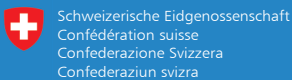


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Examining the Role of Constitutional Courts in Post-Yugoslav Transitions: Conceptual Framework and Methodological Issues

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and Cooperation SDC



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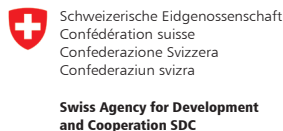
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1.

Background and Context

The role and influence of constitutional courts in policy-making processes, particularly in Europe, has increased significantly in recent decades.¹ Ran Hirschl has famously coined the term ‘juristocracy’, denoting, with rather vocal criticism, the increasingly significant role of courts as an integral part of modern liberal constitutionalism.² The role of constitutional courts has expanded not only in terms of the scope of policy issues they decide on (from a broad range of human rights to the structure of political institutions and architecture of the political process) but also with regard to the *nature* of their activity. Transcending the projected boundaries of the Kelsenian ‘negative legislator’ controlling the constitutionality of laws, the constitutional courts are increasingly seen as ‘positive legislators’, dictating the content of legislative acts to be adopted by parliaments and, in some instances, performing legislative activity to replace invalidated laws.³ This trend of *judicialization of politics* is observed not only in established democracies with a long tradition of constitutional review, but also in new and developing ones.⁴

Nonetheless, lively normative debates on the appropriate role of the courts in the democratic process still persist, admittedly with much less intensity in Europe than in the United States. The crux of the debate is the relationship between the judicial branch and the legislators. One scholarly camp – often dubbed ‘popular constitutionalists’ – argues that legislators as the agents of popular will should have the final say in interpreting the constitution.⁵ Advocates of judicial supremacy, offering various reasons and displaying intriguing nuances in their arguments, emphasize and promote the role of the courts as ‘forums of

¹ See e.g. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes: A Comparative Study* (Routledge 1991); Allan R. Brewer-Carias (ed), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011).

² Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of New Constitutionalism* (Harvard University Press 2004).

³ See e.g. Brewer-Carias (n 1).

⁴ See Vineeta Yadav and Bumba Mukherjee, *Democracy, Electoral Systems, and Judicial Empowerment in Developing Countries* (University of Michigan Press 2014) 273–274.

⁵ See e.g. Mark Tushnet, *Taking The Constitution Away from the Courts* (Princeton University Press 1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004); Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346.

principle' and ultimate authorities on constitutional matters⁶. Making a sort of a compromise between the two camps, scholars like Ely suggest a process-focused approach to constitutional review: the role of the courts in this sense should be limited to strengthening political representation and removing obstacles to political change.⁷

The role of the courts in the political process is similarly contested in the context of democratic transitions. While some authors argue for judicial activism as the cornerstone of a transitioning democracy⁸, others are skeptical of the active role of the courts in the democratic process in such countries, save perhaps for the protection of basic human rights.⁹ Advocates of the crucial role of courts in democratic transitions particularly emphasize their important potential in limiting misuse of power and distortion of democracy by the political elites.¹⁰ Skach for example notes two crucial roles of the judiciary in transition: agenda-setting - by drawing attention to fundamental values in a society, and the 'party-building function', which consists of mediating between political actors, protecting the balance of power and crystalizing party systems.¹¹

Although many scholars note that the courts in Europe, unlike their counterparts in the United States, have managed to avoid deep politicization of judging,¹² the situation with transitional civil law countries might be significantly different in this regard. Distrust in political actors and considerable public demand for justice in such contexts puts courts in a particularly favorable position to oversee and even crucially shape the political processes. Indeed, their important comparative

⁶ See e.g. Larry Alexander and Frederick Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 *Harvard Law Review* 1359; Owen Fiss, 'Between Supremacy and Exclusivity' in Richard W. Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006) 452; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996).

⁷ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

⁸ See e.g. Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press 1992) 99-102; Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2009; Kim Lane Scheppelle, 'Democracy by Judiciary. Or, Why Courts Can be More Democratic Than Parliaments' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (CEU Press 2005).

⁹ See e.g. Bojan Bugarcic, 'Courts as Policy-Makers: Lessons from Transition' (2001) 42 *Harvard International Law Journal* 247; Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005).

¹⁰ Scheppelle (n 8) 26.

¹¹ Cindy Skach, 'Rethinking Judicial Review: Shaping the Toleration of Difference?' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (CEU Press 2005) 67-68.

¹² John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 (3) *Law and Contemporary Problems* 41; Carlo Guarnieri, 'Courts as an Instrument of Horizontal Accountability: The Case of Latin Europe' in Jose Maria Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press 2003) 223-224.

advantage in relation to other institutions and other branches of government in transitional contexts is that they are so new and so *sui generis*: 'The hope is that these bodies will be more palatable to the society because they carry little of the stained baggage of traditional politico-legal institutions, and have greater room for maneuver, space for discretion, than regular courts.'¹³ As Teitel notes enthusiastically,

'The courts can make a break with the prior constitutional system because their mandates empower them to limit state power by subjecting lawmaking of the political branches to judicial review. The courts are also empowered to enforce individual rights. In this transitional moment, I contend that the constitutional courts are playing a defining role in forging post-communist constitutionalism.'¹⁴

Similarly, Sadurski explains that

'in the political vacuum and the general popular distrust of legislatures, administrations, and regular courts, constitutional courts could claim the virtues of being new, untainted by the totalitarian past, and promising to perform the role of a true vanguard in reconstructing the axiology of the legal system. Constitutional transitions in CEE were marked by deep ambiguity and contradictions; the tensions between continuity (which was considered a trademark of democratic transition, in contrast to a revolution) and change (which called for giving a new substance to formally old laws, including constitutional texts) required - as argued - a body that could enjoy a high degree of social prestige, independence, and authority. Strong constitutional courts seem to fit these requirements very well.'¹⁵

Indeed, bearing in mind their origins and assumed functions, constitutional courts can be considered transitional institutions *par excellence*. Post-communist courts in Central and Eastern Europe are commonly referred to as the third generation of European constitutional courts (after the German and Italian courts were established following the collapse of the fascist regimes in early 1950s, followed by the Spanish and Portuguese courts after the dictatorships in those countries ended in the 1970s).¹⁶ As Solyom notes in the context of the last

¹³ Adam Czarnota, Martin Krygier and Wojciech Sadurski, 'Introduction' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (CEU Press 2005) 5.

¹⁴ Ruti Teitel, 'Post-Communist Constitutionalism: A Transitional Perspective' (1994) 26 *Columbia Human Rights Law Review* 167, 170.

¹⁵ Wojciech Sadurski, 'Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?' (2010) 42 *Israel Law Review* 500, 509-510.

¹⁶ Laszlo Solyom, 'The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary' (2003) 18 *International Sociology* 133, 134-137.

wave of democratic transitions in Europe, '[i]n this given historical setting, the constitutional courts believed they represented the essence of the democratic change, and enjoyed "revolutionary legitimacy":'¹⁷

Ultimately, it is understood by and large that '[t]he success of a post-conflict transition will depend, in part, on the role of courts in sustaining a spirit of liberty and tolerance in their societies.'¹⁸ These new judicial institutions were in many ways expected to serve not only as symbols of the new democratic order, but also as vital facilitators and beacons of democratic transition. But did they manage to meet those high expectations? Generally, attempts to answer this complex question empirically have been relatively rare. Specific historical circumstances and great expectations of the courts partly explain why critical reflections on their role and influence in democratic processes have long been virtually absent, despite lively debates on this issue in many western democracies. This considerable lack of evaluation of the role of constitutional courts in transitions is also due to the assumed positive role of constitutional courts in the new democracies in Europe as derived from a specific constitutional tradition. Ignoring remarkable exceptions and with a degree of a somewhat simplifying generalization, one could plausibly argue that the 'European constitutional adjudication has *not* developed a tradition of self-doubt, agonizing over legitimacy, or "exercising the utmost care" whenever "breaking new ground" in constitutional matters.'¹⁹ Finally, European constitutional tradition is characterized by a very close interaction between the academia and the constitutional courts, which also creates powerful counter-incentives against systematic scrutiny of the role and performance of constitutional courts in these contexts.²⁰

Thus, the lack of tradition of self-doubt regarding the proper role of constitutional courts in Europe, coupled with the complexities and urgency of transitions to democracy, conceptual uncertainties and the lack of a plausible frame of reference for *constitutional transitology* also partly explain why systematic studies of the role of the courts in transition have been in rather short supply. So far, scholars have mostly, if not exclusively, focused on Central and Eastern Europe. These studies have noted a degree of positive influence of constitutional courts in transition processes in most countries studied ranging from moderate to significant.²¹ Overtly positive accounts are also notable. For example, a prominent student of constitutional courts in transitional processes

¹⁷ *ibid* 135.

