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Aziz Ismatov, Herbert Küpper, Kaoru Obata (Eds.)

Dynamics of Contemporary Constitutionalism in Eurasia

Local Legacies and Global Trends

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Preface

In 1991, the Soviet Union collapsed and fifteen newly independent countries began the process of drafting new post-Soviet and post-socialist constitutions. These constitutions uniformly contained abstract commitments to the rule of law, separation of powers, and individual rights. Thirty years later, however, many of these constitutional principles have still not been realized. This book makes an important contribution to understanding these problems of constitutional implementation. Including contributions from constitutional law experts both inside and outside the region, this book discusses the key challenges to successful constitutionalism in the region. These issues range from deeply rooted practices of executive centralism to the weakness of new institutions that seek to protect constitutional values. In reaching these conclusions, the authors draw on a wide range of academic methodologies and approaches from history to institutional analysis.

This book makes two general contributions. First, it fills an important gap in comparative constitutional law literature. As English-language comparative constitutional law literature has expanded into Asia and Africa, the role constitutional law in these former Soviet republics has been neglected. Second, and more broadly, this book is more than just an invaluable window into the internal debates and questions plaguing the region. It also shows how the region contributes to broader debates in constitutional law. The post-Soviet republics teach us a great deal about the importance of history, institutional development, and political culture to the development of constitutionalism. It therefore contributes to a broader understanding of the key forces and factors in the construction of constitutionalism. This insights from this book will therefore serve as an important starting point for future work on the region as well as enrich conceptual and theoretical discussions of constitutionalism more broadly.

William Partlett

William Partlett is an Associate Professor at the Melbourne Law School, where he writes and teaches in the field of public law. A principal field of his research is the constitutional development in the post-Soviet space.

Table of Contents

AZIZ ISMATOV / HERBERT KÜPPER / KAORU OBATA

Introduction
Constitutionalism in the Post-Soviet World

In the early 1990s, the formerly socialist states in Eurasia – a term which we use as a short equivalent for the successor states of the Soviet Union and Mongolia – as well as in Eastern Europe started to transform their entire systems. In this process of post-socialist transition, they faced multiple long-term challenges, including the need to consolidate rather sudden independence, the construction of a full state apparatus including institutional (re-)building and governance, the foundation of this independent state in a state-nation which, in some cases, needed to be created from zero, the conversion of a command economy into a market economy, and replacing universal state tutelage by an independent civil society. From an idealistic perspective, the post-socialist transition and its constitution-making process appear to be a part of moving towards a Western model of democracy and the rule of law. In reality, various local varieties emerged in the post-socialist world and created specific ways of constitution-making and constitutional culture. The until 1990 seemingly uniform Soviet world started to diversify: some states were well prepared to cope with the transition challenges, whereas others were less eager or unprepared. Therefore, the constitutional transition process offers multiple scenarios, some of which are similar to, and some of which are fundamentally different from Western Europe, post-authoritarian states such as South Korea, or post-independent Asia and Africa. Consequently, constitutional dynamics in the formerly socialist states need to be viewed as a complex phenomenon requiring a differentiating conceptualization even within the context of Eurasia with its common Soviet heritage.

Consequently, constitutionalism in post-Soviet societies represents a hybrid mixture of constitutional cultures, traditions, and logic. It is vibrant, diverse, and sometimes full of surprises. After decades of uniform stagnation, the successor states of the Soviet Union and its former allies have embarked on their own independent paths, which include varying constitutional choices. In some countries, constitutional development reflects deep-rooted conflicts about the very nature of these choices. Examples are Ukraine and Moldova, which fight over a decision for a 'Western' or an 'Eastern' orientation. This conflict about the county's fundamental orientation has been a driving force behind the constitutional developments of the last decades. Similarly, the ongoing clashes in Kyrgyzstan may be read in the light of a fight about which orientation the country should take. On the other hand, Russia's parallel debates of the 1990s about the 'European' or 'Eurasian' identity of Russians and their multinational state seem to have lost relevance.

In other countries, constitutional development has been more constant. By restoring their pre-Soviet legal personalities and constitutions, the three Baltic republics created the basis for a successful integration into EU and NATO; in doing so, their constitutional dynamics share more common features with the former Soviet satellites in Central Europe than with the other ex-Soviet republics. Constitutional life in Armenia and Georgia, too, is characterized by a general, though sometimes tumultuous, tendency to a more 'liberal' constitutional architecture. The same is true for Mongolia where, however, 'Asian' or 'Mongolian' values receive more emphasis in the constitutional self-identification than in Armenia and Georgia. Unlike some Asian states, Mongolia interprets its indigenous elements not as the opposite but as a local modification of democratic constitutionalism. Uzbekistan's cautious legal reforms that depend on one political figure's will seem to point in a similar direction: Uzbekistan's official debate tries to combine democratic constitutionalism with 'Asian' and/or 'Central Asian/Uzbek' values. In this context, this country often refers to the specific cases of 'successful Asian democracies' such as Japan and South Korea.

On the other hand, some countries strengthen the authoritarian or autocratic elements of their constitutions. The most blatant examples include the Russian constitutional amendments of 2020. Much earlier, Belarus started to dismantle the liberal substance of its constitution in 1996. Without major formal constitutional amendments, Azerbaijan's political and constitutional culture has moved quite constantly towards authoritarian structures, which the government defines as 'traditional Asian' or 'traditional Middle Eastern', carefully avoiding qualifying them as 'traditional Muslim'. Finally, Turkmenistan never seems to have paid more than lip service to the democratic elements in its post-Soviet constitution but managed, as far as one can judge from the outside, a smooth transition from late Stalinist to more indigenous forms of autocracy. This diversity raises scholarly interest and necessitates an individual country-oriented approach to analysing transitional countries' constitutional dynamics and conceptualizing their underlying self-definitions and legal philosophies.

To date, there has been relatively little work on Eurasian constitutionalism *per se* apart from some specific jurisdiction-focused studies. Therefore, we think that the post-Soviet space and its constitutional life deserve more attention than they have been given so far.

In line with such a pluralist objective, we invited distinguished constitutional scholars from Eurasia to a conference on "Dynamics of Contemporary Constitutionalism in Eurasia" in order to discuss these fundamental questions in their diversity. We are very grateful to the University of Nagoya and its Centre for Asian Legal Exchange (CALE) for having hosted this conference. Its findings are presented in this book. It will look at

the theoretical constitutional foundations and discuss how constitutional ideas have evolved in the course of the transition and who is given control of the constitution. The conference and its discussions have produced rich insights into individual specifics of constitutional identity that include, *inter alia*, parliamentarism, presidential structures, elections, constitutional review, human rights, and the rule of law in post-Soviet constitutionalism. By focusing on their concrete research topics, the authors also point to the factors that strongly affect contemporary constitutional development in the region.

We intend this book to be a first step, and we would be more than happy if it triggers more research into the exciting world of post-Soviet constitutionalism in Eurasia and beyond.

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HERBERT KÜPPER

The Politics of the Past and their Effect on the New Constitutions

1. Introduction

When an authoritarian system is converted into a democratic, rule-of-law system, the new democratic rule-of-law state faces the question of how to deal with the legacy of the previous authoritarian system, especially how to react to the injustice, and eventually crimes, that the authoritarian system committed. Naturally, this is predominantly a political question. But under the rule of law, political answers need to be brought into a legal form if these answers are to be binding upon everybody. So, the "politics" of the past becomes "legislation" on the past.

What does this mean for the constitution of such a post-authoritarian democratic rule of law?

First, the decision if the new system wants to deal with questions of the past – and if so, how and in what way? – is a political one. These answers have to be found in the political field. Not all post-authoritarian, rule-of-law states want to face the past. In Poland in the early 1990s, just to give one example, there was universal agreement that there should be a "gróba kreska", a clean break, and that the Polish people should look into the future and not at the past[1]. In Central Asia, there was no general societal agreement on a "clean break": nobody looked at the past, neither the elite nor the society, and there were no discernible voices in the public debate that invited or demanded the state or society to face the Soviet past. Therefore, in Central Asia, not to look at the past was not an active and conscious choice but rather the total passivity of all relevant agents allowed the past to disappear from public perception. On the other hand, Germany[2] and Hungary

1 Sabine Grabowski: Vom "dicken Strich" zur "Durchleuchtung", Osteuropa 48 (1998), pp. 1015–1023.

2 In the case of Germany, we have to differentiate. After 1945, post-Nazi Germany was not very much inclined to deal with the Nazi past. In West Germany, the Allied occupation authorities conducted the restitution of expropriated property, initiated indemnification legislation and, especially in the Nuremberg trials, prosecuted the most prominent state criminals. Later, West Germany rather unwillingly developed the indemnification legislation, but the prosecution of Nazi state crimes was a near complete failure. In East Germany, the Soviet occupation authorities used the prosecution of former Nazis to do away with their opponents, and used indemnification rules to reward their followers. Later, East German authorities continued this path. In contrast to post-1945, the reunited Germany after 1990 dealt with the legacy of the communist past in East Germany quite extensively, partly because the lesson learnt from post-1945 was that the post-authoritarian state has to face its past; to ignore

were obsessed with questions of the past and enacted a vast legislation about the criminal prosecution of authoritarian state crimes, about the indemnification of the victims including the restitution of nationalised and other expropriated property, about the legacy of the secret police services (especially their person-related files), about the continuation of office of the public servants of the authoritarian system, about the assets of the former state party and its organisations, and about many other questions.

The explanation for the huge differences among the post-socialist states in their attitude towards facing or not facing their past is not a legal one, but lies in the political culture and in the circumstances of the change of system in the given country. A comparative analysis of the political and cultural backgrounds of the "politics on the past" in the post-socialist world[3] and beyond reveals that three prerequisites must coincide in order to create a climate favourable for past-related measures which are more than symbolic. The most basic prerequisite is that the past is generally viewed as negative, as "unjust", that both the elite and the majority of the population share this interpretation. If the past is defined as positive or at least as neutral, as Russia's President Putin tries to do with some parts of the Soviet history, there is no basis for a critical assessment of that past's legacy. Second, there must be widespread agreement, again within the elite and society, that the past is important enough to do something about it: there must be widespread conviction that the injustice of the past needs to be addressed and rectified. This second step was negated by the Polish "gróba kreska" attitude: both the post-authoritarian elite and the people accepted the socialist past as negative but thought it best to let that past rest and turn to the future. Third, there need to be concrete initiatives on what to do exactly. A general but vague feeling that something should be done is not enough. Only if the political agents in power or societal stakeholders such as the victims of persecution formulate a concrete agenda, ideally present draft bills that parliament can debate upon, the first two prerequisites can be channelled into precise legislative projects. The interest in the past must consolidate into politics and, eventually, legislation on the past.

Second, once a political decision to face the authoritarian legacy is taken and the post-authoritarian rule-of-law state wishes to deal with questions of the past and endeavours to create justice, the usual way to do so is legislation: laws on lifting the statu-

it leads to severe societal and political distortions. For the past-related legislation in West, East and reunified Germany in theory and practice see Herbert Küpper: Kollektive Rechte in der Wiedergutmachung von Systemunrecht, Studien des Instituts für Ostrecht München vol. 52, Frankfurt/Main: Peter Lang, 2004.

3 For the most recent overview of the "legislation on the past" in the various post-socialist states of Eastern Europe see Friedrich-Christian Schroeder, Herbert Küpper (eds.): Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Osteuropa, Studien des Instituts für Ostrecht München vol. 63, Frankfurt/Main: Peter Lang, 2009.

tory prescription for old state crimes, laws on the indemnification of the victims, laws to regulate access to and the publication of the files of the secret police, laws on the lustration of present public officials with view to their past in the old regime, etc. So, the bulk of the legal side of the politics of the past is conducted on the level of legislation[4].

What does this mean for the constitution of such a rule-of-law state? There are at least two implications:

– First, the constitution itself may define the previous authoritarian system as "unjust". This will provide a constitutional basis for laws to rectify this injustice. A condemnation of the past on a constitutional level, however, is not a necessary prerequisite for rectifying legislation. Neither Germany nor Hungary[5] included commentary on the unjust nature of the past system in their constitutions, but this did not hinder their vast past-related legislation mentioned above. In practice, constitutions with explicit "condemnation clauses" on the unjust nature of the previous authoritarian system are quite rare. Such "condemnation clauses" usually find their place in the preamble, whereas the normative texts of most post-authoritarian constitution tend to contain "never again"-clauses, i. e. safeguards against a relapse into authoritarian structures in the sense of "lessons learnt from the past".

– Second, the constitution, being the supreme law and as such the yardstick for all state actions, provides the framework for any legislation. This includes past-related laws. In this respect, certain neutral constitutional provisions are important for past-related legislation, meaning that these constitutional provisions refer to all state activities and are not especially tailored for past-related measures.

2. The temporal scope of the post-authoritarian constitution

Before we examine these principles, we need to look for one moment at the temporal scope of post-authoritarian constitutions. They were enacted after the end of the authoritarian regime. Since constitutions are not retroactive, they do not have any binding force for the past and they cannot be a legal criterion for what the authoritarian system did. Only if the post-authoritarian constitution contains some form of "condemnation

4 In some cases, sub-statutory instruments may suffice. But most of the past-related measures affect the fundamental rights of the persons concerned (perpetrators of state crimes, recipients of indemnification, persons about whom the former secret police had files, etc). This why most rule-of-law constitutions require regulation by statute.

5 Hungary in the period from 1989 to 2011. The Hungarian Basic Law of 2011 takes a different stance and includes a rather extensive "constitution on the past". On this "constitution on the past" see Andrew Arato: Regime Change, Revolution, and Legitimacy, in Gábor Attila Tóth (ed.): Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law, Budapest: CEU Press, 2012, pp. 35–57.

clause" as mentioned above does it give a statement of the unacceptability of the previous authoritarian system or of some parts of it. But even then, the post-authoritarian constitution projects its values onto the past *ex post*, which is a predominantly political – and perhaps moral – act, but the post-authoritarian constitution does not make itself the legal yardstick for the activities of the authoritarian regime.

This is also the position of the European Court of Human Rights (ECtHR). The European Convention on Human Rights (Convention) is applied only to acts that the state committed after ratifying the Convention, but it does not apply retroactively to the time when the state had not yet signed the Convention, e. g. to the socialist time. A good example for this position of the ECtHR are the numerous Romanian restitution cases. The ECtHR held that expropriations by the communist regime were not subject to the scrutiny of the court because they had occurred before Romania signed the Convention. But the ECtHR did examine Romania's activities in order to restore the expropriated property to the former owners (or, usually, to their heirs) in the light of the Convention because these activities took place after Romania's accession to the Convention, and the mere fact that restitution legislation related to a period of time before the Convention had effect in Romania does not exempt the pertinent Romanian legislation from the duty to comply with the Convention and from the scrutiny of the ECtHR. In short: the communist expropriations are not examined in the light of the guarantee of property, but the subsequent restitution legislation is[6].

The same logic underlies the pertinent decisions of national constitutional courts. Whenever a constitutional court had to deal with this question, it decided that the fact alone that the previous authoritarian system does not meet the standards of the post-authoritarian rule of law and its fundamental rights does not impose any duty on the post-authoritarian state to rectify the authoritarian past. Unless there is a special provision in the constitution that prescribes certain legal measures with regard to the past – which is, as was set out before, quite rare[7] –, the non-retroactivity of the consti-

6 The leading Romanian restitution cases are probably the decision of the Grand Chamber in Brumărescu v. Romania of 28th October 1999, no. 28342/95, and the pilot decision in Atanasiu et al. v. Romania of 12th October 2020, nos. 30767/05 and 33800/06. On the ECtHR's case law in the Romanian restitution cases see Axel Bormann: Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Rumänien, in Schroeder/Küpper (fn. 3), pp. 157–185, at pp. 161–166; Herbert Küpper: Die Bedeutung der EMRK in Demokratien im Umbruch, in Magdalena Pöschl, Ewald Wiederin (eds.): Demokratie und Europäische Menschenrechtskonvention, Vienna: Manz 2019, pp. 119–181, at pp. 174–175. The Romanian constitutional court summarised the domestic constitutional and legal situation of the restitutions as "complex", which was sufficient reason for the court to remain passive and not to offer any help in the case at hand: Romanian Constitutional Court decision no. 333 of 10th May 2018.

7 The most striking example is the Hungarian Basic Law of 2011 which was enacted 22 (!) years after the end of the authoritarian system.

tution means that it does not dictate past-related measures; even if the authoritarian system violated positions that the democratic rule-of-law constitution defines as basic rights, this fact does not compel the post-authoritarian state to do something about it[8]. The political sphere may decide without any constitutional preconditions whether or not they wish to deal with the past, and whether or not they wish to enact past-related legislation[9].

If the legislator decides to enact past-related laws, this legislation is an act which takes place under the new constitution. Consequently, the legislation on the past must conform with the present constitution. The fact that its object is the pre-constitutional past does not mean that it does not underlie the authority of the new constitution. Hence, past-related laws, just as any other law, must be in full harmony with the post-authoritarian constitution valid at the time of their enactment.

In short: the non-retroactivity of the constitution does not prejudice the "if" of past-related legislation, but governs its "how".

3. The first relevant post-authoritarian constitutional principle: the rule of law

I will now exemplify the relevant principles with Germany and Hungary. These two countries have extensive past-related legislation[10] and their constitutional courts had ample opportunity to adjudicate on the constitutional side of the politics of the past.

8 The only exception may be when the violation of the basic right continues, as in the case of ongoing imprisonment or incarceration in mental hospitals etc. Usually, post-authoritarian systems are very quick to release persons which are imprisoned not for a crime but for political reasons.

9 The most explicit constitutional court decisions on the neutrality of the constitution were delivered in Germany and Hungary. The Hungarian Constitutional Court declared as early as in its decision of 20th May 1991, no. 27/1991. (V. 20.) AB, that the new constitution did not apply retroactively to the old authoritarian system; therefore, the court refused to declare old nationalisation laws as unconstitutional with retroactive effect, but limited the unconstitutionality of these laws to the time of the new constitution. The German Federal Constitutional Court first dealt with this question in connection with the regulation of property questions stemming from the Nazi period in its decision of 16th October 1968, nos. 1 BvR 118/62, 104/63, on the German-Portuguese treaty on German assets in Portugal. It repeated its position that the pre-constitutional authoritarian measure itself was not subject to constitutional scrutiny, but that the subsequent activities of the post-authoritarian constitutional state to rectify the authoritarian injustice did have to comply with the constitution, in its decision of 3rd December 1969, no. 1 BvR 624/56, on the indemnification of damages caused by the occupation forces. On these cases and the vast subsequent court practice see Küpper (fn. 2) at pp. 103–121.

10 For details, see the country reports on Germany by Friedrich-Christian Schroeder, Herbert Küpper and Axel Bormann, and on Hungary by Herbert Küpper in Schroeder/Küpper (fn. 3), pp. 61–98 (Germany) and pp. 271–322 (Hungary); Küpper (fn. 2), pp. 165–727 (Germany), 776–797 (Hungary).

The first constitutional principle relevant for past-related legislation is the rule of law. For most post-socialist East European states, the rule of law was the centre of the constitutional side of the change of system for the simple reason that socialism, which had paid lip-service to democracy and similar principles, had actively refuted the rule of law as a bourgeois principle unsuited for socialism[11], and because the rule of law means, in essence, the absence of arbitrariness, which is the exact opposite of the by-gone socialist dictatorships. Just to give one example of the fundamental importance of the newly established rule of law in post-socialist Eastern European constitutionalism: When Poland had only a transitional constitution without fundamental rights from 1992 to 1997, the Polish Constitutional Court took the rule of law clause as a starting point to develop the entire catalogue of fundamental rights[12].

3.1 No retroactive criminal law

The rule of law has many facets. One central element is that laws must not be retroactive, at least not if they put an obligation on the individual. Many constitutions set out the ban on retroactive legislation in separate articles, but dogmatically this ban is a part of the rule of law, and constitutions that do not pronounce an explicit ban still forbid retroactive laws on the basis of their rule-of-law clause. Therefore, the rule of law forbids creating, after the end of an authoritarian regime, new crimes in the Criminal Code, tailored to punish the state crimes of the former regime[13]. These authoritarian state crimes can only be punished on the basis of the criminal law in force at the time when the acts were committed.

In most East European countries, the prosecution of socialist state crimes was limited to arbitrary killings of political enemies, persons who tried to emigrate etc. These crimes can be dealt with on the basis of the homicide paragraphs of the socialist criminal codes so that nowhere in Eastern Europe it was felt that the punishment of state crimes re-

11 On the socialist negation of the rule of law as a "bourgeois will-o'-the-wisp" see Herbert Küpper: Einführung in die Rechtsgeschichte Osteuropas, Studien des Instituts für Ostrecht München vol. 54, Frankfurt/Main: Peter Lang, 2005, at pp. 423–433, 440–447, 578–579.

12 Leszek Lech Garlicki: Die Verfassungsgerichtsbarkeit in Polen, in: Georg Brunner, Leszek Lech Garlicki: Verfassungsgerichtsbarkeit in Polen. Analysen und Entscheidungssammlung 1986–1997, Baden-Baden: Nomos, 1999, pp. 64–85, at pp. 73–80.

13 The ban on retroactive criminal law was one of the major objections against the prosecution of the heads of German and Japanese state and military in the Nuremberg resp. Tokyo trials: the material criminal law that these tribunals applied, i. e. crimes against peace, war of aggression and, most of all, crimes against humanity, was at least partly perceived as having been created especially for the case and therefore constituting retroactive criminal legislation. The opposite view held that these crimes had existed in international law at least in the 1930s and that the charters of the Nuremberg and Tokyo tribunals merely codified this pre-existing law.

quired special retroactive criminal law. Poland seems to be an exception because a special law of 1998 penalises "communist crimes" (zbrodnia komunistyczna). However, a closer analysis of that law reveals that "communist crimes" is a label for criminal acts committed by persons in power during socialism and punishable under the criminal law valid at the time of the act. The most conspicuous criminal procedure for "communist crimes" was directed against the communist leadership of the 1980s including General Jaruzelski. The communist crimes that Jaruzelski was indicted for in 2006 encompassed, inter alia, the imposition of martial law in December 1981 which was interpreted as an act of treason under the socialist Criminal Code.

3.2 The protection of acquired rights

Another central element of the rule of law is the protection of acquired rights which requires that the state reduces or abolishes acquired rights only if it can rely on a reason of at least equal constitutional weight.

– *The post-totalitarian dilemma of the prosecuting rule-of-law state: Do acquired rights include statute-barred old state crimes?*

In the legislation on the past, the respect of acquired rights was most controversial in the field of the prosecution of socialist state crime. Many of these crimes were old, and according to the law in force at the time they were committed, their prosecution was statute-barred. The post-authoritarian parliaments and courts had to decide:

– do they respect the statutory prescription and refrain from prosecuting these crimes – which would be in line with the formal side of the rule of law and which calls for respect of the legal rules and acquired rights?

or

– do they rely on natural justice, lift the statutory prescription and prosecute these crimes – which would be in line with the material side of the rule of law which calls for a minimum of natural justice even if the formal rules do not make this possible?[14]

14 The conflict between the formal and the material side of the rule of law first became obvious after the Nazi regime in Germany: the Nazis had committed many unjust acts in conformity with unjust laws they had enacted which means that they had observed formal law but grossly violated natural justice. The dilemma was first solved by the so-called "Radbruch's formula" in 1946, i. e. the formula that Gustav Radbruch published in that year. If a statute conflicts with natural justice to such an unbearable extent that it becomes "incorrect law" (unrichtiges Recht) the judge and other organs must not apply that law but revert to natural justice: Gustav Radbruch: Gesetzliches Unrecht und übergesetzliches Recht, Süddeutsche Juristen-Zeitung 1946, pp. 105–108, at p. 107.

These questions came before the constitutional courts especially in Germany and in Hungary. In Germany, the state prosecuted the soldiers who had shot civilians trying to overcome the inner-German border and to emigrate to West Germany, as well as the political decision-makers who had issued the order to shoot in such cases. In Hungary, the state prosecuted members of the sometimes formal and sometimes informal party militia who had killed insurgents during and after the failed revolution of 1956 without any formal legal authority. In both countries, the accused relied on the fact that their acts lay many years back and could no longer be prosecuted according to the rules that had been valid at the time they had committed their crimes.

The German constitutional court held that in the very special situation of the post-authoritarian unravelling of an authoritarian past, natural justice could prevail over the respect of formal rules. As long as the socialist regime had lasted, it had not prosecuted its own crimes, and for this reason the perpetrators could not *bona fide* rely on statutory prescription. Since their position was not acquired *bona fide*, the post-authoritarian state could, in this very special situation, lift the statutory prescription and prosecute old state crimes[15].

The Hungarian constitutional court took the opposite position and decided that the rule of law demanded that the statutory prescription as an acquired right of the perpetrator must be respected. Consequently, it quashed statutory provisions that lifted the statutory prescription for old state crimes. The court conceded that natural justice might demand a prosecution of the few surviving perpetrators but insisted that the formal side of the rule of law was stronger[16].

15 The leading case is the decision of the German Federal Constitutional Court of 24th October 1996, nos. 2 BvR 1851, 1853, 1875 and 1852/94, published in BVerfGE 95, 96 (the so-called "Mauerschützen" decision). The reasoning of the constitutional court was accepted by the ECtHR in its decision in Streletz, Keßler and Krenz v. Germany of 22nd March 2001, nos. 34044/96, 35532/97 and 44801/98. In German legal literature, criminal lawyers in their majority accept this decision whereas constitutional lawyers are divided.

16 There were four so-called prescription decisions: of 5th March 1992, no. 11/1992. (III. 5.) AB; of 30th June 1993, no. 41/1993. (VI. 30.) AB; of 13th October 1993, no. 53/1993. (X. 13.) AB; and of 4th September, no. 36/1996. (IX. 4.) AB. On these decisions see Georg Brunner, Gábor Halmai: Die juristische Bewältigung des kommunistischen Unrechts in Ungarn, in: Georg Brunner (ed.): Juristische Bewältigung des kommunistischen Unrechts in Osteuropa und Deutschland, Berlin: Berlin-Verlag, 1995, pp. 9–40, at pp. 26–30; Georg Brunner, László Sólyom: Verfassungsgerichtsbarkeit in Ungarn. Analysen und Entscheidungssammlung 1990–1993, Baden-Baden: Nomos, 1995, at p. 45; Herbert Küpper in his country report on Hungary in Schroeder/Küpper (fn. 8), at pp. 304–308; Pál Sonnevend: Verjährung und völkerrechtliche Verbrechen in der Rechtsprechung des ungarischen Verfassungsgerichts, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 57 (1997), pp. 185–228.

The difference between the German and the Hungarian positions can be easily explained. (West) Germany had a well-established rule of law and therefore could allow an exception from the formal side of the rule of law without jeopardizing the rule of law as such. Hungary, on the other side, had just overcome the arbitrary socialist dictatorship and had just installed the rule of law[17]; in this situation, the constitutional court felt that the fresh Hungarian rule of law was still too fragile for giving up the respect for formal rules in favour of natural justice. However, in its fourth decision on statutory prescription, the Hungarian constitutional court found a solution for the dilemma: acts which were not subject to prescription under international law, such as crimes against humanity etc, could be prosecuted because the constitution accepted international law as a source of law in Hungary, and the eternal prosecutability of international crimes superseded the domestic statutory prescription.

In the Czech Republic, to give a third example, the situation was different again. The pertinent legislation lifted the statutory prescription only in cases where the prosecuting authorities could show that the socialist state had remained passive instead of prosecuting the crime. The Czech Constitutional Court upheld this relative lifting of a completed prescription period for being well balanced and reasoned that the prescription was "fictious" as long as the state was not prepared to prosecute[18].

– *Acquired rights and the restitution of expropriated property*

Acquired rights were relevant in the field of restitution as well, i. e. when giving back property that the socialist state had taken away. The strongest controversies were induced by the restitution of flats and apartments. If such an object was in the property of a *bona fide* owner, the post-authoritarian state had to weigh the acquired right of the *bona fide* owner (often the person who now lived in the flat) against the interests of the former owner who had been dispossessed by the socialist state (or, usually, their heirs).

In practice, the various East European states chose different solutions. In some states, only the objects that still were in state property were restored in kind whereas there was no restitution of now private property; this solution gave priority to the present *bona fide* owners. In other states, the present owners were obliged to give back their property to the heirs of the former owner but sometimes were eligible for some sort of indemnification; this solution favoured the heirs of former owners over the present

17 The constitutional amendment of 23rd October 1989 incorporated into the Hungarian Constitution the rule of law in its German "Rechtsstaat" version.

18 Czech Constitutional Court, decision of 21st December 1993, no. ÚS 19/93. For more detail, see Petr Bohata: Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in der Slowakischen Republik und in der Tschechischen Republik, in Schroeder/Küpper (fn. 3), pp. 231–270, at pp. 234–237, 252–254.

owners – which in many cases caused social unrest. On a constitutional level, the *bona fide* acquired rights of the present owners[19] clashed with the wish to undo former injustice which may be considered to form a part of natural justice.

The Romanian restitution practice of the 1990s and early 2000s was especially notorious because the authorities and courts used restitution legislation as a pretext to dispossess ethnic Hungarians and hand over their property to ethnic Romanians. Sometimes, the Romanian constitutional court intervened but the victims of this post-authoritarian state practice often had to revert to the European Court of Human Rights[20].

4. The second relevant post-authoritarian constitutional principle: equal treatment and equality before the law

The second constitutional principle of relevance is equal treatment. If the post-authoritarian state reacts to the authoritarian past, e. g. by prosecuting state crimes, by lustrating the civil service, by indemnifying the victims or by regulating access to the files of the former secret police, it has to treat all relevant groups and individuals in an equal way. In constitutional practice, the principle of equal treatment was most relevant in lustration and in indemnification.

4.1 Equal treatment in lustration

Lustration is the administrative procedure establishing whether or not a given person was, during the authoritarian regime, a member of the secret police, of the party or of other criminal organisations. The legislator's choice of who is subjected to lustration and who is not must observe the principle of equal treatment: if A is lustrated and B is the same position as A, then B, too, must be lustrated.

This question came before the constitutional court of Hungary. Hungary enacted a lustration law in 1993 which ordered the lustration of holders of high offices in the public sphere as well as of holders of high positions in the economy, in cultural life and in the media. The big issue was whether or not holders of high positions in the churches should be lustrated. The post-socialist government feared that a lustration of church leaders would reveal that the churches, especially the high hierarchies of the Catholic

19 In the states that chose such a solution, the constitutional position of the present owners technically did not constitute property because the socialist expropriation decrees were nullified retroactively by the post-authoritarian state with the effect that the property rights of the old owners de iure continued and the new owners could not acquire property (in some states with the exception of an acquisition of property under the Civil Code rules of usucaption or acquisitive prescription).

20 For more detail see fn. 6.

and the Calvinist churches, had been very active and willing helpers of the socialist secret police. As a consequence, the law provided for a lustration of church leaders only if requested by the relevant church. The constitutional court struck down this provision because it treated church leaders differently from leaders in the cultural life and in the non-state sector in general, and this different treatment was not mandated by any constitutionally acceptable reason[21]. The principle of equal treatment was also invoked in constitutional complaints against the Polish lustration law of 1997[22].

4.2 Equal treatment of victims of injustice

Equal treatment became constitutionally relevant in restitution cases both in Hungary and in Germany. In Hungary, there was no restitution, i. e. proprietors who had been expropriated by the socialist state received a financial indemnification but were not given back their property. Only the churches got back land property which still was in religious use, e. g. church buildings or cemeteries. The constitutional court held that the Hungarian state was constitutionally not obliged to rectify the injustice committed by the previous system, therefore there was no constitutional duty to give back expropriated land in kind, but if the Hungarian state decided to do so, it had to observe the constitution including its requirement to treat equal situations equally and unequal situations unequally. The court found the differentiation between religious property (restitution in kind) and other property (indemnification) constitutionally acceptable because the freedom of religion provided for a sufficient constitutional ground for different treatment. Therefore, the equal treatment principle was not violated[23].

In East Germany, unlike Hungary, the principle was restitution: all land that had been taken away by the socialist state was restored in kind. Only the land that the so-called "land reform" or, literally, "soil reform" ("Bodenreform") of 1946, which was conducted by the Soviet occupation forces, took away from their owners (usually large landowners, sometimes churches) and gave to small farmers was not returned in kind but the heirs of the former owners received a financial indemnification. The German Federal Constitutional Court – as well as the ECtHR which dealt with these cases after the German constitutional court – held that the question of whether the Soviet "land reform" had been a violation of property was irrelevant today because neither the German constitu-

21 Decision of the Hungarian Constitutional Court of 12th December 1994, no. 60/1994. (XII. 12.) AB. On the lustration with view to the churches see Herbert Küpper: Zurück in den Feudalismus: Religion, Kirche und Staat in Ungarn, Jahrbuch für Vergleichende Staats- und Rechtswissenschaften 2018/2019, pp. 11–56, at pp. 27–28.

22 The leading case on equality in lustration is the decision of the Polish Constitutional Court of 24th June 1998, no. K 3/98.

23 Decision of the Hungarian Constitutional Court of 12th February 1993, no. 4/1993. (II. 12.) AB.

tion of 1949 nor the European Convention on Human Rights of 1950 had governed the actions of the Soviet occupation forces and the assisting German authorities. Therefore, the expropriation as such could not be challenged before today's courts, and today's Germany was not obliged to rectify eventual violations of property that had taken place outside the authority of the German constitution. However, both the Federal Constitutional Court and the ECtHR held that the present restitution and indemnification legislation had been enacted by the German state which was bound by the German constitution and by the Convention. For this reason, this legislation had to be in harmony with the equal treatment requirement of these two documents. The differentiation between land taken away in the Soviet "land reform" of 1946 (indemnification) and land taken away by the East German state after 1949 (restitution in kind) was accepted by both the German Federal Constitutional Court and the ECHR. The German court ruled that Germany had promised to the Soviet Union, in the course of the negotiations about the reunification, that an eventually reunified Germany would not question the "land reform" of 1946, and that this international commitment of the German state was a sufficient reason to treat the "land reform" land differently from other land[24]. The ECtHR did not look at that international commitment but decided that the protection of the present owners, small farmers who had been given full property rights of that land by a GDR law in 1990, as well as the protection of a sound social structure in rural areas, where a restitution in kind would have restored large feudal properties, was sufficient ground to differentiate between "land reform" land and other land[25].

5. Other relevant post-authoritarian constitutional principles

There are several more neutral provisions in post-authoritarian constitutions relevant for the legislation on the past, but the rule of law and equality are the most important ones. Other constitutional institutions such as rules on the public service, the tenure of judges which may be affected by a lustration-related removal from office, the right to freely chose one's work(place), the right to fair procedure[26], the clause on the social

24 The most important pertinent decisions by the German Federal Constitutional Court are the decisions of 23rd April 1991, nos. 1 BvR 1170, 1174 and 1175/90, published in BVerfGE 84, 90, and of 18th April 1996, nos. 1 BvR 1452, 1459/90 and 2031/94, published in BVerfGE 94/12.
Another argument was that this differentiation was written into the final provisions of the German constitution itself and therefore had constitutional rank. This argument limited the constitutional court's scope of scrutiny to those very basic provisions that even a constitutional amendment cannot modify. On the constitutional background in detail see Küpper (fn. 2), at pp. 669–687.

25 ECtHR, decision in Jahn et al. v. Germany of 30th June 2005, nos. 46720/99, 72203/01 and 72552/01.

26 Fair procedure was a ground for the Polish Constitutional Court to quash a provision of the lustration law which allowed to re-open a lustration decision that was positive for the lustrated person even years after the end of the procedure: decision of the Polish Constitutional Court of 10th November 1998, no. K 39/97.

state etc. usually play an ancillary role only and do not shed an extra light on the basic problems of a post-authoritarian constitution dealing with the injustice of the past. For this reason, this paper is limited to the rule of law and equality.

6. Conclusion

The politics of the past do not have, at first sight, strong implications for the post-authoritarian constitution. When politics of the past turn into legislation on the past, legal analysis needs to differentiate between two questions:

– "if": Does the post-authoritarian state address the authoritarian legacy and the mischiefs of the past at all?

– "how": If the answer to the previous question is positive: Which measures does the post-authoritarian state take, which laws does it enact?

The "if" is constitutionally neutral. The values and rules of the post-authoritarian constitution including its fundamental rights are not retroactive and are not projected onto the past. Consequently, most post-authoritarian constitutions do not prejudice the decision about whether or not to face the past, and the post-authoritarian parliaments and/or governments can decide freely in this respect. Constitutions that expressly condemn the injustice of the previous authoritarian regime and actively demand measures from the post-authoritarian state are very rare. In post-socialist Eastern Europe, the most conspicuous example of such a constitution is the Hungarian Basic Law which was enacted 22 years after the end of the authoritarian regime. This long time gap suggests that there are other reasons behind this "constitution on the past" than the wish to rectify past injustice. But this is another story.

The "how" is subject to the post-authoritarian constitution. All measures that have a bearing on the past are undertaken by the rule-of-law state which is now bound by its post-authoritarian constitution. Hence, past-related legislation and other measures fall within the scope of the post-authoritarian constitution both ratione temporis and ratione materiae. A comparison of pertinent constitutional practice in Eastern Europe shows that the most important constitutional institutions are the rule of law and the right to equal treatment, and the constitutionally most delicate matters in the legislation on the past are the prosecution of time-barred state crimes (where we often face a conflict between the formal and the material side of the rule of law), the restitution of expropriated property to the heirs of the original proprietors, and the lustration of the members of the public service.

