cannot independently determine the policies on its own territory, but only in accordance with the Constitution, or that legislative power cannot be solely vested in the Assembly of the Autonomous province of Vojvodina.[56] If these provisions were unconstitutional right when the statute was declared, it is questionable why it took three years for the court to deliver the decision.

Soon after this decision, the Court started dealing with the mentioned reappointment procedure from 2008, which provided the judges with insufficient guarantees and was based on vague criteria.[57] Although the Court ignored the initiatives for the review of constitutionality for several years, it finally stroke down the contested amendments to the Act on the Judiciary which enforced the problematic procedure of reelection only in 2012, when there was again shift in the Government.[58] In addition, the Court decided on the constitutional complaints of the unelected judges and reinstated their positions.

The most recent example of strategy of delay, but the strategy of avoidance as well, was the Brussels Treaty case, which will be analyzed in detail further in the text. The initiative for constitutional review was submitted in 2013, but the Court decided on it almost two years after.

3.1.2. The strategy of avoidance

Other than by delay in the deciding, the Court shows its reluctance to deal with the hard cases by using the strategy of avoidance. This strategy can be manifested either in the court's refusal of jurisdiction or in deciding without developing clear and elaborate constitutional

[56] Ibid. p. 124, 125
[57] For the detailed analysis of the judicial reform, see Marinković Tanasije, 'Strengthening Judicial Independence in the Process of EU Integration —The Case of Serbia' (Association Zenith, Konrad Adenauer Stiftung 2012). Available at http://www.kas.de/wf/doc/kas_32813-1522-1-30.pdf.
[58] Decision of the Constitutional Court of July 11, 2012, No. VIIIУ-413/2012 (Serb)

standards. The mere fact that a court refuses the jurisdiction by issuing a decision on inadmissibility is not a proof of the self-restraint as only the judges of the constitutional court are authorized to interpret the court's competencies within Constitution.[59] Still, the analysis of the reasoning and the legal grounds used for refusal may reveal the court's politics, as well as its position towards other branches of government.

The two relatively recent cases which heated the public discussion and brought major discontent of citizens, but prominent legal experts as well, were the Brussels Treaty case in 2014 and Temporary restrictions on pension payment case in 2015.[60] In both of the cases, the court rejected the initiative for constitutional review as inadmissible.

The "Law on the temporary provisions for the administration of pension payments" adopted in 2014 introduced cuts to pensions which were higher than the average at the time (€208).[61]This cutback affected around 40% of pensioners.[62] Although the Government claimed that the aim of the law was to decrease the substantial expenditure from the central budget and that this measure was only temporary, many legal experts held that this law violated the citizens' constitutional right to peaceful tenure of a person's own property and other property rights, guaranteed by Article 58 of the Constitution. The Government did increase the pensions later in 2016 by 1.25%, but it was argued that the increase was minor in comparison to the introduced reductions and, since the increase was applied to all pensions (and not just the ones previously

[59] Article 2 of the Serbian Constitutional Court Act from 2007 prescribes that "The Constitutional Court decides on questions from its jurisdiction determined by the Constitution of the Republic of Serbia (hereinafter: the Constitution) and performs other activities determined by the Constitution and by law''.

[60] See Decision of the Constitutional court of 10 December 2015, IUo-247/2013, 10 December 2014, Official Gazette RS, 13/15; and Decision of the Constitutional court of 23 September 2015, Uz- 531/2014, Official Gazette RS, 88/2015

[61] Law on the temporary provisions for the administration of pension payment, Official Gazette RS, 116/14

[62] Barec Jurij, 'Pensioners' Rights in Serbia: Assessing the Impact of Fiscal Consolidation Measures' (2016) ESPN Flash Report.

restricted), it wouldn't adjust the imbalances caused by the Law.[63] Another argument against it was that there are no "temporary laws" in the Serbian constitutional scheme and that measures which reduce citizens' pension payments were controversial because the law itself doesn't mention the duration of their enforcement.[64] In addition, the law has been perceived as discriminatory, as it treated differently citizens with higher and lower pension income.[65] The Court dismissed the initiatives for the request of constitutionality, stating that there were no justified reasons for the constitutional review of the challenged act. In its decision, the Court stated that neither the Constitution, nor the European Convention on Human Rights provides citizens with the right to a specific pension amount and that the law was legitimate, having in mind the economic crisis which Serbia had undergone in previous years. In addition, the Court stated that this measure was even necessary and served the interest of all citizens, including pensioners. Four justices of the Constitutional court strongly criticized this reasoning in their dissenting opinions, stating that the majority based its decision on political, rather than legal arguments.[66]