¹⁸ Jennifer Widner, 'Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case' (2001) 95 *American Journal of International Law* 64, 64.

¹⁹ Sadurski, *Rights before Courts* (n 9) XIII.

²⁰ I am grateful to Wojciech Sadurski for this point.

²¹ See Bugarcic (n 9); Venelin I. Ganey, 'The Rule of Law as an Institutionalized Wager: Constitutions, Courts and Transformative Social Dynamics in Eastern Europe' (2009) 1 *Hague Journal on the Rule of Law* 263; Sadurski, *Rights before Courts* (n 9); Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (CEU Press 2005).

assesses the work of the Constitutional Court of Bulgaria as a 'success story in context.'²² Similarly, the Hungarian Constitutional Court, at least in its first nine-year term, is almost universally seen as having done a remarkable job at protecting human rights, determined even to engage in open confrontation with the government on controversial cases.²³

²² Venelin I. Ganey, 'Bulgarian Constitutional Court, 1991-1997: A Success Story in Context' (2003) 55 *Europe-Asia Studies* 597.

²³ Kim Lane Scheppele, 'Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe' (2003) 18 *International Sociology* 219, 234. See also Laszlo Solyom, 'The Hungarian Constitutional Court and Social Change' (1994) 19 *Yale Journal of International Law* 223.

2.

Constitutional Courts in Transition: An Ambiguous Role

2.1. The Contribution of the Courts to Democratic Transition

At least since the United States Supreme Court decision in *Marbury v. Madison*²⁴, the position, role, and purpose of constitutional courts have come under close scrutiny of constitutional scholars. The main question in this voluminous constitutional debate remains: are constitutional courts there to maintain the constitutional and political order, or does their role legitimately extend to giving 'concrete meaning to the ideals of the Constitution and crafting the rights needed to implement that meaning.'²⁵ In other words, it is fiercely debated and contested whether the proper role of constitutional courts is best seen in their task of conserving and protecting the constitutional system, or in contributing to reforming it.

In recent years, constitutional courts have come to be seen as serving important goals of safeguarding the constitutional order, protecting individual rights and facilitating democratic processes. Eskridge explains that this 'facilitating role' of constitutional courts can be expected on three levels and under three principal conditions: first, judges can facilitate democratic participation of all groups by insistence on vigorous enforcement of the neutral rules of the political game; second, they can neutralize 'cultural wars' between different groups by denying state assistance to racist groups and by contributing to expelling racist and xenophobic discourses from intergroup politics; finally, they can facilitate integration of new identity groups into the political process by removing discriminatory laws and unjust obstacles preventing these new actors from entering the political arena on equal grounds.²⁶ As Sadurski posits, seeing constitutional courts as protectors of constitutional rights, particularly the rights of minorities, against possible instances of tyranny of post-communist political elites, represents 'a *communis opinio* of constitutional lawyers in CEE (and also of sympathetic external observers) after the fall of Communism.'²⁷

²⁴ 5 U.S. 137 (1803).

²⁵ Widner (n 18) 64.

²⁶ William N. Eskridge, 'Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics' (2005) 114 Yale Law Journal 1279.

²⁷ Sadurski, *Rights before Courts* (n 9) 58.

In the perspective of those who affirm the critical position and role of constitutional courts in democracies, what is expected from these constitutional and political actors in general is the act of balancing: '[i]n balancing situations, judges are most clearly exposed as policymakers. In pure constitutional balancing situations (that is, when a court is faced with resolving a dispute in which each of the parties pleads a legitimate constitutional right or interest or value), it is the judges' reading of the situation – rather than the law, per se – that determines the outcome.'²⁸ In this sense, transitional contexts seem to be the primer for balancing situations. This is so because, as Stone Sweet explains, '[b]alancing standards hold sway precisely where the law is (a) most indeterminate and (b) most in danger of being constructed in a partisan way.'²⁹

One particularly important function of the courts in general and in democratic transition in particular is that of divorcing law from politics. As Owen Fiss notes, '[i]n the new democracies of the East ... the judiciary ... must give life and force to the idea of a constitutional court. Judges on these courts must convince their fellow citizens that law is distinct from politics, and that they are entitled to decide what the law is.'³⁰ Similarly, Solyom notes that 'constitutional review has a neutralizing function. Under the circumstances of transition, it is especially important that political debates be transformed into pure constitutional law issues and decided in legal terms – and it is even more important that both the new political class and the people accept this way of conflict resolution.'³¹ And yet, 'there is a certain tension between bringing the courts into the very heart of political controversies, and maintaining the fiction of them being neutral and impartial umpires operating in a court-like fashion.'³² Indeed, ambitious goals not entirely divorced from political agendas are sometimes explicit, if not in constitutional text or rules of procedure of constitutional courts, then certainly in the perceptions of individual justices. For example, the former Vice-President of the Constitutional Court of Bosnia and Herzegovina, Professor Joseph Marko, noted that nothing less than the 'reconstruction of multiethnic society is a goal of the Constitutional Court of Bosnia-Herzegovina, although there's no pure, positivistic legal ground for it.'³³

Functionalist arguments also hold sway in discussions of the role of constitutional courts in transition: in this perspective, judges in developing democracies often believe that they should 'go beyond their traditional role as interpreters of the Constitution and laws in order to assume a role as independent

²⁸ Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 10-11.

²⁹ *ibid.*

³⁰ Quoted in Sadurski, *Rights before Courts* (n 9) 39.

³¹ Solyom, 'The Role of Constitutional Courts in the Transition to Democracy' (n 16) 142.

³² Sadurski, 'Judicial Review in Central and Eastern Europe' (n 15) 504.

³³ Skach (n 11) 71.

trustees on behalf of society.³⁴ Ruling elites may sometimes see them as allies and a useful supplementary decision-making mechanism, particularly when it comes to politically costly policy decisions. On the other hand, '[l]egislators may also want to signal their personal support for rule of law to voters, especially in environments where poverty, discrimination, and unequal access to the justice system make obtaining justice a politically sensitive issue for voters.'³⁵ These aspects of the relationship between courts and legislatures are all the more relevant considering the reformist course of transitions and numerous hard decisions the political branch is expected to make in such circumstances.

2.2. Cautious Voices

An opposite perspective invites caution: while it might be true that the legitimacy of the legislature in post-communist settings is significantly undermined, this possibility (or even fact) alone does not automatically render constitutional courts somehow more legitimate. In fact, strong activism on the part of constitutional courts is particularly challenged by the conditions of 'the weak democratic legitimacy of the constitutional document' in many transitional contexts.³⁶ A related issue is the fact that the legitimacy ('revolutionary' or otherwise) of these institutions, although sometimes assumed in influential accounts,³⁷ is in fact not inevitably there – it is at best prospective and potential, rather than existent from the very beginning. According to Epstein, Knight and Shvetsova, this is due to two principal factors: the comparative youth of these courts, and the 'general and long-held suspicion of judges existing among the populace' in these countries.³⁸

One also needs to keep in mind in this context that the role and function of the courts, despite the various doctrinal defenses of judicial review, is not by definition positive, at least in the empirical realm. Indeed, constitutional courts can have both positive effects (by upholding right laws and invalidating wrong ones) and negative effects (by upholding wrong laws and invalidating right ones) in a polity.³⁹ Seen in this perspective, even judicial independence, for example, is not an absolute good in itself, as it has to be taken in context and in relation to other political factors in the

³⁴ Yadav and Mukherjee (n 4) 274.

³⁵ *ibid* 64.

³⁶ Wojciech Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (CEU Press 2005) 14-15 (quoting Arato).

³⁷ See e.g. Solyom, 'The Role of Constitutional Courts in the Transition to Democracy' (n 16).

³⁸ Lee Epstein, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law and Society Review* 117, 126-127.