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AZIZ ISMATOV

A Failure of Constitutional Revolutions in Central Asia
Traditionalism, Nominalism, and Rights

1. Introduction

Until the Soviet era, none of the five *stans*[1] comprising Central Asia had any experience of written constitutions. Therefore, constitutional rights in Central Asia (hereinafter, CA) represent a relatively recent legal phenomenon that was formally imposed rather than successfully transplanted at the beginning of the early 20th century, amid the incorporation into the Soviet Union (hereinafter, USSR or FSU (Former Soviet Union)). The pioneer constitutions in socialist CA republics replicated the union-level 1924 USSR Constitution. For example, the 1927 Constitution of the Uzbek Soviet Socialist Republic (hereinafter, Uzbek SSR) or the 1927 Constitution of the Turkmen SSR contained sporadic provisions on constitutional rights afforded mainly to the proletarian class. In 1937, all five CA republics adopted constitutions[2] that were modelled on the union-level 1936 USSR Constitution that contained comparatively more rights-related articles.[3] In 1978, CA republics adopted constitutions that imitated the union-level 1977 USSR Constitution,[4] which listed close to 40 constitutional rights. Whereas constitutional evolution demonstrates a progressive practice in books, the formal discussion on human rights in the USSR in practice, especially its farmer union-republics of CA, generally remained insignificant or void.

After the USSR collapsed in 1991, the newly sovereign CA republics set up national commissions tasked with drafting new constitutions that would presumably embrace ideas stemming from western liberal constitutionalism, including human rights. Following this, the draft constitutional *travaux préparatoires* phase in each CA jurisdiction revealed a theoretical divergence between a dominant group of positivists (proponents of the state-granted rights theories) and minority groups that supported the natural rights doctrine. In general, such a dichotomy is typical for the post-socialist transition context. On the one hand, CA inherited a strongly-rooted legacy of Soviet constitutional normativism and democratic centralism. Therefore, some delegates demanded greater regulatory authority for public institutions in terms of limiting or restricting rights

1 The five *stans* include Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.
2 The 1937 Constitution of the Uzbek Soviet Socialist Republic (1937 Constitution)
3 This Constitution is known also as Stalin's Constitution.
4 This Constitution is known also as Brezhnev's Constitution.

'for the sake of social stability and supreme national goals', as it was the case in former Soviet constitutional chapters on citizen's rights and obligations. On the other hand, post-*perestroika* reforms paved the way for predominantly young lawyers and reformists to advocate for the inclusion into the constitutional text of the *ius naturale* or natural human rights.[5]

Referring to the idealistic philosophy of *ius naturale,* some lawyers embraced human rights as a secular product of human life that could not be limited or restricted by anyone.[6] Such a view echoed a liberal idea that human rights were not only created by humans but above all – for the human.[7] Advanced foreign constitutions of Western Europe often embody rights as absolute or natural and prioritise them over any statute or normative act in case of potential conflict. Simultaneously, by enforcing absolute judicial protection of such rights, advanced constitutions create well-functioning systems with natural rights placed on the top of the legal system's hierarchy.

In the 1980s, such liberal ideas sparked 'constitutional revolutions' in the post-socialist Eastern European states and some republics of the FSU (for example, the Baltic states).[8] These revolutions helped to overcome the socialist-dominated inertia of the positivist approach that associated law with an unlimited will of public authorities. In this regard, following the collapse of socialism in the western hemisphere, Eastern European states and select republics of the FSU shifted towards constitutionalising *ius naturale* and its real practical implications in the form of effective judicial protection of human rights.

CA diverged from this trend. For example, Uzbekistan and Tajikistan's current constitutions still position the state as a main grantor of rights, whereas Kazakhstan and Kyrgyzstan incorporate *ius naturale* in their constitutional texts. Recent constitutional amendments in Turkmenistan also replaced the positivist stance with natural rights context.[9] However, regardless of the dichotomy in the normative constitutional text, CA's phenomenon is that its post-socialist constitutionalism does not go hand-in-hand with general developmental trends. None of the five *stans* re-evaluated the theoretical essence and practical respect towards human rights enshrined in their constitutions.

5 This will be used synonymously.

6 Jack Donnelly, 'Human Rights as Natural Rights' (1982) 4 Human Rights Quarterly 391, 395.

7 I.A. Katsapova, *Estestvennoe Pravo I Estestvennie Prava*, Gumanitarnie Nauchnie Issledovaniya 11, 2012. URL: http://human.snauka.ru/2012/11/1921 (Accessed on January 12, 2021).

8 On the other hand, human rights record in Baltics, particularly in Latvia and Estonia has later faced significant criticism over the problems related to growing ethnic nationalism and mass statelessness.

9 Novelties regarding article 15 can be further read in 'Ekspert: Konstitutsiya Turkmenistan Sozdala Usloviya Procvetaniya Strany.', *CentralAsiaNews* (18 May 2019) <https://centralasia.news/3761-jekspert-konstitucija-turkmenistana-sozdala-uslovija-dlja-procvetanija-strany.html> (Accessed on January 10, 2021).

None of the *stans* created effective human rights protection mechanisms. Public perception of human rights in the CA republics has left nearly unchanged or even distorted in the context of continuity of Soviet positivism (or nominal Soviet constitutionalism[10]) and pre-Soviet traditionalism that experienced its renaissance after the collapse of the USSR. Such a dualist symbiosis has resulted in the failure to set up and promote natural human rights idea across the region. In contrast, in the post-socialist Eastern European states and some FSU republics, socialism's collapse led to a real constitutional revolution that caused qualitative re-thinking of human rights.

This chapter asserts that the post-socialist constitutions of the independent CA republics of 1991–95, despite their progressive text, did not spark constitutional revolutions and largely failed to create constitutions as powerful 'power maps' insofar and reconsider the essence of human rights as natural rights. The author ties such a phenomenon with; (1) the influences from the pre-Soviet traditionalism that experienced its renaissance in the 1990s and led to the emergence of highly personalist systems in the region, and (2) the remaining tradition of Soviet positivism (or nominal Soviet constitutionalism). Therefore, one has to view constitutional rights as largely symbolic rather than strongly guaranteed and judicially protected constitutional values in such a context.

2. The viability of traditionalist settings

The present-day five CA *stans* in their current borders are an invention of Soviet policymakers. In the pre-colonial period, the region's political system existed under the three absolute theocratic monarchies based on Muslim (Sharia) law and *Adat*.[11] Such a historical statehood evolved along with strong paternalistic values based on the leader's (*khan*, *emir*) unlimited and undisputed authority. Whereas civic revolutions abolished absolutism in Europe, such tendencies did not take place in CA. In this part of the world, strong authoritarian leadership was mainly associated with preserving traditionalist societal settings and religious values, and therefore, enjoyed popular support.

In the second half of the 19th century, Tsarist Russia colonised CA's territories while preserving its Muslim (Sharia) law and the absolute domestic authority of local monarchs. Simultaneously, colonial administration gradually promoted the civil law tradition in the region, including a non-religious judiciary modelled on Russian law. Such a scenario paved the way for a parallel existence of two completely different legal systems

10 This term is borrowed from A. N. Medushevskiy, *Politicheskaya Istoriya Russkoy Revolutsii: Normy, Instituty, i Formy Sotsial'noy Mobilizatsii v XX Veke* (Tsentr Gumanitarnyh Initsiativ 2017).

11 (Author's remark) Customs based on common behavioral settings.

or legal dualism.[12] On the one hand, CA still experienced a wide application of Muslim law and functioning of Sharia courts[13]; on the other hand, it started borrowing concepts from Russia and the civil law tradition.

This period's popular revolutionary tendencies and social movements were also shaped mainly by anti-colonial rather than anti-traditionalist slogans. These slogans promoted Islam and traditionalism as collective values and the monarch's unlimited authority to guarantee such values. Given the strong traditionalist societal setting, the local population also appeared less receptive towards a new legal culture. Although the civil law tradition and Russian colonial-type courts emerged in the region, the local population still preferred resolving family or property related disputes in Sharia courts or courts of the elderly (*Aksakal*). A unique momentum in the evolution of legal systems in CA is that the application of Muslim law and functioning of Sharia courts existed even in the initial years of *sovetizatsiya*. In particular, until 1930, when the initial socialist constitutions of CA already existed, the Bolsheviks allowed loyal, 'pro-soviet' Sharia judges to continue their religious legal *praxis*.[14]

Alternative forms of traditionalism included tribalism (*juz*) in Turkmenistan and Kazakhstan and clan policy or parochialism (*mestnichestvo*) in the rest of the *stans*. Furthermore, CA societies relied on traditional instruments and local civil associations which also incorporated legal or quasi-legal functions. For example, the Uzbek *mahalla*, an urban neighbourhood ward, performed the role of social hubs and even played a central role in decision making, legal counselling and resolving private disputes on family, property and other matters based on the authoritative opinion of elder members.[15] These examples point to the deeply-rooted social traditionalist and paternalist practices. These practices demonstrated viability in adapting to socialist settings and functioning during the whole Soviet era. Furthermore, the region has witnessed a greater renaissance of such traditionalism and paternalism during *perestroika* and after the USSR's fall.[16]

12 Aziz Ismatov and Sardor Alimdjanov, 'Developmental Trajectory of Mahalla Laws in Uzbekistan: From Soft Law to Statutory Law' (2018) Vol. 4 Nagoya University Asian Law Bulletin, 3–7.

13 A Kh Saidov, *Sravnitel'noe Pravovedenie* (Izdatel'stvo Norma, Infra-M 2020) 298–99.

14 ibid 299.

15 Aziz Ismatov and Sardor Alimdjanov, 'Historical Discourse of Mahalla Functions in Uzbekistan.' (2018) 59(1) Jahrbuch für Ostrecht [Yearbook of East-European Law] 79, 80.

16 M. B. Karimova, '*Sovremennoe Sostoyanie Politicheskih Sistem Gosudarstv Tsentral'noy Azii*', Pravo i politika (2010) 2, 212–13.

3. Soviet positivism (Socialist nominal constitutionalism)

As mentioned earlier, all CA socialist constitutions cloned the union-level USSR Constitutions. A contextual comparative analysis of socialist constitutions shows that policymakers included provisions on citizens' rights into individually titled chapters.[17] Furthermore, rights-related chapters demonstrate a progressive tendency of gravitating from final chapters towards earlier constitutional chapters.[18] Third, constitutional evolution shows that human rights were mainly preserved, elaborated further, and increased. Simultaneously, modifications in all socialist constitutions indicate ideological transformations. As a good example, the absence of the right to private property, introduction, and expansion of the economic, social, and cultural rights, such as the right to work, right to free education at all levels, the right to paid leisure, and the right to free medical service, appear to reflect expanding authorisation of socialism within the context of Soviet constitutions.

The historical record demonstrates that each socialist constitution targeted specific political goals, namely: the establishment of the Soviet Union and its federalist system in the 1924 Constitution[19]; Soviet parliamentarism, and achievement of socialism and the harmony of classes in the 1936 Constitution[20]; and the proclamation of developed socialism 'with a human face' in 1977 Constitution.[21] These political slogans left no space for pluralistic ideas but incorporated the Marxist-Leninist concept to pursue socialism and socialist law solely and marginalised rights and freedoms. Neither of the CA socialist constitutions directly referenced the term human rights in any of its sections. Soviet ideologists systematically titled their constitutional chapters regulating rights as 'Citizen's rights and obligations', not 'Human rights' as many foreign non-socialist constitutions did. It is worthwhile to mention that the drafters of the Soviet constitutions had elaborated a fundamental doctrine of socialist citizen's rights, which puts a strong emphasis on the group of social-economic rights and particularly their material guaran-

17 Only the 1927 Constitution placed rights mainly within the general introductory provisions. Refer further to Aziz Ismatov, 'The Introduction of Modern Constitutionalism in Central Asian Post-Socialist Context: The Case of Constitutional Debate and Development on Human Rights in Uzbekistan in the Twentieth and Early Twenty-First Centuries' in (Multiple Aspects on Constitutionalism – Asian 'Contexts' and its Logic, Nagoya University, (2021) Vol. 7, Nagoya University Asian Legal Bulletin.

18 For instance, in 1937 Constitution, known also as Stalin's constitution, the provisions on human and citizen's rights were positioned only in Chapter X, in 1978 Constitution in Chapter VI, whereas in 1992 Constitution these rights already moved to Chapter V.

19 Medushevskiy (n 10) 270.

20 Sarah Davies and Sarah Rosemary Davies, *Popular Opinion in Stalin's Russia: Terror, Propaganda and Dissent, 1934–1941* (Cambridge University Press 1997) 102.

21 *Problems of Communism* (Documentary Studies Section, International Information Administration 1977) 4.

tees. Simultaneous inseparable unity between rights and obligations presupposed that the material guarantees of social, economic rights could become possible upon the conditionality of every citizen's participation in socialism building.[22] Traditional personal rights and freedoms, including civil and political rights, were neglected. This general constitutional framework rejected the natural law doctrine as long as the socialist concept of rights could only derive from the sources of positive law which were created, granted, and protected by the state with a Communist Party at its top.[23]

Furthermore, socialist constitutions created a significant conflict. As an example, socialist constitutions secured the rights for freedom of belief and religion. In practice, however, soviet policymakers initiated a large-scale atheist campaign in the form of strict religious ban, including the closure and dismantling of mosques and religious schools across the CA. The 1936 Constitution theoretically expanded rights, but practically created no judicial supervision in the eve of terror and repressions of 1937–38. Similarly, even though the 1977 Constitution enlarged citizens' rights, their practice in select CA republics remained limited or highly repressive. Such limitations included a strict prohibition of movement and registration in large cities, repatriation-related restrictions for CA's numerous ethnic groups, suppression of freedom of expression, persecution, unlawful detention, torture and many other critical practices. Thus, socialist constitutions cemented a Soviet positivist approach towards rights and established a tradition of nominal constitutionalism. Such nominal constitutionalism is mainly associated with the ineffectiveness of constitutional norms, absence of effective judicial review, and prioritisation of ideology and state interests over the law and society.[24]

4. A revival of traditionalism and transformation of paternalism, as a prelude to the transition towards a 'new constitutional' era

All five *stans* set up special working groups to elaborate their new constitutions after the demise of the Soviet Union. In 1992, Uzbekistan and Turkmenistan adopted their post-socialist constitutions. A year later, Kyrgyz authorities adopted the 1993 Constitution that was replaced by a new one in 2010. Tajikistan adopted its constitution in 1994, whereas Kazakhstan did so in 1995.[25] Such a step became an inaugural moment

22 Article 59 of the 1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution).

23 Ferdinand Joseph Maria Feldbrugge and others, *Encyclopedia of Soviet Law* (BRILL 1985) 124.

24 A. N. Medushevskiy, *Russian Constitutionalism* (Routledge 2006) 187.

25 The Constitution of Kazakhstan of 1993 existed only two years. In 1995, a national referendum adopted a new constitution. The main change expressed was the strengthening of the presidential power and some democratic institutions were impaired. People justified this change by pointing to the problems of the reform period and the necessity of a strong power for a smooth transition from the old to

for all CA republics because mentioned constitutions were not directly and unconditionally imposed by Moscow, but elaborated and adopted by independent, sovereign governments. Such a context initially contributed to a nominally positive image of new constitutions regarding their being 'national products' rather than something imposed from outside and, therefore, alien.

A historical process in the region demonstrates that, with the exception of Tajikistan, working groups drafted constitutions under comprehensive presidential supervision and even, integrated 'popular constitutional debates' that were generally populist.[26] Archival sources demonstrate that CA leaders often rejected or approved the final constitutional text. In the political perspective, notwithstanding collective authorship efforts, this offered legitimacy for presidents to claim a crucial role in authoring and adopting new constitutions. For instance, whereas ex-President Nazarbayev has a title of "the ideological father of the 1995 Constitution of Kazakhstan"[27], ex-President Karimov (of Uzbekistan) was often referred to as the "main author of the 1992 Constitution."[28]

The drafters of new CA constitutions implemented a soft de-communisation style, as they do not openly condemn colonialism or communism, as do many Eastern European and Asian constitutions.[29] The majority of acting political elites in CA had once been associated with the communism, including new presidents once been the head of the local Communist Party. Largely because of this background, authors of the constitutions could not condemn the past directly in the constitutional text, as it would be equal to condemning themselves. While acknowledging international law's primacy, constitutions completely omit any mentioning about the communist ideology, proletarian class dictatorship, democratic centralism, or a single-party leadership. Simultaneously, granting the constitutional right to private property became one of the major modifications signalling the switch from socialism towards a market economy.[30] In general,

new society. Refer further to, Roman Podoprigora and others, 'Religious Freedom and Human Rights in Kazakhstan' (2019) 40 Statute Law Rev 113.

26 Refer further to John Anderson, 'Constitutional Development in Central Asia' (1997) 16 Central Asian Survey 301, 302–11.

27 M. K. Suleimanov, *Konstitutsiya Respubliki Kazahstan I ee Vlijanie na Razvitije Otrasley Prava*, https://online.zakon.kz/Document/?doc_id=36882339#pos=82;-30 (Accessed on January 17, 2021)

28 Akmal Saidov and U Tadjihanov, *Islom Karimov Konstitutsiya to'grisida: O'zbekiston Respublikasining Konstitutsiyasi o'rganuvchilarga Yordam.* (Akademiya 2001) 156.

29 For example, the Preamble to the Constitution of the Republic of Latvia. Examples of condemnation of colonialism appear in the Constitution of the Socialist Republic of Vietnam (2013), and the Constitution of Myanmar (2008).

30 On the question of land ownership, all the constitutions allowed for private property, but excluded the ownership or buying and selling of land. Anderson (n 26) 311.

perambulatory parts are inspired by the ideas of independence and sovereignty, which may appear as the main motivation behind adopting the new constitutions.

Additionally, constitutions refer to the positive notions of the past or pre-Soviet legacy. For example, the Preamble of Uzbekistan's Constitution contains a wording of 'historical development experience',[31] whereas Turkmenistan and Kyrgyzstan's constitutions refer to 'Turkmen Renaissance era'[32] and 'national Renaissance of Kyrgyz ethnicity' respectively.[33] Mentioned sentences may seem vague as constitutions offer no further detailed clarification. However, given the political environment and general historical tendency, one may trace a direct link to paternalism, clan policy, tribalism, and other pre-Soviet traditionalist elements that experienced revisionism in CA in the independence era.

As mentioned above, traditionalism, though with certain variations, has its firm roots in local mentality; however, such traditionalism was subjected to a manipulative reading that suited centralizing interests in the post-soviet Central Asia. While socialist law suppressed paternalism, clan policy, tribalism, or vast influence of religious norms in the region, the collapse of the Soviet Union paved the way for the traditionalism's renaissance and even its formal re-integration into public political area. For instance, in the 1990s, all CA republics set up specific political platforms promoting traditionalist ideology based on specific national characteristics. These include; *Asaba* Party of National Renaissance of Kyrgyzstan, National Revival (*Milliy Tiklanish*) Party of Uzbekistan, or Party of Islamic Revival of Tajikistan. Similar formal and informal bodies emerged in Kazakhstan and Turkmenistan.

Another example of post-Soviet traditionalist renaissance in CA is the growing role of national elites who gradually obtained key political posts and promoted legal ideas based on moral norms, customs, religion, and deeply rooted social practices. This also led to a revision of language policies, professional promotion of local ethnic cadres, and harsh criticism of the Soviet regime. Some scholars assert that such a process is typical for societies undergoing sharp social changes.[34] Notably, in CA, clan policy or tribalism also contributed to the re-emergence of traditional paternalism that eventually paved the way for monocentric political regimes.

In Kazakhstan, re-traditionalising statehood promoted an active revival of the clan and tribal consciousness within a political bureaucracy. Although the ex-President Nazarbayev never associated himself with any particular clan or tribe (*juz*), in practice, he,

31 Preamble, The Constitution of the Republic of Uzbekistan (Uzbekistan 1992).
32 Preamble, The Constitution of the Republic of Turkmenistan (Turkmenistan 1992).
33 Preamble, The Constitution of the Republic of Kyrgyzstan (Kyrgyzstan 1993) (Outdated).
34 Saidov (n 13) 303.

nevertheless followed clan logic and rules, as otherwise, in the initial period of presidency, competing clans could have deprived him of political authority. By the end of 1990s, Nazarbayev consolidated power and obtained a position of a dominating leader. He justified the concentration of wide presidential power in his hand in terms of "the transitional character of our epoch, the huge territory of our state and its ethnic composition".[35] Such a framework eventually minimised chances for other influential political actors to appear, and established a bureaucratic clan-based presidential authoritarianism, though with certain elements imitating democracy.[36]

In Turkmenistan, clan, tribal and family identifications turned into strong national idiosyncrasy. In this regard, ex-President Niyazov saw himself as a "modern-day Ataturk who would meld the Turkmen tribes into a nation-state that would be his personal monument and claim to immortality."[37] Niyazov authored a book – the *Rukhnama*, which was canonised during his presidency and where he justified paternalism by pointing out that Turkmenistan was a completely new state made up of tribes sharing a common history, language and cultural traditions, and it was his task to create a statehood that would take precedence over tribal identity.[38] Under such a slogan, he concentrated unchecked powers in his hands and turned Turkmenistan into a classic sultanist autocracy. The elites' role in promoting traditionalism reinforced through the paternalistic ideology of Niyazov appears complicit in the formation of odious authoritarianism in Turkmenistan.

In Uzbekistan, national elites perceived Karimov as a guarantor of social stability, territorial integrity, and the guardian of national spiritual traditions. Karimov vigorously promoted the idea of collective national values and a strong state (*sil'noe gosudarstvo*) as a precondition for effective implementation of transition reforms and achievement of development goals. In particular, he asserted that "… it [was] difficult to achieve the transition from an administrative command system … without the strong state playing a regulatory role."[39] In practice, such a paternalistic idea placed presidential power on the top of the state ruling hierarchy and, above existing clans.

In Kyrgyzstan, parliaments formally were given some checking functions. Nevertheless, in practice, the constitution gave considerable leeway for Akaev for the presidential

35 '*Kazakhstanskaya Pravda*' (2.6.1992).

36 S. N. Shkel', '*Postsovetskie Rejymnie Transformacii: Opyt Respubliki Kazakhstan*' (2009) 10 Pravo i Politika, 2027.

37 Bess Brown, 'Governance in Central Asia: The Case of Turkmenistan' (2003) 14 Helsinki Monitor 206, 207.

38 ibid; The best source for Niyazov's views on tribalism and its effect on Turkmen history is the Ruhnama, published in English in 2001 and Russian in 2002. S. Niyazov, *Rukhnama* (Turkmenskaya Gosudarstvennaya Izdatel'skaya Slujba 2002).

39 Islam Karimov, *Bizdan Ozod va Obod Vatan Qolsin*, 23.

exercise of power, "with the paper commitment to a mixed system generally failing to reflect adequately the dominance of the president within the system".[40]

Tajikistan was the last in CA to adopt its constitution in 1994 as during the initial period of independence this republic was preoccupied with the civil war. Since his election, President Rakhmon has been similarly arguing for strong presidential powers that would enable the president to overcome the challenges of a transition period and establish internal stability. In practice, such slogans have led to the personalisation of power in Rakhmon and his family.

Hence, paternalism in CA gradually transformed into what constitutional scholars call 'super or crown-presidentialism'.[41] Such a political framework seeks to approach human rights concept by actively relying on traditional values and supreme national development interests. It often utilises an interpretation that in order to achieve developmental goals with particular national characteristics, sacrificing certain freedoms or restricting certain human rights is unavoidable. This claim for development influences the degree of democracy and the rule of law, which in modern CA republics are mainly associated with the importance of the strong rule by a dominant leader aimed at achieving good results. In practice, however, this often leads to a personalisation of power, suppressing transparent public politics, weakening state effectiveness, and leading to the systematic violations of human rights.

One may also trace links between traditionalist and socialist versions of political dominance. In particular, paternalism centralised political culture of presidential centralism in the place of the executive centralism of socialist law.[42] With the exception of Kyrgyzstan, CA presidents re-designed a Soviet-style institutional structure that was centralised in the Communist Party with the president's apparatus as the core of government.[43] In this system, presidential power was placed on the top of the state ruling hierarchy (much as the Communist Party was).[44] Such a structure would presumably ensure the coordinated functioning and interaction between public authorities and simultaneously afforded the executive power an extensive competency, including the

40 Anderson (n 26) 306.

41 W. Partlett *Postsovetskoe superprezidentstvo* [Post-Soviet super-presidentialism]. (2018) 27 *Sravnitel'noe konstitutsionnoe obozrenie* 3, 103–123. William Partlett, Crown-Presidentialism, International Journal of Constitutional Law (forthcoming 2021).

42 Daniel Kempton and Terry Clark, *Unity or Separation: Center-Periphery Relations in the Former Soviet Union* (Greenwood Publishing Group, 2002), 266.

43 Ibid, 268.

44 W. Partlett and A. Ismatov, Constitutional Review and State Building in Central Asia (Unpublished as of February 2021).

right to initiate and approve the legislation, formulate government policy, and appoint and dismiss top central and regional governmental officials.[45]

5. Constitutional rights in books

All CA constitutions manifest in the preamble sections a general adherence to human rights.[46] By providing the term 'human rights', authors presumably demonstrate a shift from the traditional socialist doctrine of citizens rights. New constitutions also formally included and enhanced rights, some of which were directly transplanted from foreign constitutions and the Universal Declaration of Human Rights. Such rights include; the right to life[47], equal citizenship, the right to be informed and access to information, the right to property, the rights to maintain a secret of bank accounts and legal guarantees on inherited properties, the right for entrepreneurship, the right to lodge complaints and lawsuit, the right to freedom of movement and right to choose one's residence (including the right to travel abroad) and other progressive rights.

These novelties came into existence because of several factors. Firstly, it was state sovereignty that came unexpectedly and this required newly sovereign CA republics to deal with appearing challenges, including legal reforms, in a very unprepared manner. Neither national elites, nor the society was ready to absorb constitutionalism. The historical record shows that the so-called *Belovezha* Treaty, which formally declared the USSR's dissolution, was drafted and signed by the three Slavic republics' leaders – Russia, Ukraine, and Byelorussia, without preliminary negotiation with or even notifying CA or other union-republics' leaders. CA leaders reluctantly welcomed the USSR's collapse; however, once they realised the inevitable process was on the way, they initiated statehood and new constitutions. Hence, CA's 1991–95 constitutions are largely top-down initiatives of the former communist leaders (now presidents) rather than products of popular demands.[48]

45 For ex. Section 19. The Constitution of the Republic of Uzbekistan (December 8, 1992) Supreme Council, 11 session.

46 Preamble, The Constitution of the Republic of Uzbekistan; Preamble, The Constitution of the Republic of Turkmenistan; Preamble, The Constitution of the Republic of Tajikistan (Tajikistan 1994); The Constitution of the Republic of Kyrgyzstan and also Preamble of the Constitutions of Kurgyzstan, 2010; Art 1, The Constitution of the Republic of Kazakhstan (Kazakhstan 1995).

47 CA capital punishment practice is mixed. Whereas Kazakhstan and Tajikistan have introduced a moratorium, other CA republics have abolished it whether by acceding to the OP to the ICCPR or/and mentioning about it directly in the text of constitutions as in the case of Kyrgyzstan, and Turkmenistan. Refer further to; Aziz Ismatov and Eliko Ciklauri-Lammich, "Abolishing Capital Punishment in Uzbekistan – Between External Pressure and Pragmatism," *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 130, no. 1 (2018): 279–302.

48 Anderson (n 26) 306.

The transition process also necessitated the introduction of the key principles of the market economy, such as respect and protection of private property, free competition, and freedom of movement. As these ideas existed in successful market-economies where they appeared crucial, the policymakers in CA unanimously decided to safeguard them. For example, the authors of Kazakhstan's Constitution actively referred to the French model, whereas in Uzbekistan, drafters additionally borrowed separate provisions from French and the U.S., including some Asian constitutions. Subsequently, in the wake of the new state-building process, the reflection of many universal human rights and ratification of a range of international human rights treaties was considered for CA republics as a step towards qualifying for membership in the so-called 'international democracy club.' In other words, a reflection of progressive constitutional rights in the text of CA constitutions could demonstrate their closeness to Westerns constitutions and convince potential partners of their 'serious' devotion to the democratic values and human rights.

At the same time, current CA constitutions demonstrate doctrinal dichotomy, specifically when it comes to human rights. Even though constitutions implement the term 'human rights', some constitutions (such as Uzbekistan, Tajikistan) do not provide a clear distinction between 'human rights' and 'citizen rights', but simply conflate them. Uzbekistan's 1992 Constitution dedicates Part II to Basic Human and Citizen Rights, Freedoms and Duties and includes many universal human rights. Consequently, by additionally including provisions on "equal rights and freedoms for citizens" (Article 43), (Article 11) and "state guarantees the rights and freedoms of citizens" this constitution suggests that provisions on human rights are only extended to citizens and ignore foreigners, refugees and stateless people who legally reside and work in Uzbekistan. Many progressive foreign constitutions do not draw such a distinction between citizens and non-citizens. Second, many rights in the 1992 Constitution make further references to the laws adopted by the parliament and normative-legal acts (*normativno-pravovye akty*) adopted and promulgated by the public agencies. This outsourcing eventually paves the way for both public agencies' ability to promulgate normative-legal acts that may arbitrarily limit constitutional rights and obstacles to practice and protection means of constitutional rights when violated.[49] The constitutional text of the two mentioned jurisdictions also positions human rights more as a favour that might be restricted or generously granted by the state. This approach, coupled with the fact that constitutions

49 John R. Pottenger, "Civil Society, Religious Freedom, and Islam Karimov: Uzbekistan's Struggle for a Decent Society," *Central Asian Survey* 23, no. 1 (March 1, 2004): 55–77; Pottenger; Reuel R. Hanks, "Religion and Law in Uzbekistan," in *Regulating Religion: Case Studies from Around the Globe*, ed. James T. Richardson, Critical Issues in Social Justice (Boston, MA: Springer US, 2004), 319–30; Zhanna Kozhamberdiyeva, "Freedom of Expression on the Internet: A Case Study of Uzbekistan," *Review of Central and East European Law* 33, no. 1 (January 1, 2008): 95–134.

sporadically contain phrases such as, "the State expresses …", "the State builds …", "the State guarantees …", "the State ensures …", "the State regulates" makes an impression that rights are indeed granted by the state, and not incorporated as natural rights.

The current constitutions of Kazakhstan, Kyrgyzstan, and Turkmenistan directly refer to the principle of *ius naturale*.[50] After several constitutional amendments in these republics, human rights now appear as general absolute norms and do not theoretically contain strong dependency from the state's will. However, the main question is whether such theoretical constitutional deviation results in real practical differences or a re-evaluation of human rights?

6. Constitutional rights in practice

All of the *stans* submit reports on their respective implementation of the International Covenant on Civil and Political Rights (ICCPR) to the UN Human Rights Committee (hereinafter, the HRC). Thus, all republics have been incorporated into the international system of human rights organisations and protection. Despite some progress, reports on human rights practices in the CA republics remain highly critical for many years.

6.1 Kazakhstan

In 2016, the HRC in its concluding observations mentioned more than 50 principal matters of concern and recommendations, including on religious freedom, free media, freedom of expression, freedom of movement, protests, torture, and misuse of the vague and overbroad charge of inciting social, national, clan, racial, class, or religious discord.[51] Numerous local NGOs and grassroots also point out that the situation regarding fundamental political and civil liberties has not changed, but was instead increasingly deteriorating.[52] Special rapporteurs and various UN treaty bodies have also expressed grave concerns regarding the facts that government systematically limited or posed burdensome practical restrictions on numerous rights provisions.[53]

50 Article 12, The Constitution of the Republic of Kazakhstan; Article 16, The Constitution of the Republic of Kyrgyzstan (2010); Artcile 26, The Constitution of the Republic of Turkmenistan.

51 Refer further to 'UN Doc CCPR/C/KAZ/CO/2' (9 August 2016).

52 Podoprigora and others (n 25) 118. Refer also to, Miller, Anastassiya: "Die Implementierung von Beschlüssen internationaler Menschenrechtsorgane in einigen Nachfolgestaaten der Sowjetunion – Kasachstan, Kirgisistan, Tadschikistan, Ukraine, Belarus", *Jahrbuch für Ostrecht,* 2017, 11–42.

53 ibid 117–20.

6.2 Kyrgyzstan

The HRC also describes Kyrgyzstan as a country of particular concern. In its 2014 concluding observations, the Committee issued a long list of human rights violations occurring systematically across all the CA republics. These include; torture and ill-treatment, liberty and security, detention conditions, corporal punishment, religious freedoms, freedom of expression, LGBT, violence against women, or freedom of association.[54] Furthermore, the HRC pointed to ongoing discrimination on race, language, disability and ethnic origin, tolerated by the government.[55] Particularly, the HRC raised human rights violations committed during and in the aftermath of the June 2010 ethnic conflict in the south of Kyrgyzstan, including allegations of torture and ill-treatment, serious breaches of fair trial standards during court proceedings, including attacks on lawyers defending ethnic Uzbeks, and discrimination in access to justice based on ethnicity.[56]

6.3 Turkmenistan

In 2017, the HRC, in its concluding observations, mentioned more than 50 principal matters of concern and recommendations for Turkmenistan. Human rights watchdogs repeatedly criticised the criminalisation of sexual relations between consenting adults of the same sex, punishable with imprisonment.[57] Another typical and long-practised violation is the use of forced labour of farmers, students, public and private sector workers.[58] The HRC also repeatedly pointed to the systematic practices of torture, the excessively broad definition of extremism that paves the way for unregulated surveillance activities and arbitrary deprivation of liberty, secret detention and enforced disappearance of a large number of convicted and imprisoned persons.[59]

In such a restrictive environment with human rights, it is no surprise to see problems with the freedom of religion, domestic violence, freedom of movement and residence,[60] forced evictions, freedom of expression, freedom of association, underrepresentation of women, notwithstanding constitutional provision recognising equal rights and opportunities for men and women.[61] Notably, most of the restrictions on human rights exist in the forms of statutes and normative acts.

54 Refer further to 'UN Doc CCPR/C/KGZ/CO/2' (23 April 2014).
55 Para 8, ibid.
56 Para 14, ibid.
57 Para 21, 'UN Doc CCPR/C/TKM/CO/1' (19 April 2012).
58 Para 26, 'UN Doc CCPR/C/TKM/CO/2' (20 April 2017).
59 Para 14, 16, 36, ibid.
60 Para 12, 'UN doc CCPR/C/TKM/CO/1' (n 57).
61 Para 28, 34, 38, 42, 44, 46, 'UN doc CCPR/C/TKM/CO/2' (n 58).

6.4 Uzbekistan

Before 2016, the HRC repeatedly criticised Uzbekistan for its restrictive administrative practices of movement and residence.[62] Similarly, the HRC pointed to the significant administrative obstacles to the realisation of the right to access media, freedom of expression, freedom of assembly, immediate access to legal remedies, fair and favourable working conditions.[63] The UN Committee Against Torture repeatedly criticised Uzbekistan's law enforcement agencies' systematic practices of torture.[64] In such a context, the Committee pointed to existing gaps with universal standards, such as the right to a lawyer, independent medical examination, the possibility of contact with the family and other guarantees of protection against torture.[65] Likewise, the committees protecting children and women's rights pointed to existing problems with child labour (lack of standards for age, working conditions, health) and the existence of gender segregation in labour area (lower wages for women). Analogically to other CA republics, human rights actors also raised in the past the issues of religious freedoms, freedom of expression, LGBT, violence against women, and freedom of association.[66]

6.5 Tajikistan

Much of the HRC concerns concerning Tajikistan are identical to those existing in the rest of CA republics. They include; violence against women, LGBT related discrimination and harassment, torture, death in custody, restrictions of freedom of movement, freedom of expression, freedom of conscience and religious belief, peaceful assembly, and freedom of association.[67] The broad and vague definitions of terrorism and extremism enable security agencies to suppress freedom of expression and lead to arbitrariness and abuse.[68] The Committee is also concerned about reports of deep-rooted discrimination against lesbian, gay, bisexual and transgender individuals, including homophobic and transphobic rhetoric by public officials, violence and harassment, including arbitrary arrest, detention and extortion by law enforcement officials.[69]

Hence, UN treaty organisations and numerous NGOs are increasingly critical and pessimistic about CA's practical human rights values. Simultaneously, scholars and practi-

62 Para 4, 'UN Doc A/HRC/WG.6/30/UZB/2' (March 2008).
63 Para 2, 6, ibid.
64 Para 6, 'UN Doc CAT/C/UZB/CO/3' (2008).
65 Para 11, ibid.
66 Para 65 (a), 'UN Doc CRC/C/UZB/CO/2' (2006); 'UN Doc CEDAW/C/UZB/CO/4' (5 February 2010).
67 Refer further to *UN doc CCPR/C/TJK/CO/3* (2019).
68 Para 23, ibid.
69 Para 15, ibid.

tioners question the absolute nature of constitutional rights in select CA constitutions. The universal human rights norms are in general absolute norms and do not contain any dependency on the state's will. They do not refer to the statutes and normative legal acts but instead set a model or moral standard for implementation.[70] CA constitutions directly (Uzbekistan, Tajikistan) and indirectly (the rest of the *stans*) often make references to the laws adopted by the parliament and normative-legal acts (*normativno-pravovye akty*) adopted and promulgated by the public agencies. Such outsourcing eventually paves the way for public agencies' authority to promulgate normative-legal acts that arbitrarily limit constitutional rights, and places obstacles to protection means when rights are violated.

7. Conclusion

The present chapter uses an empirical approach to offer the reader a closer look into constitutional developments in CA, although, omits a thorough examination of a constitutional text or constitutional case study law. Yet it aims to demonstrate the relationship between contemporary CA constitutionalism, particularly human rights, with a politics of the past and asserts that the concept of natural rights is incompatible with the pre-Soviet traditionalism, at least in the context it was widely utilized by the post-soviet central Asian political elites, and Soviet tradition of positivism and nominal constitutionalism.

In the wake of independence, CA leaders, former soviet *apparatchiks*, largely promoted political settings that would guarantee their strong position as a necessary 'precondition for achieving supreme national interests and goals'. Such interests included various elements, but foremost aimed at stability, security, inter-ethnic and confessional peace, unity, integrity, and successful development goals. In order to achieve such goals, these leaders argued that their control should be total and unchallenged. In practice, such a strong presidential power led to establishing a more or less authoritarian rule in CA. Political opposition was often equivalent of personal and national betrayal, and thus, strictly prohibited. The citizens were constantly reminded through state-run media, ideological publications, or public speeches of how good their life was compared to other countries suffering from political or social instability, such as Afghanistan, Pakistan, or other geographical zones hit by protracted conflicts. In such a context, national leaders could gain 'genuine' popularity that drew on the local traditionalist consciousness of "the authoritarian but benevolent leader who sacrifices himself for the good of the peo-

70 Antonio Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Bloomsbury Publishing 2011) 183.

ple".[71] A notion of traditionalism here appears more as a highly strategic and contestable reading of the history that discusses the benefits of centralized, authoritarian leadership and that benefits the powerful presidents in the region. Certainly, traditionalist rhetoric could be interpreted other ways – where authoritarianism is actually a problem and hinders development. However, such a scenario was widely neglected.