The most controversial case from the SCC jurisprudence which was harshly criticized by the academia but several judges as well was the Brussels Treaty case. Brussels Treaty or 'First agreement of principles governing the normalization of relations' was signed on 19 April 2013 in

[63] ibid.
[64] See the opinion of Zoran Ivošević, ex judge of the Supreme Court of Cassation, in 'Odluka Ustavnog Suda o Penzijama - Pravna Ili Politička [Constitutional Court's Decision on the Pension Cuts – Based on Law or Politics]' <http://rs.n1info.com/Vesti/a95474/Odluka-Ustavnog-suda-o-penzijama-pravna-ili-politicka.html>.
[65] Ibid.
[66] In the dissenting opinion, judge Olivera Vučić herself raised the question of the court's tendency to avoid legal interpretation and rather dismiss hard cases without opening public hearing, as it did here. As she reminded, public hearing is the rule, not the exception, and the Court can decide not to open it only "if it deems that the matter was sufficiently clarified in the course of procedure and that, on the basis of evidence collected, it can decide even without holding a public hearing; if it has already decided on the same matter and new evidence for making a different decision on the matter have not been provided, as well as if there are conditions for discontinuation of procedure." (article 37, clause 2 of the Act on Constitutional Courts). As she noted, it seems that too many legal issues are sufficiently clarified for the SCC. See Olivera Vučić's Dissenting Opinion

two copies. The first copy was signed by Serbian Prime Minister Ivica Dačić and EU High Representative for External Relations Ashton and the other between Kosovo Prime Minister Thaçi and Ashton. The agreement has only 15 articles and it generally regulates the terms on which the Kosovo's northern province inhabited mostly by Serbs and its institutions would be integrated into Kosovo structures. The Agreement was delivered to Government which formalized it in a form of a Report on 22 April 2013. Four days after, the Government's Report was passed in the National Assembly under a special procedure, without a debate, in a form of a Decision.[67] The position of the Government was that the Agreement didn't have international character and that it was only of political nature, therefore, it wasn't passed in the legislative procedure which is required for ratification of international agreements according to the Serbian Law on International Agreements. In addition, it claimed that the Agreement doesn't represent a tacit recognition of the independence of Republic of Kosovo, despite the fact that Article 14 of the Agreement prescribes that "It is agreed that neither side will block, or encourage others to block, the other side's progress in their respective EU path.".[68] Still, the fact that it was passed through parliamentary procedure raised questions of its incorporation into Serbian legal system. The parliamentary minority (25 MPs) submitted a request for constitutional review of the Brussels Treaty, warning the SCC that the Treaty would actually introduce the recognition of Kosovo into Serbian legal system through the back door. It took almost 2 years for the Court to deliver its decision and when it finally did, it dismissed the request, denying its jurisdiction. The first question the court had to examine was whether this was an international legally binding agreement. Second question was, even if the Court found that indeed it was an international agreement, would it be subject to constitutional review? In determining whether this was an

[67] Decision on the adoption of the First agreement of principles governing the normalization of relations was published in Official Gazette RS 38/13.
[68] The integral version of the Agreement is available at http://kim.gov.rs/eng/p03.php

international agreement, the Court referred to the Article 1 and article 2. a) of the Vienna Treaty on the Law of Treaties which states: " "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[69] On the basis of this definition, the Court subsequently had to determine whether Kosovo had international subjectivity and accordingly, ius contrahendi. In its analysis, the Court reminded that, according to the article 182 of the Serbian Constitution, Kosovo still has a status of autonomous province and additionally, there are still many countries which haven't recognize it as independent state. Establishing that the Brussels Agreement didn't explicitly referred to the contracting parties as independent states and that the text of the agreement didn't show Serbia's intent to recognize Kosovo, the SCC emphasized that Kosovo isn't independent state in relation to Serbia. Thus, according to the SCC, international subjectivity of Kosovo as the main element of international agreements did not exist in this case. The final conclusion was that the Brussels Treaty isn't an international agreement, but simply political basis of future relations between Kosovo and Serbia. Consequently, the Court denied its jurisdiction on procedural grounds and rejected the request for constitutional review.