³⁹ Sadurski, *Rights before Courts* (n 9) 115-116.

state. As Bali argues using the example of Turkey, periods of democratic transition can also bring about unprincipled coalitions of the courts with other, unelected centers of power within state structures. Thus, it is argued, independence should go hand in hand with judicial accountability to avoid institutional capture.⁴⁰

2.3. Practical Challenges

Apart from the conceptual uncertainties with regard to their proper place in rising democracies, more practical challenges that constitutional courts face in transitional contexts also abound. To start with, unlike their counterparts in developed democracies, the new constitutional courts have ‘to create a constitutional tradition, rather than transform an existing one.’⁴¹ Moreover, this complex task of ‘inventing’ legal traditions also needs to take place in a relatively short time. As Solyom notes,

‘Fortunate countries are blessed with time for organic development – time in which the principles of basic rights can evolve through the interaction of legal science and case law. Doctrines in such countries arise out of detailed analysis in a series of cases. In contrast, a country attempting to form a democratic government after a totalitarian regime does not have the benefits of time.’⁴²

In addition, judges in such contexts are often not sufficiently trained to assume such a crucial role in political processes.⁴³ Due to the specific legal tradition, nature and content of legal training, judges in civil law countries are prevalently taught to apply the law, and not to creatively interpret or create it.⁴⁴ Finally, despite their commonly broad competences, the space for transitional judicial activism by these institutions is significantly reduced. This is so bearing in mind that their role in the political processes more often than not remains reactive rather than proactive: after all, constitutional courts are, in Kelsen’s famous words, still ‘negative legislators’, despite the above noted trends in recent decades proving their potential to increasingly perform a more activist role in the policy making processes.

⁴⁰ Asli Bali, ‘Courts and Constitutional Transition: Lessons from the Turkish Case’ (2013) 11 *International Journal of Constitutional Law* 666.

⁴¹ Venelin I. Ganev, ‘Foxes, Hedgehogs, and Learning: Note on the Past and Future Dilemmas of Postcommunist Constitutionalism’ in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (CEU Press 2005) 75.

⁴² Solyom, ‘The Hungarian Constitutional Court and Social Change’ (n 23) 236.

⁴³ Sadurski, *Rights before Courts* (n 9) IV.

⁴⁴ Justice Robert F. Utter and David C. Lundsgaard, ‘Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective’ (1993) 54 *Ohio State Law Journal* 559, 569.

2.4. Strategy in Constitutional Review

Despite the socially transformative expectations from courts in transitions, considering the above challenges and obstacles the real question is how much activism and influence in political decision-making processes can realistically be expected from such institutions. When faced with complex cases opening the door to excessive judicial activism, constitutional courts, at least in theory, have a plethora of strategies at their disposal. They can adopt a minimalist agenda, employing such concepts and strategies as ‘judicious avoidance’⁴⁵ or ‘passive virtues’⁴⁶ in place of open, head-on confrontation with the political branch or the public opinion at large. When adopting a more ambitious, activist agenda, they can rely on developing new concepts, specific doctrines, or on creativity in interpreting the already established standards. Nonetheless, one needs to keep in mind that constitutional courts, at least those in Europe, cannot easily avoid dealing with the constitutional issues brought before them: indeed, unlike the diffuse model of constitutional review in the U.S., ‘[t]he centralized model [characteristic, *inter alia*, of continental Europe] is structurally “anti-Bickelian”’.⁴⁷ If a question of abstract or concrete review is referred to a constitutional court, in other words, if all procedural conditions are fulfilled, the court cannot avoid answering such a question, as it is the last resort and final authority in such matters. Of course, it is not entirely impossible for constitutional courts to find ways to avoid the case, but as a rule they need to invest a considerable argumentative effort to do so.⁴⁸

Even if constitutional courts in Europe cannot easily resort to avoidance strategies, there are various ways in which, and degrees to which, they can deal with a constitutional issue at hand. Although as a rule entrusted with strong-form review founded on the supremacy of their decisions in a constitutional system, constitutional courts can to an extent balance between variants of strong-form and weak-form judicial review (the latter being founded on the key premise that ‘there can be reasonable disagreement over the meaning of constitutional provisions’⁴⁹). In addition, they can choose their constitutional battles. Some authors, as a matter of principle, argue for a strategic approach: in cases of great controversies and contentious issues over which public opinion is severely divided, courts should not impose solutions on nations, but rather embrace dialogical techniques that facilitate and catalyze democratic

⁴⁵ See Iain Currie, ‘Judicious Avoidance’ (1999) 15 *South African Journal on Human Rights* 138; Erin F. Delaney, ‘Analyzing Avoidance: Judicial Strategy in Comparative Perspective’ (2016) 66 *Duke Law Journal* 1.

⁴⁶ Alexander Bickel, ‘Foreword: The Passive Virtues’ (1961) 75 *Harvard Law Review* 40.

⁴⁷ Victor Ferrer Comella, ‘The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism’ (2004) 82 *Texas Law Review* 1705, 1713.

⁴⁸ *ibid* 1713-1714.

⁴⁹ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 26.

deliberation on a certain issue. These techniques include incremental development of constitutional principles or, in the case of the United States, for example, reliance on constitutional doctrines such as 'void-for-vagueness' and 'as-applied challenges', which essentially return the issue to the political process to respond.⁵⁰ Epstein et al. also develop a model in which courts dealing with less controversial cases first increase the 'tolerance intervals' by political elites for their actions. On the other hand, opting for deciding on controversial cases first not only puts constitutional courts at risk of attack by the political elites, but also endangers their legitimacy and acceptance in the polity at large.⁵¹

Similarly, Shapiro cautions against extensive judicial activism in new democracies, arguing for strategic behavior of constitutional courts in such circumstances. The recipe he proposes is relatively simple: constitutional courts should deal with noncontroversial cases first, and then, gradually, take up the more complex ones.⁵² In this view, which is in many ways similar to the above model presented by Epstein et al., courts are established as important political actors only in time, and only by strategically and carefully choosing their battles.⁵³ This is how, for example, the Supreme Court of India managed to survive a crisis in the early and mid 1970s and become more activist in the late 1970s onwards.⁵⁴ The experience of the Indian Supreme Court is, however, in stark contrast with the first Russian Constitutional Court and the well-known Yeltsin-Zorkin confrontation, which led to suspending the work of the Court by the 1993 Presidential decree.⁵⁵ Other examples also show quite the opposite pattern: courts can also assert their position and authority by dealing with highly contentious cases first, as is evident from the example of the South African Constitutional Court.⁵⁶ Although caution is well advised in any event, there seem to be no ready-made formulas for determining the extent and timing of appropriate judicial activism in different transitional contexts: it is all (or at least the important aspects are) contextual.

⁵⁰ Eskridge (n 26) 1279.

⁵¹ Epstein, Knight and Shvetsova (n 38) 131-132.

⁵² Martin Shapiro, 'Judicial Review in Developed Democracies' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass 2004).

⁵³ The example of the Chilean constitutional court in the years of democratic transition is instructive in this regard. See e.g. Javier A. Couso, 'The Politics of Judicial Review in Chile in the Era of Domestic Transition, 1990-2002' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass 2004) 50.

⁵⁴ See e.g. S. P. Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 Washington University Journal of Law and Policy 29.

⁵⁵ See e.g. Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000) 115-144

⁵⁶ Theunis Roux, 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass 2004) 66.

Judicial activism, others argue, is even implicit in the very establishment of constitutional courts as centralized organs for constitutional review. According to this view, '*other things being equal*, a country with a constitutional court will tend to have more activist judicial review.'⁵⁷ At the same time, however, in common law countries with a long tradition of constitutional review, the anticipated negative reactions of various actors to the invalidation of statutes is probably one of the strong reasons why, as some authors contend, the courts in civil law countries have been exercising constitutional review 'in fairly modest terms'.⁵⁸ Nonetheless, even if generally relatively modest, constitutional review in civil law countries still displays remarkable differences in terms of its scope and political and social impact: clearly, some constitutional courts are more activist and more influential than others.⁵⁹

2.5. Between Great Expectations and Modest Achievements

In sum, constitutional courts in transitional contexts have faced a plethora of challenges. In the face of great expectations and complex, often hostile political and social environments, constitutional courts in such contexts have, somewhat counterintuitively, used various argumentative strategies to make the assumed contribution to successful democratic transition. For example, the Hungarian Constitutional Court has used law importation from other countries (in particular – Germany) to set up a new foundation for fundamental rights in the country.⁶⁰ International standards, particularly European human rights law and the jurisprudence of the European Court of Human Rights, have also served as a strong basis for judicial activism of the newly established constitutional courts.⁶¹

Ultimately, empirical studies focusing on Central and East Europe have shown that perhaps the most realistic assessment is that the post-communist case law is 'a mixed bag of undoubtedly courageous and democracy-strengthening decisions as well as of decisions which seem like a set-back to these values.'⁶²

⁵⁷ Ferres Comella (n 47) 1706.

⁵⁸ Utter and Lundsgaard (n 44) 568-569.

⁵⁹ For a comprehensive overview, see Brever-Carias (n 1).

