

Author: Violeta Beširević

Professor of Law, Union University Law School Belgrade,
NYU School of Law, Global Research Fellow 2012-2013

besirevv@ceu.hu; vb868@nyu.edu

Commentator: **Stephen Holmes**

Walter E. Meyer Professor of Law
NYU School of Law

**NYU School of Law
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The Politics of the Constitutional Court in Serbia

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Abstract

One measure of the progress toward democracy in post-communist regimes is the extent to which a constitutional review has become an effective mechanism for ensuring constitutional efficacy. The purpose of this paper is to show that the Constitutional Court in Serbia has failed to become an effective mechanism of governance and instrumental to broad sections of the Serbian society in time of transition. I will argue that, despite a strong independent position it occupies in the constitutional space, as well as its broad jurisdictional authority, the Court has largely (a) failed to reduce the difference between the (written) constitution and constitutional reality, namely to secure the efficacy of the constitution; (b) by applying a wait-and-see strategy in politically contested cases and allowing itself to oscillate between rival political parties, it has become yet another form of partisan policy; (c) it is rather deferential towards the government mostly because the judges are accustomed to be the instrument of earlier regimes and because they value their benches more than policy output; (d) it is vulnerable to efficacy due to excessive number of cases; and (e) its decisions hardly amount to “jurisprudence” because most of its decisions are written in technical terms and based on a formal interpretation of legal norms, even in rights-oriented cases, which are typically resolved by other constitutional courts under the proportionality analysis.

Although one should not expect from a constitutional court to be at the very forefront of democratization, and although I do not deny that the Serbian Constitutional Court has managed to deliver some democracy enforcing decisions, it is striking how constitutional judges in Serbia have been cautious in resolving contested political issues and prone to react only when either their decisions become politically irrelevant or when it is manifestly clear what the preference of the ruling majority is. The cases concerning constitution-making, the state of emergency, judicial reform, political decentralization and militant democracy, that I am going to discuss in this paper, will well illustrate the points. Since constitutional courts do not operate in legal or political vacuum, I will first briefly illuminate theoretical, factual and normative background in which I am going to settle my discussion.