This case was rather controversial and highly criticized, especially due to the fact that the SCC had a public hearing in which many eminent legal scholars participated. Yet, the Court decided to disregard most of the expert opinions which were aiming to explain the nature and consequences of Brussels Treaty. The scholarship split into two streams: some scholars didn't agree with the decision at all, while the others upheld the decision, but criticized the court's reasoning. For example, Beširević was of opinion that the decision itself was correct but also

[69] Vienna Treaty on the Law of Treaties is available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

held that the court should have gone into deciding on merits, following the principles of separation of powers and political question doctrine.[70] Đerić and Papić had a similar approach to this matter, analyzing it from the international law perspective.[71] Yet, constitutional theorists and professors Marković, Petrov, Marinković and Đurić thought that the Brussels agreement was de facto introduced into Serbian legal system, though in irregular manner. Thus, it was subject to constitutional review.[72] Four justices expressed their discontent and disapproval of the decision through dissenting opinions. Justice Olivera Vučić stated that SCC, denying its jurisdiction in this case, "has abandoned its role of the guardian of the constitution and human rights, paved the road to future breaches of constitutional provisions, but also disregarded the core principle of constitutional judiciary – loyalty to the Constitution ".[73]

Previous case law reveals Serbian constitutional court's rather strategic approach to deciding hard cases. At this point, it is unclear whether the court's behavior has been led by the need for the alignment with the current majority's stand point or simply by the court's wish to pertain its apolitical nature. If it's the latter, the question then is – just because a matter is political, does that per se means that it's not legal? The selected case law is narrow as it doesn't reflect the overall court's work and the development of its jurisprudence, but it still shows how the SCC as an institution dealt with some of the most important political questions of Serbia's recent history. It could be argued that play-it-safe strategy is justified in the conditions of political instability, but its detrimental effects on the constitutional jurisprudence are hardly disputable.

[70] Violeta Beširević, 'The Reason That Changes Everything - A Judicial Review of the Brussels Agreement Under the Political Question Doctrine' Hereticus 147–150 <http://media.hereticus.org/2017/11/Hereticus-1-2-2016.pdf>.
[71] Tatjana Papić and Đerić Vladimir, 'International Law Aspects of the Decision of the Constitutional Court of Serbia on Constitutionality and Legality of Brussels Agreement' (2016) 64 Annals of the Belgrade Law Faculty.
[72] Marinković Tanasije, 'Anatomy of a Decision – Politicological View on Constitutional Court's Decision on Constitutionality of Brussels Agreement' [2016] Hereticus 108.
[73] See Olivera Vučić's Dissenting opinion in IUo-247/2013

3.2. Croatia

Constitutional court of Croatia has been shaped in different social and political conditions in comparison to the Serbian and Slovenian courts. First years of its work since the secession from Yugoslavia were disrupted by the Homeland War after which the court gradually began to develop its jurisprudence. The second major element which affected the Court's jurisprudence was the accession to the EU in 2013.

As Barić notes, Croatian Constitutional Court (CCC) has passed through three periods of development which could be tracked by observing its position towards other branches of government, but through its case law as well: 1. From 1991 till 1999; 2. From 2000 till 2013; 3. From 2013 (Croatia's accession to the EU) to date.[74]

During the first post-war period, the Court showed the readiness to protect the fundamental rights to some extent (such as freedom of speech and the effective right to appeal) , but it also acted as deferential towards the executive power during the state of emergence, as it upheld 11 presidential decrees under the circumstances which were showing the presence of their unconstitutional elements.[75] In the second period, towards the accession to the EU, the court started referring to ECtHR standards in its decisions and gradually developing constitutional principles in the light of European constitutional court's jurisprudence. In the third period, the political shift of the government, along with the legal and social changes, had a major impact on the Constitutional court, especially the frequent citizens' public initiatives. Public initiatives for a referendum were introduced into Croatian legal system in 2000, as means of popular decision-

[74] Sanja Barić, 'The Transformative Role of the Constitutional Court of the Republic of Croatia: From the Ex-Yu to the EU' [2016] Analitika - Center for Social Research 13.
[75] Ibid. fn. 13

making, which was perceived to be beneficial for the democratic prosperity.[76] Yet, the scholars were right in their attempt to warn about the possible dangerous outcomes of such constitutional feature. Firstly, there are no restrictions written in the constitution in regard to the matter which is to be decided at a referendum prompted by public initiatives. The initiative can be directed towards legislative changes, but also constitutional amendments. This means that if the citizens' collect signatures of 10% of the Croatian electorate, Parliament is constitutionally obliged to call the referendum, regardless of the question posed before the citizens. With 2010 Constitutional amendment, this institution lost another important guarantee which served to prevent the unlimited rule of the majority. Previous procedural quorum requirement (turnout of 50% of the majority) for the referendum to be valid was eliminated – from onwards, any decision which was delivered on the referendum by the majority of the ones who voted was deemed to be valid. Expectedly or not, citizens have taken up on this prerogative which the Constitution provided them with, actively engaging in Croatian future constitutional and legislative future.[77] It may seem that this design gives a complete power to the citizens' majority, yet, it is not unlimited. According to the art.95/1 of the CACC: "At the request of the Croatian Parliament, the CCC shall, in the case [of popular initiative], establish whether the question of the referendum is in accordance with the Constitution and whether the requirements for calling a referendum in art. 86 para.1-3 of the Constitution have been met". Thus, the CCC has the authority to examine the constitutionality of people's direct will as well, which legitimizes it as the guardian of the