The creation of national constitutions in all five *stans* between 1991–95 was a 'top-down' process that was mainly initiated by the leaders mentioned above rather than demanded by a popular will. As any other constitution, these CA constitutions pursued their own specific political goals to cement sovereignty and accept existing leadership with contested traditionalist patterns. Regular constitutional amendments that gradually prolonged and widened presidential power in CA republics have indeed confirmed such a tendency. Given this background, human rights in the CA constitutions did not fall within the main political goals. The question, namely, why human rights were introduced and the reasons behind their adoption in the early 1990s in CA, has not been explicitly clear. The most apparent reason includes local policymakers' intention to integrate newly independent republics into the so-called 'Western democratic club' and demonstrate the closeness of their constitutions to Western models. In practice, however, human rights obtained symbolic meaning with limited or no judicial guarantees. Such a scenario was inevitable within the political context of re-interpreting traditionalism and re-implemented positivist logic of the 'state-granted rights'. The effect of the latter is visible in reports from international human rights watchdogs. Even though international human rights treaties are part of the domestic law of select CA republics, there is no evidence that domestic courts apply the provisions, respectively.

Simultaneously, conflating all five current *stans'* is not correct. Kazakhstan and Kyrgyzstan have achieved a certain measure of popular participation in political life in the form of a limited civil society, the value of independent media, and certain political leadership accountability. On the other hand, recent 2021 political events in Kyrgyzstan, namely the election of Zhaparov and his wide support for constitutional amendments based on traditional values rather than the rule of law may lead to a return to authoritarianism and personalisation of power.[72] In contrast, since the transition of political power in Uzbekistan in 2016, the government has been so far signalling to international human rights watchdogs about its awareness and intending commitments to address its human rights situation. Political systems in Tajikistan and Turkmenistan continue functioning

71 Brown (n 37) 208.

72 Natalya Pozdnyakova, 'Popravki v Konstitutsiyu: sleduet li Japarov primeru Putina?', *DW [Politika i Obshestvo]* (22 January 2021) <https://www.dw.com/ru/popravki-v-konstituciju-zhaparov-sleduet-primeru-putina/a-56304198> (accessed 10 February 2021).

according to authoritarian settings. Notably, Turkmenistan's political system resembles more of a *sultanistic* rather than a presidential setting.

Coupled with existing positive practical steps already taken in some CA republics in the domain of human rights, scholars and practitioners have yet to vigorously address existing problems of constitutionalism in this, widely isolated, and largely unknown part of the globe. This also presupposes broader participation and deliberation by local grassroots and civil society groups. Eventually, for human rights' effective protection in practice, national governments have to reform existing or create new judicial mechanisms that will rely on international human rights treaties in their *praxis*.

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

Russian Federation Interim Opinion on Constitutional Amendments and the Procedure for their Adoption

Adopted by the Venice Commission at its 126th Plenary Session (online, 19–20 March 2021) on the basis of comments by Mr Nicos Alivizatos (Member, Greece), Ms Claire Bazy Malaurie (Member, France), Ms Veronika Bílková (Member, Czech Republic), Mr Iain Cameron (Member, Sweden), Ms Monika Hermanns (Substitute Member, Germany), Mr Martin Kuijer (Substitute Member, Netherlands)

CDL-AD(2021)005 Or. Engl.

I. Introduction

1. By letter of 29 May 2020, Mr Michael Aastrup Jensen, Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, requested an opinion of the Venice Commission on constitutional amendments and the procedure for their adoption in the Russian Federation.

2. Mr N. Alivizatos, Ms C. Bazy Malaurie, Ms V. Bílková, Mr I. Cameron, Ms M. Hermanns and Mr M. Kuijer acted as rapporteurs for this opinion.

3. On 12–13 November 2020, the Venice Commission sent a list of questions to the Constitutional Court and the Russian authorities respectively. On 17 November 2020, the Permanent Representative of the Russian Federation with the Council of Europe informed the Venice Commission that due to the covid-19 pandemic, no meetings with the rapporteurs could be organised but that the Russian authorities were ready to reply to the written questions. For the preparation of a comprehensive opinion, a visit to Moscow would be indispensable according to the reply received by the Russian authorities also in light of the fact that some 100 implementing laws had to be taken into account when assessing the constitutional amendments. On 20 November 2020 the Bureau of the Venice Commission therefore decided to prepare an interim opinion on the basis of the written replies to the rapporteurs' list of questions.

4. On 23 November 2020, the Constitutional Court sent written replies to the questions to the Commission. In February 2021, the Commission received written replies from the State Duma, the Senate, the Ministry of Justice, the Commissioner for Human Rights and a group of experts. As the replies received converge to a large extent, this

opinion refers to them as "the Replies". The Commission is grateful to the Russian authorities for their co-operation.

5. On 19 February 2021, Mr Alivizatos, Mr Cameron and Mr Kuijer held an online meeting with Mr Andrey Klishas, Chairman of the Federation Council Committee on Constitutional Legislation and State Construction, Co-chairman of the working group on the preparation of proposals for amendments to the Constitution of the Russian Federation, Mr Leonid Slutsky – Chairman of the State Duma Committee on International Affairs, Mr Pyotr Tolstoy – Deputy Chairman of the Russian State Duma, and Mr Mikhail Galperin – the Russian Federation's Representative at the European Court of Human Rights, Deputy Minister of Justice of the Russian Federation. The Commission is grateful for the excellent organisation of this meeting. The rapporteurs further held a meeting with the representatives of several NGOs and wishes to thank them and the Council of Europe office in Moscow for their co-operation. Comments on the draft opinion were sent by the State Duma on 12 March 2021 and the Federation Council on 15 March 2021 (both hereinafter referred to as the "Comments").

6. On 2 March 2021, the Institute of Legislation and Comparative Law under the Government of the Russian Federation kindly provided a Thematic Commentary on the constitutional amendments.[1]

7. This interim opinion was prepared in reliance of an unofficial translation of the Law of the Russian Federation amending the Constitution of the Russian Federation on improving the regulation of certain aspects of the organisation and functioning of public authority (CDL-REF(2020)066) as well as the official translation of the amended Constitution (CDL-REF(2021)010), kindly provided by the Constitutional Court. The translations may not accurately reflect the original version on all points.

8. This interim opinion was drafted on the basis of comments by the rapporteurs, the online meetings and the replies to the written questions and comments received. Following its examination by the Sub-Commission on Democratic Institutions (online, 18 March 2021) and an exchange of views with Mr Andrey Klishas, Chair of the Federation Council Committee on Constitutional Legislation and State Building of the Russian Federation, and with Mr Pyotr Tolstoy, Deputy Chairman of the State Duma of the Federal Assembly of the Russian Federation, it was adopted by the Venice Commission at its 126th Plenary Session (online, 19–20 March 2021).

1 Khabrieva T. Y., Klishas A. A., Thematic commentary to the Law of the Russian Federation Amending the Constitution of the Russian Federation of March 14, 2020 No. 1-FKZ "On improving the regulation of certain aspects of the organization and functioning of public authority", Moscow, 2021, 216 p.

II. Scope of the present opinion

9. Upon request by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, the Venice Commission has already assessed the amendments to Articles 79 and 125 of the Constitution in its Opinion CDL-AD(2020)009, adopted on 18 June 2020, on the Draft Amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights.

10. This Opinion will therefore not cover the amendments to Articles 79 and 125 of the Constitution; in line with the request by the Parliamentary Assembly, the Venice Commission in this opinion will examine the other constitutional amendments adopted in 2020, as well as the procedural aspects of their adoption.

11. In doing so, the Commission's task is not limited to examining only those amendments which constitute innovations, or have otherwise introduced new powers or features; it will analyse also amendments which perpetuate a given power or institution, raise to constitutional status something which is already in federation law or consolidate existing practices.

III. Chronology of the preparation and adoption of the constitutional amendments

12. In his address to the Federal Assembly of the Russian Federation on 15 January 2020,[2] the President of the Russian Federation, Mr Vladimir Putin, proposed amending various provisions of the 1993 Constitution of the Russian Federation. By decree of the same day, he established a working group to prepare proposals for such amendments.[3] On 20 January 2020, the President submitted the draft law On improving the regulation of separate issues of organisation of the public authority to the State Duma.[4] Three days later, the draft passed the first reading. On 2 March 2020, the President proposed additional amendments to the Constitution.

2 Послание Президента Федеральному Собранию, 15 января 2020 года (Presidential Address to the Federal Assembly, January 15, 2020), available at http://kremlin.ru/events/president/news/62582.

3 Образована рабочая группа по подготовке предложений о внесении поправок в Конституцию (establishment of a working group to prepare proposals for amending the Constitution, 15 January 2020), available at http://kremlin.ru/events/president/news/62589.

4 Законопроект № 885214–7, О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти, 20 января 2020 года (Bill No. 885214–7, On improving regulation of certain issues of the organization and functioning of public authorities, January 20, 2020).

13. The draft, with these new amendments, passed the second and third readings in the State Duma on 10 and 11 March 2020 respectively.[5] Subsequently, the Draft law was approved by the Council of Federation of the Russian Federation on 11 March[6] and by the legislative councils of all the federal subjects of the Russian Federation on 12 and 13 March. One day later, on 14 March 2020, it was enacted by the President of the Russian Federation and published on the official online portal www.pravo.gov.ru (hereinafter "the Amendment Law", unofficial translation CDL-REF(2020)066).

14. At the same time, on 14 March, the President sent a request to the Constitutional Court of the Russian Federation to verify the compatibility of the Amendment Law with Chapters 1, 2 and 9 of the Constitution.[7] The Court issued its Conclusion no. 1-Z on 16 March 2020, finding the amendments and the procedure compatible with these chapters.[8] The Court concluded that:

5 Постоновление Государственной Думы, О проекте закона Российской Федерации о поправке к Конституции Российской Федерации "О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти" (проект № 885214–7), 11 марта 2020 года (Resolution of the State Duma on the draft law of the Russian Federation on an amendment to the Constitution of the Russian Federation "On improving the regulation of certain issues of the organisation and functioning of public authorities" (draft No. 885214–7), 11 March 2020).

6 Постановление Совета Федерации Федерального Собрания Российской Федерации О Законе Российской Федерации о поправке к Конституции Российской Федерации "О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти", 11 марта 2020 года (Resolution of the Federation Council of the Federal Assembly of the Russian Federation on the Law of the Russian Federation on an amendment to the Constitution of the Russian Federation "On improving regulation of certain issues of the organization and functioning of public authorities", 11 March 2020).

7 Президент направил запрос в Конституционный Суд, 14 марта 2020 года ("The President sent a request to the Constitutional Court"), 14 March 2020, available at http://kremlin.ru/events/president/news/62989.

8 Заключение Конституционного суда Российской Федерации о соответствии положениям глав 1, 2 и 9 Конституции Российской Федерации не вступивших в силу положений Закона Российской Федерации о поправке к Конституции Российской Федерации «О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти», а также о соответствии Конституции Российской Федерации порядка вступления в силу статьи 1 данного Закона в связи с запросом Президента Российской Федерации, 16 марта 2020 года (Conclusion of the Constitutional Court of the Russian Federation on the compliance with the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation of the provisions of the Law of the Russian Federation on the amendment to the Constitution of the Russian Federation "On improving the regulation of certain issues of the organization and functioning of public authorities", as well as on the compliance with the Constitution of the Russian Federation Federation of the procedure for the entry into force of Article 1 of this Law in connection with the request of the President of the Russian Federation, 16 March 16 2020), available at http://doc.ksrf.ru/decision/KSRFDecision459904.pdf.

1) the procedure for the entry into force of Article 1 of the Law of the Russian Federation on Amendments to the Constitution of the Russian Federation "On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Power" was in accordance with the Constitution of the Russian Federation; and

2) the provisions of the Law on the amendment to the Constitution of the Russian Federation "On improving the regulation of certain issues of the organization and functioning of public authorities", complied with the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation.[9]

15. Following a postponement[10] due to the covid-19 pandemic, an All-Russian vote (общероссийское голосование) took place from 25 June to 1 July 2020. The voters were asked to answer the following question: "Do you approve the amendments to the Constitution of the Russian Federation?" According to the official data provided by the Central Electoral Commission of the Russian Federation, 78 per cent of the voters casting a valid vote answered yes and 22 % answered no, with a turnout of 68 per cent.[11] Following the vote, the President signed an executive order on 3 July to amend the Constitution and the amendments (Article 1 of the Law) entered into force on 4 July 2020.

IV. Analysis of the procedure for the Adoption of the Constitutional Amendments

16. Replies: As concerns the procedure of adoption of the Amendments, the Replies insist that there was sufficient wide public consultation on the amendments. The Amendments do not amend Chapters 1, 2 and 9 of the Constitution, for which the convening of a Constitutional Convention would have been necessary (Article 135 of the Constitution), and the procedure followed for the constitutional amendments of Chapters 3 to 8 was correctly followed, as the amendments were passed by both chambers of the Assembly and approved by all subjects of the Federation. The provisions of Chapters 1 and 2 retain an enhanced interpretative potential as compared to the amendments in other chapters. Other constitutional provisions must be interpreted and applied only in a systematic relation to them.

9 Заключение Конституционного суда Российской Федерации (Conclusion of the Constitutional Court of the Russian Federation), op. cit., p. 51.

10 The vote had been planned for 22 April 2020.

11 ЦИК РФ, Ход общероссийского голосования по вопросу одобрения изменений в Конституцию Российской Федерации (CEC of the Russian Federation, All-Russian vote on the approval of amendments to the Constitution of the Russian Federation), available at http://www.cikrf.ru/analog/constitution-voting/hod/.

17. According to the replies, furthermore, there is no obligation that all parts of a legal act, in this case the Amendment Law, enter into force at the same time. The additional review by the Constitutional Court and the all-Russian vote only provided additional stages that provided increased safeguards and legitimacy, even though this was not even required. Without being obliged to do so, the constitutional legislator limited itself by deciding that to enter into force the amendments would require an additional, nationwide vote. In any case, following their approval in the all-Russian vote, the amendments reflect the will of the sovereign people of the Russian Federation and they constitute the new version of the Constitution in force. The Comments point out that the 2020 amendments were not "wide-ranging" and concern only 26 per cent of the Constitution. Previous amendments were profound as well. They concerned the extension of the mandates of deputies and the President, and the relationship between the Government and the State Duma, the formation of the Federation Council, the organization the judiciary and the prosecutor's office. In order to allow for a more thorough discussion, the deadline for amendments was extended twice, from 6 to 14 February 2020 and then to 2 March 2020. The vote took place on 1 July 2020. This was a quite reasonable timeframe, which allowed civil society and the expert community to make some 1000 proposals for changes. In its opinion on the 1994 constitutional amendments, the Venice Commission had not raised the issue of the speedy adoption of those amendments.

A. Speed of preparation of the amendments – consultations

18. The Constitution of the Russian Federation was adopted in 1993 through a referendum. Between 1993 and 2019, it was subject to minor changes only, the most substantive of them being the extension in 2008 of the mandate of the members of the Duma and of the President from 4 to 5 and 6 years respectively.[12] The constitutional amendments adopted in 2020 constitute the most extensive and substantive revision of the 1993 Constitution ever carried out.

19. Such extensive revisions usually take a long time, as they should involve consultations with various political and social actors concerned by the revisions,[13] drafting of the text and its discussion in parliament and, potentially, a preparation for a referendum. Instead, the 2020 revision of the Constitution of the Russian Federation, despite its

12 Law of the Russian Federation on amendment to the Constitution of the Russian Federation dated December 30, 2008 No. 6-FKZ "On Changing the Term of Powers of the President of the Russian Federation and State Duma", which came into force from the day of its official publication on December 31, 2008 (Rossiyskaya Gazeta, December 31, 2008).

13 Venice Commission, CDL-AD(2013)012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary, paras. 135, 137; CDL-AD(2020)019, Malta – Opinion on ten Acts and bills implementing legislative proposals subject of Opinion CDL-AD(2020)006, paras. 10–13.

large extent, was carried out in less than six months (and would have been carried out in about 3 months, were it not for the covid-19 crisis). While such a speedy procedure is not per se unlawful, it is not appropriate for such a wide-ranging constitutional reform. Representatives of civil society insisted that the speed of process and the procedure chosen did not leave them any meaningful way to express their objections to the amendments of the Constitution.

B. Competence of the Constitutional Court

20. Similar issues relate to the consultation of the Constitutional Court. Seeking the conclusion of the Constitutional Court was not required under Article 136 of the Constitution. This competence of the Constitutional Court was neither foreseen in the Constitution, nor in the Law on the Constitutional Court (which was amended on 25 November 2020) nor in the Court's own rules of procedure. Requesting a new type of conclusion from the Constitutional Court within a very short deadline (the Amending Law requires the Court to reply within seven days) could well be detrimental to a thorough preparation of an assessment of such wide-ranging constitutional amendments. The Comments point out that according Article 3 (1) (7) of the Law on the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court also exercises "other powers" vested in it by federal constitutional law and that Article 3 (2) of the Amending Law was adopted in compliance with the constitutional requirements provided for federal constitutional laws. The Venice Commission however insists that the Amending Law was an ordinary law only, not a constitutional law. Even if it was adopted with the majority required for federal constitutional laws (Article 108 of the Constitution), constitutional laws are labelled as such, which is not the case for the Amendment Law.[14]

C. Competence of the Constitutional Assembly

21. In its Chapter 9, the Constitution contains provisions relating to constitutional amendments and review of the constitution. The text makes a distinction between amendments to provisions of Chapters 3–8 that shall be adopted "according to the rules fixed for adoption of federal constitutional laws and come into force after they are approved by the bodies of legislative power of not less than two thirds of the constituent entities of the Russian Federation" (Article 136) and a review of any provision of Chapters 1, 2 or 9, which require, if supported by a qualified majority of the two chambers

14 Закон РФ о поправке к Конституции РФ от 14.03.2020 N 1-ФКЗ "О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти", http://www.consultant.ru/document/cons_doc_LAW_346019/, http://kremlin.ru/events/president/news/62989.

of the Parliament, the convocation of a Constitutional Assembly (Article 135). This Assembly may then either reject or amend the proposed constitutional amendments. Subsequently the (amended) proposed amendments require adoption by the Assembly or need be submitted to a referendum (Article 135).

22. While the constitutional amendments adopted in 2020 do not formally entail revisions of Chapters 1, 2 or 9, these chapters are affected as concerns substance. For instance, materially the provision of the new Article 67.1 on the territory belongs to Chapter 1 (the Fundamentals of the Constitutional System) rather than Chapter 3 (the Federal Structure). New Article 75 on social rights touches a subject matter belonging to Chapter 2 (Rights and Freedoms of Individual and Citizen). The introduction of a ban on same-sex marriage in Article 72 (g1) would also fit into Chapter 2.

23. While from a purely formal viewpoint Article 135 appears not to be applicable, the Venice Commission is of the view that from a material point of view the constitutional amendments adopted in 2020 ought to have fallen within the competence of a Constitutional Assembly. The Comments point out that according to Article 135 a Constitutional Assembly can only decide to reject amendments to chapters 1, 2 and 9 or to elaborate a new Constitution by a vote of two thirds of its members or a referendum. As no amendments to chapters 1, 2 and 9 had been proposed, there was no formal basis for convening a Constitutional Assembly. As no federal constitutional law on the Constitutional Assembly as required by Article 135 existed, convening an Assembly would have been unconstitutional. The introduction of values related to Federalism in chapter 3 on the federal structure is natural because this chapter is not limited to the organisation of the territory. The Venice Commission nonetheless still considers that the application of Article 135 would have been appropriate and that a federal constitutional law on the Constitutional Assembly could have been adopted before amending the Constitution.

D. *Ad hoc* procedure

24. By virtue of Article 134 of the Constitution, constitutional amendments have to be adopted according to the rules foreseen for the adoption of federal constitutional laws. Articles 2 and 3 of the Amending Law partly modify the procedure foreseen in Chapter 9 of the Constitution, in an *ad hoc* manner.

25. In 1995, the Constitutional Court held that "the procedure of the adoption of amendments to Chapters 3–8 significantly differs from the procedure for the adoption of a federal constitutional law".[15] Therefore, in 1998 a special law On the Order of the

15 Постановление Конституционного Суда РФ. N 12-П По делу о толковании статьи 136 Конституции РФ от 31 октября 1995 г (Resolution of the Constitutional Court of the Russian Federation.

Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation,[16] was adopted. The 1998 law has the rank of ordinary law, which can be amended without a constitutional amendment. Nonetheless, any constitutional amendment has to respect the provisions of the Constitution itself.

26. The 2020 Amending Law derogates from the provisions of the 1998 law, establishing specific rules for the adoption and entry into force of the amendments in stages. In its conclusion of 16 March 2020, the Constitutional Court held that "the provisions of the Law that have entered into force – in relation to the regulation of the procedure for the subsequent entry into force of its other provisions – have priority over the named Federal Law as contained in a special and newer legal act, moreover, having greater legal force".[17]

27. Through the provisions introduced by the Amending Law, a new procedure in three different stages was established for the adoption and entry into force of the 2020 constitutional amendments.

28. A first stage encompassed the drafting of the amendments, their adoption by the legislative power and by the constituent entities of the Federation until the entry into force of Article 3 of the text. In this stage, the standard rules foreseen by the Constitution and the 1998 Law still applied.

29. A second stage started from the moment of the entry into force of Article 3 of the Amending Law and was regulated by this very provision. Under this sui generis procedure, the President was required to submit a request to the Constitutional Court as to the compatibility of the amendments with Chapters 1, 2 and 9 of the Constitution and the compatibility of the procedure for the entry into force of Article 1 of the Amending Law (the substantive amendments to the Constitution, hereinafter, "the Amendments") The Court was required to issue a conclusion within seven days (Article 3.2). Once the request was made and the Conclusion issued, Article 2 of the Amending Law would enter into force (Article 3.3).

30. The third stage encompassed the organization of the nationwide vote and the entry into force of Article 1 of the Amending Law. This stage was regulated by Articles 2 and 3

N 12-P on the interpretation of Article 136 of the Constitution of the Russian Federation of October 31, 1995.), para 2.

16 Федеральный закон N 33-ФЗ О порядке принятия и вступления в силу поправок к Конституции Российской Федерации от 4 марта 1998 года (Federal Law N 33-FZ On the Procedure for Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation dated March 4, 1998).

17 Заключение Конституционного суда Российской Федерации о соответствии (Conclusion of the Constitutional Court of the Russian Federation on Compliance), op. cit., p. 7.

of the Amending Law. Article 2 provided rules for an *ad hoc* "nationwide vote", thus derogating from the rules contained in the Federal Constitutional Law on Referendums.[18] The main differences compared to a referendum relate to the procedure and notably that there is no quorum and that the vote is not consultative but the entry into force of the Amendments is made conditional on the positive outcome of the vote (Article 3(4) to (5) of the Amending Law). The Comments point out that these procedures provided sufficient guarantees and were approved by the Constitutional Court. Furthermore, that their adoption was justified because the Federal Constitutional Law on Referendums applies only to amendments of Chapters 1, 2 and 9 of the Constitution. The Venice Commission nonetheless considers that in such a case the existing legislation should have been made applicable, rather than creating a new *ad hoc* procedure.

31. The Venice Commission notes that the *ad hoc* nationwide vote was subject to much less elaborate and detailed rules than a referendum would have been. This resulted in a substantial reduction of procedural guarantees, which are inter alia designed to ensure a degree of balance in how the issues are presented, and thus increase the legitimacy of the result of the referendum. The Federal Constitutional Law on Referendums would have required sufficient air-time also for opponents of the amendments (Article 59 (9)). Article 60 (5) of that Law would have obliged State institutions to remain neutral.[19] Article 2 of the Amending Law establishing the *ad hoc* rules for the all-Russian vote ensures airtime to the Central Electoral Commission only and has no provisions on the neutrality of state bodies.

32. The Venice Commission further notes that under the rule of law it is inappropriate to introduce a new type of referendum for one particular revision of the Constitution.[20] Even if the all-Russian vote did not replace the vote by the Assembly and the constituent entities of the Federation, the Commission recalls that, as indicated in the 2020

18 Федеральный конституционный закон N 5-ФКЗ О референдуме Российской Федерации от 28 июня 2004 года (Federal Constitutional Law No. 5-FKZ On the Referendum of the Russian Federation of 28 June 2004).

19 Article 60 (5) It is prohibited to conduct campaigning on referendum issues, to issue and distribute any campaign materials:
1) government bodies, other government bodies, local government bodies;
2) persons holding state and municipal positions, state and municipal employees using the advantages of their official or official position;
3) military units, military organizations and institutions;
4) charitable organizations and religious associations, as well as organizations established by them;
5) referendum commissions and voting members of referendum commissions;
6) foreign citizens, stateless persons, foreign legal entities;
7) representatives of organizations that issue mass media in the course of their professional activities.

20 Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, para. 242; CDLA-D(2016)007rev, Rule of Law Checklist, II.A.5.i.

Revised Guidelines on the Holding of Referendums, "referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament's exclusive jurisdiction".[21]

33. According to the Parliamentary Assembly of the Council of Europe, a referendum "should not be used by the executive to override the wishes of parliament or be intended to bypass normal checks and balances".[22] Checks and balances were affected because the review by the Constitutional Court had to be conducted within seven days (see paragraph 19) and the all-Russian vote was not subject to the same procedural guarantees as a referendum (as explained above).

34. The Amending Law also derogated from Article 2 (2) of the 1998 Federal Law N 33-FZ On the Procedure for Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation, which provides that there should be specific amending laws on interrelated topics, rather than a single en bloc vote on all amendments.[23] The Comments insist that the amendments are all interrelated with each other and therefore the requirement of Federal Law N 33-FZ is met. The Venice Commission cannot follow this argument as the amendments cover a very wide range of issues.

35. Furthermore, Article 3 of the Amending Law derogated from Article 136 of the Constitution. Under Article 136 of the Constitution, the proposed amendments had already been adopted because of the approval by the constituent entities. Article 3 of the Amending Law provides that the amendments would not have entered into force if the Constitutional Court had found them incompatible with Chapters 1, 2 and 9 of the Constitution or if the all-Russian vote would have resulted in a negative vote. However, this is regulated at the level of an ordinary law and could not derogate from the Article 136. This means that notwithstanding the promises of the Amending Law, the amend-

21 Venice Commission, CDL-AD(2020)031, Revised guidelines on the holding of referendums, II.1.

22 Parliamentary Assembly, Resolution 2251 (2019), Updating guidelines to ensure fair referendums in Council of Europe member States, point 3.1.

23 Article 2
1. Amendments to Chapters 3–8 of the Constitution of the Russian Federation (hereinafter referred to as "amendments" to the Constitution of the Russian Federation) shall be adopted in the form of a law of the Russian Federation on amendments to the Constitution of the Russian Federation.
2. An amendment to the Constitution of the Russian Federation in this Federal law means any change of the text of Chapters 3–8 of the Constitution of the Russian Federation: deletion, addition or new wording of any of the provisions of the said Chapters of the Constitution of the Russian Federation. One law of the Russian Federation on amendments to the Constitution of the Russian Federation shall cover interrelated amendments to the constitutional text.
3. The law of the Russian Federation on amendments to the Constitution of the Russian Federation shall be given a name that reflects the essence of the amendment.

ments had to enter into force, no matter what the outcome of the Constitutional Court Conclusion and the all-Russian referendum was.

36. Lastly, comparative constitutional history shows that whenever the amendment procedure provided for by the Constitution was abandoned, this resulted in serious problems for democracy and the protection of human rights.

E. Conclusion as to procedure of adoption of the amendments

37. As regards the procedure, the Venice Commission concludes that the speed of preparing such wide-ranging amendments was clearly inappropriate considering the (societal) impact of the amendments. This speed resulted in a lack of time for a proper period of consultation with civil society prior to the adoption of the amendments by parliament.[24] In view of the subject matters which were covered, a Constitutional Assembly should have been convened under Article 135. As a Constitutional Assembly was not convened, the Amendments were adopted, according to Article 136, after their adoption by Parliament and the constituent entities of the Federation. Following these two steps, the Amendments had to enter into force under Article 136. A negative outcome of the additional steps, i. e. the review by the Constitutional Court and the all-Russian vote, could not prevent the entry into force of the Amendments. The procedure used to amend the Constitution creates an obvious tension with Article 16 of the Constitution which safeguards the "firm fundamentals of the constitutional system of the Russian Federation".

V. Analysis of the substance of the Constitutional Amendments

38. Following some general considerations, this opinion will mostly follow the order of the fields of constitutional law listed in the Explanatory Report to the Amendment Law,[25] which are:

a) the position of candidates/office holders;
b) the structure of State bodies, their competences and mutual relationships;
c) the protection of social rights;

24 Venice Commission, CDL-AD(2013)012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary, para. 135; CDL-AD(2020)019, Malta – Opinion on ten Acts and bills implementing legislative proposals subject of Opinion CDL-AD(2020)006, para. 9 seq.

25 Пояснительная записка к проекту закона Российской Федерации о поправке к Конституции Российской Федерации "О совершенствовании регулирования отдельных вопросов организации публичной власти" (Explanatory note to the draft law of the Russian Federation on an amendment to the Constitution of the Russian Federation "On improving the regulation of certain issues of organizing public authority), available at https://sozd.duma.gov.ru/bill/885214-7.

d) the basic values of the State; and
e) the relationship between the Russian national law and international law.

As the relationship between the Russian national law and international law has been widely analysed in the previous opinion of the Venice Commission,[26] this opinion will focus on the first four areas. In view of its importance for the separation of powers and checks and balances, this opinion will deal with amendments relating to the judiciary in a section of its own.

A. General issues

1. Constitutionalisation of existing law

39. Replies: In the Replies and during the online meeting, the Russian authorities insisted that many of amendments only raise to the constitutional level regulations that have already existed for a long time at the level of ordinary federal legislation (e. g. Article 83 (e1) on the appointment of certain ministers; Article 72 (1) (g1) referring to marriage as a union of a male and a female. Therefore, these amendments do not result in any novelties and should not be criticised at the moment when they were formalised in the Constitution. The Comments explain that raising existing legal provisions to the constitutional level, allow consolidating the established practice of interaction of public authorities, and strengthening the guarantees of legal protection of cultural, social and political traditions. Constitutionalisation (also known as constitutional entrenchment) reflects the dialectic of legal development, including the dependence of the effectiveness of the norm on the occupied places in the system of sources of law. They provide a sense of justice and provide social guarantees, that were previously enshrined in ordinary legislation only. The ultimate goal of the adoption of the corresponding block of amendments was to make them irreversible, and to make it impossible to nullify the positive results that Russia has achieved over the past few years of its development and which are positively perceived by Russian society.

40. The Venice Commission does not share this approach. The nature of a provision as constitutional law and as ordinary law is very different and "constitutionalising" a rule affects its character. Constitutionalising issues that in the normal course of affairs should be dealt with through acts of Parliament, excludes them from open debate and thus restricts democracy.

41. An obvious difference is also that constitutional provisions cannot be reviewed by the Constitutional Court (see article 125 of the Russian Constitution). On the contrary,

26 Venice Commission, CDL-AD(2020)009, Opinion No. 981/2020, op. cit.

they become the Constitutional Court's yardstick for evaluating other legal provisions. "Constitutionalising" a legal provision therefore withdraws it from the competence of the Constitutional Court, narrowing the scope of its jurisdiction and affects the constitutional framework for the Court.[27]

42. Another effect of constitutionalising and raising the hierarchical rank of a law is that it withdraws that legal provision from the influence of any later legislation that could contradict it (exclusion from the lex posterior principle) or simply affect its scope through other legislation applied in the same context (e. g. procedural legislation with attenuating effects). Therefore, the constitutionalised norm becomes more rigid and this can lead to a petrification of otherwise more flexible norms, affecting areas that are otherwise open to an application and interpretation in conformity with the changing needs of society.[28]

43. As a consequence, provisions that may have been acceptable on the level of ordinary law because they were sufficiently flexible and were under the jurisdiction of the Constitutional Court need to be examined more strictly at the moment of constitutionalisation because they will affect society in a more rigid manner for a longer period of time.

2. Separation of powers

44. States have a wide discretion to choose their own political model; this discretion – however – is not unlimited. In its opinion on constitutional amendments in Turkey, the Venice Commission found that "[e]very State has the right to choose its own political system, be it presidential or parliamentary, or a mixed system. This right is not unconditional, however. The principles of the separation of powers and of the rule of law must be respected, and this requires that sufficient checks and balances be inbuilt in the designed political system. Each constitution is a complex array of checks and balances and each provision, including those that already exist in the constitution of another country, needs to be examined in view of its merits for the balance of powers as a whole."[29] This means that even the constituent power is bound by common constitutional heritage and its principles, such as the rule of law, the separation of powers or the protection of human rights. This opinion examines to which extent the amendments remain within

27 Venice Commission, CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, paras. 138–142.

28 In respect of Articles 79 and 125 of the Constitution, see Venice Commission, CDL-AD(2020)009, Russian Federation – Opinion on draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights, para. 20.

29 Venice Commission, CDL-AD(2017)005, Turkey – Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para 124.

the framework of these principles. If one institutional actor is "at the centre of power and other actors have too weak an institutional position to provide sufficient checks and balances", this creates "a serious risk for the rule of law".[30]

B. The position of candidates/office holders

45. The Amending Law has substantially altered the requirements for certain candidates/office holders as well as the modalities of their term of office.

1. Office of the President

46. The amended Articles 81 and 91, pertaining to the President of the Russian Federation, now stipulate that:

a. The President of the Russian Federation shall be prohibited, in accordance with the procedure prescribed by federal law, from opening and holding accounts (deposits) and from keeping cash and valuables in foreign banks located outside the territory of the Russian Federation (Article 81 (2));

b. The same person may not hold the office of President of the Russian Federation for more than two terms (Article 81 (3));

c. Holders of the office of President enjoy immunity even after they leave the office (Article 92–1(1)).

a. Prohibition of financial assets abroad

47. Article 81 (2) constitutionalises in respect of the President existing legislative rules banning state officials from holding accounts and from using financial instruments abroad.[31] Whereas it is doubtful whether imposing such a prohibition on an extensive category of individuals is necessary and proportional to the pursued goals (making state officials immune from external pressure), in case of the President, the highest representative of the State, the test of proportionality seems to be met.

30 Venice Commission, CDL-AD(2018)028, Malta – Opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, paras. 143–144.

31 31 See, for instance, Федеральный закон N 79-ФЗ О запрете отдельным категориям лиц открывать и иметь счета (вклады), хранить наличные денежные средства и ценности в иностранных банках, расположенных за пределами территории Российской Федерации, владеть и (или) пользоваться иностранными финансовыми инструментами, 7 мая 2013 года (Federal Law N 79-FZ On the prohibition of certain categories of persons to open and have accounts (deposits), keep cash and valuables in foreign banks located outside the territory of the Russian Federation, own and (or) use foreign financial instruments, 7 May 2013).

b. Term limits

48. The new wording of Article 81 (3) prevents a person from holding the office of the President for more than two terms.

49. In its 2012 Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions the Venice Commission established that limiting the mandate of the President of a country to one mandate with the right to one re-election was a standard practice.[32] In most cases, the rule applies to consecutive re-election, thus not excluding a later return of the person to the office (Czech Republic, Finland, France, Latvia, Lithuania, Romania, Slovakia, etc.). In some cases, it bars individuals from running more than two terms irrespective of whether they are consecutive or not (Austria, Bulgaria, Germany, Poland, etc.). In a minority of countries, re-election is entirely excluded (Mexico, Republic of Korea, Switzerland, etc.). All these models are acceptable, as long as they are based on the respect for the will of the people as the bearer of sovereignty in the state and as long as they grant fair treatment to all the candidates/office holders.

50. In its 2018 Report on Term Limits – Part I – Presidents, the Commission pointed out that "[p]residential term-limits are common in both presidential and semi-presidential systems, and also exist in parliamentary systems (both where the Head of State is directly and indirectly elected), while in the latter systems they are not imposed on prime ministers, whose mandate, unlike those of Presidents, may be withdrawn by parliament at any time. In presidential and semi-presidential systems, term-limits on the office of the President therefore are a check against the danger of abuse of power by the head of the executive branch. As such, they pursue the legitimate aims to protect human rights, democracy and the rule of law."[33] Furthermore "abolishing limits on presidential re-election represents a step back in terms of democratic achievement." Specifically, the Commission insisted that "[t]o the extent that constitutional amendments strengthening or prolonging the power of high offices of state are proposed, such amendments (if enacted) should have effect only for future holders of the office, not for the incumbent."[34]

51. There are good reasons why presidential systems contain strict mandate limits. In a presidential system which grants substantial executive powers to the president, the longer the incumbent remains in office, the more cemented his or her power becomes.

52. In light of the above, the Venice Commission welcomes the introduction of the two-term limitation of the mandate of the President.

32 Venice Commission, CDL-AD(2012)027, Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions, adopted by the Council for Democratic Elections, para. 49.
33 Venice Commission, CDL-AD(2018)010, Report on Term Limits – Part I – Presidents, para. 120.
34 Ibid., paras. 124 and 128.

53. However, by virtue of Article 81 (3.1), this provision "is applied to the person having held or holding the post of the President of the Russian Federation without taking into account the number of terms he (she) had held or is holding this post by the time of coming into force of the amendment to the Constitution of the Russian Federation introducing the relevant limitation, and does not exclude for him (her) the possibility to hold the post of the President of the Russian Federation: during the terms allowed by this provision". This provision creates an exception for the current and previous holders of the office to stand for two completely new terms, regardless of the number of their past mandates. As this provision applies to two specific persons, this amounts to an *ad hominem* constitutional amendment.