⁶⁰ See e.g. Catherine Dupre, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2003).

⁶¹ Solyom, 'The Role of Constitutional Courts in the Transition to Democracy' (n 16) 143-146. See generally e.g. James Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge 2012).

⁶² See Kasia Lach and Wojciech Sadurski, 'Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity' (2008) 3 *Journal of Comparative Law* 212, 232-233.

Though some scholars note rather successful cases, such as the case of the Constitutional Court of Bosnia and Herzegovina, which reportedly played a crucial role in building ‘tolerance regimes’ and reducing inter-ethnic tensions in the country,⁶³ others are of the opinion that such cases should rather be seen as exceptions, not least because Bosnia and Herzegovina presents a special case in many respects.⁶⁴

⁶³ Skach (n 11).

⁶⁴ Sadurski, ‘Transitional Constitutionalism’ (n 36) 16.

3.

Key Factors of and Assumptions on Judicial Activism in Transition: A Framework for Understanding

3.1. Conceptualizing Constitutional Review in Transition

The key question for our purposes is, of course, how the above conclusions, more or less empirically founded, on the contribution of courts to democratic transitions have been arrived at in the various analyses conducted so far. At the outset, one needs to note that studying the role of the courts in transition is not an easy or straightforward task. It might be the case that ‘judicialization entails observable, and therefore measurable, changes in individual behavior’,⁶⁵ but measures accounting for judicial policy influence are far from clear and self-evident, not least in transitional contexts. Most importantly, as some scholars suggest, transitional contexts face us with the problem of the frame of reference: ‘[t]he legal theories of transition remain underdeveloped, leaving many normative questions of judicial structure unanswered.’⁶⁶ Moreover, as others argue, ‘theories of adjudication associated with understandings of the rule of law in ordinary times are inapposite to transitional periods. Our ordinary intuitions about the nature and role of adjudication relate to presumptions about the relative competence and capacities of judiciaries and legislatures in ordinary times that simply do not hold in unstable periods.’⁶⁷ In short, this perspective holds that ‘in dynamic periods of political flux, legal responses generate a *sui generis* paradigm of transformative law.’⁶⁸

Nonetheless, others suggest that this transitional relativism towards the place of law in general and of courts in particular is somewhat misleading and that the role of judges in transition is not much different from that in times of normalcy. Lach and Sadurski summarize the counterarguments well:

⁶⁵ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2010) 13.

⁶⁶ Bugarcic (n 9) 249.

⁶⁷ Teitel, ‘Transitional Jurisprudence’ (n 8) 2034.

⁶⁸ *ibid* 2014.

‘For one thing, the constitutional courts themselves resist, whenever they have an occasion, appeals to special factors of the transition period: their perception is that they operate in a “normal” democratic context, and this self-perception should be taken at face value. Second, we fear that “exceptionalism” may become a self-fulfilling diagnosis: if no “normal” democratic criteria and templates are applied to the assessment of post-communist regimes, the nondemocratic elements will persist without the challenges and objections they deserve. Third, in many respects, post-communist systems of CEE *are* already consolidated democracies, and various pathologies and aberrations which they experience (such as the recent populist backlash, mentioned before) have its opposite numbers (sometimes, coming in nastier and more dangerous versions) on the other side of the East-West divide in Europe.’⁶⁹

However normatively undesirable and potentially practically counterproductive it may be, a measure of exceptionalism seems to be inherent in the very concept of transitional constitutionalism. One would have to recall, in this context, Justice Barak’s persuasive assertion that one of the main roles of judges in a democracy is ‘bridging the gap between law and society’ whereby ‘the judge is the primary actor in effecting [the legal] change’ so that the law is congruent with changing social realities, at the same time never losing sight of the need to ensure *stability with change*.⁷⁰ Therefore, rather than questioning their validity and normative and explanatory value, the *exceptionalist* arguments and discourses regarding the role of constitutional courts in transition are better and more plausibly seen as a matter of degree. Indeed, it becomes clear that the challenges that constitutional courts face in transition with overarching and constant social, political and economic change are much more complex than in normal circumstances of relative social stability.

Another problem in the very conceptualization of the role of the courts in transition is the factor of time. First, it is not always clear when transition can be considered to have ended and the period of normalcy to have begun. If, for example, in the context of Croatia one can plausibly argue that the transition ended with the country entering the European Union, for other post-Yugoslav states the long and painful transition may arguably be said to be still lasting.⁷¹ Second, interpretations of the role and influence of the courts in a polity may also change in time. As Tushnet notes, in time ‘the lesson will be, not that

⁶⁹ Lach and Sadurski (n 62) 233.

⁷⁰ Aharon Barak, ‘Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) 116 *Harvard Law Review* 19, 28-29.

⁷¹ In this sense, for example, Berend and Bugarcic have recently written about the incomplete transitions in Central and Eastern Europe. Ivan T. Berend and Bojan Bugarcic, ‘Unfinished Europe: Transition from Communism to Democracy in Central and Eastern Europe’ (2015) 50 *Journal of Contemporary History* 768.

judicial review is valuable, but that it is pointless.' In time, constitutional review may become seen as putting 'a façade of legality and constitutionalism on a purely political practice that continued unaffected by the Constitutional Court's decision. We simply do not know which interpretation will turn out to be correct.'⁷² This is particularly the case with transitional constitutionalism as transformative law and political practice.

3.2. Internal and External Factors

Even if a fully-fledged analytical framework for assessing the contribution of courts to social transformation in transitional contexts is not readily available, key factors that have impact on the extent and effects of judicial activism in such contexts seem more apparent. According to Jennifer Widner's 'social scientist's perspective', the influence of the courts in consolidating post-conflict democracies will depend on a number of factors, including: a) other actors – for example, the public, the legal community as a whole etc.; b) the influence of donors and the international community [in the case of the successor states of the former Yugoslavia, certainly the EU conditionality]; c) substantive law, technical and financial constrains; d) 'reciprocal relationships and feedback effect' – i.e. how the power constellation in a given context changes over time (attitude of opposition, activities and initiatives of other actors – such as the legal community etc.); e) expectations regarding the role and position of constitutional courts.⁷³

Ferres Comella identifies structural and institutional features as key factors influencing judicial activism of constitutional courts. He emphasizes the following factors: selection and tenure of judges; the level of rigidity of a constitution (how difficult it is to amend it) - as justices may feel less burdened when they know that their rulings may easily be neutralized through constitutional amendment; doctrinal strength of precedent (of course, constitutional precedent is stronger in common law countries than in civil law countries, where justices have more flexibility for revision in future cases and are hence more encouraged to be activist); finally, the type of constitution a constitutional court is tasked to enforce and protect: the more expansive the constitution, the easier for the justices to find grounds to invalidate a statute.⁷⁴

Procedural aspects also bear crucial importance in this context. Among key procedural factors affecting the position and the performance of constitutional courts in democracies are the range of actors authorized to refer an issue to the

⁷² Mark Tushnet, 'Judiciary and Institutions of Judicial Review' (1993) 8 *American University Journal of International Law and Policy* 501, 504.

⁷³ Widner (n 18).

⁷⁴ Ferres Comella (n 47) 1733-1734.

constitutional court, how referrals are dealt with, as well as the scope of review of constitutional complaints – i.e. are the courts limited to the examination of what is argued in petitions, or can they also act *ultra petitem* in cases where there is strong indication that another legal issue may have direct implications on the case in question.

Another variable influencing the performance of constitutional courts is what Tushnet calls justices' 'legal-constitutional culture' or styles of judicial decision-making.⁷⁵ Tushnet even posits that this particular factor might be more important in new democracies than institutional details (composition, length of terms, the existence of specialized constitutional courts or general courts where judicial review is only part of their competences etc.). In this perspective, 'legal-constitutional culture' is seen as having two aspects – legal culture in general, including public perceptions on constitutional adjudication and activities of justices as experts in constitutional interpretation, and legal culture as constitutional attitudes of the main actors, justices in particular. The latter aspect also can be differentiated depending on how judges themselves see the constitutional framework – in terms of e.g. originalist and formalist or instrumentalist approaches.⁷⁶

Understanding and assessing the role of constitutional courts in transitions would be incomplete without taking into account the broader political constellation in which the courts operate and which they are part of. Previous studies in different contexts have shown, in particular, that politics clearly matter and that the specific political landscape in the country (the extent of political diffusion being the main factor in the equation) will determine the intensity, depth and overall success of constitutional review.⁷⁷ Broader political constellation not only crucially determines the nature of constitutional disputes that come before constitutional courts, but also affects the way the cases are dealt with, as well as the fate of courts' decisions – i.e. the complex problematics of compliance. Observing the relevant cases in Central and Eastern Europe, Sadurski and Lach note that that 'the greater the tensions between the political forces are, the greater is the possibility that sooner or later the adversaries will turn to the constitutional court to contest policy choices of political opponents.'⁷⁸ The presence of strong tensions between dominant political forces often leads to a rise in politically colored constitutional disputes which particularly threaten to compromise the courts' neutrality and public credibility.⁷⁹

⁷⁵ Tushnet, 'Judiciary and Institutions of Judicial Review' (n 72) 510.