[76] Article 87 of Croatian Constitution prescribes : "1.The Croatian Parliament may call a referendum on proposals to amend the Constitution, a bill or any such other issue as may fall within its remit. 2. The President of the Republic may, at the proposal of the Government and with the countersignature of the Prime Minister, call a referendum on a proposal to amend the Constitution or any such other issue as he/she may deem to be of importance to the independence, integrity and existence of the Republic of Croatia. 3. The Croatian Parliament shall call referenda on the issues specified in paragraphs (1) and (2) of this Article in accordance with law, when so requested by ten percent of the total electorate of the Republic of Croatia.". The decisions made ad referenda are binding.

[77] On the comparison between the public initiative design and its outcomes in Croatia and Slovenia, see Podolnjak Robert, 'On Constitutional Reforms of Citizen-Initiated Referendum – Causes of Different Outcomes in Croatia and Slovenia' Revus <https://journals.openedition.org/revus/3337>.

Constitution. Nevertheless, it could and it did undermine its authority from the citizens' perspective. For example, in June 2010, Croatian trade unions required a referendum against the Government's Draft of the amendment to the Labour act, after collecting more than 700,000 signatures.[78] The draft itself contained several contested provisions concerning the extension of collective agreements and the position of the trade unions in the negotiation processes. Soon after that, the Government withdrew the draft and accordingly, the Parliament refused to call on referendum, claiming that there was nothing to be decided on, as the legislation didn't exist anymore. The trade unions referred to the Constitutional Court, arguing that there were no guarantees that the Government wouldn't resubmit the same draft after some time and that lawfully collected signatures should still be considered as a legal basis for the referendum. In addition, they claimed it would be impossible and inexpedient to collect those signatures again. The CCC approached this issue cautiously, yet, according to the citizens - inadequately, as it decided that the there was no legal basis for the referendum to be held.[79] The structure of the court's rationale was thought-provoking: firstly, the Court was of opinion that it couldn't deny the citizens' right to referendum if all the procedural requirements were met just because there was no legislation. As the CCC stated, the decision based on that reason would be "restricting will of people and their right to participate directly in the democratic processes" (22.2). This line of argument would seemingly lead towards the approval of the citizens' request. Nevertheless, the Court further on claimed that "the Government's withdrawal of the draft was in accordance with the spirit of the Constitution and should have been considered as an appropriate and legit answer to the citizens' discontent, therefore, the referendum had lost its legal cause". Thus, according to the CCC, the mere fact that the Government didn't go through with the draft was a

[78] Ibid.
[79] Decision of the Constitutional Court of 20 October 2010, U-VIIR-4696/2010, NN, 119/2010

"proof of citizens' successful participation in the democratic processes", so the referendum was not needed. This decision was harshly criticized in media, which undermined the court's institutional legitimacy.[80] Nevertheless, the Court emphasized in that decision that "the Constitutional court, as the guardian of the Constitution, cannot disregard the obvious fact that the contested amendment was an example of insufficiently developed and imperfect legal framework"(25) This decision had a major impact especially because it was the first case in which the court dealt with public initiative.

In its later jurisprudence, public initiatives were often the matter of constitutional review, which put the court in the center of public attention, but also made scholars engage into thorough analysis of the CCC jurisprudence.[81] The first successful public initiative which even led to the constitutional amendment was the 2013 initiative by the conservative association "In the Name of Family". Decision on this initiative has broaden the CCC jurisprudence and introduced new standards of the interpretation of the Constitution.[82]

The constitutional design of public initiative which gives such a vast power to the citizens to directly decide on the legislative and constitutional changes of their country can put constitutional court in a difficult position. The fact that the Court goes "against the will of people" could be perceived as judicial activism. Yet, if the Court took up on deciding the cases

[80] See Nataša Božić, 'Ustavni Sud Rusi Ustav [Constitutional Court Striking Down the Constitution]' <https://www.zadarskilist.hr/clanci/20102010/ustavni-sud-rusi-ustav>.

[81] On other important CCC decisions concerning public initiatives, see Ana Horvat Vuković, 'Ustavni Sud Republike Hrvatske i Referendum [Constitutional Court of the Republic of Croatia and Public Initiative Referendums 2013-2015]' 37 Collected Papers of the University of Rijeka Faculty of Law 805.