54. Replies: The Replies insist that the removal of term limits was adopted by the Federal Assembly, approved by all the constituent entities of the Russian Federation and approved by the sovereign people in a nationwide vote. Counting the mandates of the current and former Presidents would have been a retroactive application of the term limit. A re-election of the President, without taking into account the previous terms of his tenure, will be possible only as a result of the subsequent expression of the will of citizens in direct elections. This is associated with the presence of two consistently implemented democratic guarantees – the All-Russian vote on the amendments, and in the future – the vote of citizens in direct elections. The constitutional principle of democracy implies the possibility for the people to exercise the right to elect in free elections the person they deem most worthy for the post of the head of state. The participation of a current head of state does not at all prejudge an electoral victory. The Amendments confirm the fundamental intention of the constitutional legislator to ensure the constitutional practice of the periodic rotation of persons holding the office of President. The Amendments result in a redistribution of public authority between the various branches of power, in particular from the President to Parliament. These significant changes justify a transitional rule not to take into account the presidential terms before the Amendments. The Constitution provides sufficient guarantees as to parliamentarism, multiparty system, the presence of political competition, the separation of powers, the provision of rights and freedoms by independent justice, including through constitutional proceedings. Leaders in other countries (Chancellor Merkel, President Kekkonen, Prime Minister Juncker etc.) held office for very long periods.

55. The Commission considers nonetheless that for all the reasons indicated above that show the necessity of limiting the President's mandate to two terms, and which have been espoused in Article 81.3, the ad hominem exclusion from the term limits of the current and previous President is regrettable.

c. Immunity

56. While Article 91 granted immunity to the President in office, the new Article 92–1 provides that also a "President of the Russian Federation who has ceased to exercise his (her) powers upon expiration of his (her) term of office or before the end of his (her) term due to his (her) resignation or persistent inability for health reasons to carry out the powers invested in him (her), shall have immunity." Since former presidents shall become members of the Federation Council for life (Article 95 (2) (b)), they will enjoy immunity in this capacity as well (Article 98 (1)). For lifting the immunity of former Presidents, the same procedure as that applicable to active presidents applies (Article 93).

57. Article 93 establishes a complex procedure for lifting the immunity of current and former Presidents: "The President of the Russian Federation may be impeached and the immunity of the President of the Russian Federation who has ceased to exercise his (her) powers may be removed by the Council of Federation only on the basis of charges of high treason or of another grave crime brought by the State Duma and confirmed by a resolution of the Supreme Court of the Russian Federation on the existence of indications of a crime in the actions of the President of the Russian Federation, both acting and who has ceased to exercise his (her) powers, and by a resolution of the Constitutional Court of the Russian Federation confirming that the established procedure for bringing charges has been observed."

58. Replies: The Replies state that these provisions ensure excluding politically motivated prosecution against former Presidents. According to the Replies, such guarantees are important in countries where the characteristics of the rule of law are relatively recent. Providing this immunity is within the discretion of the constitutional legislator. The special immunity for former Presidents is needed in case a former President were to resign as a Senator for life (Article 95 (2) (b)) and would thus lose senatorial immunity. In practice, former President Medvedev is not member of the Federation Council. The Comments explain that the procedure for lifting presidential immunity under Article 93 corresponds to standard procedures for impeachment of a head of state, as exists in France (Article 68 of the French Constitution) or the USA (Article II, Section 4, of the US Constitution). A lowering of the guarantees for former Presidents would have resulted in insufficient legal protection for a person who served as Head of State, which is unacceptable. Granting immunity to the former Presidents significantly correlates with the constitutional practice of rotation in the office of President.

59. The Venice Commission notes that Article 91 grants full inviolability, not only functional immunity. The same is necessarily true for new Article 92–1 as a former President does not exercise presidential functions anymore. By applying to former Presidents the

procedure for lifting of immunity applicable to the current President (Article 93), this provision considerably extends the immunity that the former presidents have already enjoyed under the 2001 Law on Guarantees for the President of the Russian Federation who has Ceased to Exercise his Powers, and Members of his Family.[35] Whereas this law provided for the lifting of the immunity following decisions of both the Supreme Court and the Constitutional Court with a simple majority in the State Duma,[36] the now applicable Article 93 of the Constitution requires both for current and previous Presidents "two-thirds of votes of the total number of senators of the Russian Federation and deputies of the State Duma respectively, on the initiative of not less than one third of deputies of the State Duma and on the basis of a resolution of a special commission set up by the State Duma". The immunity for former Presidents produces effects even with respect to acts carried out after the termination of the mandate.

60. The Venice Commission notes that granting such an extensive immunity to former heads of State is very unusual. In most countries, former heads of State either do not enjoy any immunity or, more commonly, continue to enjoy functional immunity with respect to official acts done while in office. Only in a small minority of countries do former heads of State continue to enjoy personal immunity after leaving the office, though even then, the scope of the immunity is usually specified in the relevant legal act.[37]

61. According to Article 93 of the Constitution, the immunity can be lifted "only on the basis of charges of high treason or of another grave crime". This means that the immunity for other crimes is absolute and cannot be lifted. Granting such absolute personal immunity to Presidents and former Presidents, even for acts committed after the end of

35 Закон N 12-ФЗ О гарантиях Президенту Российской Федерации, прекратившему исполнение своих полномочий, и членам его семьи, 12 февраля 2001 года (Law No. 12-FZ On guarantees to the President of the Russian Federation, who has terminated the exercise of his powers, and members of his family, 12 February 2001).

36 Article 3 (3): "The President of the Russian Federation, who has terminated the exercise of his powers, may be deprived of immunity by the Federation Council of the Federal Assembly of the Russian Federation (hereinafter – the Federation Council) only on the basis of an accusation of high treason or other committing by the State Duma of the Federal Assembly of the Russian Federation (hereinafter – the State Duma) a serious crime, confirmed by the conclusion of the Supreme Court of the Russian Federation on the presence in the actions of the President of the Russian Federation, who has terminated the exercise of his powers, signs of a crime and the conclusion of the Constitutional Court of the Russian Federation on the observance of the established procedure for bringing charges."

37 See Article 3 of the Constitutional Law of the Republic of Kazakhstan No. 83-II on the First President of the Republic of Kazakhstan – Elbasy, 20 July 2000; Article 12 of the Law of the Kyrgyz Republic No. 152 on Guarantees of the Activities of the President of the Kyrgyz Republic, 18 July 2003; Article 18 of the Law of Turkmenistan No. 192-IV on the President of Turkmenistan, 21 May 2011; Article 2 of the Law of the Republic of Uzbekistan No. 480-II on the Essential Guarantees of the Activities of the President of the Republic of Uzbekistan, 25 April 2003.

the term of office, contradicts the principle of equality before the law granted by Article 19 of the Constitution, which itself has not been amended. Such an unjustified privilege raises a serious issue under the rule of law.[38]

62. To conclude, the very unusual wide scope of immunity, taken together with rules of impeachment that make it very difficult to dismiss a president, raise serious questions as to the accountability of the President and contradict the rule of law.

2. Requirements for other candidates/office holders

63. The pre-2020 Constitution sets out very few such requirements, for instance, Russian citizenship and a minimum age of 21 for the members of the State Duma (Article 97(1)) and those of Russian citizenship, a minimum age of 35 and permanent residence in the Russian Federation of not less than 10 years for the President (Article 81(2)). The Amending Law introduced citizenship, age and permanent residence conditions for the candidates/holders of all the highest positions in the country. It also introduced a negative condition: candidates/office holders may not have the citizenship of a foreign state or a (right to) permanent residence within the territory of a foreign state. For the President, in addition, this negative condition applies also retrospectively to a foreign citizenship or foreign permanent residence held in the past. There is an exception foreseen for States or territories which have been incorporated[39] into the territory of the Russian Federation.

64. Replies: The Replies argue that the constitutional legislator has discretion to impose such restrictions. Residence in a foreign state makes that person vulnerable to outside influences and weakens the link to the Fatherland/homeland. The Constitution may prevent risks associated with such persons holding certain positions. A citizen of the Russian Federation can renounce the citizenship of a foreign state or the residence in a foreign state, thus removing the obstacle to holding relevant public positions. The Russian Federation has an agreement allowing for dual citizenship with Tajikistan only. The Comments explain that these limitations are in conformity with Article 55 (3) of the Constitution (on the limitation of rights and freedoms) and that similar access restrictions to public service are contained in many modern constitutions and the legislation of developed democracies (Australia, Colombia and the USA), since they directly relate to state sovereignty and national security. The legal or actual subordination of a member

38 Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, section II.D.

39 See also Venice Commission, CDL-AD(2014)004, Opinion on "Whether Draft Federal constitutional Law No. 462741–6 on amending the Federal constitutional Law of the Russian Federation on the procedure of admission to the Russian Federation and creation of a new subject within the Russian Federation is compatible with international law".

of a legislative body to the sovereign will of both the Russian Federation and a foreign country is not consistent with the constitutional principles of the independence of the mandate of members of parliament and state sovereignty and calls into question the supremacy of the Constitution. This reasoning was extrapolated to other offices.

65. The Venice Commission notes that it is common to subject candidates to/office holders of the highest position in the State to certain requirements that usually relate to citizenship, age, permanent residence and/or moral integrity. The Commission however also notes that it is not common to prohibit the candidates/office holders from having, or even having had in the past, more than one citizenship and/or, even more so, permanent residence. The Venice Commission is aware of the change in the Russian legislation[40] which made it possible for the citizens of the Russian Federation to acquire another citizenship without losing the Russian one. This legislative change has implemented Article 62 (1) of the Constitution, by virtue of which "a citizen of the Russian Federation may have the citizenship of a foreign State (dual citizenship) according to the federal law or an international agreement of the Russian Federation".

66. In view of this legislative change, there might be legitimate reasons to exclude from standing as candidates to the highest positions in the State those who would avail themselves of this new possibility and would acquire another citizenship, in addition to the Russian one. However, it is more difficult to understand why this restriction should apply to a rather extensive range of professions (including all judges and prosecutors), why it should be applied retrospectively (for the President) and why it should even apply to those who hold, or held in the past (for the President), permanent residence in another country. Excluding all such individuals from the circle of potential candidates to a relatively extensive range of positions constitutes a very broad interference with the right of citizens to participate in managing state affairs, including directly, to enjoy equal access to State service and to participate in the administration of justice (Article 32 of the Russian Constitution). Article 19 of the Constitution guarantees the right to equality.

67. Further, Article 32 (2) of the Constitution as well as, in respect of elected officials, Article 3 Protocol 1 ECHR, as interpreted by the European Court of Human Rights,[41] guarantee the right to be elected which, in the instant case, might be considered as severely curtailed.

40 Федеральный закон N 62-ФЗ О гражданстве Российской Федерации, 31 мая 2002 года (Federal Law No. 62-FZ On Citizenship of the Russian Federation, May 31, 2002).

41 The Comments insist that the practice of the European Court of Human Rights on this article is arbitrary and contradicts the 1969 Vienna Convention on the Law of Treaties. The Venice Commission does not share this view.

C. The Structure of State Bodies, their Competences and Mutual Relationships

68. The Amending Law introduces extensive institutional changes, establishing certain new bodies and shifts competences among various powers in the State. Many of these changes relate to the powers of the President. Below, this opinion examines how amendments to specific powers affect the separation of powers and checks and balances.

1. Appointment of the Chairman of the Government

69. In the Commission's view, a significant result of the Amending Law is that it strengthens the competences and the position of the President of the Russian Federation. On this point, the representatives of the Russian authorities profoundly disagreed with the rapporteurs. In their view, the amendments either consolidate already existing competences of the President, or even strengthen the role of the parliament to the detriment of the President. The Venice Commission has carefully examined the amendments against the background of this argument but has nonetheless reached the conclusion that the President's position is strengthened by the amendments.

70. Under the Constitution of the Russian Federation, the Russian President does not formally belong to any branch of power, including executive power. As provided in the Constitution the President is the Head of State but not the head of the Government. At the same time, the Constitution provides that the President shall adopt measures to ensure the coordinated functioning and interaction of all bodies of state power, including executive power.[42] The President shall perform the "general leadership of the Government of the Russian Federation" (Article 83 (b)) and executive authority shall be exercised by the Government "under the general direction of the President of the Russian Federation" (Article 110 (1)). One of the main functions of a constitution is to identify and distribute public power. The principle of the separation of powers requires that all institutions exercising public power fall within its purview, this obviously includes the President. Otherwise separation of powers is meaningless. An organ of the state which exercises significant power in the state cannot be excluded from this principle by simply stating that it does not "belong" to any particular branch of government.

71. The President shall both appoint, upon the candidature approved by the State Duma, and dismiss the Chairman of the Government (Article 83 (a)). Thus, while the appointment of the Chairman has to be approved by the State Duma, his or her dismissal is decided solely by the President. The Chairman's dismissal does not entail the

42 Kuznetsova, T. O., Kremyanskaya, E. A., & Rakitskaya, I. A. (2014). Russian constitutional law. ProQuest Ebook Central.

dismissal of the whole Government (as is the case for Prime Ministers in other (semi-) presidential states).

72. The President disposes of the same powers with respect to the Deputy Chairman of the Government and all the other members of the Government (Article 83 (e)). While previously, the appointment and dismissal of the members of the Government was made on the proposal of the Chairman of the Government, no such requirement is foreseen under the amended Constitution.

73. Replies: The Replies point out that the need for the Chairman of the Government to engage with the State Duma seeking the approval of the ministers does not diminish but rather increases the political importance of the Chairman and the Duma. In this way, the relationship between the President and the Chairman of the Government becomes clearer. According to Article 83 (d), the President appoints federal ministers only after their approval by the State Duma (with the exception of federal ministers, whose appointment takes place after consultations with the Federation Council). This is a strengthening of the role of the State Duma. The President has no right to refuse the appointment of Deputy Chairmen of the Government and federal ministers, approved by the State Duma (Article 112(3)). The provision in Article 113 according to which the Chairman of the Government is personally responsible to the President for the exercise of the powers assigned to the Government strengthens the position of the Chairman of the Government.

74. It is positive that the State Duma now has to approve most ministers. However, the Venice Commission is concerned that this new system of appointment marginalises and weakens the role of the Chairman of the Government. The Chairman of the Government now has a limited say in who members of his/her Government will be, but s/he still holds political responsibility for the acts of his/her Government (Article 113), whereas the President performs in substance the leadership of the Government and does not assume (political or other) responsibility for the acts of that Government.

75. If the State Duma rejects three candidatures for the Chairman of the Government submitted by the President, the President shall appoint the Chairman of the Government and s/he may dissolve the State Duma (Article 111(4)) but there is no obligation to dissolve the State Duma as this was the case before the Amendments.

76. Replies: The Replies point out that in practice the State Duma has never been dissolved under this provision, even during times of strained relations between the President and the legislator. The Constitution allows the President to present to the State Duma as Chairman of the Government each time a different candidate or the same candidate three times in a row. The new discretion of the President to dissolve or not to dissolve the State Duma provides an additional opportunity to overcome disagreements

between state powers and to avoid delays in the formation of the Government and interruptions in the work of the legislator. The Comments insist that the European Convention on Human Rights does not require any special theoretical constitutional concepts regarding the acceptable limits of their interaction.[43] The Amendments refine the model of the separation of powers and correspond to an increased role of parliament in its cooperation with the executive branch. An obligation for the President to dissolve the State Duma would have resulted in the possibility to exert real pressure on the Duma.

77. The Commission notes that the possibility for the President to appoint a Chairman of the Government who does not enjoy the confidence of parliament already existed in the previous version of the Constitution. This was already objectionable as being in conflict with the democratic principle. In addition, the amendments give additional leverage to the President in such a framework as it remains uncertain for the State Duma whether it will be dissolved after the third rejection. During such a phase, the President obtains significant influence over the members of the State Duma.

2. Appointment of ministers / heads of federal executive authorities

78. Articles 83 (e) and 83 (e1) establish a two-track system for the appointment of members of the Government. While for most members, the decision is left to the President with the approval of the State Duma, for some members enumerated in Article 83 (e1) consultation of the Federation Council is required.

79. Article 83 (e1) reserves to the President's discretion "following consultations with the Federation Council", the appointment and dismissal of all "heads of federal executive authorities (including federal ministers") for matters relating to foreign affairs, defence, justice and internal affairs" (often referred to as "power ministers").

80. Article 112 (4) provides that after the rejection of three candidates for the office of Deputy Chairman of the Government or minister by the State Duma, the President can appoint the candidates nonetheless. However, if after three rejections more than one third of the posts of member of the Government remain vacant (i. e. the President has not used his/her right to nominate the candidates notwithstanding their rejection by the State Duma), the President can dissolve the State Duma.

81. Replies: As concerns the power to appoint ministers (Article 83 (e1)), the Replies insist that already before the amendments, there were ministers who operated under a special chain of command. This existing situation relating to the ministers for foreign affairs, defence, justice and internal affairs is now reflected in the Constitution. There-

43 European Court of Human Rights, Kleyn and Others v. the Netherlands [GC], of 6.5.2003, application no. 39651/98, 39343/98, 46664/99 et al.

fore, the amendments do not create any new problems or phenomena. The President is the guarantor of the Constitution and determines the basic objectives of the internal and foreign policy of the State (Article 80 (3)). His or her appointing powers are balanced by the need to consult the Federation Council. There is no shift of competences from Parliament to the President and on the contrary the powers of Parliament have been increased. In general, the constitutional legislator has a wide power in regulating the respective powers of the President, the State Duma, the Federation Council, the Government and courts. As concerns the discretion of the President to dissolve or not the State Duma following three rejections of Ministers resulting in the vacancy of more than a third of Government posts, the Replies argue that this threshold provides an indicator as to the inability of co-operation between the Chairman of the Government and the State Duma in personnel matters. The President should have the choice to dismiss the Chairman of the Government or dissolve the State Duma. The Comments recall the Venice Commission's opinion on the 1993 Constitution (CDL(1994)011), according to which "the form of government is based on a novel and interesting conception of presidentialism". The Russian system is more akin to the French than to the US Constitution and the Venice Commission's criticism of the Russian system is too vague. The President may not refuse to appoint Deputy Prime Ministers and federal ministers whose candidacies have been approved by the State Duma. As concerns the formation of the Government's "power block", an additional coordination procedure has appeared in the form of consultations with the Federation Council. Therefore, is remains absolutely unclear how the Amendments would have strengthened the role of the President. The conclusions of the Venice Commission on strengthening the role of the President are not supported by proper arguments and are based on an incorrect interpretation of the Amendments.

82. As already pointed out above, the Venice Commission is of the opinion that the constitutionalisation of the system of appointments of ministers with a special chain of command creates problems of accountability.

83. The split method of appointments of ministers is an exception from the general rules for appointment of Ministers in Article 83 (e) and Article 112 (2), which is problematic taking into account the status of and notably the possible influence of the President on the members of the Federation Council (see below).

84. As such, cooperation between the executive and the legislative powers on the appointment of members of the Government is to be welcome. However, a presidential system which grants such wide powers to the President in effect means that the President can recast the administration of the state as s/he thinks fit.

85. In the light of the possibility for the President to appoint certain Ministers without the agreement of Parliament, the Commission regrets that the Amendments give

the President an additional power to dissolve the State Duma. While the constitutional system empowers the President to act as a neutral arbiter in settling disputes between different institutions in the state, there appears to be no institutional mechanism to require him to act neutrally. The President thus can act as a non-neutral arbiter between the State Duma and his own Government.

86. The absence of sufficient checks and balances in this domain goes beyond what is the rule even in strong presidential regimes. For instance, in the United States, the Senate has the power to reject presidential nominations, while, for the most important ministerial positions, the Russian Parliament does not. This is not appropriate under the principle of separation of powers, even in presidential regimes.

3. Presidential administration vs. Government

87. Already before the amendments, the President had a separate "presidential administration". Article 110 (3) provides now that the activities of federal executive authorities are directed by the Government "except those whose activities are directed by the President of the Russian Federation". This somewhat cryptic reference makes it possible to attribute directly to the President a considerable number of activities. Taken together with the provision that the President exercises the "general direction" of the Government (Article 11 (1)), this provision reveals on the one hand the subordinate character of the Government, despite its approval by Parliament, as well as the centralized character of the presidential power, on the other hand. Such a double system of administration risks creating problems of inefficiency, delays and duplication of work.

4. Forming of the Council of State

88. The Amending Law establishes or, rather, formalises, a new organ, the State Council of the Russian Federation (Государственный Совет Российской Федерации). This Council shall be formed by the President "for the purpose of ensuring the co-ordinated functioning and interaction of public authorities, determining the general direction of the domestic and foreign policy of the Russian Federation and the priority areas of the socio-economic development of the state" (Article 83 (f5)).

89. Replies: The Replies state that the Council of State is only an advisory body assisting the Head of State. The Council has been in place since 2000, when it was created by a decree of the President.[44] Following the Amendments, Law No. 394-FZ "On the State

44 Указ Президента Российской Федерации № 1602 О Государственном совете Российской Федерации, 1 сентября 2000 г года (Decree of the President of the Russian Federation No. 1602 On the State Council of the Russian Federation, September 1, 2000).

Council of the Russian Federation" was adopted on 8 December 2020 and entered into force on 19 December 2020. The State Council is formed by the President to ensure the coordinated functioning and interaction of the bodies that are part of the unified system of public power. It determines the main directions of the domestic and foreign policy of the Russian Federation and priority directions of socio-economic development of the state. The competences of the State Council do not overlap with those of other state bodies. Comments point out that the competence of the Council of State does not in any way compete with the competence of the Government and it does not contradict Article 11 of the Constitution. The Council of State is a state body but not a body of state power. The State Council is not a state authority but an advisory body. It does not exercise authority but is a body that assists the President in exercising his authority.

90. The Commission is of the opinion that while, as such, the formalisation of a body which has already existed for two decades is to be welcomed, a tension might be created with Article 11 of the Constitution as the State Council is not mentioned there as a body which exercises state power. It appears to the Venice Commission that the State Council is, *de facto*, a body exercising state power. The legitimacy provided to Council of State though its constitutionalisation and the strengthening of the Presidential Administration acting on the basis of advice from the Council of State can weaken the Government and add to the problems of "double administration" mentioned above.

5. Appointment of 30 Senators of the Federation Council

91. The Amending Law has altered the composition of the Federation Council. According to the previous version of Article 95, the Federation Council included two representatives from each constituent entity of the Russian Federation – one from the legislative (representative) and one from the executive State government body. In addition, Article 95 provided that the President can appoint up to ten per cent of the members of the Federation Council. The total number of members being 178, the number of Federation Council members appointed by the President was determined as 17 by an amendment to the Federal Law no. 11-FKZ of 21 July 2014. However, in practice the President did not appoint these 17 members.[45]

92. According to the Amendments, the members of the Federation Council are now called "Senators". The amendments also changed the composition of the Federation Council by empowering the President to appoint 30 representatives, i. e. removing this ten per cent limit and nearly expanding the number of members who can be appointed

45 System of composition: http://council.gov.ru/en/structure/council/status/; current composition http://council.gov.ru/en/structure/members/.

by the President to 17 percent. These senators appear to be eligible for reappointment. Seven out of these 30 members may be appointed for life.

93. Replies: The Replies explain that the amendments do not endanger the independence of the Federation Council. The federal basis of the bicameral model is safeguarded because the Federation Council members representing the constituent entities of the Federation are still much more numerous than those appointed by the President. In addition, there are sufficient safeguards for the Senators who enjoy immunity during their term of office according to Article 98. Article 102 of the Constitution considerably extends the list of powers of the Federation Council and the new Article 103–1 reflects the competence of the Council to exercise parliamentary control. The Comments explain that the 30 Senators to be appointed by the President are representatives of the Russian Federation, not of the President. The Federation Council is not conceived as a body representing political interests but a forum for cooperation between the Federation and the constituent entities. The purpose of the amendments is to facilitate such cooperation. The Amendments strengthen both chambers of the Assembly. All constituent entities of the Federation have equal legal status and powers and the Senators representing them have equal status as well. The number of senators from the constituent entities by far outweigh those appointed by the President. The appointment of Senators of the Upper House by the President is similar to the situation in other countries (Belarus, India, Ireland, Italy, Kazakhstan, Tajikistan, Uzbekistan).

94. The Venice Commission notes that while there is a shift of powers towards the Federation Council, the composition of the same body changes, enabling the President to appoint a larger share of members to the body that is competent to control his or her activities.

95. An important factor to take into account is the relative size of the 85 constituent entities of the Federation (Article 65) composing the other part of the Federation Council. They include territories of very unequal size and political weight (20 republics, 7 territories, three towns of federal importance and a large number of regions whose political weight is certainly lower). This heterogeneity means that a "presidential block" of 30 Senators could have an important impact on the work of the Federation Council.

96. The total number of Senators will change, depending on the number of these new members of the Federation Council (amended Article 95). The fact that in the past the President has not appointed his 17 members does not rule out that he – or a future President – will appoint all 30 Senators of his/her quota. The President thus gains leverage to influence the membership of the Federation Council. Given that the Federation Council is the only State body competent to decide on the impeachment of the President and that it also plays an important role in the appointment of various high State

officials, such a right is problematic from a structural and systematic viewpoint, even if the President did not appoint any members of the Federation Council in the past.

97. However, it is positive that the Senators now have a six-year term (Article 95 (6)), whereas the Constitution did not guarantee a fixed term of office beforehand.

98. Further, the two assemblies benefit from the extension of the powers of parliamentary control provided for in new article 103.1, including the possibility of carrying out inquiries into the heads of state bodies. This is to be welcomed.

6. Reinforced veto power

99. With regard to Parliament, beyond the unchecked appointment of 30 Senators, the President's veto power is reinforced by his/her new possibility to appeal to the Constitutional Court (Article 107 (3)). Already under the previous wording, a presidential veto had to be overridden by a two thirds majority of the total number of Deputies of the State Duma and members of the Federation Council. The additional possibility of a recourse to the Constitutional Court is positive as it can lead to a judicial settlement of an otherwise only political conflict. See, however, the comments of the changes relating to the Constitutional Court below.

7. Unified system of public authority – position of constituent entities of the Federation and local self-government

100. Article 80 (2), which defines the missions of the President, provides that s/he "shall ensure the coordinated functioning and interaction of bodies forming the unified system of public authority". Article 132 (3) stipulates that "Local self-government bodies and state power bodies shall be integrated in the unified system of public authority in the Russian Federation, and shall cooperate to most efficiently resolve tasks in the interests of population inhabiting the relevant territory."

101. The amendments also expand the powers of the Federation, including the "organisation of public authority" (Article 71 (d)) and the joint jurisdiction (Article 72). These provisions shift considerable competences from the constituent entities to joint competence with the Federation (e. g. information technology, digital data, education).

102. Replies: The Replies point out that the amendments do not negatively affect the country's federal nature and municipal autonomy. The changes are not incompatible with the principle of federalism and the delimitation of competences, as set out in Articles 71 to 73 of the Constitution. The unified system of public authority is primarily a functional unity, which does not exclude organisational interaction between public authorities and local self-governing bodies when they solve tasks in the respective ter-

ritory. The need for the coordinated functioning of public authorities derives from Article 3 of the Constitution, according to which the multinational people is the bearer of sovereignty in the Russian Federation. Ensuring human rights requires concerted action of various levels of public power as a single whole for the benefit of citizens. The amendments do not affect the autonomy of regional or local authorities, including the system of financial resources required for their functioning. The power to "establish" local taxes is changed to their "introduction", which is in conformity with the requirement of a "legally established tax" as per Article 57 of the Constitution. The Comments insist that the competence of the constituent entities and municipalities is extended by adding joint jurisdiction in the field of agriculture, general issues of youth policy, provision of affordable and high-quality medical care, preservation and strengthening of public health, protection of family, motherhood, fatherhood and childhood, etc. There is no reduction in their competences in the field of information technology and digital data, which were not regulated in the Constitution before. In the Russian concept and practice of federalism, there is no conflict between regions and the Federation. Already according to Article 3 (2) of the Federal Law of 27 July 2004 No. 79-FZ "On the State Civil Service of the Russian Federation", the state civil service of the Russian Federation is subdivided into the federal state civil service and the state civil service of the constituent entities of the Russian Federation. Strengthening the unified system of state power objectively contributes to strengthening the role of local government, regions and their interaction with central authorities. The division of the State civil service into federal and regional, as well as the existence of a municipal service, is not affected by these amendments. No changes have been made to the legislation on the state civil and municipal service in this context and are not planned to be made. Article 71 (r) only concerns restrictions related to state and municipal service as a specific element of the legal status (residence, bank accounts in a foreign state). In conformity with the principle of unity of the legal foundations of the federal civil service and the civil service of the constituent entities of the Russian Federation, the existing Federal Law "On Municipal Service in the Russian Federation" already provides for restrictions related to municipal service in Russia. Article 73 on the exclusive competences of the constituent entities was not amended. Article 72 on joint competence was expanded in the fields of agriculture, youth and public health to develop cooperative federalism. Local self-government has new powers to ensure medical care (Article 132 (1)). Regional or local autonomy have not been restricted.

103. The Venice Commission notes that the division of authorities and powers among State government bodies of the Russian Federation and State government bodies of constituent entities of the Russian Federation (unamended Art. 11 (3)) is an important measure to ensure checks and balances.

104. Even before the amendments, Article 77 specified that all the public powers, central or territorial, formed a "unified system of executive authority ". However, Article 80 introduces a new notion by referring to a "unified system of public authority". The terms "executive authority" and "public authority" are not identical. The reference to this new this term in the Article 132 (3) on local authorities confirms this assessment: "Local self-government bodies and state power bodies shall be integrated in the unified system of public authority in the Russian Federation, and shall cooperate to most efficiently resolve tasks in the interests of population inhabiting the relevant territory".

105. Practical effects of this new terminology can be seen in Article 71 (r), which provides that the status of all public officers, including posts of "municipal service" will be fixed at the federal level only. This results in a serious limitation to the powers of self-government on the regional and local levels. It means that the civil service of these entities can be integrated into the civil service of the Federation. If this were the case, the constituent entities of the Federation and municipalities no longer can count on the loyalty of their civil servants because they are part of a fully integrated civil service that is obliged to follow instructions from the central power.

106. It is the President who shall ensure the coordinated functioning and interaction of the bodies forming part of the unified system of public authority (Article 80 (2)). Specific arrangements ("properties") of exercising public authority on the territories of cities of federal significance, administrative centres (capitals) of constituent entities of the Russian Federation and other territories can be established by federal law (Article 131 (3)). Bodies of state power can take part in forming bodies of local self-government, appointing and relieving of their posts the officials of local-self-government in order and in cases specified by federal law (Article 131 (1–1)).

107. With such an increased centralization comes a continued affirmation of the "Russian" character of the Federation,[46] even if the unamended Article 3 of the Constitution affirms that the State is "multinational" and that it ensures local autonomy. Thus, the amendments seriously curtail regional and local autonomy to a degree that seems to contradict the federal character of the Russian Federation.

108. The Venice Commission concludes that the strengthening of the President's powers and position does not only take place at the expense of the other state organs on the federal level as the Government, the Duma and the Federation Council, but also at the expense of the constituent entities and notably local self-government bodies. This is at

46 See comments on the "state-forming nation" in Article 68 (1) and the corresponding explanations in the Comments below.

odds with the idea of a Federation and local democracy, which are guaranteed by the unamended Articles 11 (3) and 12 of the Constitution.

8. Conclusion on changes in structure and competences of state powers

109. Taken together, while in some respects the powers of the parliament have indeed been expanded, at least formally, the Commission is of the view that important increases in the presidential powers (single system of state power, appointments of the chairman and members of the Government, constitutionalisation of the presidential Council of State, appointment of 30 Senators of the Federation Council, etc.) have been introduced. The combined effects of these presidential powers weaken the possibility of other actors, such as the Federation Council, to effectively provide checks and balances.

D. The Protection of Social Rights

110. Article 75 of the Constitution deals with monetary policy, the system of taxes and state loans. The Amending Law has added three more paragraphs which read as follows:

> *"5. The Russian Federation respects the labour of citizens and ensures protection of their rights. The state guarantees minimal wage in the amount of no less than subsistence rate for able-bodied general population throughout the Russian Federation.*
>
> *6. In the Russian Federation the system for pension provisions to citizens shall be developed on the basis of principles of generality, fairness and solidarity of generations, its effective functioning shall be supported, and the pensions indexation shall be performed no less than once a year in the order established by federal law.*
>
> *7. In the Russian Federation in accordance with the federal law obligatory social insurance, targeted social support of citizens and indexation of social allowance and other social payments shall be guaranteed."*

111. Moreover, a new Article 75-1 has been added which stipulates that "conditions shall be created in the Russian Federation for the sustainable economic growth of the country and improving the welfare of citizens, and for mutual trust between the state and society, protection of the dignity of citizens and respect for working persons shall be guaranteed, civil rights and duties shall be balanced and social partnership, economic, political and social solidarity shall be ensured".

112. Replies: The Replies explain that sustainable economic growth cannot be enforced in court as it is not a subjective right. However, this provision can serve as an argument in assessing the constitutionality of other legal the provisions in the economic sphere. It can also serve as a criterion for assessing the effectiveness of public authorities in

exercising their powers in the framework of political responsibility of the Government under Article 117 of the Constitution.

113. The Venice Commission notes that the Constitution already contains a list of social rights in its Chapter 2. More specifically, Articles 37 and 39 stipulate:

> "Article 37
>
> 1. Labour shall be free. Everyone shall have the right freely to use his (her) labour skills and to choose the type of activity and occupation.
>
> [...]
>
> 3. Everyone shall have the right to work in conditions, which meet safety and hygiene requirements, and to receive remuneration for labour without any discrimination whatsoever and not below the minimum wage established by federal law, as well as the right of protection against unemployment. [...]"

> "Article 39
>
> 1. Everyone shall be guaranteed social security for old age, in case of illness, disability and loss of the bread-winner, for the bringing up of children and in other cases specified by law.
>
> 2. State pensions and social benefits shall be established by law.
>
> 3. Voluntary social insurance, the creation of additional forms of social security and charity shall be encouraged."

114. The new provisions incorporated by the Amending Law elaborate on these provisions and, as such, belong into Chapter 2 of the Constitution, which can be amended only by the Constitutional Assembly (see above). From the substantive perspective, the new provisions seem compatible with the obligations that the Russian Federation assumes under its national law (Chapter 2 of the Constitution) and under various international instruments (the International Covenant on Economic and Social Rights, the European Social Charter, ILO instruments, etc.). They should be welcomed in this respect.

E. The Basic Values of the State

115. The Amending Law has introduced several provisions which declare certain basic values on which the State relies. As the Venice Commission has already noted, these provisions would, from a substantive perspective, belong to Chapter 1 or, in some cases, the Preamble of the Constitution. Yet, they are mostly incorporated in Chapter 3.

1. State succession

116. Article 67.1(1) declares the Russian Federation as the successor of the USSR and the successor with respect to the membership in international organizations, international treaties, assets, debts and obligations.

117. Replies: The Replies state that this provision is an integral characteristic of and basis of the sovereignty of the Russian Federation. This provision only re-states an already established situation in public international law. They distinguish between the following categories:

a) the Russian Federation, which considers itself the successor state of the USSR, including as concerns the seat in the UN Security Council;
b) the Baltic states, which do not consider themselves successors to the USSR; and
c) other successor states of the USSR.

118. The Venice Commission does not see a problem in referring to this status of the Russian Federation in the Constitution, even if it would have been more coherent to place this provision in the preamble of the Constitution.

2. Equality of peoples of the Russian Federation

119. The Venice Commission notes that it is the usual practice to incorporate provisions on basic values and normative orientation of the State into the text of the Constitution. Yet, the State needs to make sure that the provisions are formulated, and implemented, in such a way so as not to contradict obligations under international law.[47] Four of the amended provisions give rise to some concern in this respect.

120. The first one is the amended Article 68(1) with the reference to the language of the "stateforming people" (язык государствообразующего народа), even if it is specified that this people is in a union of equal peoples among themselves (входящего в многонациональный союз равноправных народов Российской Федерации). The previous wording confined itself to saying that Russian was the official language.

121. Replies: The Replies argue that these provisions are only an objective recognition of the Russian people's role in the formation of Russian statehood. They do not change the nature of the Russian Federation because they are of a non-political, supra-party and non-confessional nature and do not establish any state ideology, change the principles of pluralistic democracy and the secular nature of the Russian State. They do not introduce any restrictions of human rights that would be incompatible with Chapters 1

47 See, for instance, Venice Commission, CDL-AD(2011)016, Opinion No. 621/2011, Opinion on the new Constitution of Hungary, 20 June 2011.

and 2 of the Constitution and they do not violate the rights and the dignity of other nationalities or national minorities. They are not incompatible with the provisions of Articles 3 (1) on the multi-ethnic people of the Russian Federation, Article 19 (2) on the right to equality regardless of [ethnic] nationality and on the Preamble provision on the principle of equality and self-determination of peoples. The Comments explain that the term "state-forming people" should be considered in relation to Articles 67.1[48] and 68[49], which are dedicated to national traditions, the memory of ancestors, thousand-year history and continuity in the development of the state and multinational culture. Terms such as "French nation" or "all Germans" in the other constitutions are not objectionable either. Article 3 of the Constitution establishes as the bearer of sovereignty the multinational, not the Russian, people of the Russian Federation. Article 5 enshrines the principle of equality of peoples. Some of the constituent entities of the Russian Federation are formed on the basis of the national-territorial principle and have the right to establish their own state language. The Russian people being the state-forming nation and the Russian language being the state language is an objective fact of modern Russian society. The reference "state-forming people does not violate the principle of equality of peoples. Provisions on state languages exist in many multi-lingual countries (Belgium, Canada, or India).

122. The Venice Commission notes that the concept of a state-forming people is not used anywhere else in the text and it is not clear what it is intended to express. It seems that these assertions are not a response to particular national, territorial or cultural claims, but express a desire to explain the specificity of Russia in a historical continuum.