⁷⁶ *ibid* 510-512.

⁷⁷ See generally Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003).

⁷⁸ Lach and Sadurski (n 62) 226.

⁷⁹ *ibid*.

Depending on the political circumstances, courts can also be more or less cautious in dealing with cases brought before them, and more or less concerned with issues of compliance. Indeed, concern with compliance and support of the political majorities for their decisions is arguably a greater constraint in transitional democracies than it is in the more developed ones:

‘unlike courts in evolved democracies, those in Eastern Europe have yet to establish their own independence, legitimacy, or authority (or, for that matter, the authority of their constitutional systems) ... which in turn limits their ability - again perhaps to a greater extent than their counterparts in mature democracies - to issue rulings that other actors will respect and implement, even when it is not in their self-interest to do so.’⁸⁰

One would have to note in this context that, insurance theory notwithstanding,⁸¹ opposition to constitutional courts and judicial review on the part of the political branch is likely to emerge at a certain point, regardless of constitutional pre-commitments protecting the position and role of the court. Indeed, faced with controversial decisions, ‘[p]oliticians will respond, credibly, that they never agreed to limit themselves in *this* particular way on *this* particular issue.’⁸² In this sense, Epstein, Knight and Shvetsova have developed a particularly useful model of ‘tolerance intervals’, which helps predict the likelihood of attack by the political decision-makers on the courts’ decisions. According to this model, elected actors engage in *ex ante* cost-benefit assessment when considering possible attacks on the court. Four factors are crucial in this assessment, some of which are case-specific, while others are related to the court itself: a) the degree to which the case is important to the political circles; b) the authoritativeness of the case – namely, ‘the ability of the justices to produce a clear, consensual ruling in the general legal area at issue in the dispute.’⁸³; c) the position of the public towards the matter under review; and d) the general confidence of the public in the court. From these factors, the following model emerges:

‘(1) the less salient the case, (2) the more authoritative past decisions within the general issue area, (3) the closer the Court’s policy is to the public’s preferences, and (4) the more confidence the public has in the Court, the longer the tolerance interval (and vice versa). For policies falling within their tolerance interval, the actors have calculated that the benefits of acquiescing to the Court’s decision override the cost of an attack; for

⁸⁰ Epstein, Knight and Shvetsova (n 38) 125-126.

⁸¹ This theory, advanced by Ginsburg, essentially posits that political parties install and accept constitutional review as a way to entrench their power and ideologies, anticipating the periods when they will be out of power. Ginsburg (n 77).

⁸² Tushnet, ‘Judiciary and Institutions of Judicial Review’ (n 72) 509.

⁸³ Epstein, Knight and Shvetsova (n 38) 129.

policies falling outside the interval, they have determined that the benefits of an attack outweigh the costs of acquiescence; and for policies at the extreme ends of the interval, they are indifferent between attacking and not so doing.⁸⁴

The important point here is, of course, the vulnerability and fragility of constitutional courts as *sui generis* institutions which, unlike ordinary courts, are not indispensable.⁸⁵ At the same time, consideration given to the issue of compliance and possible opposition to their decisions does not necessarily imply opportunism on the part of the judges of constitutional courts. Rather, such considerations are to a greater or lesser degree inherent in the judicial function, as justices inevitably have to rely on the political branch to give effect to their decisions.

3.3. The Importance of History and Legal Tradition

An important variable in the complex equation of constitutional review is also the constitutional and legal tradition. Indeed, one of the common features in constitutional jurisprudence in general is reference to tradition, history, and precedent. As Uitz confirms, despite their otherwise limited potential to resolve inherent indeterminacy of constitutional adjudication, one cannot ignore ‘the unusual popularity and high acceptance rate of references to the past, history, and traditions in constitutional cases.’⁸⁶ Tradition, however, as already noted above, plays a rather ambiguous role in the context of transitional states. It is thus interesting to observe how arguments of history are used as a means of ensuring continuity, which is a prominent legal value, but is also highly contested in the context of transitions to democracy and of coming to terms with the previous periods of authoritarian rule. Solyom identifies two general approaches to this important issue: ‘the restoration approach’, embodied in the German or Czech constitutional courts, which completely ignores the socialist legacy as if it was never (legally) there, and ‘the prospective approach’, advanced, for example, by the Hungarian constitutional court, which recognizes the legal continuity of the new order.⁸⁷

Curiously enough, and what is of particular relevance for a project focusing on the successor states of the former Yugoslavia, socialist legal theory (and certainly the practice in the former socialist bloc) also suggests a cautious approach to

⁸⁴ Epstein, Knight and Shvetsova (n 38) 130.

⁸⁵ Ferres Comella (n 47) 1727.

⁸⁶ Renata Uitz, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication* (CEU Press 2005) 9.

⁸⁷ Solyom, ‘The Role of Constitutional Courts in the Transition to Democracy’ (n 16) 140-141.

judicial review, albeit for reasons different from those elaborated above in the context of continental legal tradition. According to this perspective, due to the understanding that it is the proletariat that should rule and a related assumption that the proletariat could not possibly act contrary to their interest, no division of powers or judicial review was considered necessary. Moreover, 'many socialist legal thinkers labeled judicial review "a reactionary bourgeois institution" whose purpose was to maintain the economic exploitation of the working classes.'⁸⁸ In such a perspective, the long Yugoslav tradition of constitutional review dating back to 1963 could be seen as a curious anomaly. Nonetheless, this model of constitutional review was not entirely incompatible with a one-party regime: it was based on a familiar premise that '[a]ll functions of authority and public authorization, as well as the function of the political party, emanate from the Constitution',⁸⁹ which then makes it entirely plausible to entrust the control and protection of constitutionality to constitutional courts of the state and the federal units, respectively. In addition, the essentially political nature of constitutional adjudication in the former Yugoslavia was made explicit, as is evident from the writings of the then leading ideologues and constitutional scholars.⁹⁰ As such, although criticized by some members of the political and academic elites of the time, the constitutional judiciary in the socialist Yugoslavia was ultimately not seen as incompatible with the overarching socialist principle of unity of powers, but was rather construed as reinforcing it.⁹¹ At the same time, and as a consequence of its position in the wider constitutional and political constellation, as well as due to its limited competences and authority, the constitutional judiciary in the socialist Yugoslavia was different, considerably more modest and ultimately less significant, than constitutional courts in modern liberal democracies.⁹²

Thus, on its face value, the constitutional and political tradition of civil law countries, coupled with socialist legal tradition and understanding of the role of constitutional courts in the context of wider ideological projects, contributes to limiting the expectations from judicial review in post-Yugoslav transitions. As Ginsburg notes, 'when an institution exists under authoritarianism ... it is unlikely to be seen as legitimate in the very early years of democratization.'⁹³ Nonetheless, a reverse hypothesis is also valid. Considering the specificities and tradition of the Yugoslav model of judicial review, one could as well plausibly assume that in the post-Yugoslav case(s) *the factor of legal tradition would work more in favor*

⁸⁸ Utter and Lundsgaard (n 44) 573-574.

⁸⁹ Dimitrije Kulic, 'The Constitutional Court of Yugoslavia in the Protection of Basic Human Rights' (1973) 11 *Osgoode Hall Law Journal* 275, 275.

⁹⁰ See, for example, Jovan Djordjevic, *Ustavno pravo* [Constitutional Law] (Savremena administracija 1982) 789 ('...Constitutional Court ensures and expresses politics through law...').

⁹¹ Matej Accetto, 'On Law and Politics in the Federal Balance: Lessons from Yugoslavia' (2007) 32 *Review of Central and East European Law* 191, 208.

⁹² *ibid* 210-211. See also Sadurski, *Rights before Courts* (n 9) 1.

⁹³ Ginsburg (n 77) 257.

than against excessive constitutional review,⁹⁴ however questionable its actual role in the overwhelming dominance of one party might have been.