[82] In its outcome, the referendum based on this initiative introduced the definition of marriage as a "union between a man and a woman . On details and effects of this constitutional amendment Ana Horvat Vuković, 'Referendum Narodne Inicijative 2013. – Ustavni Identitet Kao Osnova Ustavnosudskog Aktivizma [Popular Initiative Referendum of 2013 – Constitutional Identity as a Basis for the Constitutional Court's Activism]' in Robert Podolnjak and Branko Smerdel (eds), *Referendum narodne inicijative u Hrvatskoj i Sloveniji [Popular Initiative Referendum in Croatia and Slovenia]* (HUUP 2014).

prevalently on the basis of people's will, while disregarding the constitutional principles and its jurisprudence, it would transform from negative legislator into positive one.

On the other hand, there was also a case in the CCC earlier jurisprudence in which the Court showed significant level of activism in the name of protection of human rights and citizens' benefit.[83] In 1998, the CCC brought a decision on unconstitutionality of the Act on Adjustment of Pensions and Other Allowances from the Pension and Disability Fund and Administration of Funds of the Pension and Disability Fund.[84] In 1993, the Government of the RC stopped adjusting pensions in accordance to the increase in inflation rate and cost of living, although it continued to do so with wages. During the proceedings, the Court demanded an expert opinion on the outcome of such policy and it turned out that from 1993 to 1997, the wages increased twice as much as pensions. Therefore, the standard of living for pensioners was significantly lower than the standard of the working population.[85] Multiple initiatives were submitted to the Court with the request for constitutional review of the Law with such outcomes. The CCC stroke down the contested provisions of the Act, referring to the social justice, equality and the rule of law as basic principles of the Croatian constitution. The Court did not question the state's authority to legislate on this matter and to adjust the pensions rate pro futuro, but "since the challenged Law interferes with the rights of citizens whose pension rate was established under different retirement conditions on the basis of legal acts which are still valid", the CCC declared the contested provision unconstitutional. When compared to the previously analyzed decision of the SCC, this case shows the willingness of the constitutional court to go against the other branches of government as a protector of the Constitution. Perhaps the reasoning of the CCC

[83] Barić (n 71) 20.
[84] U-I-283/1997, NN 69/199 [Croatian]
[85] Barić (n 71) 20.

could be disputed, having in mind that the judges didn't go into further elaboration on what social justice or equality stand for. Nevertheless, unlike the SCC, CCC at least went into deciding on merits and began building the standards for the future jurisprudence. The decision itself brought such a dissatisfaction of other branches of government that the leading politicians even opened the debate about passing a law which would restrict the judicial activism.[86] Nevertheless, the parliament eventually (after six years) enforced the Court's ruling.

The previous cases were just some of the examples significant for this research because they show how the court had to balance between independent development of its jurisprudence and the will of citizens' or other branches of government. Unlike the Serbian constitutional court which has rarely openly collided with other branches of the government, the CCC had a different history, getting into open clashes with the ruling party.[87] At one point, there was even a public debate on question whether the constitutional court should cease to exist.[88] The mere fact that many CCC decisions were negatively assessed by the ruling party shows that the court in many instances didn't refrain from delivering decisions which would affect the daily politics. Nevertheless, this doesn't mean that the strategies of avoidance and delay are not present in its jurisprudence.

[86] Ibid. 21

[87] After the Glavaš case (U-III-4150/2010, nn 6/2015) and Bandić case (U-III-1451/2015, nn 44/2015), the ruling party labeled the court as "an enemy on a mission to undermine all the government's efforts and major policies." Barić (n 71) 36.

[88] 'Utrnuće Ustavnog Suda Bilo Bi Fijasko [Suspension of the Constitutional Court Would Be a Fiasco]' (2 October 106AD)<https://www.vecernji.hr/vijesti/hazu-podrzao-ustavni-sud-utrnuce-ustavnog-suda-bilo-bi-fijasko-1059174> accessed 20 March 2019.

3.2.1. Decision timing

As Barić notes, the CCC has had a suspicious timing of delivering its decisions.[89] One of the important cases from the CCC early jurisprudence which shows how the court took up on strategic timing of the decision was the Public Assembly case.[90] The 2005 amendment of the Act on Public Assembly[91] introduced included a general prohibition of assembling in front of St. Mark's Square, apparently for cultural and safety reasons. Nevertheless, the fact that all the important political institutions in that country (Parliament, Government and the Constitutional court) are on that square brought to light the probable inner reasons behind this legislation. This way, de facto disabled peaceful protests in front the most important institutions in Croatia. The Court ignored the petition for the review of the Public Assembly Act for five years, delivering the decision on unconstitutionality right before the election, when it was obvious that the right-wing party would lose.