123. As the provision stresses that the state-forming people "are part of the multi-ethnic union of equal peoples of the Russian Federation", the Venice Commission tends to

48 Article 67
1. The territory of the Russian Federation shall include the territories of its subjects, internal waters and territorial sea and air space above them.
2. The Russian Federation shall possess sovereign rights and exercise jurisdiction over the continental shelf and in the exclusive economic zone of the Russian Federation as defined by the federal law and the rules of international law.
3. The boundaries between the subjects of the Russian Federation may be altered upon their mutual agreement.

49 Article 68
1. The state language of the Russian Federation throughout its territory shall be the Russian language.
2. Republics shall have the right to introduce their own state languages. In state bodies, bodies of selfgovernment and institutions of Republics they shall be used equally with the state language of the Russian Federation.
3. The Russian Federation shall guarantee to all its peoples the right to preserve a native language, create conditions for its learning and development.

agree with the Replies that this is not meant to establish any legal or other hierarchy. However, the inclusion of provisions referring to the Russian nation creates a tension with this multi-ethnic character of the Russian Federation.

3. Religion

124. Article 67.1 (2) refers to faith in God as part of the memory of the ancestors that should be preserved. The Comments explain that this reference does not result in abandoning the secular nature of the Russian Federation and it does not contradict Article 14, according to which no religion can be established as state religion or as mandatory. Religious associations are separated from the state and equal before the law.

125. The Venice Commission recalls that under Article 9 of the ECHR, Article 18 of the ICCPR and Article 28 of the Constitution of the Russian Federation, everyone is granted freedom of conscience and religion, which also entails freedom not to have any religion (and any faith in God).[50] Article 67.1 (2) must not be interpreted as entailing the obligation to have any religion and the Venice Commission assumes that it will not be interpreted in this way. The Commission also notes that Article 9 of the Convention guarantees a broader right to freedom of religion than Article 28 of the Constitution. The latter should also be extended to guarantee public manifestations of worship, teaching, practice, and observance, in accord with the Convention standard.

4. Freedom of expression / scientific freedom

126. By virtue of the amended Article 67.1 (3), the Russian Federation "shall honour the memory of the defenders of the Motherland and shall defend historical truth. Belittling the significance of the heroic feat of the people in defending the Motherland shall not be permitted".

127. Replies: The Replies state that an expression that violates the rights and freedoms of others is socially dangerous and may be punishable under criminal law.[51] Under the legislation in force, actions aimed at desecrating the memory of the defenders of the Fatherland/homeland and rehabilitation of Nazism are already punishable.[52] This constitutional amendment does not affect the freedom of expression, which is guaranteed by the unamended Article 29 of the Constitution. This provision intends to supress the rehabilitation of Nazism, and is in line with international obligations of the Russian

50 See ECtHR, Kokkinakis v. Greece, Application No. 14307/88, 25 May 1993, para 31.

51 Decisions of the Constitutional Court of 25 September 2014 No 1873-O, 27 October 2015 No 2450-O, 29 September 2016 No 1927-O, 28 March 2017 No 665-O, 27 June 2017 No 1411-O and others.

52 Article 13.15 of the Code of Administrative Offences; Article 354 and 244 (b) (2) of the Criminal Code.

Federation, notably the UN General Assembly Resolution 72/156 of 19 December 2017, which, inter alia, calls on states to take concrete measures to prevent the denial of crimes against humanity and war crimes committed during the Second World War. The Comments insist that the school curricula on history do include a critical analysis of Russian history and that the Amendments cannot be seen as limiting freedom of expression and scientific research which are guaranteed under the Constitution and the European Convention on Human Rights. The feat of the Russian people in defending the Fatherland is an objective fact and cannot be subject to revision. This circumstance is in no way associated with the prohibition of scientific research.

128. The Venice Commission is not in a position to assess whether the amendment would even extend to cover the punishment of criticism of such matters as the Ribbentrop Molotov Pact as has been alleged in civil society. The Commission notes that it is not unusual for constitutions to contain identity-strengthening, or extolling, provisions. However, this amendment seems aimed at historical research. It is the hallmark of a democratic society that it is sufficiently sure in itself not to need prohibitions on historical research. This is not, in any way, to question that Nazi Germany was defeated in large part due to the efforts of the peoples of the Soviet Union, and that these peoples paid a huge price for this.

129. This amendment should therefore be given a narrow interpretation, to avoid any risk that important historical research is discouraged. It must not collide with the right to freedom of holding opinions without interference, the right to freedom of expression and the right to freedom of academic research. These rights are enshrined in the Constitution of the Russian Federation (Article 29), the ECHR (Article 10) and the ICCPR (Article 19).

5. Kin-minorities

130. New Article 69 (3) stipulates that "the Russian Federation shall provide support to its compatriots living abroad in the exercise of their rights, the protection of their interests and the preservation of all-Russian cultural identity".

131. Replies: In explaining this provision, the Replies refer to Federal Law No. 99-FZ of 24 May 1999 "On State Policy of the Russian Federation Regarding Compatriots Abroad", according to which "compatriots" are individuals who were born in one state, live or have lived in it and have common language, history, cultural heritage, traditions and customs, as well as descendants of those individuals in direct descending line. Compatriots abroad are thus citizens of the Russian Federation permanently residing outside the territory of the Russian Federation. Compatriots are also persons and their descendants residing outside the territory of the Russian Federation and belonging, as

a rule, to peoples who have historically lived in the Russian Federation, as well as persons who have made a free choice in favour of a spiritual, cultural and legal connection with the Russian Federation whose relatives in the direct ascending line previously resided in the Russian Federation, including persons who were citizens of the USSR, resided in states that were part of the USSR, acquired citizenship of these states or became stateless persons; descendants (emigrants) of the Russian state, the Russian republic, the RSFSR, the USSR and the Russian Federation, who had the corresponding citizenship and became citizens of a foreign state or stateless persons (Article 1 of the said law).

132. In its 2001 Report on the Preferential Treatment of National Minorities by their Kin-State, the Venice Commission recalled that, while States may legitimately protect their own citizens during a stay abroad, "responsibility for minority protection lies primarily with the home States".[53] It further recalled that "the adoption by States of unilateral measures granting benefits to the persons belonging to their kin-minorities, which in the Commission's opinion does not have sufficient diuturnitas to have become an international custom, is only legitimate if the principles of territorial sovereignty of States, pacta sunt servanda, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected".[54] In this context, the Commission also recalls that "[t]he protection of a State's citizens on the territory of a third State is mainly a responsibility of the latter State."[55]

133. In its 2011 Opinion on the Constitution of Hungary, the Venice Commission expressed its trust "that future interpretation of the Constitution and subsequent legislation and policies will be based on the interpretation [of the relevant provision] as a commitment to support the Hungarians abroad and assist them, in co-operation with the States concerned, in their efforts to preserve and develop their identity, and not as a basis for extra-territorial decision-making".[56] The Venice Commission expresses the same trust, relating this time to the Russians living abroad, with respect to the interpretation and application of Article 69 (3) of the Constitution of the Russian Federation.

53 Venice Commission, CDL-INF(2001)019, Report on the Preferential Treatment of National Minorities by their Kin-State, conclusions.

54 Ibidem.

55 Venice Commission, CDL-AD(2010)052, Opinion on the Federal Law on the Amendments to the Federal Law on Defence of the Russian Federation, para. 60.

56 Venice Commission, CDL-AD(2011)016, op. cit., para 44.

6. Marriage

134. While the European Court of Human Rights has left some margin of appreciation in this field,[57] same-sex marriage is a hotly discussed topic in many European countries. The Commission observes a trend in some parts of Europe to enable same sex marriage,[58] whereas it is by way of constitutional amendment that same sex marriage is excluded in other countries.[59]

135. Replies: The Replies point out that this provision is in line with the cultural traditions of the people of Russia. The Constitution considers the family as one of the traditional foundations of society[60] and this provision does not impose any discriminatory restrictions on other types of unions, including polyamorous unions, same-sex unions, etc. The European Court of Human Rights had not established a European consensus on a right to marriage for same sex couples.[61] The institute of marriage between a man and a woman "serves the goal of the preservation of the human race".

136. The addition of Article 72 (1) on joint jurisdiction of the Russian Federation and constituent entities of the item (g1) on the "protection of the institution of marriage as the union of a man and a woman" has the effect of permanently excluding same-sex marriage, which excludes further discussion on this topic. The Comments point out that in the absence of European consensus this question cannot be seen as a human rights issue and therefore does not relate to chapter 2 of the Constitution.

137. Article 72 (1) (g1) is one of the provisions that in substance belong to the chapters that can be amended only by a Constitutional Assembly. As a rider, it was added however to a provision on the joint jurisdiction of the Russian Federation and the constituent entities.

7. Non-interference into the internal affairs of the State

138. New Article 79–1 provides that the Russian Federation takes measures to preserve and strengthen international peace and security, to ensure peaceful coexistence of the states and peoples, to prevent intervention into the internal affairs of a State.

57 European Court of Human Rights, Schalk and Kopf v. Austria, 24 June 2010 (Application no. 30141/04); Orlandi and Others v. Italy, 14 December 2017 (Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12).

58 Austria, Constitutional Court, decision G 258/2017 of 04-12-2017 [CODICES: AUT-2017-3-003]; France, Constitutional Council, decision 2013–669 of 17-05-2013 [CODICES: FRA-2013-2-002].

59 Serbia, Article 64 of the Constitution; Georgia, Article 30 of the Constitution; Slovakia, Article 41 of the Constitution.

60 See also Constitutional Court decision no. 24-P of 23 September 2014.

61 Oliari and Others v Italy Italy, Applications nos. 18766/11 and 36030/11), §§ 189–194.

139. Replies: The Replies point out that the Constitution envisages only the sovereignty of the Russian Federation.[62] Article 79–1 does not imply a waiver by the Russian Federation of international treaties and of its international obligations and therefore do not conflict with Article 15 (4) of the Constitution. The principle of non-interference in the internal affairs of a state is a universally recognised principle of public international law, including in Article 2(7) of the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. Therefore, its inclusion in the text of the Constitution of the Russian Federation cannot become an obstacle to the fulfilment of the Russian Federation's international obligations.

140. The Venice Commission agrees that this provision does not and cannot imply a waiver by the Russian Federation of its international obligations. Therefore, the Russian authorities cannot avail themselves of the principle of non-interference in internal affairs to reject criticism of the alleged non-observance of its international obligations.

F. Judiciary

141. Notably in presidential regimes, the independence of the judiciary is an essential element of checks and balances. In respect of the Constitution of Turkey, the Venice Commission was of the opinion that "[i]n a presidential system, important supervisory and control powers fall on the judiciary. The judiciary has to be fully independent from the legislative and, especially, from the executive power and has to be able to check, and if necessary strike down, acts adopted by the parliament and the president."[63] Moreover, "[t]he fundamental principles of the rule of law, the separation of powers and the independence of the judiciary create the framework which legitimates various political systems and forms of government, as long as they remain democratic. Negligence of these fundamental rules could lead to the transformation (or, better, the degeneration) of the whole system into an authoritarian one. This danger is stronger in the case of introduction of a presidential system instead of a parliamentary one. In legal literature, presidentialism is often considered to be generally less conducive to democracy, especially in countries with deep political cleavages, in which more than two political parties compete for power and which do not have a long tradition of political compromises. A presidential regime requires very strong checks and balances. In particular, a strong, independent judiciary is essential because the controversies which in a parliamentary

62 Constitutional Court of the Russian Federation Ruling 249-O, 6 December 2001, para. 3.1.

63 Venice Commission, CDL-AD(2017)005, Turkey – Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para. 111.

regime are normally settled through political debate and negotiations, in a presidential regime often end up before the courts."[64]

1. Criteria of eligibility for judicial office

142. The amendments in Article 119 of the Constitution concern the criteria of eligibility for judicial office. The new components are (i) the requirement to be "permanently resident in the Russian Federation", (ii) the prohibition to hold the citizenship of a foreign state or a residence permit or any other document confirming the right of the holder to permanent residence within the territory of a foreign state, and (iii) the prohibition from opening and holding accounts (deposits) or keeping cash and valuables in foreign banks located outside the territory of the Russian Federation.

143. European and international standards demand that judicial appointments need to be based on objective, transparent and non-discriminatory selection criteria, which can relate to formal requirements (nationality, minimum age, qualifications, professional experience, et cetera), judicial skills and human skills.[65]

144. In so far as the newly introduced criteria aim to secure that only Russian nationals living in the Russian Federation are eligible for judicial office, they appear to be unproblematic. The Venice Commission has previously held that "it is usually a fundamental principle that a country cannot have foreign nationals serving as judges"[66]. Equally, it appears reasonable to expect a judge to live in the country to do his/her work. From the viewpoint of the country concerned, persons with double citizenship are citizens with all rights (e. g. right to vote in national election) and obligation (e. g. military service) pertaining to citizenship. Therefore, it would be less reasonable to rule out double citizens from judicial office, notably as double citizenship is even expressly allowed under Federal law.

64 Venice Commission, CDL-AD(2017)005, Turkey – Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para 44.

65 M. Kuijer, The Blindfold of Lady Justice, Wolf Legal Publishers 2004, p. 222. See, inter alia: CM/Rec(2010)12, para. 44: appointments "should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity." A similar provision is included in the European Charter on the Statute for Judges in sections 2.1 and 2.2. In doing so, it mentions criteria related to legal knowledge (i. e. qualifications and professional experience), judicial skills (i. e. independent thinking and the ability to show impartiality) and human skills (i. e. the candidate's capacity to respect human dignity and put the law into practice).

66 CDL-AD(2013)018, Monaco – Opinion on the balance of powers in the Constitution and the Legislation, para. 86.

145. In so far as the new criteria are introduced to allow the relevant authorities to check the financial assets of judges in order to enforce anti-corruption legislation, they would be equally unproblematic[67] (assuming that this is indeed the rationale behind the amendment).

2. Court Presidents

146. According to Article 102 (1) (g) it is within the jurisdiction of the Federation Council to appoint the President, the Vice-President and the other judges of the Constitutional Court and of the Supreme Court.[68] Article 83 (f) stipulates that the President of the Russian Federation "shall appoint presidents, vice-presidents and judges of other federal courts". It appears that the President of the Russian Federation is empowered to appoint court presidents of federal courts, except for the Constitutional Court and the Supreme Court.

147. Already before the constitutional amendments, court presidents were appointed by the President of the Russian Federation. The amendments constitutionalise this competence. As concerns the level of regulation – constitutional or legislative –, it is true that "[t]here are no standards on whether the appointment of court presidents should be explicitly regulated on the constitutional or legislative level. In any case, in view of the important functions of the court presidents, a clear regulation on their appointment must be adopted. […]"[69]

148. Court presidents have a very powerful role not only in the Russian Judiciary. In general, the Venice Commission recommends depoliticising the appointments of court presidents: "[…] The main role in judicial appointments should […] be given to an objective body such as the High Judicial Council provided […] in the Constitution. It should be understood that proposals from this body may be rejected only exceptionally. From an elected parliament such self-restraint cannot be expected and it seems therefore preferable to consider such appointments as a presidential prerogative. Candidatures should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. For court presidents (with the possible exception of the President of the Supreme Court) the procedure should be the same."[70]

67 CDL-AD(2019)024, Armenia – Opinion on the amendments to the Judicial Code and some other laws, para. 42.

68 There may be a translation error in the English translation of the Constitution (CDL-REF(2021)010).

69 Venice Commission, CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, § 24.

70 CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, § 17.

149. By constitutionalising the power of the President to appoint "other" court presidents, the amendments introduce a further element of strengthening the powers of the President in the delicate field of the judiciary where not only objective elements but also the appearance of independence is important,[71] this results in a further reinforcement of the powers of the President over the court hierarchy.

3. Prosecution office

150. According to the amended Article 129 (3), the "[t]he Prosecutor General of the Russian Federation and deputies of the Prosecutor General of the Russian Federation shall be appointed and dismissed upon consultations with the Council of Federation by the President of the Russian Federation." The previous wording of Article 129 (2) had provided that the "[t]he Prosecutor General of the Russian Federation and deputies of the Prosecutor General of the Russian Federation shall be appointed and dismissed by the Council of Federation upon a proposal of the President of the Russian Federation." The Comments explain that the institute of the Prosecutor's Office had been established in the 18th century under Peter I. The powers of the Prosecutor's Office were significantly reduced in 2007 when the functions of the initiation of criminal cases were transferred to the Investigative Committee of the Russian Federation and the possibility to seek the annulment of court decision was reduced. Nonetheless, the Venice Commission is of the opinion that in view of the wide powers of the prosecution system, attributing the appointment of the Prosecutor General to the President results in a deeply problematic reinforcement of the powers of the President.

151. In 2005, the Venice Commission discussed the overly wide powers of the prosecution system in Russia: "Nevertheless the overwhelming impression remains of an organisation which is still too big, too powerful, not transparent at all, exercises too many functions which actually and potentially cut across the sphere of other State institutions, in which the function of supervision predominates over that of criminal prosecution, but which nevertheless, despite its powers, remains vulnerable to presidential and other political power. The strongly hierarchical structure of the Procuracy, concentrating power in the hands of the Prosecutor General, reinforces these concerns. As it stands, the system does not seem to comply with Recommendation (2000)19 and raises serious concerns of compatibility with democratic principles and the rule of law."[72]

71 Venice Commission, CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 28.

72 Venice Commission, CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, para. 75.

152. This opinion was critical notably of the provisions on supervisory powers, which define "the organs over which supervision is exercised: 'federal ministries, state committees, services and other federal executive authorities, representative (legislative) and executive state authorities of constituent entities of the Russian Federation, local self-government bodies, military administration bodies[…] and heads of commercial and non-commercial organisations'. That is an exceptionally wide circle of entities, encompassing as it does organs of legislative, executive and local-government authority as well as commercial and non-commercial institutions. Combined with the sweeping powers of the Prosecutor's Office as described above, this inevitably raises concerns as to the compatibility of these supervisory powers with the checks and balances required for the functioning of a democratic system."[73]

153. It is regrettable that by attributing to the Prosecutors Office the supervision of the "implementation of laws", the amended Article 129 (1) now even added a constitutional basis for excessive powers.

154. However, it is positive that the Federation Council now has a new competence to hear the annual report of the Prosecutor of the Russian Federation on the rule of law and public order in the Federation (Article 102 (1) (l)).

4. Dismissal of highest judges – Constitutional Court/Supreme Court

155. The amended Article 83 (f3) gives the President the power to propose to the Federation Council the termination "in accordance with the federal constitutional law the powers of the President of the Constitutional Court of the Russian Federation, the Vice-president of the Constitutional Court of the Russian Federation and the judges of the Constitutional Court of the Russian Federation, the Chief Justice of the Supreme Court of the Russian Federation, deputy chief justices of the Supreme Court of the Russian Federation and judges of the Supreme Court of the Russian Federation, presidents, vice-presidents and judges of the cassation and appeal courts in the event of them committing a violation tarnishing the honour and dignity of judge, as well as in other situations established by federal constitutional law demonstrating impossibility for a judge to continue discharging of its powers".

156. Conversely, Article 102 (1) (k), provides as a competence of the Federation Council, the "termination upon proposition of the President of the Russian Federation in accordance with the federal constitutional law of powers of the President of the Constitutional Court of the Russian Federation, the Vice-president of the Constitutional Court of the Russian Federation and the judges of the Constitutional Court of the Russian Feder-

73 Ibid. para. 59.

ation, the Chief Justice of the Supreme Court of the Russian Federation, vice-presidents of the Supreme Court of the Russian Federation and judges of the Supreme Court of the Russian Federation, presidents, vice-presidents and judges of the cassation and appeal courts in the event of them committing a violation tarnishing the honour and dignity of judge, as well as in other situations established by federal constitutional law demonstrating impossibility for a judge to continue discharging of his (her) powers."

157. Replies; The Replies insist that in its decision 45-P of 2 February 2006, the Constitutional Court had noted that only the Supreme Court shall hear as a court of first instance decisions to suspend or terminate the powers of judges. The mandate of a judge can be terminated only if a miscarriage of justice was the result of conduct inherently incompatible with the judge's office (Constitutional Court decision No 3-P of 28 February 2008). Safeguards against the dismissal of judges are not personal privileges but ensure the interests of justice. The procedure of dismissal only concerns judges who by virtue of their position in the judiciary can influence decision-making in their favour by the judicial community. Therefore, this special mechanism restores the balance of power and can be regarded as an extraordinary measure. The commission of an offence against the honour and dignity of a judge is a serious reason to terminate a judge's mandate and this procedure is essentially similar to the "impeachment" procedure applied to judges in a number of countries. The grounds for this procedure are governed by federal constitutional laws, which are not exempt from possible future constitutional review. The new procedure is thus intended to contribute to transparency in the dismissals of these judges. Nonetheless, as the term honour and dignity of a judge indeed leaves some discretion, the judicial authorities are currently preparing a revised code of judicial ethics which will elaborate on these grounds for dismissal. The Comments explain that committing an offense that defames honour and dignity is traditionally the basis for the removal of judges from office. These concepts are applied in reference to the Code of Judicial Ethics. Law No. 3132-I "On the status of judges in the Russian Federation" establishes that the early termination of the powers of a judge occurs in exceptional cases for material, guilty, incompatible with high rank of judge violation of the provisions of substantive law and (or) procedural legislation.

158. The Commission is strongly of the view that the reference in Article 102 (1) (k) to "a violation tarnishing the honour and dignity of judge" is very vague. While this ground for termination already existed on the level of legislation,[74] moving it to the constitutional level compounds the problem. The elaboration of the grounds for dismissal in a Code of Judicial Ethics would be useful but a regulation on the level of law would be

74 See also International Commission of Jurists, Securing justice: The disciplinary system for judges in the Russian Federation Report of an ICJ Mission.

preferable to compensate for the vagueness in Article 102 (1) (k). In the absence of further specification of these grounds, judges would be placed in a position of uncertainty which might have a chilling effect on the independence of the judicial power.

159. In the field of judicial discipline, a balance needs to be struck between judicial independence, on the one side, and the necessary accountability of the judiciary, on the other, in order to avoid negative effects of corporatism within the judiciary. The Consultative Council of European Judges has stated that it does not believe that it is possible to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings.[75] Such codification of misconduct should be done at the national level. A comparative law research report entitled "Judicial Independence in Transition"[76] observed that in many European countries the grounds for the disciplinary liability of judges are defined in rather general terms. As an exception, in Italy the law provides an all-inclusive list of thirty-seven different disciplinary violations concerning the behaviour of judges both in and outside their office.

160. Principle 5.1 of the European Charter on the Statute for Judges states that the grounds giving rise to a disciplinary sanction need to be "expressly defined". A similar wording was chosen by the European Court of Human Rights in the case Pitkevich v. Russia.[77] In this case, the Court found it relevant that the grounds for taking disciplinary action were "precisely defined". This point was repeated in the 2013 Volkov judgment: in the absence of practice, domestic law needs to establish guidelines concerning vague notions to prevent arbitrary application of the relevant provisions: "the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of 'breach of oath' and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects".[78]

161. Moreover, as the UN Basic Principles on the Independence of the Judiciary confirm,[79] disciplinary proceedings against judges shall be conducted according to an established procedure, for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and shall be carried out by an independent authority and subject to review. In its 2015 Concluding observations on the Russian Federation, the UN

75 CCJE-GT (2002) 7, p. 32.

76 Seibert-Fohr, Anja (ed.); [Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht], Beiträge zum Ausländischen Öffentlichen Recht und Völkerrecht; vol. 233, Berlin, 2012.

77 ECtHR (admissibility decision) 8 February 2001, Pitkevich v. Russia (appl. no. 47936/99).

78 ECtHR, Oleksandr Volkov v. Ukraine of 9 January 2013, application no. 21722/11, para. 185.

79 UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principles 17–20.

Human Rights Committee recommended that the Russian Federation "ensure that an independent body is responsible for judicial discipline, clarify the grounds for disciplinary action and guarantee due process in judicial disciplinary proceedings and independent judicial review of disciplinary sanctions".[80] Any decision on the dismissal of judges taken by the legislative or executive power should always be precedent by, and conditioned upon, a disciplinary decision issued within the judiciary itself.

162. The Venice Commission acknowledges that using broadly defined norms cannot be completely avoided. The Opinion on the Judicial System Act of Bulgaria states that "[t]he Venice Commission acknowledges that, in defining unethical behaviour, the law may have recourse to some comprehensive formulas".[81] However, the Commission has previously noted that concepts such as the "dignity of a judge" are too subjective to form the basis of a disciplinary liability.[82] Similarly, the Commission has previously commented that "undermining the reputation of the court and judicial function" is excessively vague.[83] In its 2016 Rule of Law Checklist, the Venice Commission stressed that "offences leading to disciplinary sanctions /for judges/ and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s)".[84] These requirements belong among the guarantees of the independence of the judiciary as one of the main elements of the rule of law.

163. When using open-ended notions, it is particularly important which body is assigned with the interpretation and application of such notions in practice. The constitutional arrangements in the Russian Federation allocate this task to the Federation Council which appears to be at odds with international standards. In the 2013 Volkov judgment, the ECtHR emphasised the importance of the independence and impartiality of the body imposing disciplinary sanctions and referred to the European Charter on the Statute for Judges in this respect (i. e. the substantial participation of judges in the relevant disciplinary body). The Venice Commission has likewise stated on various occasions that the removal of a judge from office should not be imposed by a political body.[85]

80 UN Doc. CCPR/C/RUS/CO/7, Concluding observations on the seventh periodic report of the Russian Federation, 28 April 2015.

81 CDL-AD(2017)018, Bulgaria – Opinion on the Judicial System Act, para. 108.

82 CDL-AD(2014)018, Kyrgyz Republic – Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges, para. 22.

83 CDL-AD(2015)053, Former Yugoslav Republic of Macedonia – Opinion on Laws on the Disciplinary Liability of Judges and Evaluation of Judges, para. 36.

84 Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, para 78.

85 See for example Venice Commission, CDL-AD(2018)028, Malta – Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, para. 53.

164. The Commission was informed that the Federation Council asked the General Assembly of Judges to draw up a list of examples clarifying this notion to be put in the Judicial Code of Ethics. The Venice Commission welcomes this information and recommends that the Federation Council include such criteria in the implementing legislation.

165. Article 18 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation[86] requires a decision from the Constitutional Court itself and (in specific cases) a qualified majority of not less than two-thirds of the acting judges. It provides that the termination shall be effected by the Federation Council upon the submission of the Constitutional Court.

166. What is new and worrying, given the vagueness of this ground (and other grounds in Article 18 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation), is the body to whom the interpretation and application of this ground is assigned. The initiative for the termination of powers has now been shifted from the Court itself to the President, which constitutes a severe interference with the independence of judges. It is not clear whether the wording of Article 83 (f3) and 102 (1) (k) ("in accordance with federal constitutional law") means that the requirement of a submission of the Constitutional Court shall be maintained. The Comments point out that the President the President would exercise his powers under Article 83 (f3) only based on a submission by the Court itself. However, there is no constitutional guarantee for that.

167. In the light of the problematic constitutional provisions, the Commission recommends including in implementing legislation the criteria for dismissals that are currently being prepared by the General Assembly of Judges and to specify that disciplinary liability may only be engaged if a violation has been committed 'deliberately'/'with intent' or 'with gross negligence' which would prevent application of open-ended notions too

86 Art. 18 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation)
The termination of the powers of the Judge of the Constitutional Court of the Russian Federation shall be implemented by the decision of the Constitutional Court of the Russian Federation which shall be transmitted to the President of the Russian Federation, to the Federation Council and which shall constitute an official notification of the occurrence of the vacancy.
The termination of the powers of the Judge of the Constitutional Court of the Russian Federation under the provisions of Paragraph 1 of Section One of the present Article shall be effected by the Federation Council upon the submission of the Constitutional Court of the Russian Federation.
Termination of powers of a Judge of the Constitutional Court of the Russian Federation on the ground indicated in Item 6, 7 or 8 of Section 1 of the present Article shall be effected by the Council of Federation upon submission of the Constitutional Court of the Russian Federation adopted by the majority of not less than two thirds of the number of acting Judges.

hastily.[87] The Comments point out that this already corresponds to the current practice of the implementation of the legislative provisions.

5. Reduction of the number of judges of the Constitutional Court

168. Article 125 (1) reduces the number of the judges of the Constitutional Court from 19 to 11, including the Chairman of the Court and his/her deputy. Article 3 (7) of the Amending Law provides that the judges of the Constitutional Court who are in office on the day on which Article 1 of the Amending Law enters into force, shall continue to exercise their powers and no new judges shall be appointed until the number of 11 is reached. The current number of judges is 12.

169. Replies: The Replies explain that after the adoption of the Constitution in 1993, the Constitutional Court originally operated in two chambers of 9 and 10 judges respectively. This separation into two chambers was later abolished. Courts which operate in chamber usually have a larger number of judges. Given that the Constitutional Court now only works in plenary, the large number of judges was no longer justified. The determination of the number of judges of the Constitutional Court is in the discretion of the constitutional legislator. In any case, there will be no early termination of mandates and all current judges remain in function until the expiry of their mandates (there is no age limit for the President of the Constitutional Court according to Article 13 of the Federal Constitutional Law on the Constitutional Court).

170. The Venice Commission agrees that the number of judges at the highest courts and tribunals of a state, including constitutional courts, varies largely from country to country and there is no ideal number. For each country, the appropriate number depends on inter alia the procedural laws and the ensuing workload for such courts, the legal culture and the overall trust of the people in the justice system.[88]

171. Nonetheless, even if the mandates of the current judges are not affected, the Commission notes that Article 3 (7) of the Amending Law explicitly refers to the grounds for the termination of powers as described by the Federal Constitutional Law on the Constitutional Court of the Russian Federation. Such a reference to the grounds for dismissal the Constitutional Court judges in the Amending Law, taken together with the President's new competence to initiate their dismissal(see above), could have a chilling effect for the current Constitutional Court judges.

87 Cf. CDL-AD(2017)018, para. 106.

88 CDL-AD(2019)027, Ukraine – Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies, para. 40.

6. *A priori* control by the Constitutional Court

172. Article 125 (5–1) establishes a new competence of the Constitutional Court, which upon request by the President shall *inter alia* verify the constitutionality of draft laws before the enactment by the President.

173. Replies: The Replies point out that *a priori* constitutional review has long been known in constitutional law theory as a means of checking the constitutionality of laws that are not yet in force, as a mechanism in the system of checks and balances.

174. The Venice Commission has previously held that a combination of a priori and a posteriori control needs to be approached carefully.[89] When a draft law is submitted to purely abstract control its scope of practical application and interpretation by the ordinary courts is not yet known. Often, a pre-existing unconstitutionality becomes visible only in the practice of the application of the law. The legislation on the Constitutional Court should ensure that a priori control does not exclude *a posteriori* control of provisions that were found to be constitutional in the abstract procedure.

7. Conclusion on the Judiciary

175. Even if certain amendments taken in isolation fall within the discretion of the national constituent legislator, the Venice Commission is of the view that, taken together (and in the light of the changes in the composition of the Federation Council (see Article 95)), the provisions on the Judiciary may amount to a serious danger for the rule of law in the Russian Federation. This danger should be mitigated by implementing legislation.

VI. Conclusion

176. By letter of 29 May 2020, the Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on constitutional amendments and the procedure for their adoption in the Russian Federation.

177. The Venice Commission has already dealt with some of the 2020 Constitutional Amendments to the Constitution of the Russian Federation in its previous opinion CDLAD(2020)009. The present opinion therefore addresses the remaining substantive issues which were not analysed in the previous opinion as well as the procedure for the adoption of the amendments.

89 Venice Commission, CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paragraph 37; 49–50.

178. The Venice Commission welcomes that the Amendments bring about a number of positive changes, inter alia:

- The increased protection of social rights.
- The two-term limitation of the mandate of the President.
- The possibility for the President to refer to the Constitutional Court the use of a presidential veto.
- The constitutionalisation of the State Council, which has, already for two decades, operated based solely on an executive legal act.
- The extension of parliamentary control, including the possibility of carrying out inquiries into the heads of state bodies and the competence to "hear" the annual report of the Prosecutor of the Russian Federation.
- The introduction of a fixed six-year term for most of the Senators of the Federation Council.

179. Nonetheless, the Commission has also identified some serious flaws in the Constitution and the procedure of its adoption.

180. As to the **procedure of the adoption of the amendments**, the Venice Commission concludes that the speed of the preparation of the preparing such wide-ranging amendments was clearly inappropriate for the depth of the amendments considering the (societal) impact of the amendments. This speed resulted in a lack of time for a proper period of consultation with civil society prior to the adoption of the amendments by parliament. In view of the subject matters which were covered, a Constitutional Assembly should have been convened under Article 135. As a Constitutional Assembly was not convened, the Amendments were adopted under the procedure of Article 136 of the Constitution. Once the two steps of this procedure were exhausted (adoption by Parliament and the constituent entities of the Federation) the Amendments had to enter into force. A possible negative outcome of the additional steps which were introduced by ordinary law, (the control by the Constitutional Court and the all-Russian vote), could not prevent the entry into force of the Amendments under the procedure foreseen in the Constitution.

181. The procedure used to amend the Constitution creates an obvious tension with article 16 of the Constitution which safeguards the "the fundamental principles of the constitutional order of the Russian Federation".

182. Analysing the **substance of the amendments**, the Venice Commission concludes that they have disproportionately strengthened the position of the President of the Rus-

sian Federation and have done away with some of the checks and balances originally foreseen in the Constitution.

183. The *ad hominem* exclusion from the term limits of the current and previous Presidents contradicts the very logic of the adopted amendment limiting the President's mandate to two terms. The unusually wide scope of immunity, taken together with rules of impeachment that make it very difficult to dismiss a President put an excessive limit on the accountability of the President.

184. The President has acquired additional powers at the expense of the Chairman of the Government. The increase in the number of Senators appointed by the President may give the latter additional leverage, thus raising doubts as to whether the Federation Council will be independent enough from the executive to be able to exercise the monitoring functions entrusted to it by the Constitution.

185. Taken together, these changes go far beyond what is appropriate under the principle of separation of powers, even in presidential regimes.

186. The Amendments weaken constituent entities and local self-government bodies. The inclusion of provisions referring to the Russian nation creates a tension with the multi-ethnic character of the Russian Federation.

187. With regard to the judiciary, the amendments, notably the power for the President to initiate the dismissal of apex court presidents as well as presidents, vice-presidents and judges of the cassation and appeal courts on the basis of a very vague ground, and the conferral of the relevant decision to the Federation Council, affect the core element of judicial independence. Taken together, the amendments to the provisions on the Judiciary amount to a danger to the rule of law in the Russian Federation. The Venice Commission recommends at the very least to include in the implementing legislation the detailed criteria of what constitutes "a violation tarnishing the honour and dignity of judge" and "impossibility of discharging the functions of a judge" as defined by the Assembly of Judges. In addition, the implementing legislation should specify that disciplinary liability may only be engaged if a violation has been committed 'deliberately'/'with intent' or 'with gross negligence' which would prevent application of open-ended notions too hastily.

188. The Comments by the State Duma note that many of the amended constitutional provisions considered will be developed in legislation and in the practice of their application. Only on this basis, will it be possible to make balanced conclusions on the development of constitutionalism in the Russian Federation. The Venice Commission will complement this interim opinion with a final opinion, taking also into account major implementing legislation.

189. The Venice Commission remains at the disposal of the Russian authorities and the Parliamentary Assembly for further assistance in this matter.

ELENA V. GRITSENKO

Federalism and Local Self-Government in the Light of Russia's 2020 Constitutional Reform*

1. Introduction

Russia's 2020 constitutional reform is full of paradoxical elements which render a legal analysis difficult and are more appropriately the object of political studies and various speculations. One paradox is that, on the one hand, the title of the constitutional amendment act[1] and the choice of the chapters of the Russian Constitution that were amended suggest that the focus of the constitutional reform lies on questions of the territorial organisation of public power and the vertical separation of powers as well as the horizontal partition of power. On the other hand, however, questions of federalism and local self-government were hardly touched in the wider public or expert discussions. These questions remained marginal in the campaign and public information concerning the all-Russian people's vote on the adoption of the amendment as well.[2]

Another logical and legal contradiction is that elements of other constitutional institutions and even aspects of an ideological nature are included into the chapter on the federal structure. These include provisions about traditional values that aim at the protection of the constitutional, state and cultural identity of the Russian Federation and its peoples (Article 67.1 Constitution RF), or provisions on the realisation of human and civil rights and duties, especially guarantees for social and labour-related rights (Articles 75 and 75.1 Constitution RF). If we take into account that the values proclaimed in the chapter "Federal Structure" merely repeat the provisions in the preamble of the

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1 Law of the Russian Federation no. 1-FKZ on an amendment of the Constitution of the Russian Federation of 14th March 2020 "On the perfection of the regulation of various questions of the organisation and the functioning of the public power" (Amendment Act).

2 N. Zotova, Golosovanie po popravkam v Konstitutsiyu Rossii: kakie temy prodvigaet reklama i chego izbegayut agitatory, https://www.bbc.com/russian/features-53111327 (last visit: 22th June 2020); Buklet "Popravki k Konstitutsii Rossiiskoi Federatsii: nasha strana, nasha Konstitutsiya, nashe reshenie", http://cikrf.ru/analog/constitution-voting/informatsionnye-materialy/makety/ (last visit: 4th July 2020).

1993 Constitution, adding only some additional aspects,[3] their relevance to the federal structure is unclear. The Constitutional Court of the Russian Federation, in its opinion on the Amendment Act before its entering into force,[4] had problems in determining the place of the "*complex of the amendments that aim at the protection of the* ***all-Russian state identity***" (emphasis added by the author) within the federal structure. The Constitutional Court identified this all-Russian state identity as a new element of the constitutional status of the Russian Federation on the one hand and as a constitutional condition and task for the activities of the organs of state power of the Russian Federation and, to a considerable extent, also of the organs of state power of the subjects of the Russian Federation on the other hand.[5] These identity-based tasks are worded in a very general manner and do not differentiate between the federation and its subjects so they sound as if they were directed at the Russian Federation in general.