When considering the factor of history and tradition, one would have to take into account another important aspect – the more immediate institutional history: that is, the origins, beginnings and early developments of constitutional adjudication in a new democracy. These aspects are crucial not merely in the context of path dependence, but also with regard to the democratic pedigree of constitutional courts. Important questions in this sense are whether or not the courts were formed following a broad deliberative process involving decision-makers, experts and other relevant actors. These factors may also crucially influence the success and achievements of constitutional courts in transition.⁹⁵

3.4. Legitimacy and Public Confidence

Most of the above factors are also relevant for developed democracies, but seem to have different weight in transitional contexts. Certain factors seem to be more important than others and should be elaborated in more detail and in a more systematic way. One such particularly important factor is a court's legitimacy. Legitimacy is a notoriously indeterminate concept, and every attempt at definition reveals its complexity. As Sadurski explains, in the case of constitutional courts we should consider legitimacy across three axes or three dichotomies:

a) sociological legitimacy (actual respect in the eyes of the general public) and normative legitimacy (concerned with independent judgment, reasonableness and consistency);

b) formal legitimacy (whether or not an activist court remains *intra vires*) and meta-constitutional legitimacy – which is particularly relevant for most European constitutional courts (as it concerns not the formal authorization, which is clearly there, but if the relevant actors hold that the constitution *should* endow courts with extensive powers of judicial review);

c) finally, and most important for our purposes, the input legitimacy (the pedigree of a constitutional court and actual basis of their legitimacy – process of election and authorization by parliament, charisma or reputation of individual justices etc.) and output legitimacy (the consequences of their actions in relation to the dominant political values in a society).⁹⁶

⁹⁴ *ibid.* ('[o]ne might expect that *prior history of judicial review* would provide an important source of support for constitutional judges in new democracies.')

⁹⁵ See e.g. Nicolas Mansfield, 'Creating a Constitutional Court: Lessons from Kosovo' (2013) East-West Management Institute Occasional Paper Series <www.gjk-ks.org/repository/docs/EWMI_Report_on_Kosovo_Constitutional_Court.pdf> accessed 20 November 2016.

⁹⁶ Wojciech Sadurski, 'Constitutional Courts in Transition Processes: Legitimacy and Democratization' (2011) <www.researchgate.net/publication/228134351_Constitutional_Courts_in_Transition_Processes_Legitimacy_and_Democratization> accessed 12 August 2016.

Sadurski further explains that output legitimacy is intuitively most appropriate for the assessment of the (normative and meta-constitutional) legitimacy of courts. Nonetheless, the problem lies in that it is too content-specific and too dependent on often severely divided views on the rightness or wrongness of a particular decision to be used as a proxy for the legitimacy of the courts. Therefore, as Sadurski rightly suggests, ‘input legitimacy is more important than output legitimacy’ and can serve as ‘a useful tie-breaker’ when assessing legitimacy.⁹⁷

Other authors also confirm that public opinion, or the dominant values of a society, as well as public perceptions regarding the proper role of the judiciary in a democracy are of crucial importance when considering the position and role of constitutional courts in a democracy.⁹⁸ This is particularly relevant at the very beginning, as ‘increasing public trust in and support for the judiciary in the immediate post-transition period encourages the courts in a new democracy to (1) publicly challenge and confront the government during this period, and (2) to demand more judicial authority.’⁹⁹ Relying on several examples from transitions, from Indonesia to Bulgaria, Yadav and Mukherjee argue that ‘courts will be more likely to believe in the legitimacy of their demand for increased powers, and in their ability to get it during the post-transition period of institutional design if they can draw on deep reserves of public support for their institution.’¹⁰⁰ In this sense, courts can, *inter alia*, develop efficient outreach strategies: they can effectively and creatively use the media and establish cooperation with civil society groups to enhance their public posture.¹⁰¹

It needs to be emphasized that the legitimacy of courts is not independent from their activity. On the contrary: ‘[j]udicial activity is not only influenced by [society’s perception of the judicial role]; it also influences that perception.’¹⁰² Some aspects of this active role of courts are constitutional and institutional, and others are related to their actual performance. According to Barak, key common preconditions for realizing the judicial role in a democracy are: independence of the judiciary (both personal and institutional), judicial impartiality and objectivity, and public confidence in the judiciary.¹⁰³ Public confidence, nonetheless, should not be confused with popularity. As Barak puts it eloquently:

⁹⁷ *ibid* 5-6.

⁹⁸ Barak (n 70) 33.

⁹⁹ Yadav and Mukherjee (n 4) 38-39.

¹⁰⁰ *ibid* 43.

¹⁰¹ *ibid* 61.

¹⁰² Barak (n 70) 33.

¹⁰³ *ibid* 53-55.

‘Public confidence does not mean pleasing the public; public confidence does not mean ruling contrary to the law or contrary to the judge’s conscience to bring about a result that the public desires. On the contrary, public confidence means ruling according to the law and according to the judge’s conscience, whatever the attitude of the public may be. Public confidence means giving expression to history, not to hysteria.’¹⁰⁴

3.5. The Concept and Practice of Dissenting Opinions

The regulation and actual practice of dissenting opinions also matters. Dissents, it is often emphasized and hypothesized, can serve important functions. This is especially the case in the European context: ‘separate opinions may play an important role in enriching the constitutional debate and may help the evolution of constitutional law ... [in particular] in transitional contexts where interpretive gaps are frequent and an established interpretation of the new rules has not yet emerged.’¹⁰⁵ But downsides are also noted: in the early stages of the Court’s operation in transitional contexts, ‘in times when the court’s authority and legitimacy are still weak, the publication of seemingly unanimous opinions can serve to protect the newly established court.’¹⁰⁶

Indeed, there seems to exist a significant tension, even ‘a genuine conflict between the pursuit of this value [of pluralism within the courts and the possibility to express different views on constitutional matters] and the development of a shared or common view of what the constitution requires.’¹⁰⁷ The crucial downside to the practice of open dissent, according to some views, is that ‘the state of law can remain unsettled, hopeless and futile activities may be needlessly encouraged, and inadequately reasoned doctrine can be produced. Worse than this, the exposure of internal divisions in the Court may encourage political actors to respond politically by trying to reshape or pack the Court rather than persuade its members.’¹⁰⁸

Nonetheless, other scholars maintain that judicial dissents help us understand justice, point out the weaknesses in the logic of the majority decision, contribute

¹⁰⁴ *ibid* 60.

¹⁰⁵ Katalin Kelemen, ‘Dissenting Opinions in Constitutional Courts’ (2013) 14 *German Law Journal* 1345, 1352.

¹⁰⁶ *ibid* 1356. ‘In Germany and in Lithuania, ... the publication of dissent was not allowed in the first period on the ground that it might compromise the authority of the newly established court. In both cases it took approximately two decades to acknowledge that the constitutional court’s authority was sufficiently established to introduce dissenting opinions.’

¹⁰⁷ John Ferejohn and Pasquale Pasquino, ‘Constitutional Adjudication: Lessons from Europe’ (2004) 82 *Texas Law Review* 1671, 1673.

¹⁰⁸ *ibid* 1699.

to the marketplace of legal ideas, and serve as prophetic platforms in that they provide grounds and theories for future legal developments – so that yesterday’s dissent can become translated into today’s majority.¹⁰⁹ Voices in favor of dissents within constitutional courts extend to transitional contexts as well. For example, Joseph Marko, a former justice of the Constitutional Court of Bosnia and Herzegovina, argues in favor of allowing dissenting opinions, as they enable transparency of the proceedings and faithful representation of different voices within the society, thereby contributing to the public perception of fairness of the judicial game.¹¹⁰

¹⁰⁹ See e.g. William J. Brennan, Jr. ‘In Defense of Dissents’ (1986) 37 *Hastings Law Journal* 427; see also Ruth Bader Ginsburg, ‘Speaking in a Judicial Voice’ (1992) 67 *New York University Law Review* 1185.

¹¹⁰ Joseph Marko, ‘Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance’ *EURAC Diversity and Autonomy Papers* 7/2004, 33-34 <http://webfolder.eurac.edu/EURAC/Publications/edap/2004_edap07.pdf> accessed 20 August 2016.

4.