In the Glavaš case, initiated by constitutional complaints of a right-wing politician who was charged with the war crimes, the Court delivered its decisions after 4 years, right before the 2015 elections later won by the right-wing coalition.[92] The CCC quashed the convicting sentence of the Supreme Court delivered in 2010 which led to the politician's retrial.

One of the most important cases which shows the CCC's has avoided to grapple with the questions which represent delicate topics in Croatian society was the Abortion case, decided 26 years after the petition was lodged.[93] The judges of the constitutional court didn't hide their

[89] Barić (n 71) 34.
[90] U-I-295/2006 and U-I-4516/2007, NN 82/201, decision of 11 July 2011.
[91] Zakon o javnom okupljanju [Act on Public Assembly] NN 150/2005.
[92] U-III-4150/2010, NN 6/2015
[93] U-I-60/1991, NN, 25/2017

reluctance to decide on this issue. The former president of the CCC, Jasna Omejec, when discussing this case in media stated that "sometimes the best decision is the one never taken".[94]

The previous case law shows that the CCC, as well as the SCC, often uses the strategy of delaying their decision until the moment is "right", despite the legal limitation of the time in which the court should deliver its decision. Article 32 of the CACC prescribes that "The Constitutional Court shall render the decision upon the request, the accepted proposal and the constitutional complaint, as a rule, within the term not longer than one year."[95] Thus, the delay of the ruling even represents a breach of law within Croatian legal system.

On the other hand, avoidance of deciding through the refusal of jurisdiction in the hard cases of CCC jurisprudence is not as common as in SCC's. Yet, the Abortion case is a paradigmatic example of this strategy as well.

3.2.2. The strategy of avoidance

Strategy of avoidance has been apparent in the CCC jurisprudence in the paradigmatic Abortion case. The debate on the legality of the abortion began in 1991, when the Croatian Movement for Life and Family submitted an initiative for constitutional review of the Act on health measures for the realization of the right to freely decide on the childbirth dating from 1978.[96] The important peculiarity of this, still valid, law is that it was introduced during the time when Croatia was a part of former Socialist Federal Republic of Yugoslavia. The legal basis for

[94] Marinko Jurasić, 'Poigravanje s Temeljnim Ustavnim Institucijama Prerasta u Opasan Državni Eksperiment' [Playing with the Basic Constitutional Institutions Becomes a Dangerous State Experiment' (01 2016) <www.vecernji.hr/hrvatska/jasna-omejec-poigravanje-stemeljnim-ustavnim-institucijama-prerasta-u-opasan-drzavni-eksperiment-1050698> accessed 20 March 2019.

[95] The Constitutional Act on the Constitutional Court of the Republic of Croatia, NN, 49/02

[96] Zakon o zdravstvenim mjerama za ostvarivanje prava na slobodno odlucivanje o radjanju djece [Act on Health Measures for the Realisation of the right to freely decide on the childbirth], NN, 18/78., 31/86., 47/89. i 88/09.

its provisions were article 191 of the 1974 SFRY Constitution and article 272 of the 1974 Constitution of the Socialist Republic of Croatia which stated: "It is a human right freely to decide on family planning. This right may be restricted only for reasons of health".[97] Croatian Constitution of 1990 does not contain a provision on the human right to freely decide on childbirth as the mentioned provisions were omitted. In the following years, a number of initiatives were submitted with the same request but the court remained silent. The discussion between conservative and liberal groups in Croatia on the question of legality of the abortion has been transposed even to the academia. In one the academic articles which the CCC used when deciding, conservative legal scholar Dubravka Hrabar claimed that there is no such thing as family planning within Croatian constitution, but there is provision which states that "Every human being has the right to life".[98] As Hrabar holds, the term "human being" is broader than "a person", therefore, this provision should protect an unborn as well.[99] The SCC was put before a difficult task of deciding on some of the most contested questions not only in Croatia, but in other European countries as well. There were two main questions for the court to decide: 1. Is the contested Law constitutional? It had to be taken into account that it was passed under the constitution and social regime which don't exist anymore and was never harmonized with the Constitution of 1990. 2. Does the article 21. of the Croatian Constitution of 1990 protect an unborn as well?