But can these conditions and tasks be considered to be elements of the constitutional status? And to what extent do they address exclusively the organs of state power of the federation and its subjects? One is as doubtful as the other because this historical-cultural background was not ignored in the preamble to the 1993 Constitution as historical and cultural traditions linked to a uniform social community, the multinational people of the Russian Federation. The attempt to include them in the Amendment Act now as characteristics and tasks of the Russian Federation and thus to provide additional unclear ideological elements[6] was not linked to the institute of the federal structure

3 Compare: "We, the multinational people of the Russian Federation, united by the common fate on our soil" (Preamble) and "The Russian Federation, united by a history of a thousand years …" (Article 67.1(2) Constitution); "We, the multinational people of the Russian Federation, … preserving the historically developed state unity" (Preamble) and "The Russian Federation … recognizes the historically developed state unity (Article 67.1(2) Constitution); "We, the multinational people of the Russian Federation, … honouring the renown of the ancestors who passed down on us the love and respect towards the fatherland as well as the faith in the good and in justice …" (Preamble) and "The Russian Federation … protects the memory of the ancestors who handed down on us their ideals and the faith in god, as well as the continuity of the development of the Russian state" (Article 67.1(2) Constitution).

4 Opinion of the Constitutional Court of the Russian Federation of 16th March 2020 no. 1-Z on the request of the President of the Russian Federation about the question whether the provisions of the law of the Russian Federation no. 1-FKZ on the amendment of the Constitution of the Russian Federation "On the perfection of the regulation of various questions of the organisation and the functioning of the public power", not yet entered into force, are compatible with the provisions of chapters 1, 2, and 9 of the Constitution of the Russian Federation, as well as whether the procedure to set Article 1 of that law into force corresponds with the Constitution of the Russian Federation.

5 Point 3. par. 1 of the Opinion.

6 In fact, the choice is very arbitrary. Not all historical-cultural achievements of the multinational people of the Russian Federation are expressed equally clear in the tasks of the state. The provision in the preamble that confirms the *inviolability of the democratic basis of Russian statehood* (emphasis added by the author) by the multinational people is not continued in chapter 3 with similar clarity.

or to new rules on the relations of the federation with its subjects. The purpose of the amendments on all-Russian state identity seems instead to lie in the intention to provide the constitutional amendments with an ideological tinge and thus with a certain meaning. This gives rise to the danger that the ideological elements are transformed into tasks for the state and its organs by empowering the legislator to use the extremely vague wording as a constitutional basis for further limitations of constitutional rights, especially of the freedoms of speech and of art. We cannot, for instance, be sure that the "*historical truth*" (emphasis added by the author) which is not always clearly identifiable but now has to be protected by the Russian Federation (Article 67.1(3) Constitution RF) will not lead to new criminal offences designed to protect it against encroachments or distortions.

A systematic analysis of the amendments concerning the federal structure and local self-government permits us to classify the pertinent amendments according to their legal content and aim into the following groups:

- Editorial changes of the existing text of the Constitution that do not affect the content of the provisions but merely change their wording.
- Relative changes, i. e., modifications of an ideological nature without an immediate connection to the institutions of the federal structure or local self-government, with a declarative character, but carrying the potential for a transformation into concrete tasks, including the introduction of prohibitions or the limitation of rights and freedoms. The relativeness of these changes lies in the wide margin of discretion that they give to the legislator in their interpretation or the conservation of the status quo.
- Constitutional amendments that change the Russian model of the federal structure and local self-government and require, in addition, implementation by the Russian law-maker.
- Closely related are amendments that incorporate existing and practically applied laws into the Constitution and refer to laws. The particular trait of these amendments lies in the fact that they frequently lift onto the constitutional level constitutionally debated legislative interpretations of the federal relations and the organisation of local self-government, interpretations which have been the object of constant and quite sharp criticism by constitutional lawyers and a potential object of the scrutiny of the Constitutional Court, thus making them a part of the constitutional system of federalism and local self-government. To confer a constitutional rank to such laws violates the Constitution internally because this creates contradictions within one uniform legal act. The basic problem arises how to bring

these new constitutional provisions into an inner harmony with the unchanged constitutional basics and constitutional rights in the Chapters 1 and 2 of the Constitution.

Let us now have a closer look at the various amendments to the federal structure and local self-government, their legal content and their purpose.

2. Unity of the system of public power

The amendments are summarized succinctly by the name of the Amendment Act and the terms introduced into the text of the Constitution: "*organisation of public power*" and "*uniform system of public power*" [Articles 67(1), 71 lit. d), 80(2), 83 lit. f.5, 131(3), 132(3) Constitution RF]. The meaning of the term "public power" in relation to the term "state power" remains unclear. The explanatory letter of 20th January 2020 only contains the following passage: "*In conformity with the bill, the organs of local self-government and the organs of state power of the Russian Federation enter into a uniform system of public power in the Russian Federation and co-operate to exercise as effectively as possible the competencies of state importance*".[7]

At the same time, the Constitutional Court introduced the term "public power" long ago into the legal thinking in order to denote the interrelation between state power (of the federation and the subjects) and local self-government. In doing so, the Constitutional Court emphasised the unity of the structural principles of all public power in the Russian Federation and indicated that the organisation of power on the local level "*has to correspond to the basics of the constitutional order of the Russian Federation and to the principles that are derived from these basics: democracy and decentralisation of public power, irrespective of the fact whether they are exercised by an organ of state power of the local level or by a communal organ that does not belong to the system of state power*".[8] Furthermore, it is remarkable that the Constitutional Court recognizes the functional connection between state power and local self-government[9] and confirms their organisational separation in most cases, especially the non-integration of the organs of local self-govern-

7 See: http://kremlin.ru/supplement/5473.

8 Point 7 par. 3 of the decision of the Constitutional Court of the RF of 24th January 1997 no. 1-P "Re examination of the constitutionality of the law of the Udmurt Republic 'On the system of the organs of state power in the Udmurt Republic' of 17th April 1996" (Udmurtia decision), Vestnik Konstitutsionnogo Suda RF 1997 no. 1; on the question of the term "public power" in the Russian literature see N. S. Bondar': Grazhdanin i publichnaya vlast': Konstitutsionnoe obespechenie prav i svobod v mestnom samoupravlenii, Moscow 2004; V. E. Chirkin: Sovremennye modeli publichnoi vlasti, Trudy Instituta gosudarstva i prava RAN 2013 no. 3, pp. 42–63; S. S. Zenin: Pravovoe zakreplenie sistemy vlasti v Konstitutsii RF: teoreticheskii aspekt, Lex Russica 2013 no. 12, pp. 1366–1373.

9 Sect. 7 par. 7 of the Opinion.

ment into the system of the organs of state power which is an immediate consequence of Article 12 Constitution RF.[10]

The Amendment Act deviates from this logic and emphasises the organisational aspect of the unity of the system of public power which is not limited by any other aspect of this unity, i. e., emphasises the coordinated functioning and the co-operation of organs stemming from various autonomous systems. Thus, Articles 80(2) and 132(3) Constitution RF hold that the *organs* of state power and the *organs* of local self-government pertain to the uniform system of public power. Although the constitutional amendments do not mention expressly a uniform system of the *organs* of public power, there is the clear danger of such an interpretation of these constitutional provisions. There is also the danger that federal organs will interfere into the organisational independence of the subjects and that organs of the federation and of its subjects will interfere into the organisational independence of local self-government. In this context, it is significant that Article 131(1.1) of the Constitution RF incorporated the contentious provision of Article 34(4) of the Federal law on the organisation of the local self-government,[11] giving the organs of state power the right to be involved, in the cases and procedures established in a federal law, in the formation of the organs of local self-government as well as the appointment and dismissal of officials of the local government.

The unity of the organs of the federation and of its subjects in the system of public power is another field where the Amendment Act grants the federal law-maker wide discretion. The first chapter of the Constitution, containing the principles of the federal structure in Article 5(3), affirms the unity of the system of state power. Until now, this unity was interpreted under the aspect of uniform organisational principles of the system of the organs (sovereignty of the people, democratic rule of law, separation of powers), with a view to both the federal system and the systems of the organs of state power of the subjects. This unity (uniformity) was interpreted predominantly in a functional way. Each system of organs, the federal system and the systems of the subjects, was considered to be autonomous: the pertinent public structures establish themselves independently from each other [Articles 11(2) and 77(1) Constitution RF]. A systematic interpretation of Article 5(3) in conjunction with Article 77(1) and (2) Constitution RF limited the extension of the principle of the unity of the system of organs of state power of the federation and of the subjects exclusively to the organs of the executive branch and only to cases *when they exercised powers of the RF* in matters of exclusive

10 Point 4 of the Udmurtia decision.

11 Federal law no. 131-FZ of 6th October 2003 "On the general principles of the organisation of local self-government in the Russian Federation".

federal jurisdiction and of joint jurisdiction of the federation and its subjects.[12] Accordingly, the Constitution formulated the exercise of federal powers by the organs of the subjects, acting as agents of the federation, as a prerequisite for the inclusion of the executive organs of the subjects into a uniform system and the establishment of their hierarchical dependence on executive federal organs.

The Amendment Act no longer links the inclusion of the organs of state power of the subjects into a uniform system of public power to the exercise of some federal competency. The law-maker may interpret this as a basis for widening federal involvement in the establishment of organs of state power of the subjects as well as the appointment and dismissal of officials of the subjects. The pre-existing presidential powers (contained in federal legislation) to take part in the appointment and dismissal of the chiefs of the subjects[13] and in the dissolution of legislative (representative) power organs of the subjects,[14] are now given a constitutional basis. The power of the President to guarantee a harmonised functioning of all "*organs in the uniform system of public power*" [Article 80(2) Constitution RF] creates an additional basis for federal interference into the organisation and exercise not only of the state power in the subjects, but also directly and under circumvention of the regional level into the public power of local self-government.

One important element in the uniform system of public power is the judicial system of the Russian Federation which comprises federal courts as well as courts of the subjects, as the Constitution and a federal constitutional law set out. Until now, the Constitution refrained from listing the judicial organs and left the organisation and reform of the court system to the federal legislator; the federal constitutional law on the court system[15] provided for federal courts as well as constitutional courts and justices of the

12 For more detail see E.V. Gritsenko: Razgranichenie i peredacha polnomochii v sisteme publichno-vlastnykh otnoshenii, Sravnitel'noe konstitutsionnoe pravo 2009 no. 2 pp. 72–91.

13 The most relevant piece of legislation is the Federal law no. 184-FZ of 6th October 1999 "On the general principles of the organisation of the legislative (representative) and the executive organs of state power of the subjects of the Russian Federation" (henceforth: Subjects power organs act). It gives the President the power of consultation with the candidates for the office of the leader of a subject [Article 18(3) no. 4], the right to approve of a nomination of a candidate for the office of the leader of a subject if the office becomes prematurely vacant due to a voluntary resignation [Article 18(3) no. 7], the power to recommend the election of a candidate for the office of the leader of a subject by the legislative organ of the subject [Article 18(3.2) no. 6 and (3.2.1.), the right to appoint a provisional leader of a subject [Art. 19(9), (9.1)], and the right to dismiss a leader of a subject because of a vote of no-confidence by the legislative organ of the subject [Article 19(1) lit. b)] or because the President lost his confidence [Article 19(1) lit. d)].

14 Article 9(4) no. 1 d) Subjects power organs act.

15 Federal constitutional law no. 1-FKZ "On the court system of the Russian Federation" of 31st December 1996.

peace of the subjects [Article 4(2)]. The existence of constitutional courts in the system of the subjects' organs of state power and the protection of the regional constitutions that they provided were traditionally deemed to be a confirmation and illustration i. a. of the autonomy of the subjects.[16] Now, however, Article 118(3) Constitution RF is supplemented with a provision that "*the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, the federal courts of ordinary jurisdiction, the economic courts and the justices of the peace form the court system of the Russian Federation*". To include a list of the elements that form the court system of the Russian Federation into the text of the Constitution and, at the same time, to maintain a reference to a federal constitutional law on the court system gives rise to a number of questions and uncertainties. First, the differentiation of the federal courts into courts of ordinary jurisdiction and economic courts, as such originating from Soviet times, receives a constitutional basis which terminates the discussion about further separate judicial branches (such as, e. g., administrative courts) and stops the federal legislator from developing the federal court system. Second, this list does not mention the constitutional courts of the subjects. As a consequence, it is unclear whether the list in the Amendment Act is final. A positive, yet constitutionally quite debatable decision of the Constitutional Court threatens the very existence of the institution of a constitutional judiciary in the subjects.[17]

This creates the danger that the principle of the autonomy of the subjects in the appointment of their organs and the principle of the organisational autonomy of the local self-governments will finally dissolve in a uniform system of public power. One of the most important indicators of the constitutional status of the subjects, the "*creation of their own system of state power in accordance with general principles established by federal law*", is limited even more, rendering the Russian Federation even more centralist.

3. Delimitation of competencies between the federation and its subjects, competencies of local government

Unlike Germany, the vertical delimitation of competencies between the federation and the subjects in Russia is not set out according the horizontal separation of powers in legislative, executive, and judicative state activities. The competencies of the federation and the subjects are not marked off functionally but following *criteria of the subject-mat-*

16 For more detail see E. V. Gritsenko: Federativnaya gosudarstvennost' Rossii i Germanii v zerkale konstitutsionno-sudebnogo pravoprimeneniya: znachenie nemetskoto opyta dlya rossiiskoi praktiki, Pravoprimenenie 2019 T. Z. no. 3, pp. 21–43, at p. 31.

17 The Constitutional Court, in point 5 of its Opinion, refers to the final character of the new constitutional list and does not see a contradiction to Articles 10 and 11 Constitution RF.

ter, i. e., competencies are defined as fields of real life activities, state polity, and legislation. This application of mixed criteria is the very basis of the lists of subject-matters in exclusive federal jurisdiction (Article 71) and subject-matters in the joint jurisdiction of the federation and its subjects (Article 72) in the Constitution of 1993. Therefore, it is assumed that for instance in matters in exclusive federal jurisdiction federal organs possess all competencies of both legislative and executive nature. The simultaneous application of several criteria of delimitation does not allow, however, a clear separation of matters in exclusive federal and in joint jurisdiction.

The Constitution determines the jurisdiction of the subjects with the "residue principle": the subjects have full jurisdiction outside the jurisdiction of the federation and the joint jurisdiction (Article 73 Constitution RF). This does not mean, however, that jurisdiction is delimited in favour of the subjects: The spheres of life activities, state policy and legislation as objects in the jurisdiction of the federation and in joint jurisdiction are determined through the application of various, frequently overlapping criteria, and are phrased in such a wide manner that practically no sphere of exclusive jurisdiction of the subjects remains.[18]

Despite the very detailed and profound criticism of the jurisdiction delimitation criteria in legal literature, the contents of the provisions in Articles 71–73 Constitution RF were hardly changed. On the one hand, numerous amendments of Articles 71 and 72 Constitution RF were of an editorial nature, making the existing text more precise.[19] On the other hand, the amendments not only do not eliminate uncertainties in the criteria delimiting the jurisdictions and overlaps in a larger number of subject-matters, but they added even new contradictions. The adoption of the "*organisation of public power*" as a matter of exclusive federal jurisdiction in Article 71 lit. d) Constitution RF especially contradicts the principle of a federal structure which presupposes a sufficient amount of jurisdiction with the subjects so that these may organise their public power autonomously. Furthermore, this exclusive federal jurisdiction overlaps with the joint jurisdiction of the federation and the subjects to "*determine the general organisational principles of the system of the organs of state power and of the local self-government*" in Article 72(1) lit. m) Constitution RF. This shows that the Constitutional Court and the law-maker face serious tasks to ensure the inner coherence of the provisions in the amended constitutional text on the delimitation of jurisdictions. Until now, the Constitutional

18 A. Blankenagel: V poiskakh ischeznuvshikh isklyuchitel'nykh polnomochii sub''ektov Rossiiskoi Federatsii, Sravnitel'noe konstitutsionnoe obozrenie 2007 no. 7 p. 153. On the question of contradictions in the delimitation of the jurisdictions of the federation and its subjects in the Russian constitutional model see also: I. A. Umnova: Konstitutsionnye osnovy sovremennogo rossiiskogo federalizma, Moscow 1998, pp. 189 et seq.

19 Examples are the "activities in the cosmos" being replaced by "cosmic activities" or "information" being supplemented by "information technologies" in Article 71 lit. i) Constitution RF.

Court, in point 3.1 par. 4 of its Opinion, merely stated, without giving any reasons, that the amendments and specifications of the jurisdictions in Articles 71 and 72 Constitution RF "*do not deviate from the principle of federalism and do not contradict the ensuing criteria for the delimitation of jurisdictions*".

The constitutional approach to the structure of the competencies of the organs of local self-government changes in accordance with the federal legislation on local self-government and the interpretation of the Constitutional Court. In its old version, Article 132 Constitution RF only mentioned the powers to decide questions of local importance and certain state competencies delegated by a federal or a regional statute as elements of these competencies. Now, the constitutional competencies of the organs of local self-government include *other competencies*, exercised by them in consultation with the organs of state power in the framework of the uniform system of public power such as ensuring "*access to medical care*" [Article 132(1) and (3) Constitution RF][20]. The Constitution does not shed any light on the nature of these competencies, but their legal content strongly resembles the powers of organs of local self-government to participate in the fulfilment of public tasks of a general state nature contained in the Federal law on local self-government.[21] The Constitutional Court confirmed in a decision of 2018[22]: The power to decide in questions of local importance, attributed to the communal organs, does "*not exclude their constructive co-operation with organs of state power for an effective fulfilment of general tasks, linked immediately with questions of local importance, in the interest of the population of the communal structures, as well as the participation of organs of local self-government in the fulfilment of these or other public functions of state importance – in the procedure to transfer individual state competencies [Article 132(2) Constitution RF]* ***as well as in other forms*** *(emphasis added by the author)*".[23] Thus, the Constitutional Court too accepts, within the framework of the powers of communal organs to co-operate with organs of state power, communal competencies to participate in the fulfilment of public functions that are not transferred by law.

The problem with this group of competencies that belong neither to the questions of local importance nor to the state competencies transferred by law is the financial guaran-

20 It is remarkable that Article 132(1) Constitution RF enumerates the power of the organs of local self-government to ensure access to medical care in the limits of their powers and in accordance with the federal law as an additional power which is not a part of the other competencies of the local organs to decide questions of local importance.

21 Article 20 nos. 4, 4.1 and 5 of the Federal law on local self-government.

22 Decision of the Constitutional Court no. 33-P of 18th July 2018 on the examination of the constitutionality of Article 242 no. 3 of the Budget Code of the Russian Federation on the basis of a complaint of the local structure – municipal borough of the city of Chita.

23 Decision of the Constitutional Court no. 33-P of 18th July 2018 (fn. 22), point 2 par. 3 and 4, with further references.

tee – the exercise of these competencies is always financed from the communal means of the local budget. Until now, the communal organs could decide themselves whether or not they assumed these additional optional competencies, if the opportunity arose and they possessed the necessary financial means (Article 20 no. 5 par. 3 of the Federal law on local self-government). The new rules in the Constitution no longer leave the communal structures any choice. There is the risk that these competencies are converted from optional ones into ones that a federal law makes compulsory. Until now, the Constitution does not guarantee financial compensation because the competencies do not fall under the rule of Article 132(2) Constitution RF.

As a matter of fact, the new version of Article 133 Constitution RF awards the organs of local self-government in such cases the right to have recompensed the additional expenditure incurred "*as a consequence of the fulfilment of public functions by the organs of local self-government in co-operation with organs of state power*". Such a post factum guarantee obviously does not carry the same weight as the guarantees for financial compensation accompanying the transfer of individual state competencies in the statutory procedure. The organs of local self-government are obliged to prove that they incurred additional expenditure in order to obtain compensation.

It is also remarkable that the Amendment Act defines the guarantees for compensation more narrowly than the former version of Article 133 Constitution RF which had granted local governments a right to obtain compensation for additional expenditure as a consequence of decisions of organs of state power independently from the nature of the competencies transferred on the communal organ and of the ensuing obligations. Now, additional expenditure is reimbursed only if the organs of local self-government exercise public functions in co-operation with organs of state power. Given the logics of the adversary procedure, the onus of proof not only for the expenditure but also for the cooperation in the fulfilment of public functions rests with the claimant local self-government.

The new wording of Article 132(1) Constitution RF modifies the issue of local importance in the field of taxation, too: the organs of the local self-government no longer decide about the "*establishment*" of local taxes and levies, but only about their "*introduction*". Despite the centralised character of the Russian budget and tax system, the constitution-maker of 1993 took into account the provisions of the – at that time not yet ratified – European Charter of Local Self-Government when codifying the requirement of a statutory basis for establishing tax duties (Article 57 Constitution RF) and concentrating far-reaching powers in the field of taxation in the hands of the federal law-maker insofar as the communal structures were given the right to "establish" local taxes. Article 9 par. 3 of that Charter proclaims, among the financial guarantees of the

local autonomies, their right to determine autonomously and in the framework of the law the rates of local taxes and levies. There is wide agreement that the determination of the rates of local taxes includes their establishment. Article 132(1) Constitution RF with its provisions about the establishment of local taxes does not contradict Article 57 Constitution RF with its guarantee that taxes and levies have to be established by statute. Local taxes, too, are established primarily by statute, the Code of Taxation, which grants the representative organs of the communal structures only some competencies to establish individual elements of the local taxes (tax rates, payment procedure and deadlines, peculiarities of the tax base, tax privileges, reasons and procedure of their application) – and even this only if the code itself does not regulate these aspects.[24]

At the same time, the literature on tax law criticised the use of the term "*establishment of a tax*" to denote different competencies of public entities.[25] There were suggestions to name the mentioned competencies of communal organs competencies "to introduce a tax" and not "to establish a tax"; the latter competency was to remain with the legislator. Assuming that "*to establish a tax*" and "*to introduce a tax*" are indeed two legally separate actions which follow each other in a way that the "*establishment*" occurs through legislation and the "*introduction*" is limited to the competent public entity regulating the elements not regulated by law and introducing the tax in the pertinent territory, the constitutional amendment referring to local taxation may be interpreted as a clarifying modification that does not change the content of the constitution. If, however, the "*introduction of local taxes and levies*" is interpreted in a way that it forbids all norm-creating activities of communal structures, a constitutional basis to limit the competencies of the organs of local self-government in the field of taxation has been created.

4. National and territorial principles of the structure of the Russian Federation, the territorial basis of local self-government

The subjects do not enjoy a uniform constitutional status, which defines the Russian Federation as asymmetrical. Among the subjects of the federation, the Constitution differentiates between republics which it labels "state", and structures similar to a state: regions, oblasts, an autonomous oblast, autonomous districts and cities of federal im-

24 See e. g., on the local wealth tax of natural persons Articles 12 and 32 of the Code of Taxation. Since the Code of Taxation fully regulates the basic aspects of this local tax (subjects of taxation, object of the tax, tax period, procedure of calculation, payment procedure and deadlines), which the local structures cannot change, the competencies of the local structures with view to this tax are limited to the regulation of tax privileges.

25 M. Yu. Berezin: Regional'nye i mestnye nalogi: pravovye problemy i ekonomicheskie orientiry, Moscow 2006, pp. 47–55.

portance. Republics and autonomous districts are shaped according to the national-territorial principle and regions, oblasts, and cities of federal importance according to the territorial principle. Thus, relevant peculiarities may be identified in the status of certain types of subjects of the Russian Federation. Unlike the other subjects, the republics, for instance, have next to the formal attributes of statehood the additional right to determine a state language to be in use next to the general state language, Russian [Article 68(2) Constitution RF].

In its Altai Decision no. 10-P of 7th June 2000,[26] the Constitutional Court was of the opinion that the constitution did not accept any other bearer of the sovereignty and no other source of power than the multinational people of Russia and thus did not recognize any other state sovereignty than that of the Russian Federation. The subjects have no right to appropriate the characteristics of a sovereign state, even if their sovereignty is limited and despite the fact that the Constitution of the RF labels the republics – unlike the other subjects – as "states" [Article 5(2) Constitution RF]. Neither the constitutions of the republics nor the charters of the other subjects possess constitutional autonomy. Even when regulating the organisation of the state power of the subject they need to be in harmony not only with the Constitution of the Russian Federation but also with the general principles laid down in federal laws which regulate the questions of the system of state power in the subjects in great detail.[27] Human and civil rights and freedoms do not fall at all in the scope of the constitutions and charters of the subjects because they are in the exclusive jurisdiction of the federation [Article 71 lit. c) Constitution RF].

As a result, the case law of the Constitutional Court denies the republics not only sovereignty but statehood in general. It is an undisputed thesis that the other subjects lack statehood, and as a consequence, awarding this quality to the republics would violate Article 5(1) Constitution RF with its principle of the equality of all subjects.[28] The

26 Point 2.1 par. 3 of the decision no. 10-P of the Constitutional Court of the RF of 7th June 2000 re examination of the constitutionality of individual provisions of the Constitution of the Republic of Altai and of the Federal Law "On the general principles of the organisation of the legislative (representative) and the executive organs of state power of the subjects of the Russian Federation" (Altai Decision), Vestnik Konstitutsionnogo Suda RF 2000 no. 5: "The Constitution of the Russian Federation does not accept any other bearer of the sovereignty and no other source of power than the multinational people of the Russian Federation, and hence does not accept any other sovereignty than the sovereignty of the Russian Federation. The sovereignty of the Russian Federation in the sense of the Constitution of the Russian Federation excludes two layers of sovereign power in a system of state power, both possessing priority and independence; thus, it does not allow a sovereignty of the republics nor of any other subjects of the federation".

27 Subjects power organs act.

28 Point 2.6 par. 6 of the Altai Decision.

Constitutional Court points out that the constitutional term "state" for the republics does not more than "*reflect certain peculiarities of their constitutional status in connection with factors of historical, national and other character*"[29] and thus do not mean more than the acknowledgement of tradition.

Another reason for the lack of statehood of the subjects is that the Constitutional Court does not attribute to the peoples of the subjects any state-building quality: The peoples in the Russian Federation are merely considered to be cultural-ethnic communities, a part of the multinational people of the Russian Federation which creates the uniform statehood of the Russian Federation. Hence, the Constitution Court, arguing with the lack of sovereignty of the subjects, denies the republics the confirmation of their own citizenship and, consequently, the right "*to lay down by law who is their citizen and (…) full-fledged legal subject, possessing all constitutional human and civil rights*". That the Constitution does not accept a citizenship of the subjects but anchors in Article 6 the principle of a uniform citizenship of the Russian Federation and that citizenship is an exclusive jurisdiction of the federation [Article 71 lit. c) Constitution RF] is, according to the Constitutional Court, the basis for judging the establishment of a separate citizenship by the subjects inadmissible.[30]

This legal position of the Constitutional Court as well as the systematic interpretation of the preamble and of the principles of the federal structure in chapter 1 of the Constitution leads to the inevitable conclusion that the state-building role is attributed exclusively to the multinational people of the Russian Federation – the creator of the Constitution and of the Russian state. However, the new wording of Article 68(1) Constitution RF that mentions a new subject – "*the state-building people as a **part** of the multinational Union of peoples of the RF with equal rights*" [emphasis added by the author] and bearer of the state language of the Russian Federation – violates the previous concept and contradicts the mentioned principles. It is also remarkable that the constitution-maker does not follow this logic until the end, defining the culture of the Russian Federation and consequently the Russian language as a unique heritage of the entire multinational people [Article 68(4) Constitution RF].

29 Point 2.6 par. 7 of the Altai Decision.

30 Point 3.4 par. 2–5 decision no. 250-O of the Constitutional Court of the RF of 6th December 2001 on the request of the State Assembly of the Republic of Bashkortostan on the interpretation of a number of provisions in Articles 5, 11, 71, 72, 73, 76, 77 and 78 of the Constitution of the Russian Constitution. It is remarkable that the Constitutional Court developed its position even when Law of the RF no. 1948–1 "On the citizenship of the RF" was still in force because Article 2 of that law provided for a citizenship of the republics within the RF. The version of the law "On the citizenship of the RF" adopted on 31st May 2002, which is still valid, follows the position of the Constitutional Court and dropped the institute of a republican citizenship.

The Amendment Act also modifies the constitutional approach to the composition of the federation and the interpretation of the territorial boundaries of the federal and communal relations. After concluding the federation treaty on 31st May 1992, the Russian Federation set aside the Soviet model of territorial structure which had granted the status of an autonomous structure as a subject of the RSFSR only to compact non-Russian nations and peoples and had created administrative-territorial units on the rest of its territory. The constitution-maker of 1993 embraced the idea of overcoming the inequalities in the territorial development through foregoing a unitary organisation of power on a relevant part of the Russian territory – in regions, oblasts, and cities of federal importance. The experiences of the Anglo-Saxon law family with the foundation of federal capital districts and other territories under direct federal administration[31] were refuted as incompatible with the principles of the power of the people and the federal structure. Consequently, Articles 5(1) and 67(1) of the 1993 Constitution (in its old version) distributed the entire territory of the Russian Federation without exception among the various types of subjects.

The principle of the power of the people affects the organisation of the public power on the local level in local self-governments as well. As the Constitutional Court decided in the "Kursk case", local self-government is a necessary form of the power of the people and a necessary element of the mechanisms of the people's sovereignty. The right of the citizens to participate in the local self-government does not result from the will of the population of the communal structure but arises on the basis of the Constitution. Changes in the territorial organisation must not dispense with local self-government.[32]

Given all this, territories with a special status may be created on the territory of subjects or communal structures where state administration and local self-government are exercised with special features according to valid federal law.[33] The principles of the

31 This refers especially to the federal territories in the USA, Australia, Canada, India, Pakistan, Malaysia et al; see S. A. Avak'yan: Federal'naya territoriya, in: Konstitutsionnoe pravo. Entsiklopedicheskii slovar', otv. red. i ruk. avt. koll. S. A. Avak'yan, Moscow 2001.

32 Point 4 of the Decision of the Constitutional Court no. 15-P of 30th November 2000 re examination of the constitutionality of the charter (the basic law) of the Kursk Oblast in the version of the law of the Kursk Oblast of 22nd March 1999 "On the Introduction of Amendments and Supplements into the Charter (the Basic Law) of the Kursk Oblast" (Kursk Decision), Vestnik Konstitutsionnogo Suda RF 2001 no. 1.

33 Closed administrative-territorial structures (Federal law no. 2397–1 of 14th July 1992 "On the closed administrative-territorial structure"), science cities (Federal law no. 70-FZ of 7th April 1999 "On the status of a science city"), special economic zones (Federal law no. 116-FZ of 22nd July 2005 "On the special economic zones in the Russian Federation"), zones of accelerated development (Federal law no. 473-FZ of 29th December 2014 "On areas of accelerated socio-economic development in the Russian Federation"), areas of innovative development (Federal law no. 244-FZ of 28th September 2020 "On the innovation centre 'Skolkovo' and others").

federal structure and of local autonomy remain intact. The borders of the subjects and the communal structures are not changed. The creation of federal districts as a level of federal administration between the federation and the subjects requires neither the establishment of a special public law status for these districts nor changes in the territorial structure.[34]

The amendment on the federal territories in Article 67(1) Constitution RF does not match this constitutional concept. It is safe to assume that such territories may be established in accordance with a federal law that includes the regulation of the organisation of public power in the given territory. In its opinion, the Constitutional Court interpreted the norm in a way that it does not aim at giving federal territories a status equal with that of the subjects (point 3.1 par. 2 of the opinion). The Constitutional Court did not answer the question whether the organisation of public power in the federal territories may occur outside the framework of the federal relations and local self-government. Such an interpretation is probably wrong. The population of a federal territory cannot be denied the right to be represented in the Federal Council as well as in organs of popular representation created by that population. Any other interpretation would infringe the principle of the sovereignty of the people and the principle of the equality of human and civil rights. In this context we may refer to the discussion among American experts about granting the Federal District of Columbia the status of a state.[35]

The provisions of the Amendment Act on the special features of the exercise of public power in the cities of federal importance, the administrative centres of the subjects and other territories are just as questionable. Article 131(3) Constitution RF allows a regulation of these special features "*by federal law*". So far, the law has accepted special features in the constitutional status of a city of federal importance because it is at the same time a city and a subject of the federation where a uniform development of the municipal economy is to be guaranteed (Article 79 of the Federal law on local self-administration). Accordingly, the law-maker is not only *entitled* but *obliged* to provide for special features in the organisation and exercise of public power (state power and local self-government) in cities of federal importance. Yet, the referral to a federal statute does not seem to be entirely precise. It contradicts Articles 11(2), 66(2), 71(1) lit. m), and 77(1) Constitution RF. A systematic interpretation of these old and still valid constitutional provisions shows that the special features of the exercise of public power in the cities of federal importance depend on the provisions in their *charters*, within the framework of the generally accepted constitutional principles laid down in detail,

34 Decree of the President of the RF no. 849 of 13th May 2000 "On the plenipotentiary representative of the President of the RF in the federal districts", Rossiiskaya gazeta of 16th May 2000.

35 Congress voted in favour of a 51st state, https://news.mail.ru/politics/42349494/?frommail=1 (last visit on 27th June 2020).

inter alia, in the federal laws on the power organs of the subjects and on local self-government. The status of the administrative centre (capital city) of a subject is one of the few questions within the jurisdiction of the subject itself and object of regulations in its constitution (charter). For this reason, the referral to a federal statute with view to the exercise of public power in the capital cities of the subjects requires a reservation; an additional clarification of the constitutional sense is necessary.

Every legal regulation of the special features of the organisation and exercise of public power in the territories mentioned in Article 131(1) Constitution RF needs to respect the constitutional guarantee that it is forbidden to deny local self-government and the constitutional principle of its organisational autonomy (Articles 12 and 3 Constitution RF). Any interpretation of Article 131(3) Constitution RF in the sense that a model of public power without respect for the local self-government is possible in the cities of federal importance, the administrative centres of the subjects, federal and other territories violates the sense of these fundamental constitutional principles.

The new text of Article 131(1) Constitution RF refers to the communal structures as the subject of the right to local self-government, but municipal and village settlements as a basic element of communal structures are not mentioned in this context. This new text leads to uncertainties whether or not the settlement principle of the territorial self-government organisation retains its constitutional relevance. The Constitutional Court explicated in its Udmurtia Decision[36] that it is the municipal and rural settlements that, being naturally historically grown communal structures closest to the population, are the primary unit to decide questions of local importance. It seems that this legal position of the Constitutional Court remains valid even after the amendment of Article 131(1) Constitution RF because the formation of the territory of communal structures occurs "*with view to historical and other local traditions*" and naturally historically grown localities continue to be the territorial basis of local self-government although this does not exclude the recognition as communal structures of other territories that unite settlements.

5. Conclusions

Many experts give extreme and categorical opinions when assessing the present Russian Constitution. Thus, the Constitution of 1993 was characterised mainly as liberal-democratic and a break with the socialist Soviet past.[37] However, such assessments

36 Point 5 par. 2 and 3 of the Udmurtia Decision.

37 See e. g., V. A. Chetvernin (ed.): Konstitutsiya Rossiiskoi Federatsii. Problemnyi kommentarii, Moscow 1997; I. A. Umnova-Konyukhova: Konstitutsiya Rossiiskoi Federatsii: otsenka konstitutsionnogo ideala i ego realizatsiya skvoz' prizmu mirovogo opyta, Lex Russica 2018 no. 11 (144), pp. 23–39 at pp. 26–27.

were one-sided and grasped only one part of the true content of the Russian constitution. In reality, this Constitution inherited much from Soviet basic laws, for instance the institution of constitutional duties, the interpretation of the principles of legality and social equality of the citizens or the social rights of the citizens and the social duties of the state.

Equally, assessments of the constitutional reform in Russia that started in January 2020 as a new strategy of development or as a return to traditional values and therefore as a rejection of the ideals of a democratic rule-of-law state[38] are too categorical and incomplete as well.

It is an exaggeration to speak of a fundamental change in the 1993 Constitution. The conclusion of the Constitutional Court in its opinion on the Amendment Act seems to be correct that the constitution *as a whole does not change* (emphasis added by the author) because the basic traits of the constitutional order and the human and civil rights and duties, forming the centrepiece of the constitution, remain in force without modification.

The above analysis of the changes in the federal structure and local self-government shows that most amendments produce additional vagueness, widen legislative discretion and require further constitutional interpretation and harmonisation with other constitutional provisions in accordance with the constitutional principles in order to eliminate uncertainties and contradictions. This task, which is not an easy one, rests upon the law-maker and the Constitutional Court.

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38 Rahr for instance argues that the central aspect of the constitutional reform lies in the fact that Russia will dictate herself not to belong any longer to liberal Europe. Russia will revive the "other Europe" with other traditions and values: Rahr, Kommentar zur Verfassungsreform in Russland, 23rd April 2020, https://www.ostinstitut.de/news/aktuelles/news_ansicht/d/kommentar_von_rahr_zur_verfassungsreform_in_russland; see also Otto Luchterhandt: Vladimir Putin schafft Klarheit: Präsident Russlands de facto auf Lebenszeit, part 2, Ost/Letter 1–2020, p. 26; Andreas Steininger: Musste das wirklich sein? – Kommentar zur Verfassungsreform in Russland, Ost/Letter 1–2020, pp. 2, 10.