Approaches to Evaluation and Our Approach

4.1. Central Question and Focus of the Research Project

Accounting for the role and effects of constitutional courts in transitions is an interdisciplinary endeavor by its very nature. It would seem to have to start off with the truism that insights from social sciences - political science (structures, design, institutions, and political system), social psychology (judicial behavior) and organizational theory (e.g. concern with the court's position, institutional stature and legacy) - are all highly relevant for assessing the role of a constitutional court in democracy.¹¹¹

In defining our research question and focus of our research, we opt to avoid normative arguments on the appropriate role of judges in the democratic processes and questions such as whether judges are too active or too passive in a given context. There are arguments for and against judicial activism, and significant advocates of both sides to the debate. Relatedly, this is not a project that is concerned with identifying reasons or factors that influence the choice of a particular institutional structure or type of judicial review in the first place and at the beginning of the process of transition.¹¹²

When it comes to our key research question, we take the approach similar to that of Shapiro, and we ask 'how and when have constitutional courts [in our case - in the successor states of the former Yugoslavia] succeeded?'¹¹³ Shapiro defines success in this sense 'narrowly and positivistically in terms of when an exercise of constitutional judicial review has changed public policy in the direction the court wants public policy to go.'¹¹⁴ Nonetheless, we adopt a more flexible and more comprehensive approach: we are concerned both with cases where courts succeeded and those in which they did not. The main criterion

¹¹¹ See generally Ran Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) 11 *International Journal of Constitutional Law* 1.

¹¹² For an example of such an effort, see e.g. Shannon Ishiyama Smithey and John Ishiyama, 'Judicious Choices: Designing Courts in Post-Communist Politics' (2000) 33 *Communist and Post-Communist Studies* 163.

¹¹³ Shapiro (n 52) 7.

¹¹⁴ *ibid.*

is the relative importance of the case. In this sense, we adopt an explicitly *transitional* perspective and look for cases where the specific goals of transition and democratization were at stake – in other words, we are concerned with the content of decisions, and not only with process and outcomes. Thus, while keeping a degree of abstraction, we are interested in discerning the *social transformation performance* of constitutional courts¹¹⁵ in Bosnia and Herzegovina, Croatia, Kosovo, Serbia and Macedonia. An important qualification is, however, in order: we understand that while the transition can generally be understood to mean the reform of a polity and its institutions towards liberal democracy, the specific goals of transition to democracy that we have in mind for the purposes of our project (and to which the constitutional courts are expected to contribute) are not uniform and are certainly not always obvious. Goals of transition can indeed vary from one context to another. In Bosnia and Herzegovina, for example (and, to an extent, in Macedonia and Kosovo), bearing in mind the elaborate ethnic political power-sharing mechanisms institutionalized in this country, one can more plausibly talk about the transition towards the liberal-nationalist version of democracy.¹¹⁶

4.2. On Important or Difficult Cases

Important cases for the purposes of this research project are not necessarily obvious. Many questions have come to the agenda of constitutional courts in transitional contexts, including genuinely *transitional* questions (such as lustration, political crimes, privatization, compensation for past injustices etc.). We are, however, not interested in how constitutional courts have dealt with transitional questions, but rather in how they assumed and performed their general, ‘normal’ competences in extraordinary times of transition. Keeping in mind that we aim to focus on important, transformative cases, abstract constitutional review intuitively comes to mind. Indeed, as Solyom also confirms, it is the power of courts in transitioning democracies to review laws *in abstracto* that has served as a crucial basis for their activism.¹¹⁷ In the words of Sadurski,

‘it seems obvious that in the process of considering a law *in abstracto* the court behaves much more as a quasi-legislator than as a judicial body, and that the implications for the general allocation of powers are thus much more grave than when the review is limited to the adjudication of concrete

¹¹⁵ cf Siri Gloppen, ‘Courts and Social Transformation: An Analytical Framework’ in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006) 35.

¹¹⁶ See e.g. Yael Tamir, *Liberal Nationalism* (Princeton University Press 1995); Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press 1977).

¹¹⁷ Solyom, ‘The Role of Constitutional Courts in the Transition to Democracy’ (n 16) 133.

cases. One of the reasons for this is that abstract review, when (as is often the case) addressed to a recently adopted law, brings the court right into the center of a political controversy.¹¹⁸

Nonetheless, to focus exclusively on abstract review cases seems too limiting for our purposes, as it is not easy to establish a firm delimitation between important and less important cases solely using this particular criterion. As Habermas also notes, 'the Constitutional Court is concerned only with cases of collision; its rulings almost always deal with hard cases and subsequently become important precedents.'¹¹⁹ Indeed, the distinction between abstract and concrete review in this sense, especially in the European context, is often vague, perhaps even misleading.¹²⁰ In the words of Stone Sweet,

'European concrete review ... remains meaningfully abstract in an overt and formal way. Technically, the task of the constitutional court is to answer the constitutional question posed - for example, is a provision of the code unconstitutional? - not to try or dispose of litigation. The task of the presiding/referring judge is to (a) determine if the facts warrant a referral, (b) properly frame the question to the constitutional court, and (c) resolve the dispute in light of the answer given.'¹²¹

Finally, even individual constitutional complaints may be important in more ways than one: they can have significant institutional, even constitutional implications (as the European Court of Human Rights decision in *Sejdic and Finci v. Bosnia and Herzegovina*, for example, has vividly shown¹²²).

While the criteria of their relative importance and their implications on the broader goals of transition are used as a general guideline for the selection of cases to be considered within this research project, additional criteria, justifications and clarifications are articulated for each individual country context. In this sense, we understand that the importance of cases for our purposes is to a significant extent also a context-specific issue.

¹¹⁸ Sadurski, *Rights before Courts* (n 9) 70.

¹¹⁹ Jurgen Habermas, *Between Facts and Norms* (MIT Press 1996) 243.

¹²⁰ cf Ginsburg (n 77) 38 ('In practice, the distinction between abstract and concrete review is not as important as it may appear, but it is a widely used theoretical construct.')

¹²¹ Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why it May Not Matter?' (2003) 101 *Michigan Law Review* 2744, 2771.

¹²² See Edin Hodzic and Nenad Stojanovic, *New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights Decision in the Case of Sejdic and Finci v. BiH* (Analitika - Center for Social Research 2011) <<http://www.analitika.ba/files/NEW%20OLD%20CONSTITUTIONAL%20ENGINEERING%20-%202007062011%20za%20web.pdf>> accessed 20 August 2016.

Even if one accepts that they can come from different procedural avenues and be initiated by different actors, important cases for the purposes of our research project require additional clarification. An important or difficult case can mean different things in different classifications and perspectives. It should be noted, first, that an important case does not necessarily mean a famous or popular case. According to Lim, for example, English legal scholarship operates with two dominant conceptions of landmark cases: the first focuses on the actual merits of the case – ‘how well-reasoned or significant a case is on the grounds of precedent, principle, and rule’. The second conception focuses on the historical context of those cases, examining whether the case is canonical or ‘can be (better) explained by contextual variables such as politics, economics, or culture.’¹²³ As an example of another possible approach to this issue, describing his own research agenda, Morrison uses a rather narrow, self-referential definition of important cases as those that ‘are directly and continually useful to practitioners in the daily pursuit of legal practice.’¹²⁴

In stark contrast, we look at cases with broad political or even constitutional implications, those that deal broadly with key elements and often gigantic goals of transition to democracy: democratization, separation of powers, minority rights etc. - cases involving (attempted or materialized) ‘change in law with direct policy effect’.¹²⁵ The character of such cases makes them relevant for the society at large, and not only for a limited circle of academics and practitioners. This distinction between, on the one hand, purely technical and professional and, on the other hand, broader, societal relevance of a case is not always obvious and straightforward, although it is sometimes perhaps too easily assumed in distinguishing between different cases in various categorization efforts.¹²⁶ Moreover, such distinctions are not always useful for determining canonicity of particular cases, as they ignore other crucial elements, such as the practice of subsequent courts in creating a canonical case. Of course, academic perspectives on landmark cases do not necessarily follow these categorizations, and there can be such a thing as a landmark case from an academic perspective (whereby landmark cases are in fact construed through a dialogical, polemical and deliberative practice of extensive academic commentary).¹²⁷ It is questionable whether the landmark nature of a case can be determined at all based on rational, objective and determinate criteria, or whether it should rather be seen as shifting

¹²³ Ernest Lim, ‘On ‘Landmark’ or ‘Leading’ Cases: *Solomon’s Challenge*’ (2014) 41 *Journal of Law and Society* 523, 524.

¹²⁴ John Morison, ‘What Makes an Important Case? An Agenda for Research’ (2012) 12 *Legal Information Management* 251, 256.

¹²⁵ *ibid* 256.

¹²⁶ *ibid* 259.