In its decision, the Court took into consideration expert opinions of various actors coming from the field of law and medicine, but it referred to the international documents and constitutional jurisprudence of other European countries as well. Although the Court refused to

[97] 1974 Constitution of the Socialist Republic of Croatia, NN, 8/74., 31/81., 5/86., 28/89. i 33/89.
[98] Article 21 of the Constitution of the Republic of Croatia 1990
[99] Dubravka Hrabar, 'Pravo Na Pobačaj – Pravne i Nepravne Dvojbe [Right to Abortion – Legal and Non-Legal Concerns]' (2015) 65 Zagreb Law Review 797.

review the case, in its decision on inadmissibility the court did to some extent set its position in regard to this matter. As for the first question, the court admitted that the contested Law isn't harmonized with the current Croatian constitution. (par.35). Nevertheless, that still doesn't mean that it is unconstitutional. According to the principle of legal succession, Croatia accepted to apply the laws of former Yugoslavia until the new legislation gets passed or the previous one gets harmonized with the new constitution. Nevertheless, that harmonization never happened, so the Court ordered the Parliament to pass new legislation in the next two years. (50)

The second question would be impossible to be decided on before answering the question: when does the life begin? The Court clearly rejected to deal with this question, but along with the statement that: "Article 21 of the Constitution protects the right to life of an unborn human being as long as it doesn't interferes with the woman's right to privacy (….). The legislator has the margin of appreciation in balancing these two rights. Thus, the CCC held that it did not have the jurisdiction to say when the life begins, but only to review if the legislator stroke a proper balance between these two rights" (§50, 50.1). Despite the fact that the CCC dismissed the petition to review this case after 26 years of delaying it, the reasoning of this decision sent a clear message: it's for the legislator to decide on this issue and it is possible to assume from this ruling what the Court's standard will be if the question of abortion ever again comes before it. Nevertheless, besides deciding on the constitutionality of the law which regulates the abortion, the CCC could possibly deal with the public initiative on this matter as well.

Previous case law shows that the CCC has had a similar development process as the SCC, departing from the same historical and similar social and political conditions. It seems that both constitutional courts still have to elaborate on the national constitutional standards, reach the consistency in the decision-making and insist on the independence on other political actors,

eventually raising their credibility. Conclusion which could be drawn from the comparison of these narrowly selected high-profile cases is that these courts are still struggling to position themselves as institutions independent on other branches of government or political majority. Although both courts use strategy of delaying, a difference between them can be noted in comparison to the strategy of avoidance (refusal of jurisdiction). In comparison to the CCC, the SCC is more prone to avoiding the high-profile cases which is the reason why its work is less publicly visible and subject to critic. On the other hand, as the CCC has to deal with the public initiatives as well and decide on the proposals coming directly from the citizens, it is put in the center of public attention. In that sense, its work is more open and transparent than the work of the SCC. Yet, the assessment of the courts' credibility shouldn't be based only on the public opinion. The satisfactory level of democratic legitimacy should derive from the quality of the decisions, coherency and consistency of the constitutional interpretation – not by abiding with the will of the political majority.

3.3. Slovenia

Slovenia had a different trajectory in the post-communist context in comparison to Serbia and Croatia.[100] As Bugarič notes, in the first years after the fall of communism, Hungarian and Slovenian constitutional courts became the most powerful institutions, whose jurisprudence immensely contributed to the empowerment of the liberal democratic values and put constrains on the excesses of the executive branch.[101] Soon after the adoption of the Slovenian constitution in 1991, the Slovenian constitutional court had to adapt its jurisprudence to a completely new set

[100] See Matej Avbelj, 'Crises and Perspectives in Building a European Nation – The Case of Slovenia', *Nation's transitions: social and legal issues of Slovenia's transitions: 1945-2015, (Slovenia 1945-2015)* (1st edn, Nova Gorica: European Faculty of Law 2014). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494727
[101] Bugarič (n 11) 232.

of legal values. In order to depart from remains of the previous regime, the court exercised a certain level of judicial activism which was negatively assessed in public life.[102] Nevertheless, from 1998, after the change of the judges, the court continued to work as an independent institution, following well-established legal standards and enhancing the rule of law in the country.[103] Although Slovenia has experienced to some extent a "democratic backsliding" in the recent years, along with Hungary and Poland (although in a different manner), the Slovenian constitutional court has remained a respected institution of high credibility, whose decisions have been rarely questioned or criticized.[104] Nevertheless, there have been scholars who held that the signs of "failing democracy" in Slovenia also affected the constitutional court in the high-profile Patria affair.[105] The background of this case was a High court of Ljubljana's 2013 sentence for a bribe of an opposition leader and former Prime Minister Janez Janša. The decision of the High Court was seemingly flawed, allegedly containing a number of violations of constitutional rights.[106] Nevertheless, it led to incarceration of Mr. Janša in 2014, three weeks before the elections. Consequently, Mr. Jansa lodged a constitutional complaint before the Constitutional court. The issue with this complaint was that it was sought before exhausting all the legal remedies on the basis of article 51 of the Constitutional court Act (CCA) which prescribes: *"*Before all extraordinary legal remedies have been exhausted, the Constitutional Court may exceptionally decide on a constitutional complaint if the alleged violation is manifest and if