ANDRIY TYUSHKA

Revolutionary Constitutionalism

Constitutional Order, Contentious Constitutional Politics and Participatory Constitutional Change in Ukraine since 1990

Introduction

The tension between constituent and constituted power is an inherent feature of democratic orders, with popular constitutionalism contesting the scope of political authority. With the proliferation of political populism and the related birth of 'illiberal democracy', popular constitutionalism has faced yet another contender – so-called populist constitutionalism. Now nearly omnipresent, populism triggers profound changes in domestic politics as well as it imprints states' foreign policy orientations – in Europe and elsewhere in the world. Europe's neighbourhood abounds in vivid examples of dissent and struggle between the constituent and the constituted power. A series of revolutions, which, in the last decades, shook a good number of EU neighbour states to the south and east, points to an emerging pattern of everyday contention as a result of constituent power's distrust, dissent, or its suppression or negligence by *un*democratizing public authorities. Ukraine's three revolutions since 1990, Georgia's 2003 'rose' and 2018 'rave' revolutions, Armenia's unfinished revolutions (from 2015 #ElectricYerevan to 2018 Velvet revolution) as well as the unfinished 2020 dignity ('anti-cockroach', or 'slipper') revolution in Belarus, but also the sweeping changes of constitutional order in Tunisia, Egypt or Moldova, – all demonstrate the trend in regaining popular sovereignty and power and the rise of post-revolutionary 'protest state' model[1]. Allegedly, contentious constitutionalism may become a widespread and firm form of constitutional politics in increasingly populist political settings. In certain contexts of (unfinished) democratic transition and recurrent backsliding, such as the Ukrainian, contentious constitutionalism takes an extreme form of 'revolutionary constitutionalism', that is, constitutional change and (re-)engineering (reform and modernization) in the wake of political rev-

1 Hereto count as well the less 'turbulent' forms of revolutionary change, broadly seen, including the so-called *'counter-revolutions'* (that is, the elite-driven rollback of the revolutionary constitutional change and the return to the constitutional *status quo ante*), such as the 2010 'blue' counter-revolution in Ukraine, as well as the so-called *'silent' or 'quiet' revolutions* (that is, the emergence of a new set of values, due to a generational change or other considerable societal shift, that changes the social basis of constitutional politics and participation as well as domestic politics at large), such as the ones that Ukraine and Tunisia, for instance, had undergone following their 2019 elections or that Moldova experienced in the wake of the 2019 governmental change.

olutions. Trapped in a seemingly vicious circle of 'revolution-constitution-revolution', Ukrainian constitutionalism does not entirely fit the classical understandings of revolutionary constitutionalism that predicates a 'constitutional revolution' to successfully finalize the constitutional-political transition and reform process; instead, it outlines a form of dynamic popular contention, control and 'correction' (participatory change) of constitutional politics. Needless to say, that such zig-zags of Ukrainian constitutional change with*out* transformation are fraught with consequences for the country's constitutional tradition, continuity as well as the resilience of the constitutional order as such.

Empirically addressing the matters of Ukraine's contemporary constitutional order and traditions, identity and values, change, continuity, reform and modernization over the past three decades, this chapter theoretically draws on the author's own account of 'revolutionary constitutionalism'[2] as well as the broader scholarship on the notion[3], including the recent advancements in the field on 'revolutionary constitutions' studies[4].

1. Contentious constitutionalism and revolutions: on *'revolutionary constitutionalism'*

Even though this chapter deals with the notion of revolutionary constitutionalism predominantly in the context of Ukraine's constitutional law and politics, the very rise of the contentious (revolutionary) constitutionalism as a phenomenon has a much broader base worth noticing.

First and foremost, in many countries of Eastern Europe, the choice for hybrid (semi-presidential) regimes gave rise to swinging constitutional orders. For instance, soon after regaining its independence in 1990, Ukraine opted for a president-parliamentary form of government[5] in its first Constitution (1996), but, following the 2004 Orange revo-

2 Andriy Tyushka 'A Liberationist Constitution? Maidan's Revolutionary Agenda and Challenges for Constitutional Reform in Ukraine' (2014) 13(1) European View 21; Andriy Tyushka 'From Constitutional Volatility to Constitutional Stability: Any Chance to Reconcile Constitutionalism and Power Struggle in Ukraine?' (2016) 23(16) Historia i Polityka 57; Andriy Tyushka '*Contentious constitutionalism:* Popular versus Populist Constitutionalism, Revolutions, and the Rise of Everyday Contention in the European Union's neighbourhood' (2019) Paper presented at the 26th CES International Conference of Europeanists, Madrid, 20–22 June 2019.

3 Stephen Gardbaum, 'Revolutionary constitutionalism' (2017) 15(1) International Journal of Constitutional Law 173; Richard Albert (ed), *Revolutionary Constitutionalism: Law, Legitimacy, Power* (Hart Publishing 2020).

4 Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Belknap Press/Harvard University Press imprint 2019).

5 As a hybrid, that is in-between, form of government that is neither purely presidential nor parliamentary, *semi-presidential form of government* comes in distinct configurations. Usually it is distinguished between two main subvariants of semi-presidentialism: 'weak semi-presidentialism' ('semi-parlia-

lution and the adoption of an amended Constitution, changed to a premier-presidential government (2004); it, then, soon reinstated the semi-presidential rule in 2010, after the so-called 'Blue' counter-revolution; four years and one revolution later, the 'Euromaidan' (Dignity) revolution brought back the semi-parliamentary regime (2014). The initial president-parliamentary form of government in Georgia (1995–2004) gave way, in the wake of the 2003 Rose Revolution, to a hybrid balancing between a more parliamentary and a more presidential order (2004–2010); it was only after new constitutional amendments were passed that enshrined the growing preference for a premier-presidential regime (2010–2017, and especially from 2018 on). Before becoming a parliamentary republic in 2015, Armenia, too, swung between semi-presidentialism (1996) and a form of government that leaned more towards presidential than hybrid rule, as the 2005 creeping change for 'semi-presidentialism *plus*' had it in practice. Stykow's comprehensive regional study of twelve regimes in post-Soviet Eurasia (all ex-USSRs but three Baltic republics) showcases a strong pattern of such swinging constitutional-order dynamics as well as the persistent 'in-betweenness', or hybridity, of the regime types proper even beyond semi-presidentialism[6].

Secondly, the rise of politics of both constitutional[7] and 'unconstitutional' constitutional amendments[8] in the region but also further afield resulted in constitutional acceleration[9] that, in many cases, however, fell short of leading towards constitutional

mentarianism' or 'premier-presidential government') and 'strong semi-presidentialism' ('semi-presidentialism' proper or 'president-parliamentary government'), see, for instance: Andriy Tyushka, 'Semi-Presidential Systems' in R. Grote, F. Lachenmann and R. Wolfrum (eds), *The Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2018). This chapter adheres to the use of the term 'semi-presidentialism' to connote a general reference to this hybrid form of government, whereas the references to 'premier-presidential' and 'president-parliamentary' regimes are used to connote variance within the semi-presidential system as observed i. a. within the Ukrainian 'swinging' constitutional order dynamic.

6 Petra Stykow, 'The devil in the details: constitutional regime types in post-Soviet Eurasia' (2019) 35(2) Post-Soviet Affairs 122.

7 On the determinants of *constitutional amendability*, see, for instance: Tom Ginsburg and James Melton, 'Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty' (2015) 13(3) International Journal of Constitutional Law 686; Xenophon Contiades and Alkmene Fotiadou, 'The Determinants of Constitutional Amendability: amendment models or amendment culture? (Review essay)' (2015) 12(1) European Constitutional Law Review 192.

8 On *unconstitutional constitutional amendment*, see, for instance: R. George Wright, 'Could a constitutional amendment be unconstitutional?' (1991) 22(4) Loyola University Chicago Law Journal 741; Yaniv Roznai, 'Unconstitutional constitutional amendments – the migration and success of a constitutional idea' (2013) 61(3) The American Journal of Comparative Law 657; Yaniv Roznai, *Unconstitutional constitutional amendments: The limits of amendment powers* (Oxford University Press 2017).

9 Along with 'unconstitutional' constitutional amendments, the constitutional acceleration was also driven by the rampant constitutional amendment politics in post-communist Eastern Europe, see:

reform and modernization. So, the 1994 Constitution of Moldova has been amended eight times by now, including both the changes introduced to the constitutional order as well as the amendments of substantial provisions of the Constitution. Tunisia's 1959 Constitution was amended six times for the past two decades. Ukraine's 1996 Constitution has been amended five times by now resulting each time in the change of the constitutional order; however, hereto also count further multiple amendments of substantive provisions, including the most recent ones on Ukraine's Euro-Atlantic integration as an overarching principle of state development (2018/19), the reform of the judiciary (several revisions since 2014, including the 2016 and the newly planned 2021 reform) or decentralization. Having studied all constitutional amendments in twelve post-Soviet states[10] since their first post-Soviet Constitutions were adopted in the 1990s up until 2015, Fruhstorfer estimated that the occurrence of such amendments ranges from 0.1 amendments laws per year in Georgia to even 0.63 laws on constitutional amendment adopted annually in Russia[11]. In total, this study of twelve jurisdictions identified 59 amendments, with over 70 % of them dealing with the issues in executive-legislative relations[12].

Inherently related to the second observation, the acceleration of constitutional adjudication (as well as instrumentalization of it) present, *thirdly,* another important factor that gave rise to constitutional contention as a phenomenon. Two illustrative cases stand out in this regard – Ukraine's 2010 and Moldova's 2019 constitutional affaires. In 2010, Ukraine's Constitutional Court (CCU) took the decision to invalidate the 2004 amendments to the Constitution based on the alleged 'violations of procedure' when adopting them, as claimed by then-majority forming 252 Party of Regions members of the Ukrainian Parliament. Remarkably, driven by this simple (not constitutional, as required) parliamentary majority, the retreat of constitutional change occurred, quietly, through a series of institutional 'corrective' measures that followed, that is, legislative backtracking on constitutional matters took effect[13]. In a similar manner, Moldova's Constitutional Court was dragged into the political struggle, soon turning into a constitutional crisis, and resorted to judicial activism favouring one of the parties, by way of i. a. issuing manipulative interpretations of the Constitution that barely distinguished

Roberts, A. (2009). The politics of constitutional amendment in postcommunist Europe. *Constitutional Political Economy*, *20*(2), 99–117.

10 Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

11 Anna Fruhstorfer, 'Paradoxes of constitutional politics in the post-soviet space' (2017) 2 University of Illinois Law Review 767, here p. 776.

12 Fruhstorfer (n 11) 767–790.

13 Tyushka 2014 (n 2) 23–24.

the difference between the 'may' vs 'must' formulations with regard to the modalities of dissolving the country's Parliament.

The speed and manner of constitutional change precipitated, *fourthly,* mass constitutional mobilization within respective societies and the emergence of the 'protest publics' and 'everyday contention' as twin-phenomena. Together, they contributed to a shift of the paradigm whereby constitutional matters are no longer tied to 'big' revolutionary moments, but, instead, became subject of regular activity within the established movements, be those engaged and networked civil society or expert advocacy networks that pursue their constitutional agendas via protests but also through various forms of legal and legislative contestation, (event and fact) documentation, investigation, or mobilization of the international support. Thereby, such a marriage of 'constitutional mobilization'[14] and the 'protest publics'[15] kindled a socio-political constellation where protests have become ritual rather than rupture, that is, a finished revolution. The recent 2020 report by the Institute of Modern Russia nails this point with its statistics on the '20 years of protests' under Putin's rule, in that ca. 12 000 protests, with approximately 2.5 mln participants, took place in Russia for the past two decades. Sure, a good fraction of them could be said to have pursued a constitutional agenda[16].

Finally, *fifth*, the twin-rise of populism and post-truth politics, including the practices of 'populist sovereignism', contributes to the ritualization of contestation on the elites' side as well. The instrumentalization of appeals to an imaginary majority and the resulting misrepresentation of it as *volonté générale*, the general will, usually lead to the imitation of participatory constitutional change that, once the veil of populist rhetoric fades away, becomes contested by the protest publics yet again.

Altogether, these developments have given the notion of 'constitutional contention' a whole new meaning and, in various configurations, have been responsible for the proliferating constitutional crises regionwide. Some even argue that such profound crises even filled with life the paradoxical phenomenon of 'unconstitutional constitutions'[17]. The manifested 'everyday contestation' practices in the realm of constitutional matters,

14 Paul Blokker, 'Constitutional Mobilization and Contestation in the Transnational Sphere' (2018) 45 Journal of Law and Society S52.

15 Nina Belyaeva, 'Exploring Protest Publics: A New Conceptual Frame for Civil Participation Analysis' in Nina Belyaeva, Victor Alber and Dmitry G. Zaytsev (eds), *Protest Publics* (Cham: Springer) 9–31; Institute of Modern Russia, *Russia under Putin: 20 Years of Protests* (IMR 2020); Mason W. Moseley, *Protest state: The rise of everyday contention in Latin America* (Oxford University Press 2018).

16 Institute of Modern Russia, *Russia under Putin: 20 Years of Protests* (IMR 2020).

17 Catherine Dupré, 'The Unconstitutional Constitution: A Timely Concept' in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos 2015) 364–383.

sought to improve socio-economic conditions but also to revert de-legitimized institutions and constitutional processes, further contribute to the consolidation of the phenomenon well beyond the current case study on Ukraine's constitutionalism. Therefore, it warrants a closer look and conceptualization as an analytical lens.

1.1 Contentious constitutionalism

Contentious constitutionalism might be defined as a 'a state and a reiterated process of a country's *swinging* constitutional order renewal and reinstatement as a consequence of within-systemic (*ordinary*) political and legal struggle between popular and other forms of constitutionalism'[18]. However, contentious constitutionalism is not exclusively about constitutional renewal or milestone constitution-making moments – it equally is about maintaining (by defending or re-instating) the most suitable constitutional order, which is lesser studied a topic. Reflecting on the recent participatory turn in constitution-making, or so-called 'grassroots constitutionalism', Finn underscores that act of constituting instantiates understandings about 'where and how far citizens ought to assume responsibility, not only for constitution-*making*, but also and equally importantly for constitutional *maintenance*'[19]. The latter one is understood as a configuration of a constitutional order that allows citizens to 'have a direct, significant and ongoing role in and responsibility for achieving and maintaining a constitutional way of life'[20]. Thereby, contentious constitutionalism, as conceptualized herewith, is rooted in comparative constitutional theory and Charles Tilly's 1978 'contentious politics' approach, in its contemporary reading[21], – and thus reflects a move towards studying 'new constitutionalism', that is, bringing *the political* (and political science!) back in to constitutional theory.

Pace Tilly, contentious politics entails episodic, disruptive, or at least extra-institutional political behaviours:

> *'*Contentious politics *involves interactions in which actors make claims bearing on other actors' interests, leading to coordinated efforts on behalf of shared interests or programs, in which governments are involved as targets, initiators of claims, or third parties'*[22].

18 Tyushka 2019 (n 2) 2.

19 John E. Finn, 'Some notes on inclusive constitution-making, citizenship and civic constitutionalism' in Gary Jacobson and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham: Edward Elgar Publishing 2018) 436–455, here p. 436.

20 Finn (n 19) 437.

21 Charles Tilly and Sidney Tarrow, *Contentious Politics* (2nd ed., OUP 2015).

22 Tilly and Tarrow (n 21) 7.

As a result, contentious politics 'brings together three familiar features of social life: *contention, collective action,* and *politics*'[23]. The way it manifests itself may vary from the so-called 'contentious performances' to 'repertoires' and 'campaigns'[24]:

- *contentious performances* are 'relatively familiar and standardized ways in which one set of political actors makes collective claims on some other set of political actors'[25];
- *contentious repertoires* are 'arrays of performances that are currently known and available within some set of political actors'[26];
- *contentious campaigns* are 'combinations of performances that focus on a particular policy and usually disassemble when that policy is implemented or overturned,' and thus are manifested through 'movements, interest groups, political parties, the media, interested onlookers, and state agents'[27].

Even though Tilly and Tarrow's 'contentious politics' does not explicitly cover the constitutional domain, treating constitution-making as a new field of contentious politics, as proposed herewith, holds a promise as an explanatory approach. Empirical observations seem to be justifying its application, too. For instance, Ukraine's constitutional politics of the past three decades has a record of all the above-mentioned forms of contention, including the most recent 2014 revolution's mass demonstrations as 'contentious performances', a whole set of revolutionary and post-revolutionary 'repertoires' of (socio-political) action on restoring and maintaining the constitutional order, as well as volunteer and organized civil society's 'campaigns' on driving constitutional and other domestic reforms, including justice reform, or monitoring constitutional affairs at large.

Obviously, the areas of contestation in the constitutional domain differ from other policy areas. The *main areas of contention* in constitutional politics are: (a) the Constitution as such; (b) substantive constitutional topics; and (c) constitutional process.

A comparative constitutional outlook allows to distinguish as well two *main lines* of contention: (1) the popular versus populist (illiberal) contentious constitutionalism, and (2) the popular versus authoritarian contentious constitutionalism. Whereas populism and constitutionalism are not necessarily antithetical[28], and, in some contexts,

23 Ibid.
24 Ibid., at 14–15.
25 Ibid., at 14.
26 Ibid.
27 Ibid, at 15.
28 Chris Thornhill, 'Constitutionalism and populism: National political integration and global legal integration' (2020) 12(1) International Theory 1, doi:10.1017/S1752971919000186; Luigi Corrias,

populism can be regarded as an erosion of constitutionalism, populist constitutionalism is essentially at odds with popular constitutionalism as it draws the Constitution into the political sphere via abusive (and aggressive) constitutional politics, thus prompting Constitution to become a political topic like any other[29]. Popular constitutionalism draws on the assumption that 'the people' are anterior to, and above, constitution, thus emphasizing the foundational nature of popular sovereignty. Reflecting much of the Carl Schmitt's and Emmanuel Joseph Sieyès' scholarship and the idea of constituent power being a sovereign power (*pouvoir constituant*)[30], popular constitutionalism also fits Hans Kelsen's positivist normativism, thus drawing on the idea of a strong link established between constituent and constitutional power. Popular sovereignty endows the constituent power with the self-granted authority to exercise *unfettered* constitutional amendability. This clearly contrasts with the constitutional power's *limited* scope of constitutional amendment, including because of the implicit constitutional unamendability principle. Against this backdrop, the very instrumentalization of popular sovereignty in populist campaigns, where 'the people' is believed to be a unit often represented via direct democracy only, enables the dictum of elections and referenda and thus the dictum of 'popular sovereignism'. It is because populists believe that the democratic mandate supersedes constitutional legality that they challenge constitutions and popular constitutionalism at large. Accordingly, shielded by the complacency of legality, constitutions are drawn into the political sphere through abusive and aggressive constitutional politics, and they become a political topic like any other. Landau observes that constitution-making (and amendment) process is used as a tool of ordinary rather than higher politics in order to entrench an existing or newly empowered government's position through measures that concentrate its power and render successful electoral opposition more difficult[31]. Mudde and Kaltwasser suggest that populism is essentially democratic – but at odds with liberal democracy[32]. Fournier posits that the populist rhetoric 'manipulates the rule of law and the majoritarian pillars of constitutional democracy by convincing a fictional majority that constitutional democracy gives rise to a tyranny of minorities', thus weaponizing 'a specific constitutional strategy of legal

'Populism in a constitutional key: Constituent power, popular sovereignty and constitutional identity' (2016) 12 European Constitutional Law Review 6.

29 On why constitutional politics is different from other ('ordinary') politics, see: William Partlett and Zim Nwokora, 'The foundations of democratic dualism: Why constitutional politics and ordinary politics are different' (2019) 26(2) Constellations 177.

30 See, for instance: Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press 2020); Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press 2020); Mikael Spång, *Constituent power and constitutional order: above, within and beside the constitution* (Palgrave Macmillan 2014).

31 David Landau, 'Abusive constitutionalism' (2013) 47 University of California Davis Law Review 189.

32 Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A very short introduction* (OUP 2017) 81.

and constitutional reforms aiming at disrupting constitutional democracy'[33]. As such, populist constitutionalism resembles an illiberal constitutional practice[34]. Yet another contender of popular constitutionalism is authoritarian constitutionalism[35] – a no less oxymoronic phenomenon than illiberal/populist constitutionalism as discussed above. Both attack public law at its root, that is, at its conception of constituent power. The highly contested July 2020 constitutional amendment in Russia came to pass under the slogans of being population-driven (and, thus, allegedly undertaken in the constituent power's interest) whereas was largely an attempt by the ruling elites to secure their own political future and interests – much in vein of the lasting authoritarian constitutionalist practice in this country[36]. The August 2020 electoral fraud in Belarus led to massive and lasting countrywide popular protests demanding the resignation of Alexander Lukashenka, who, instead, offered a 'constitutional reform' to eventuate in 2022 as a solution to the crisis[37] – a misgauged and misleading solution, one should say. It should be also stated that authoritarian constitutionalism can be practiced in established autocracies and hybrid, or ambiguous, political regimes as well as unconsolidated democracies alike[38]. In all its variants, however, it stands at odds with popular constitutionalism, for, as Isiksel put it with regard to the Turkish tradition of authoritarian constitutionalism, '[t]he system functions on a shared assumption that the constitution *matters*; that it cannot simply be tossed aside once a party is in power'[39].

Just like populist (illiberal) constitutional politics, authoritarian constitutionalism is keen on instrumentalizing appeals towards a popular will or even instrumentalizing the

33 Théo Fournier, 'From rhetoric to action, a constitutional analysis of populism' (2019) 20(3) German Law Journal 362, at 363.

34 See, for instance: Bojan Bugarič, 'The Rise of Nationalist-Authoritarian Populism and the Crisis of Liberal Democracy in Central and Eastern Europe' in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Constitutionalism under Stress* (Oxford University Press 2020) 21–38.

35 See, for instance: Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell Law Review 393; Tom Ginsburg and Alberto Simpser (eds), *Constitutions in authoritarian regimes* (Cambridge University Press 2014); Helena Alviar García and Günter Frankenberg (eds), *Authoritarian constitutionalism* (Cheltenham: Edward Elgar Publishing 2019).

36 Alexei Trochev and Peter H. Solomon Jr, 'Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state' (2018) 51(3) Communist and Post-Communist Studies 201.

37 Hanna Vasilevich, 'Constitutional reform in Belarus: Consolidation or conflict?' (2021) New Eastern Europe, 03.03.2021, https://neweasterneurope.eu/2021/03/03/constitutional-reform-in-belarus-consolidation-or-conflict/.

38 Duncan Kennedy, 'Authoritarian constitutionalism in liberal democracies' in Helena Alviar García and Günter Frankenberg (eds), *Authoritarian Constitutionalism* (Cheltenham: Edward Elgar Publishing 2019) 161–184.

39 Turkuler Isiksel, 'Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism' (2013) 11 International Journal of Constitutional Law 702, at 705.

very process of popular constitution-making[40], by capitalizing on its input legitimacy in subsequent practices of abusive constitutionalism[41]. This is an important observation in context of contentious constitutionalism. It acknowledges that authoritarian governments do not rule through non-legal mechanisms alone – they indeed embrace law (and both legal and paralegal methods of constitutional contention) as a tool strengthening their rule, consolidating their authority and legitimizing it as a constitutional one, thus making it last longer.

Finally, at least *three forms of constitutional contention* (and change) can be identified.

The first and the most widespread form is constitutional change via *constitutional* constitutional amendments, that is, amendments that comply with both the substantial and procedural requirements.

The second way to contend and change constitutions is the adoption of '*unconstitutional* constitutional amendments'[42], that is, those amendments that were enacted while disregarding the principles of formal (or implicit) constitutional unamendability or disregarding the amendment procedures proper. Even if a formal constitutional change in a given jurisdictional context appears possible through the amendment procedure, a number of restrictions to it may still apply, including: (1) *procedural restrictions*, that prescribe special procedural conditions required for amending the constitution such as special majorities, special quorums, referenda, elections, or constituent assemblies; (2) *temporal restrictions*, that require constitutional actors to adhere to certain specifications as to the timing of various steps in the formal amendment process, either at the proposal or ratification stages, or both; (3) *circumstantial restrictions,* that specify the circumstantial dimension in which constitutional amendments are prohibited; and, last but not least importantly, there are also (4) *substantive limitations* on the ability to amend constitutions, not least in view of the limited scope of the amendment power that, ipso facto, does not permit *any* amendment whatsoever, especially if it violates fundamental rights or basic principles[43]. The latter limitation may come in two forms – as an explicit, or formal, provision on constitutional amendment (and, unamendability, respectively) and as an implicit principle. The so-called 'formal constitutional unamendability' (pace Richard Albert)[44] reflects the state of affairs when constitutions explicitly impose 'lim-

40 William Partlett, 'The dangers of popular constitution-making' (2012) 38(1) Brooklyn Journal of International Law 193.

41 See, for instance: Landau (n 31); Jorge González-Jácome, 'From abusive constitutionalism to a multilayered understanding of constitutionalism: Lessons from Latin America' (2017) 15(2) International Journal of Constitutional Law 447.

42 Roznai 2017 (n 8).

43 Ibd., at 5–6.

44 Richard Albert, 'Counterconstitutionalism' (2008) 31(1) Dalhousie Law Journal 37.

itations on amending constitutional subjects (provisions, principles, rules, symbols, or institutions) through the formal constitutional amendment provision'[45]. In turn, implicit constitutional unamendability draws on a social contract within a given jurisdiction that presupposes the existence of certain supra-constitutional principles that cannot be amended through a formal procedure as they reside within the authority of the constituent power.

Consequently, the third way of constitutional contention and change is *revolutionary* constitution-making that draws on *unfettered* constitutional amendability exercised by a constituent power. As a truly distinct and radical form of constitutional contention that results in emerging ruptures, rather than 'ordinary' tensions between the constituent and constitutional powers, it also warrants a special treatment – as a subvariant, and a special case, of contentious constitutionalism.

1.2 Revolutionary constitutionalism

Revolutionary constitutionalism, thus, can be seen as an extreme form of contentious constitutionalism, that is, an 'agonistic form of democratic constitutional renewal or change in response to systematic and deteriorating unconstitutional practices, including abusive constitutionalism and unconstitutional constitutional amendments'[46]; by extension, it also includes reverse dynamics of counter-revolutionary change (retraction, or re-transition) of constitutions or a constitutional order at large. In light of such a definition, both the phenomenon-epitomizing 'colour revolutions' as well as 'counter-revolutions' of sorts (elitist, establishmentarian, electoral) do count herein[47].

The link between a revolution and constitution is obviously far from being new, as many historical events and scholarly records show. It is, however, the changing character of contemporary revolutions, including their reiterated occurrence and the broken link between revolution and a profound societal change, as well as the rise of constitutional agendas in everyday contestation that make a difference. Back in the late 1970s, Skocpol characterized revolutions as rare but momentous occurrences[48], which might well contrast with the nowadays proliferating repeated and unfinished revolutions. Sultany ponders on the many challenges of revolutionary constitution-making in Egypt, Tunisia and Libya after the Arab Spring in light of post-revolutionary stabilization and legiti-

45 Roznai 2017 (n 8) at 6.

46 Tyushka, 2019 (n2) 2.

47 David Lane, '"Coloured Revolution" as a Political Phenomenon' (2009) 25(2–3) Journal of Communist Studies and Transition Politics 113; Jamie Allinson, 'Counter-revolution as international phenomenon: The case of Egypt' (2019) 45(2) Review of International Studies 320.

48 Theda Skocpol, *States and social revolutions: A comparative analysis of France, Russia and China* (Cambridge University Press 1979).

mation of the new order that not always might get resolutely instituted[49]. Arato puts it quite unequivocally:

> *'After a period of thirty years dormancy, revolutions have made a dramatic return, this time in the Arab world. Whether the outcome in each setting is a liberal democratic constitution, a new dictatorship, or civil war and the decomposition of states, this state of affairs forces us to return to the problems of the revolutionary constitution.'*[50]

It, therefore, should also be emphasized that the link between a revolution and constitution is not necessarily linear and predetermined, as not all revolutions result in, or aim at, constitution-making (or constitutional change), and certainly not all constitutions (and not every constitutional change) is a product of a revolution. It is true that '[t]urning a revolution into a constitution […] reveals the essentially political nature of constitutionalism'[51], which innately draws on the constituent power's sovereignty that, along with the authority to establish, control and alter the government, also includes the constitutional authority to abolish it – not least through the exercise of the right to revolt. Not every right to revolt eventuates, however, in constitution-making. It is tempting to align with Arato's astutely made point hereon: 'If all constitutions that have been *made* emerged from a revolutionary process, we would have many more revolutions that historians have managed to keep track of'[52].

Finally, in some cases, revolutionary constitutionalism succeeds in eventuating into a constitutional revolution, and thus breaking the chain of repeated revolutionary constitution-making and constitutional change. The 1988–1993 revolutions in Central and Eastern Europe are a collective case in point. Richards argues that, as Central and Eastern European states were (re)building their constitutional orders, such processes were best to be seen from a perspective of comparative revolutionary constitutionalism – much in the tradition of American and British constitutional experiences in which both 'the founding and pivotally important amendments to the […] Constitution rest on a genre of revolutionary constitutionalism'[53]. As in the American case, the CEECs' revolutionary and constitutional projects were conceived as a common enterprise, which allowed to consolidate the constitutional order and make it sustainable. In other Eastern European countries, including in Ukraine, the link between revolution and constitution

49 Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (Oxford University Press 2018), at 236–262 (chapter 8 "Revolutionary constitution-making").

50 Andrew Arato, *The adventures of the constituent power* (Cambridge University Press 2017) 257.

51 Anthony F. Lang, Jr., 'From Revolutions to Constitutions: The Case of Egypt' (2013) 89(2) International Affairs 345, at 348.

52 Arato (n 50), at 258.

53 David A.J. Richards, 'Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law' (1993) 26 New York University Journal of International Law and Politics 1, at 2.

got amalgamated to the extent that no constitutional revolution has proved to be feasible so far. For Jacobson, a constitutional revolution occurs 'when there is a paradigmatic displacement in the conceptual prism through which constitutionalism is experienced in a given polity', whereby such a transformation will usually be 'accompanied by critical changes in constitutional identity, although not every mutation of identity will entail a shift of sufficient magnitude to be considered revolutionary'[54]. Accordingly, revolutionary constitutionalism and constitutional revolution correlate as a path and a destination – while being inherently related, the two terms connote distinct constitutional processes, endpoints and phenomena at large.

Following Gardbaum, revolutionary constitutionalism is 'is a type or variant of constitutionalism in which the adjective connotes an essential connection with a political revolution'[55], and, as such, is chiefly about 'using the constitution-making process to attempt to institutionalize and bring to a successful conclusion a political revolution'[56]. He further explains that:

> *'This connection is most commonly that a revolution is the way constitutionalism is introduced into a polity (the 'classic' or primary sense), but it can also be that constitutionalism – here, electoral victory followed by constitution-making – is the means employed by a revolutionary movement to achieve its political raison d'être (the newer sense). Revolutionary constitutionalism is therefore to be contrasted with other, non-revolutionary types or models of constitutionalism, such as evolutionary and elite constitutionalism.'*[57]

Thereby, *revolution* should be regarded in a broader sense, that is, encompassing critical junctures that lead to a profound change in the constitutional order and politics within a given polity. In that, I align with Ackerman's broad understanding of revolution – that is, 'revolutions on a human scale', by which he means non-totalitarian processes where protagonists 'do not attempt a total makeover of society'[58], even though they aim to fundamentally reorganize particular spheres of social and political life. In such cases, he further contends, constitutional change takes the form of 'revolutionary reforms'[59] for revolutions are not (to be) defined by legal breaks. This un-positivist reading of revolution, shared herewith, better reflects the realities of both contemporary revolutions and

54 Gary Jacobsohn, 'Anchoring and sailing: contrasting imperatives of constitutional revolution' in Gary Jacobson and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham: Edward Elgar Publishing 2018), 334–353, at 334.

55 Gardbaum 2017 (n 3) at 176.

56 Ibid., at 174.

57 Ibid., at 176.

58 Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Belknap Press/Harvard University Press imprint 2019) 28.

59 Ibid., at 29.

constitution-making. As above argued, the previously assumed (and observed) link between revolution and profound social transformation has been broken, as evidenced by less-transformative and unfinished revolutions since the mid-1990s, which gave rise to the phenomenon of 'counter-revolution'[60]. The new media and a new way of organizing social and political life, furthermore, provide for a possibility of a 'different' revolution be it Twitter, Facebook or all sorts of performative (singing, clapping, silent, ballot, floral, etc.) revolutions. Along with charismatic and leader-centered revolutions, there are to be observed as well the 'spontaneous, leaderless or moveementless constitutionalist revolution[s] (i. e. "uncharismatic revolutions")'[61], such as the 2011 Arab Spring region-wide revolutions.

As carefully observed by Rana, '[i]n the revolutionary settings the central challenge is how to avoid the problem of permanent upheaval', thus, consequently, '[t]o endure over time such constitutional projects must somehow "translate …. high-energy politics" into a durable governing model'[62]. This suggests not only re-constituting the authority but also instituting respective regime as well as legalizing and legitimizing respective constitutional arrangement. Ackerman lays out that there are, in general, three different pathways to constitutionalism, that is, ways in which constitutions have won legitimacy: revolution, strategic cooptation and elite construction[63]. The first path – *revolution* – suggests constitution-making by revolutionary outsiders, whereby 'a revolutionary movement makes a sustained effort to mobilize the masses against the existing regime'[64], that is, when a mass movement declares the existing system of government illegitimate and eventually replaces it. The second path – *strategic co-optation* – signifies constitution-making and political order build-up by pragmatic insiders: when 'confronting popular movements for fundamental change', the insider-establishment would respond with 'strategic concessions' that would split the revolutionary outsiders into 'moderate and radical camps', with the 'moderate outsiders' being subsequently invited to join the political establishment in governing the country in a 'co-optation strategy' that would culminate in 'landmark reform legislation'[65]. Finally, the third path – *elite construction* – presupposes that 'the old system of government begins to unravel but the general population stays relatively passive on the side-lines', thus rendering the 'emerging power vacuum' to become exploited by previously 'excluded political and social

60 Allinson 2019 (n 47).

61 Stephen Gardbaum, 'Uncharismatic Revolutionary Constitutionalism' in Richard Albert (ed), *Revolutionary Constitutionalism: Law, Legitimacy, Power* (Hart Publishing 2020) 133–154, at 133–134.

62 Aziz Rana, 'Constitutionalism and the Predicament of Postcolonial Independence' in Richard Albert (ed), *Revolutionary Constitutionalism: Law, Legitimacy, Power* (Hart Publishing 2020) 71–90, at 72.

63 Ackerman 2019 (n 58) 3–6.

64 Ackerman 2019 (n 58) 3.

65 Ibid., at 4.

elites', who serve as the principal force in the creation of a new constitutional order[66]. In a way, this third way may resemble something akin to an insider-outsider compact on constitutional arrangement. Importantly, in his treatment of revolutionary constitutionalism, Ackerman looks beyond 'the revolutionary moment', that is 'time one', and outlines a four-stage dynamic in which revolutionary politics becomes normalized, legitimized, constitutionalized and consolidated[67].

In what follows, the chapter analyzes the origins and development of Ukrainian constitutionalism as a case of revolutionary constitutionalism, characterized by omnipresent contentious constitutional politics as well as repeated instances of revolutionary and counter-revolutionary constitution-making.

2. Ukraine's contentious constitutional politics, revolution and revolutionary constitutionalism since 1990

Ukraine's modern constitutional tradition has a long – centennial – history, with the First Republic's (1917–1923)[68] state- and nation-building project resembling perhaps the brightest and most epitomic episode[69]. It is rooted, however, in broader and less institutionalized processes of state-building within the Cossack Hetmanate (1649–1764), a Cossack state in central Ukraine. It was then when Ukraine's first-ever Constitution was drafted – the 1710 Constitution by Hetman Pylyp Orlyk, which was a revolutionary (as per the zeitgeist of the time) social contract envisaging a democratic constitutional

66 Ibid., at 6.

67 Ibid., at 4–10.

68 In general, Ukraine's contemporary political system has consolidated, for the past 100 years, in three key stages: the birth of the modern political system during the First Ukrainian Republic (1917–1923), its colonial institutionalization during the Soviet times (the Second Ukrainian Republic in 1922/23–1990) and the rebirth of the Ukrainian state after regaining independence from metropolitan Soviet Russia in 1990/91 (the current Third Ukrainian Republic since 1991). Some authors contend, however, that the 2013–14 Euromaidan Revolution was a divergent break with the Third Republic, thus giving rise to the emergence of the Fourth Ukrainian Republic since 2014, see: Paul D'Anieri, 'Establishing Ukraine's Fourth Republic: Reform after Revolution' in Henry E. Hale and Robert W. Orttung (eds), *Beyond the Euromaidan: Comparative Perspectives on Advancing Reform in Ukraine* (Stanford University Press 2016) 3–20.

69 See Конституція Української Народньої Республіки (Статут про державний устрій, права і вільності УНР), http://zakon5.rada.gov.ua/laws/show/n0002300-18. See also: І.Я. Терлюк, 'Український конституціоналізм як державно-правова практика: доба "Першої УНР"' (2015) 825 Вісник Національного університету Львівська політехніка, Серія: Юридичні науки 289. The period of the First Ukrainian People's Republic (1917–1920) is also regarded as the origin of the Ukrainian revolutionary constitutionalist tradition, see, for instance: О.М. Мироненко, *Витоки українського революційного конституціоналізму 1917–1920 рр.: Теоретико-методологічний аспект* (НАНУ Ін-т держави і права ім. ВМ Корецького 2002).

order with the due division of powers. Thereby, it is not only the oldest constitution in Europe but also one that is even older than the American Constitution of 1787.

Throughout its evolution, Ukraine's constitutional tradition has been inextricably linked to revolution. One might rightfully question this link as revolutions appear to be hardly compatible with tradition. As Savchyn argues that 'revolution, as paradoxical as it may sound, is a precursor to the formation of a new legal tradition, in denial of the old law, which is dying out and no longer proves to be suitable for new social structures'[70]. Instead, legal tradition, broadly speaking, is 'based on respect for the old law, on the reproduction of rules and procedures based on the old law, which can adapt to changing circumstances and change in an evolutionary way'[71]. Paradoxically, however, this link between revolution and constitution-making has not only endured – it defined a peculiar state of Ukraine's contentious constitutionalism at all times.

Ukrainian constitutionalism emerged in the wake of the Ukrainian Cossacks' fight to limit the monarchical powers of metropolises in the 17th–18th centuries, and survived the colonial phase of constitutionalism in 19th–20th centuries during the country's imperial dependence under the rule of the Russian and Austria-Hungarian empires. It underwent a new dimension of national constitutionalism as a result of the national democratic revolution in Ukraine of 1917–1920, which evolved on the basis of the revolutionary parliamentarianism of the Ukrainian Central Council (*Ukrayinska Tsentralna Rada*)[72]. Following the establishment of Soviet rule in Ukraine in the 1920s, an ideology and instrumentalized politics of the so-called Soviet (socialist and, in fact, totalitarian) constitutionalism were introduced. This relied on the authority of the Communist party in a one-party system and actually sought to subordinate members of society to the state (according to the USSR Constitutions of 1924, 1936, and 1977)[73]. The system of Soviet constitutionalism formally lasted until the end of 1980s when it was virtually abolished by the national democratic revolutions that took place not only in Ukraine but also in many republics of the former Soviet Union.[74] Such a system

70 Михайло Савчин, *Сучасні тенденції конституціоналізму у контексті глобалізації та правового плюралізму* (РІК-У 2018) 90.