¹²⁷ Lim (n 123) 530-531.

and provisional.¹²⁸ Moreover, although at least some ‘great cases’ can be more or less self-evident,¹²⁹ it might well be that what makes a case canonical is not necessarily the legal or technical quality or persuasiveness of analysis, style and argumentation. Rather, ‘[i]t is the rhetorical success and political acceptability of the decision that will carry the day.’¹³⁰

4.3. Research Approach and Research Questions

This research project focuses on constitutional courts in each of five countries of the former Yugoslavia. All five courts have similar institutional features and jurisdictions – a combination of abstract and concrete review, and constitutional complaints adjudication. Nonetheless, in order to be able to narrow down the scope of the research project, the actual analysis focuses on specific case law concerning *difficult* constitutional and political issues. In that sense, individual case studies deploy what might be termed a multi-level case study approach, where at one level, courts as institutions are treated as cases to be studied, while at another level, specific decisions of those courts are treated as case studies as well.

The ‘most difficult case’ design¹³¹ was followed when selecting specific constitutional court decisions in each of the countries covered by this research project. In other words, the underlying hypothesis that constitutional courts have made a positive contribution to political and social change and overall transition to democracy is tested on cases that are ‘the most challenging and least favorable to it.’¹³² Individual cases (constitutional court decisions) that have marked the five states’ respective transitions to democracy (dealing broadly with power-sharing, ethnic/minority rights, human rights, federalism/organization of government, or issues pertaining to the division of powers) are thoroughly examined. In particular, how the specific cases have been initiated, deliberated, decided and what the follow-up was (in terms of acceptance and compliance with the decisions in question) is explored. The specific jurisprudence is selected based on the preliminary research in the preparatory phase, combining

¹²⁸ *ibid* 548–549. See also Allan C. Hutchinson, *Is Eating People Wrong?: Great Legal Cases and How They Shaped the World* (Cambridge University Press 2011) 10 (‘Rather than view great cases as fixed stars or landmarks, I think that it is more appropriate to think of them as temporary lighthouses, designed with a particular purpose in mind, constructed with available materials, and with a limited working life.’).

¹²⁹ Hutchinson (n 128) 8 (‘what counts as a great case is simply whatever people agree to designate a great case’).

¹³⁰ *ibid* 10.

¹³¹ Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 *American Journal of Comparative Law* 145–148.

¹³² *ibid* 148.

the criteria of importance of cases in the above sense, common knowledge and suggestions of the interviewees (in particular – constitutional court judges). In selecting the cases, we aimed to achieve both thematic and procedural variety.

On the basis of the foregoing discussion, our specific research questions are formulated as follows:

1. To what extent have the respective constitutional courts in Bosnia and Herzegovina, Croatia, Kosovo, Macedonia and Serbia been activist?
2. What was the nature of their activism – e.g. what types of constitutional disputes served as the basis for excessive judicial activism, or lack thereof?
3. What particular arguments or keywords were used by the courts to justify (or avoid) activism in specific cases?¹³³
4. Has the nature of judicial activism evolved in time and, if so, in what way?¹³⁴
5. What factors have contributed to the position and role (successes and failures) of the courts in the democratic transition processes?

One needs to note that this research project, like most similar projects in other contexts¹³⁵, for the most part adopts a rather narrow understanding of policy influence, focusing on more immediate and direct policy change. This not to deny, however, that levels of policy influence are numerous and multifaceted – from agenda setting and changing the dominant public discourses to affecting concrete policies.¹³⁶ Research on judicial politics, especially on the political and social impact of the courts, could certainly benefit from more developed and more refined methodologies that would enable the capturing of policy influence of constitutional courts in this broader sense. It is only through such examination that the fuller picture of the place of constitutional courts in a broader political and social constellation would be drawn. Nonetheless, although aiming also to consider broader implications of the operation of constitutional courts in the successor states of the former Yugoslavia, our research project for the most part follows the standard, narrow methodological focus in this field.

¹³³ We assume that exceptionalist arguments and transition-based reasoning will be dominant. See also Sadurski, *Rights before Courts* (n 9) 297.

¹³⁴ A dominant view is that the need for, and opportunities for judicial activism on the part of courts will decrease in time, as the transition progresses. See, for example, Sadurski, *Rights before Courts* (n 9) 296.

¹³⁵ See e.g. Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006); Ginsburg (n 77); Sadurski, *Rights before Courts* (n 9).

¹³⁶ See e.g. Fred Carden, *Knowledge to Policy: Making the Most of Development Research* (IDRC and Sage Publications 2009) <<http://idl-bnc.idrc.ca/dspace/bitstream/10625/37706/1/IDL-37706.pdf>> accessed 15 November 2016. See also Ingie Hovland, 'Making a Difference: M&E of Policy Research' (2007) ODI Working Paper 281 <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2426.pdf> accessed 15 November 2016.

Finally, it is important to clarify what we mean by judicial activism for the purposes of this project. In understanding and operationalizing this concept, we entirely follow Sadurski's definition. By judicial activism we thus understand

'the substitution of the view of the parliamentary majority with that of the court's majority concerning the proper articulation of the meaning of a constitutional right [or provision, for that matter] when these two views collide *and* when it is possible for the court, within the set of argumentative resources available to it, to uphold or to strike down the law.'¹³⁷

One needs to note at the outset that we are not concerned with quantitative analysis: we are not interested in counting all cases, and comparing those numbers with the number of cases the courts actually decide to deal with, and then looking for all instances of judicial activism in the latter group of cases. Rather, '[a]t the end of the day, what matters for the characterization of a court as "activist" is not so much a proportion of the relatively "trivial" matters decided by it but rather the very fact that, even if very rarely, it has reversed some truly fundamental political choices on central public issues.'¹³⁸ Sadurski also suggests a 'working test' in this sense: 'an inquiry into the "judicial activism" of constitutional courts involves two criteria: the importance of the laws invalidated ... and the nature of the reasoning leading to such invalidation.'¹³⁹

Now that we are clearer on what we mean by important cases and what our understanding of judicial activism is in the context of our research project, it is important to emphasize that we are particularly interested in assessing the contribution of the courts to democratic transitions and establishing links between the various factors identified above (in particular, broader political constellation and the court's legitimacy as a multi-faceted and almost all-encompassing concept in the terms discussed above) and judicial activism. We have in mind here that 'judicial power is heavily conditioned by two variables: the size of a court's zone of discretion, and the extent to which people activate it, through litigation.'¹⁴⁰ As Stone Sweet posits, '[a] court that operates in a relatively large zone of discretion is far more likely to gain decisive influence over the institutional evolution of a polity than one that operates in a relatively restrictive environment.'¹⁴¹

¹³⁷ Sadurski, *Rights before Courts* (n 9) 96-97.

¹³⁸ *ibid* 97.

¹³⁹ *ibid*.

¹⁴⁰ Stone Sweet, *The Judicial Construction of Europe* (n 28) 30.

¹⁴¹ *ibid* 12.

5.

Epilogue to the Prologue

The cases of the post-Yugoslav states have an important story to tell about the promise and challenges of constitutional review and judicial activism in democratic transition. The first important aspect of this multi-faceted story is what the five case studies presented herein have in common: a long history and legacy of constitutional adjudication, similar institutional features following for the most part the standard European model of constitutional review, and the fact that they have operated in conditions of complex transition – involving not only the transition to democracy and a fundamental economic transition, but also, to a lesser or greater degree, a transition from conflict to peace. On the other hand, differences among the five cases are also evident. The most important one is related to the nature of the political and constitutional system – from the elaborate tripartite power-sharing mechanisms in Bosnia and Herzegovina, through elements of power-sharing in Macedonia and Kosovo, to the standard majoritarian democracies of Croatia and Serbia. Additionally, these five successor states of the former Yugoslavia find themselves in different stages of democratic transition – with only Croatia being a member of the European Union. Relatedly, their constitutional courts have had considerably different trajectories: for example, the Constitutional Court of Kosovo is still in its relatively early stage of operation and the Constitutional Court of Bosnia and Herzegovina has been active for almost 20 years now.

Against such a background, the individual case studies gathered in this working paper series are stories of the same origins, history and tradition, similar transitional challenges and yet divergent transitional paths of constitutional adjudication. They present a unique opportunity to test the main theories and assumptions on the role of constitutional courts in democratic transitions and to examine various factors affecting their performance and influence in the polity over time. As elaborated in this introductory paper, despite the growing academic interest in the field in recent decades, theories of transition and of the place, promise and constraints of constitutional adjudication in transitional contexts still remain underdeveloped, more often than not based on intuitions, uncertainties and assumptions, with still insufficient empirical evidence. We hope that this working paper series, which broadens the horizons of study of European transitional jurisprudence towards the southeast, presents a fresh contribution to the field.

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