[102] Miro Cerar, 'Slovenia's Constitutional Court within the Separation of Powers' in Wojciech Sadurski (ed), *Constitutional Justice, East and West Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, vol 62 (Springer Netherlands 2003) 216.
[103] ibid 2016.
[104] Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism' (2015) 13 International Journal of Constitutional Law 219, 234 <https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mov010> accessed 28 March 2019.
[105] Matej Avbelj, 'Will Slovenia join Hungary and Romania as examples of constitutional back-sliding?' (*Verfassungsblog*) <https://verfassungsblog.de/slovenia-bound-jail-opposition-leader-electoral-period-2/> accessed 28 March 2019.
[106] Matej Avbelj, 'Failed Democracy: The Slovenian Patria Case (Non)Law in Context' [2014] SSRN Electronic Journal 2 <http://www.ssrn.com/abstract=2462613> accessed 28 March 2019.

irreparable consequences for the complainant would result from the implementation of a certain act." Thus, the court has a discretionary power to decide what stands for manifest and irreparable consequences. In this case, the constitutional court did not hold that the imprisonment could fall within this exception and it declared the constitutional complaint inadmissible, as the available legal remedies weren't previously exhausted.[107] In its reasoning, the court justified its decision relying on mutual inter-institutional respect with Supreme Court. Secondly, the Court stated that the exception from article 50 should be interpreted restrictively and that this complaint under the scrutiny test doesn't meet the requirements for declaring manifest violation.[108] This case brought a lot of public attention as the complainant has been one of the most important political actors on Slovenian scene ever since 2000s. Nevertheless, only one year after, in April 2015, the Constitutional court went into merits on this case – it overturned the conviction and ordered a retrial.[109]

Although this case shows how the constitutional court cannot always escape involving into daily politics, still, it couldn't fit into the case law on the strategy of avoidance. Slovenian case is an apparent exception in the discussion on the challenges which the constitutional courts of post-communist countries have had to face with. The possible explanation for such a success of the Slovenian constitutional court in comparison to the Serbian and Croatian is perhaps its institutional design – Slovenian constitution does not allow re-election of judges, thus, the judges don't have an incentive to adjust their views and jurisprudence with the current or prospective political majority.[110]

[107] Up-373/14-22 of June 11th, 2014 [Slovenian]
[108] Avbelj, 'Failed Democracy' (n 106) 8.
[109]Matej Avbelj, 'Slovenia constitutionally reloaded, but still failing' (*Verfassungsblog*) <https://verfassungsblog.de/slovenia-constitutionally-reloaded-but-still-failing/> accessed 28 March 2019.
[110] Cerar (n 102) 2019.

Conclusion

The aim of this thesis was two-tiered: firstly, to show the wide accessibility of the constitutional courts in these countries, through the analysis of the constitutional and legislative provisions; secondly, to show that the institutional design isn't the only or even the prevalent criterion in the assessment of the court's contribution to the democratization process. Throughout this paper I intentionally didn't define the democratization process until the concluding remarks. In a broader sense, the democratization can be defined from two aspects: in regard to the society and in regard to the institutions. On one hand, a society which respects and promotes individual rights and freedoms, but also actively engages in deliberative processes with the demand of accountability on behalf of the political representatives. On the other hand, the institutionalization as an aspect of democratization process depends mostly on the work of constitutional court, as a guardian of the constitution and protector of the human rights and liberties. It is also important to emphasize that democratization, its elements and progress should be considered as a different process in each country, as they are significantly determined by the political conditions, history and cultural values of each country. As it can be examined from the previous case law and literature, Slovenian constitutional court has enjoyed much more credibility than the other two courts from the beginning of its work in the 1990s. In addition, there have been rare examples of high-profile cases within its jurisprudence. Other two courts, on the other hand, seem to still have a lot work to do in order to establish its authority within society and other institutions. There are various possible reasons which could explain these differences, but the contribution of this thesis lies in the acknowledgment that they exist. The chosen case law shows that, in many instances, the Croatian and Serbian constitutional courts have had to

deal with the cases in which the legal reasoning can easily slide into policy-making. What I would propose is that, rather than delaying or refusing the jurisdiction without an elaborate reasoning, the courts should develop the national constitutional standards which would be applied in similar cases with consistency. I am not claiming that the courts should always involve in deciding the high-profile cases and even less that the only "right" approach is to go against the political majority. Instead, if the courts developed strong constitutional standards and applied them with consistency, their decisions would be harder to contest. Strategies of delay and avoidance as means of preserving the apolitical nature can save the court from getting in the middle of political or social conflicts, but it cannot enhance the development of the constitutional jurisprudence nor contribute to the consolidation of these democracies.

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