71 Ibid.

72 Anton Kotenko, 'Mykhailo Drahomanov's ideas of parliament' (2020) 11(1) Journal of Eurasian Studies 6.

73 Dietrich Frenzke, 'Die Entwicklung des ukrainischen Verfassungsrechts von 1978 bis 1995' (1995) 41 OER Osteuropa Recht 338.

74 Михайло Савчин, *Конституціоналізм і природа конституції* (Ліра 2009) 70–108; Михайло Гультай, 'Вітчизняний конституціоналізм радянської доби та його трансформація після здобуття Україною незалежності' (2015) 5 Вісник Конституційного Суду України 59. It should be pointed out in this context that – albeit the USSR Constitution was formally abolished on 8 December 1991 – the system of Soviet constitutionalism had been, in one way or another, informing the con-

proved to be unable to transform into multinational constitutionalist orders, as then imposed by historical circumstances, which is why it self-dissolved under the pressure of domestic and international factors.

2.1 The 1990–1991 Granite Revolution and the 1995–1996 constitution-making

In Ukraine, where civic and national constitutionalism had kept deep roots, the constitutional revival was one of the main tasks of the national democratic revolution in 1990–1991 known as the *"Granite Revolution"*. In this peaceful revolution, the *Verkhovna Rada* (the parliament) played a prominent role, which is why it thereafter took a central position in governing the state. Significantly, this was the key to the introduction of classical liberal-democratic constitutionalism in Ukraine,[75] which encompassed people's sovereignty, the division of powers and the rule of law as imperatives of the constitutional order. The constitution-making process in the early 1990s had been marked, however, by deep political struggle and divisions between political forces and then-state institutions[76], which resulted in several draft constitutional texts presented. As Gallina observes, early constitution-making in post-Soviet Ukraine was a contentious episode as '[t]he various constitutional drafts reflected the volatile political situation'[77]. In absence of a solid agreement on the Constitution's text, June 1995 saw the adoption of the Constitutional Agreement (*Konstytutsiynyy Dohovir*) between the President and the Parliament, a transitory constitutional arrangement with the duration of just twelve months but, nonetheless, substantive consequences for public and political contention[78].

It was also in light of the increase of this contention, especially after then-President Leonid Kuchma issued a decree on the holding of a nationwide referendum in September 1996 on the earlier proposed March 1996 draft constitutional text (fraught with consolidating presidential powers), that the constitution-making process in Ukraine

stitution-making in the newly emerged post-Soviet countries for nearly half a decade or so after the collapse of the Soviet Union. In Ukraine's case, it was substantially the Constitution of the Ukrainian Soviet Socialist Republic of 1978 that was in force, with certain amendments, until the year 1996.

75 Юрій Г. Барабаш і Анатолій О. Селіванов (ред), *Конституційна юрисдикція* (Право 2012) 19–29.

76 Henry E. Hale, 'Constitutional Performance after Communism: Implications for Ukraine' in Henry E. Hale and Robert W. Orttung (eds), *Beyond the Euromaidan: Comparative Perspectives on Advancing Reform in Ukraine* (Stanford University Press 2016) 124–142.

77 Nicole Gallina, 'Ukraine' in Anna Fruhstorfer and Michael Hein (eds), *Constitutional Politics in Central and Eastern Europe* (Springer 2016) 497.

78 Kataryna Wolczuk, *The Moulding of Ukraine: The Constitutional Process of State Formation* (CEU Press 2001) 196–225; Frank Evers, 'Verfassungsentwicklung und Rechtssicherheit in der Ukraine' (1998) 42 Recht in Ost und West 41.

received a new impetus and a more resolute course. So, over the 'constitutional night' of 27 to 28 June 1996, with dozens of debating and voting rounds, the first Constitution of the newly independent Ukraine was adopted with 315 out of 450 votes cast. The 1996 Constitution proved to be a genuine 'compromise constitution'[79] and, as such, it not only reflected the minimalistic constitutional arrangement overshadowed by the clash of identities and power struggle – it also was an embodiment of transitional constitutionalism, thus oftentimes opening to gaps between the law and practice of the basic Ukrainian law. Effectively, it established the president-parliamentary form of semi-presidentialism, which, in reality, 'had granted the president independence from parliament and control of the government through the prime minister'[80]. The rights to nominate and, no less importantly, dismiss the prime minister (after presidential elections and a confirmed vote of no confidence by the Parliament) and the right to dissolve the Parliament (if it proved to be unable to hold an orderly session), along with the powerful (absolute) legislative veto right (that could only be overruled by a two-thirds majority in the Parliament), introduced a strong asymmetry to the legislative-executive balance and allowed for the practice of patrimonial politics.

This constitutional (im)balance, furthermore, was conducive to further attempts at consolidating presidential power via constitutional change. Seeing no good window of opportunity therefor in the Parliament, then-President Kuchma initiated, instead, by his decree, an All-Ukrainian referendum on 16 April 2000 that included questions on substantial constitutional matters. In particular, the four questions asked referred to the possibility of creating a second chamber in the Parliament, stripping the parliamentarians of their immunity, reduction of their number from 450 to 300 members of parliament, as well as to whether the president should have the right to dissolve parliament under certain conditions. Notably, all questions were answered positively by an overwhelming majority of the participants: majorities between 80 % and 90 % approved the questions-proposals, whereby around 81.1 % of Ukrainian citizens took place in the voting[81]. However, this popular mandate failed to eventually receive validation by the two-thirds majority in the Parliament – the missing prospect of mobilizing such a parliamentary majority in support of the charted constitutional amendment left the referendum results rest abeyant.

79 Peter Van Elsuwege, 'The Law and Politics of Post-Soviet Constitutionalism' in Arkady Moshes and Andras Rácz (eds), *What has remained of the USSR: Exploring the erosion of the post-Soviet space* (Finnish Institute of International Affairs 2019) 21–38, at 24.

80 Gallina 2016 (n 77) at 500.

81 Venice Commission, *Implementation of the Constitutional Referendum in Ukraine*, Strasbourg, 16.10.2000, CDL-INF(2000)14 ENG, https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2000)014-e.

2.2 The 2004 Orange Revolution and the remaking of Ukraine's constitutional order

In an endeavour to move forward with the planned constitutional change, then-President Kuchma presented, in 2003, a constitutional amendment draft that would i. a. allow carrying constitutional reform based on the popular mandate alone (ie. the results of the 2000 referendum), without subjecting it to parliamentary approval. It also sought to weaken the presidential position and make a transition towards a premier-presidential regime[82]. This draft, too, failed to mobilize the necessary two-thirds majority in the Parliament, even though this time, in a very dramatic manner: with 294 votes received in support of the draft law, just six were missing to make it pass by the necessary majority. With an impasse looming large, the center of constitutional contention was then shifted to the Constitutional Court of Ukraine (CCU), which had to handle the power struggle between the President and the Parliament and not always had been keen on finding a middle way[83]. With then-President Kuchma becoming incrementally assertive and determined to run, for a third time, presidential elections, the CCU got framed to pick a side – the President's side[84]. In a controversial ruling of December 2003, the CCU allowed L. Kuchma to run for president a third time, however, eventually this right was not embraced. Instead, after these two failed attempts to secure his power, L. Kuchma decided not to run for president but to ensure his ally – Viktor Yanukovych – triumphed over the oppositional candidate Viktor Yushchenko, and thus exploited the administrative resources in rigging the November 2004 presidential elections. Such manipulation of the popular vote took masses to the streets, urging the Supreme Court to order, on 3 December 2004, a third round of elections, which resulted in Viktor Yushchenko's victory by some 52 % of the popular vote. It was a victorious moment of Ukraine's second revolution, the 'Orange Revolution'.

This marked yet another turning point of modern Ukrainian constitutionalism, on its transitory path from a (proto-)authoritarian to a democratic political order. This constitutional development, prompted by the 2004 *"Orange Revolution"*, was undeniably revolutionary in its nature[85]. In the wake of the revolutionary transformation, Ukraine's

82 Oliver Vorndran, 'The Constitutional Process in Ukraine – Context and Structure' (2003) 10 Journal of Constitutional Law in Eastern and Central Europe 213.

83 Wolczuk observed, in this regard, that 'the Court found itself in a highly precarious and vulnerable position […]. Despite the frequent invalidation of, at least some provisions of, legal acts, the Court often strove to limit the impact of its rulings by carefully seeking out the middle ground', see: Wolczuk 2001 (n 78) at 260.

84 Wolczuk 2001 (n 78) at 331.

85 On revolutionary context and content of the 2004 constitutional transit in Ukraine, labeled as a path 'from politics of revolution to politics of survival', see: Armen Mazmanyan, 'Constrained, pragmatic

constitutional order was soon amended as the Parliament passed, on 8 December 2004, the Constitutional Amendment Act which established a new logic of the executive-legislative balance – that is, the premier-presidential rule[86]. Some saw this transition from president-parliamentary form of government to the premier-presidential version of semi-presidentialism as a 'resurrection', or resurfacing, of L. Kuchma's 2003 constitutional reforms[87], and with it the reemergence of power struggle. Indeed, the transition to premier-presidentialism had weakened the presidential powers[88], not least by reducing them in what regarded the appointment of the prime minister and the cabinet of ministers, that is government, as well as the dismissal of the prime minster, which, accordingly, became a parliament's prerogative. Still, the remaining influential position of the president in legislation, due to his maintained legislative initiative and veto rights, soon led, however, to new power struggles between V. Yushchenko and the parliamentary majority[89]. Such a state of art has widely been seen as a 'trademark' of Ukrainian constitutional politics, where both constitutional reform and maintenance were usually subdued to the presidential self-interest. As Fruhstorfer notes, such trademark is also characteristic of post-Orange Revolution Ukraine in general in that 'this self-interest was neither limited to constitutional politics nor to the president'[90] alone. Along with multiple power struggles between the ruling and oppositional forces, the constitutional struggle continued as well[91]. Soon after the 2004 constitutional amendments took effect on 1 January 2006 they became contested, this time again in/through the Constitutional Court of Ukraine. The latter one had to decide on the constitutionality of the 2004 transition, given that it was not supported by an All-Ukrainian referendum but a revolution instead, which proved to be a shaky ground and an emblematic contentious issue between the constituent and the constituted power. In April 2008, the CCU stated, *argumentum a contrario*, that the constitutional change was unconstitutional as it

pro-democratic appraising constitutional review courts in post-Soviet republics' (2010) 43 Communist and Post-Communist Studies 409, at 419–421.

86 Law of Ukraine "On Amendments to the Constitution of Ukraine" No. 2222-IV of 8 December 2004, http://zakon2.rada.gov.ua/laws/show/2222-15> (last accessed on 8 June 2014. On 1 January 2006, this Law has become an integral part of the Constitution and – as a result of that – lost its force as an alone-standing piece of legislation.

87 Roman Olearchyk, 'Kuchma's constitutional reform resurfaces' (2004) *KyivPost,* 24.06.2004, https://www.kyivpost.com/content/ukraine/kuchmas-constitutional-reform-resurfaces-21296.html.

88 Kimitaka Matsuzato, 'Disintegrated Semi-Presidentialism and Parliamentary Oligarchy in Post-Orange Ukraine' in Robert Elgie, Sophia Moestrup and Yu-Shan Wu (eds), *Semi-Presidentialism and Democracy* (Palgrave Macmillan 2011) 192, at 193.

89 This is also connected to the largely unfinished constitutional reform, with 2004 amendment act being just a start of it, see: Anton Filipenko, 'The Long-Suffering Constitution' (2011) 46(2) Statutes and Decisions: The Laws of the USSR and Its Successor States 74, at 74.

90 Fruhstorfer 2017 (n 11) at 782.

91 Gallina 2016 (n 77) at 504–506.

lacked proper procedure, that is, the endorsement by an All-Ukrainian referendum[92]. Subsequently, a national constitutional council was tasked, in 2008, to elaborate a new constitutional draft. Remarkably, the change of the political landscape in the country resulted in renewed contention via competing constitutional drafts, then submitted by President Viktor Yushchenko and the new coalition formed between Viktor Yanukovych's Party of Regions and the Batkivshchyna Party led by Yulia Tymoshenko. The issue dragged on for two more years until the 2010 presidential election brought Viktor Yanukovych a revenge victory and with it, a reverse in Ukraine's constitutional politics, that is, constitutional *coup d'état*.

2.3 The 2010 Blue Counter-Revolution and the breaking of Ukraine's constitutional order

The 2010 *"Blue Counterrevolution"*[93] occurred in both the political and legal constitutional domains. First, in violation of then-valid constitutional norms, the newly elected President V. Yanukovych 'bent' the procedure of appointing prime minister to his good avail and received the 'blessing' for such a violation from the Constitutional Court by its Decision 11-rp/2010 from 16 April 2010[94]. Furthermore, in October 2010, by Decision 20-rp/2010, the CCU reinstated the president-parliamentary form of government, as established first under the 1996 Constitution, ruling thereby the 2004 constitutional amendments unconstitutional[95]. Both from a substantive and procedural point of view, this CCU-enacted 2010 amendment proved to be unconstitutional itself. The key to the paralegal (or quasi-legal) constitutional restoration, in fact, a 'constitutional *affaire*'[96] that was accomplished by CCU's Decision 20-rp/2010, was in allowing for a 'technical' amendment to the Constitution's text as if it was an ordinary law. This method was invented and implemented by the newly appointed constitutional justices who paradoxically 'ha[d] been ordered to invalidate the [previously launched] constitutional reform'[97]. This 'technical' amendment run at odds with the principles of constitutional

92 Decision of the Constitutional Court of Ukraine no.6-rp/2008, Kyiv, 16.04.2008, https://ccu.gov.ua/sites/default/files/ndf/06-rp/2008.doc.

93 Svetlana Bocharova and Sergei Sidorenko, 'The Blue Counterrevolution: Viktor Yanukovych Eliminates the Consequences of the "Orange Revolution"' (2011) 46(2) Statutes and Decisions: The Laws of the USSR and Its Successor States 80, at 80.

94 Decision of the Constitutional Court of Ukraine no.11-rp/2010, Kyiv, 6.04.2010, https://ccu.gov.ua/sites/default/files/ndf/11-rp/2010_0.doc.

95 Decision of the Constitutional Court of Ukraine no. 20-rp/2010, Kyiv, 30.09.2010, https://ccu.gov.ua/sites/default/files/ndf/20-rp/2010_0.doc.

96 Tyushka, 2014 (n 2) at 23–24.

97 Vitalii Chervonenko, 'They Have Been Ordered to Invalidate Constitutional Reform: Files of the New CCU Justices' (2011) 46(2) Statutes and Decisions: The Laws of the USSR and Its Successor States 46, at 46.

amendability (and unamendability, too); what is more, thereby, even the prescribed the participation of the Parliament in the procedure of amending the Basic Law of Ukraine was neglected. Consequently, the new version of the Constitution (re)instated in 2010 was the result of the sole decision of the Constitutional Court of Ukraine no. 20-rp/2010 from 30 September 2010 and a series of subsequently undertaken institutional 'corrective' measures.

The Decision No. 20-rp/2010 was adopted upon the constitutional petition of 252 parliamentarians who referred in their claim to the alleged violations of procedure that took place during the consideration and adoption of Law No. 2222-IV on 8 December 2004.[98] Hence, the law was requested to be declared unconstitutional. Interestingly, the Constitutional Court adopted a unique (both in terms of the content and the consequences) decision to approve the petition. Thereby, the CCU revisited its own precedent, which had only been set two years before, when, on a similar matter, a diametrically opposite position had been taken. On 5 February 2008, the Constitutional Court of Ukraine adopted the resolution (CCU Res. No. 6-y/2008)[99] on the similarly formulated claim filed by 102 members of the Parliament who questioned the constitutionality of procedures during the adoption of Law No. 2222-IV in 2004. In that Resolution, the Court expressed precisely the opposite position if compared with its tenor in Decision No. 20-rp/2010 of the year 2010. The inconsistency, or even self-contradiction, combined with the substitution of terms that accompanied this judicial activism and the ultra-vires character of select actions, rendered the accomplished amendment a truly contentious nature[100]. The Court's collegium itself was apparently quite aware thereof as this peculiarly ambiguous situation with constitutional re-transition was addressed in the Dissenting Opinion of Justice Petro B. Stetsiuk.[101] What is more, the Court hesitated justifying such a position taken in the resolutive part of its Decision 20-rp/2010. Instead, the CCU only referred, in the motivational part of this notorious ruling, to a kind

98 For peculiar details on the 2004 constitutional reform and its contentious constitutionality, see: Elena Geda, 'An Undisputed Case: The Consideration of Legality of Constitutional Reform has not Elicited Disputes between the Parties' (2011) 46(2) Statutes and Decisions: The Laws of the USSR and Its Successor States 50. As noted by Mishina, even during the 2004 constitutional reform, the role of the Constitutional Court of Ukraine was openly disregarded, which made the Venice Commission repeatedly express its concern about the legal-procedural admissibility of the 2004 constitutional change in Ukraine, see: Venice Commission, 'Opinion on the procedure of amending the Constitution of Ukraine', CDL-AD(2004)030, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)030-e.

99 Резолюція Конституційного Суду України no. 6-y/2008, 02.02.2008, http://www.ccu.gov.ua/uk/doccatalog/list?currDir=10578.

100 Барабаш і Селіванов 2012 (n 75) at 6–18, 30–65, 90–116.

101 Dissenting Opinion of Constitutional Justice P.B. Stetsiuk on the Decision of the CCU No. 20-rp/2010 from 6 October 2010, http://www.ccu.gov.ua/doccatalog/document?id=122681.

of a 'restoration of the previous wording of norms in the Constitution of Ukraine' that was to be enacted. Being quite an innovative and far-reaching a judicial undertaking, this 'restoration' of constitutional norms is still lacking any grounding in constitutional text or tradition, and thus contravenes the constitutional amendability principles. It, therefore, comes as no surprise that, back in 2010, the Constitutional Court did not prescribe how such an innovative action, as 'restoration' of constitutional text, was meant to be implemented: there was in fact no legal and legitimate way to do so[102]. The simple fact that the Constitutional Court of Ukraine has *ex officio* violated the basic law by substituting the terms, and with it the higher and ordinary laws, thus quasi-retracting Law No. 2222-IV (which, in fact, around then did not legally exist anymore for it had become a part of the new Constitution after 1 January 2006), did not only give rise to the de-legitimation of this state authority – it also mirrored the depth and breadth of 'frivolous', or 'pen-and-phone', constitutional politics conducted under V. Yanukovych presidency. Hence, *de jure* no changes to the Constitution of Ukraine were duly introduced, while *de facto* 'technical' amendments to the text of Ukraine's Constitution were deceivingly made. For many observers, the day this decision was made marked a 'day of death'[103] of the recurring constitutional reform. At the same time, it inaugurated the period of constitutional 'counter-reforms'[104] in Ukraine and the overall 'involution of constitutionalism' towards a quasi-authoritarian order[105]. The public and media discourse was quick to notice such a sorrow state of the constitutional process, that is, devolution, and frame it as a deep political struggle, saga or even war on Constitution[106]. As a result, the whole 2010 constitutional amendment debacle led to growing popular non-acceptance of the state authorities, including the Constitutional Court, whose legitimacy was called into question for the first time in the history of Ukrainian constitutionalism. Against this background, the new wave of constitutional (counter-)reform, called into life in 2012 when then-President V. Yanukovych formed a Constitutional Assembly[107], received little popular support, not least as it was sought to legalize the practice of un-

102 Михайло Савчин, 'Природа актів Конституційного Суду України: теоретико-методологічні аспекти' (2007) 5 Вісник Конституційного Суду України 77.

103 Dmitrii Korotkov, 'Constitutional Reform – Day of Death' (2011) 46(2) Statutes and Decisions: The Laws of the USSR and Its Successor States 83, at 83.

104 Arkadii Moshes, 'The Constitution of Counterreforms' (2011) 46(3) Statutes and Decisions: The Laws of the USSR and Its Successor States 83, at 83.

105 Юрій Маціївський, 'Інволюція конституціоналізму і квазі-авторитарний режим в Україні' (2011) 3 Вибори та демократія 49.

106 Natalia Chaban and Vlad Vernygora, 'Ukraine's Constitutional "Saga": Ukrainian Media Reflections of the Constitutional Process' (2010) 14(3) TRAMES Journal of the Humanities and Social Sciences 227.

107 'Yanukovych Forms Constitutional Assembly Chaired by Kravchuk', *Kyiv Post,* 18.05.2012, https://www.kyivpost.com/article/content/ukraine-politics/yanukovych-forms-constitutional-assembly-chaired-b-1-127827.html.

folding authoritarianism and unrestraint presidential rule in the country. The gap between the constituent and constitutional power grew even further when V. Yanukovych failed to sign, in November 2013, at the Vilnius Summit of the Eastern Partnership, the Association Agreement with the European Union that, for many Ukrainian citizens, was seen as a hope for democratic renewal. This episode in Ukraine's contentious constitutionalism, when popular constitutionalism faced off the growingly authoritarian one, resulted in the largest, for now, popular uprising-turned-revolution.

2.4 The 2013–2014 Euromaidan (Dignity) Revolution and Ukraine's restoration constitution-making

Sparked by this U-turn on the initialled and much-expected Association Agreement, the popular unrest and manifest dissatisfaction, via countrywide public demonstrations, soon grew in scale and consolidated its constitutional agenda[108]. The Euromaidan, or Dignity[109], Revolution that took people to the streets in November 2013 demanded, above all, justice and the restoration of the democratic constitutional order[110], which rolled back considerably since 2010. The protesters were demanding, in particular, the resignation of the President Yanukovych and his Prime Minster and Minster for Internal Affairs. As Savchyn claims, the 2014 Dignity Revolution was essentially 'a response to the total assertion of Yanukovych's personal dictatorship green-lit [ie. authorized] by the Constitutional Court's decisions of 6 April 2010 (Dec. no. 11/rp/2010) and of 30 September 2010 (Dec. no. 20-rp/2010)'[111]. The demands to curtail corruption, restore justice and public security, too, formed the broadly scoped agenda of the revolution. Ukraine's third revolution has, thus, been essentially informed by both the constitutional rationality and constitutional sentiments of the Ukrainian citizens, with the sentiments being no less important than the rationality of the exercised right to revolt[112].

108 Tyushka 2014 (n 2).

109 Weinrib treats the very idea and many dimensions of dignity as a central theme of modern constitutionalism, and thus central to authority, justice and public law and the modern constitutional state in general, see: Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press 2016).

110 Following Partlett, '*restoration constitution-making*', as a method of constitutional transition, can be defined as 'as a process of constitutional change that is governed by the partial or full restoration of a pre-existing constitution as well as its associated laws and institutions', which is, in addition to genuinely revolutionary settings, is 'often found in constitutional transitions that take place in the aftermath of war, a military coup, or outside occupation', see: William Partlett, 'Restoration constitution-making' (2015) 9 Vienna Journal on International Constitutional Law 514, at 527.

111 Савчин 2018 (n 70) at 90.

112 In his *Constitutional Sentiments* (2011), Sajó makes a very clear point: although constitutions indeed are written to regulate human behaviour and affairs, they do so by appealing to people's hearts – and not only their minds. For emotions, like fear, shame, proudness, etc., play a vital role in shaping be-

Soon after *Euromaidan* rose up to protest in November 2013, which the state authorities failed to legitimately respond to but succeeded in illegally suppressing it, the revival of the constitutional order, associated primarily with limiting presidential powers, became an urgent imperative of the revolution. The starting point for calls for constitutional re-transition and, at the same time, the point of no return, was the notorious "Black Thursday", 16 January 2014. On that day, the government of Ukraine did not only demonstrate that the power of ruling *by* law (instead of observing the rule *of* law)[113] – it also encroached upon the very constitutional order it was deemed to protect. As constitutional security and national security are inherently intertwined[114], the subversion of the country's constitutional order was soon fraught with grave consequences as the volatile revolutionary situation became exploited in Russia's aggressive campaign vis-à-vis Ukraine that, in February-March 2014, resulted in the annexation and occupation of the Ukrainian Crimea by Russia.

The revolutionary demand to return to the 2006–2010 constitutional order, as established by the Constitution as amended on 8 December 2004, did not only express people's belief that the 2004 version of the country's basic law much better reflected the values and governmentality of Ukrainians (i. e. the ideas of how they wish to be governed).[115] It testified as well to the importance of duly restoring the constitutional order. Therefore, the re-transition to a premier-presidential system of government was crucial for both the successful solution of the most acute social and political crisis to occur in the independent Ukraine and for the feasible prospect of a return to liberal-democratic state(hood). On 21 February 2014, the Verkhovna Rada of Ukraine adopted Law No. 742-VII 'On Restoration of Certain Provisions of the Constitution of Ukraine'[116]. Given President Yanukovych's failure to sign the bill, this law was supplemented with a

haviour, and thus individual and social sentiments are as crucial for understanding of constitutional development as the political reason, institutional rationality and legal doctrinality of this process. See: András Sajó, *Constitutional Sentiments* (Yale University Press 2011). On the role of emotions in constitutional process, see also: András Sajó, 'Emotions in Constitutional Design' (2010) 8(3) I·CON 354.

113 Andriy Tyushka, 'Maidan's doomsday: fierce laws, farce amnesty and furiously faithful people in Ukraine' (2014) *GeoPolitika,* 27.02.2014, http://www.geopolitika.lt/?artc=6546.

114 Іван І. Завидняк, 'Конституційний лад України та національна безпека: співвідношення у контексті доктрини верховенства права' (2010) 2 Часопис Київського Університету Права 123; Альберт А. Єзеров, 'Конституційна безпеа як складник національної безпеки України' (2013) 27(2) Стратегічні Пріоритети 120.

115 Наталія В. Стецюк, 'Принцип поділу влади в українській державно-правовій традиції' (2012) 641 Науковий вісник Чернівецького Університету, Серія: Правознавство 138. It should be emphasized that, historically, the Ukrainian constitutional tradition featured choices for parliamentarism rather than presidentialism as a form of governemment, see, for instance: Kotenko 2020 (n 72).

116 Закон України 'Про відновлення дії окремих положень Конституції України' no. 742-VII, 21.02.2014, http://zakon3.rada.gov.ua/laws/show/742-18.

parliamentary resolution enacting the amendments to the Constitution and the restoration of the wording of the text of 8 December 2004. The resolution also took into account the changes made in 2011 (Law No. 2952-VI)[117] and 2013 (Law No. 586-VII)[118]. Following the publication of the law in the official journal on 1 March 2014, the constitutional order of 2004 was restored. It has been in force in Ukraine since 2 March 2014.

Accordingly, several crucial adjustments have been made in order to return to the parliamentary-presidential form of government in Ukraine[119]. It has considerably widened the scope of powers granted to the Parliament, while at the same time constraining presidential powers. Additionally, a stronger and more independent Prime Minister has enhanced the system of checks and balances under the renewed constitutional order. For instance, the Prime Minister has become, since then, the *ex officio* chief executive (this excludes, however, Prime Minister's authority over ministries of defence and foreign affairs, as well as the security service, that all remain within the responsibility of the President). Parliamentary powers have been considerably extended with respect to controlling the Government (ministers, except for the aforementioned, are now subordinated to a parliamentary majority) and the President (the Parliament can overrule a presidential veto; laws enter into force upon their signature by the speaker of the Parliament). Under the current Constitution, the parliamentary speaker becomes acting president in case of the President's death, resignation or impeachment. The prosecutor general, who plays a very important role in the country's justice system, will once again be appointed and dismissed by a parliamentary majority (cf. *Table 1* for more detail).

Changes were also enacted for the Ukrainian legislation deemed to have been illegally adopted in the period of 2010–2011, which amounts to some 80 legal acts that empowered the President with excessive authority. These were to be abolished in a five-day term.

Despite all the essential innovations post-2013/14 revolution, the constitutional reform and transition has not been complete in Ukraine until now. The return to the 2004 version of the Constitution should best be regarded as a temporary constitutional arrangement[120], for it does not correspond with current demands for constitutional de-

117 Закон України 'Про внесення змін до Конституції України щодо проведення чергових виборів народних депутатів України, Президента України, депутатів Верховної Ради Автономної Республіки Крим, місцевих рад та сільських, селищних, міських голів' no. 2952-VI, 01.02.2011, http://zakon3.rada.gov.ua/laws/show/2952-17.

118 Закон України 'Про внесення змін до статті 98 Конституції України' no. 586-VII, 19.09.2013, http://zakon3.rada.gov.ua/laws/show/586-18.

119 Всеволод Речицький, 'Український конституційний процес у 2014 році' (2015) 18(11–12) Часопис 'Критика' 18.

120 Tyushka 2016 (n 2).

Table 1: Pre-2014 and Post-2014 Constitutional Orders of Ukraine Compared

	Constitution ver. 1996 (in force 1996–2004, 2010–2014)	Constitution ver. 2004 (in force 2004–2010, 2014–...)
Form of government	***Presidential-parliamentary*** *(i. e. strong semi-presidentialism)*	***Premier-presidential*** *(i. e. weak semi-presidentialism)*
President	appoints and dismisses prime minister, ministers, heads of central executive bodies	suggests to the parliament the candidacy of prime minister; ministers are appointed by president upon the agreement with prime minister
	appoints and dismisses heads of regional state administrations	upon the nomination by the Cabinet of Ministers, appoints heads of regional state administrations
	suggests to the parliament the candidacy of prosecutor general; dismisses the prosecutor general	prosecutor general is appointed and dismissed by the parliamentary majority
	is entitled to dissolve the parliament if it fails to launch an ordinary plenary meeting within 30 days	is entitled to dissolve the parliament if: a) parliamentary factions fail to establish a coalition within 30 days; b) coalition fails to form a government within 60 days; c) the parliament fails to launch an ordinary plenary meeting within 30 days
Parliament	mixed elections system (225 MPs elected according to majoritarian electoral system, other 225 MPs – according to party lists system); parliament is elected for a 4-year term	proportional elections system (according to party lists); parliament is elected for a 5-year term
	in case of president's death, resigning, or impeachment, prime minister becomes an acting president	in case of president's death, resigning, or impeachment, parliament's speaker becomes an acting president
	parliament works w/o forming coalition, majority is constituted by both parliamentary factions and non-factional MPs	parliamentary majority is formed by a coalition of parliamentary factions only, which were established according to election outcomes
	MPs do not have to be members of parliamentary factions, they can act as non-factional parliamentarians	MPs, elected according to party lists, are deprived of their mandate provided they don't join any of the parliamentary factions; MPs are also deprived of their mandate if they are excluded from a faction upon the decision of the faction leadership

	Constitution ver. 1996 (in force 1996–2004, 2010–2014)	Constitution ver. 2004 (in force 2004–2010, 2014–...)
Parliament	speaker of the parliament cannot sign bills into laws if the president exercises his/her veto right	in case the president exercises his/her veto right, the parliament can overrule this veto; law enters into force upon its signature by the speaker of the parliament
Prime Minister and Cabinet of Ministers	President is the chief executive. Ministers are subordinated to the president.	Prime minister is the chief executive. Ministers are subordinated to the parliamentary majority coalition and the prime minister. Head of Security Service of Ukraine, Minister of Defence, and Minister for Foreign Affairs are subordinated to the president.
	Cabinet of Ministers resigns upon the election of new President	Cabinet of Ministers resigns upon the election of new Parliament
	The number of deputy prime ministers is limited to three (plus first deputy prime minister)	Number of deputy prime ministers is not limited
	in case of president's death, resignation, or impeachment, prime minister becomes an acting president	in case of president's death, resignation, or impeachment, parliament's speaker becomes an acting president
Judiciary	The first appointment to the post of a judge for a 5-year term is made by president; other categories of judges, except for the judges of the Constitutional Court of Ukraine, are lifetime appointed by the parliament	
Constitutional Justice	Upon consultation with prime minister and minister of justice, the president appoints 1/3 of justices in the CCU; Verkhovna Rada appoints another 1/3 of justices in the CCU; and 1/3 of justices is appointed by the Convention of Judges of Ukraine	

Source: compiled by the author

velopment in the country and was also previously a matter of concern of the Venice Commission[121]. Back in 2005, the Venice Commission resolutely maintained in its assessment of the constitutional engineering in Ukraine following the 2004 reform that, although the 2004-version constitutional order offers 'increasing parliamentary features of the political system', such constitutional amendments, however, 'do not yet fully allow the aim of the constitutional reform of establishing a balanced and functional system of

121 Venice Commission, 'Draft opinion on the Constitutional Situation in Ukraine' (Opinion No. 599/2010), Strasbourg, 20.12.2010, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2010)126-e. See also: Савчин 2009 (n 74) at 113–120.

government to be attained'[122]. Hence, the thinking towards a '2004 *plus*' Constitution[123] has been in the pipeline for half a decade now. The late 2014 presidential and parliamentary elections inaugurated a new political configuration in the country, with President Petro Poroshenko arriving at power. The newly formed post-revolutionary parliamentary coalition, in the coalition agreement concluded on 21 November 2014, defined further constitutional reform as one of their priorities for the 2014–2019 legislature, thus reiterating the need for a new constitutional arrangement. In 2014–2016, the ruling coalition initially succeeded in pushing forward some crucial Euromaidan reforms, including the decentralization, law enforcement and anti-corruption reforms. The outbreak of war in Ukraine's east, following Russia's hybrid aggression in Donetsk and Lugansk regions of Ukraine in June 2014, and the growing internal competition within the ruling elites brought the course of reforms to a halt, thus also suspending some of the charted constitutional developments, including as regards the 2016-launched constitutional justice reform[124].

2.5 The 2019 Ballot (Counter–)Revolution and the birth of populist constitutionalism in Ukraine?

The period of 2016–2018, thus, saw yet another functional crisis of Ukrainian constitutionalism, as well as new calls for the adoption of a genuinely new constitution[125] – mainly as a move, by some political forces, to mobilize voters in the run-up to 2019 presidential and parliamentary elections. This period also saw the birth of new (left and right) populist projects as well as a renewed oligarchic and state-institutional struggle. April 2019 presidential elections brought an unprecedented, in Ukrainian history, land-

122 Venice Commission, 'Opinion on the Amendments to the Constitution of Ukraine Adopted on 8 December 2004', 2005, CDL-AD(2005)015, http://www.venice.coe.int/docs/2005/ CDL-AD(2005)015-e.asp.

123 Importantly, the '2004 *plus*' constitution has still to address the 'traditional' unresolved challenges to Ukrainian constitutionalism, including the practice of (neo)patrimonial democracy, restraining the political influence of rent-seeking entrepreneurs, and the build-up of non-clan party politics, see, for instance: Oleksandr Fisun, 'Ukrainian Constitutional Politics: Neopatrimonialism, Rent-Seeking, and Regime Change' in Henry E. Hale and Robert W. Orttung (eds), *Beyond the Euromaidan: Comparative Perspectives on Advancing Reform in Ukraine* (Stanford University Press 2016) 105–123.

124 Still, even being not fully completed, the major judicial reform conducted in 2016–2018 was positively assessed, not least as it provided for a breakthrough on the way to the establishment of constitutional democracy in Ukraine, see, for instance: Володимир Кампо, *Конституція і становлення конституційної демократії в Україні (2014–2018 роки)* (Зелений Пес 2019) 33–72. There are also a number of gaps and inconsistencies, however, that have persisted 2016 judicial reform and thus present a considerable challenge to Ukraine's constitutional justice, see: Serhii Prylutskyi and Olga Strieltsova, 'The Ukrainian Judiciary under 21st-Century Challenges' (2020) 7(2–3) Access to Justice in Eastern Europe 78.

125 Кампо 2019 (n 124) at 119–129.

slide victory of a new populist force[126] and, as a matter of fact, a genuinely popular public figure, that is, showman Volodymyr Zelenskyy. With over 73.22 % of the popular mandate received in the second round, his victory also signaled that a silent, or ballot, populist (counter-)revolution[127] had occurred. This (counter-)revolution brought sweeping changes to the political order in the country as, right on the next day after his inauguration as the President of Ukraine, V. Zelenskyy issued a decree on the dissolution of the Parliament and called for early parliamentary elections[128]. This presidential decree of 21 May 2019 got immediately contested as 62 members of the Parliament filed, three days later, a constitutional petition to the CCU to recognize this degree unconstitutional. By its Decision no. 6-p/2019 from 19 June 2019, the Constitutional Court upheld the presidential decree acknowledging that a 'constitutional conflict' arose between the president and parliament over the dissolution of parliament which did not have any legal solution and, thus, had to be resolved by the people of Ukraine by way of holding early parliamentary elections[129]. Accordingly, the early elections to the Verkhovna Rada were held on 21 July 2019. These elections yet again confirmed the rise of the new (populist) force in Ukraine as the presidential party 'Sluha Narodu' (The Servant of the People) gained 43.16 % of the popular mandate and 254 out of 450 seats in the Parliament, respectively. Such a confident and solid victory provided a fertile ground for manipulations and unconstrained exercise of authority, which has weakened Ukraine's emerging constitutional democracy. Some even argue that reverse-democratic – illiberal and autocratic – tendencies took root in the country post-2019[130].

Thereby, the constitutional reform got resumed as well. In September 2019 to February 2020, the number of seats in the Parliament were reduced from 450 to 300, and parliamentarians were (partially) stripped of their immunity. Moreover, the proportion-

126 Andrew Wilson, 'Zelensky plunders the populist playbook' (2019) *Aspen Review,* 4/2019, https://www.aspen.review/article/2019/zelensky-plunders-populist-playbook; Volodymyr Yermolenko, 'Zelenskiy's Populism 2.0: What it Means for Ukraine' (2019) *New Eastern Europe*, 24.04.2019, neweasterneurope.eu/2019/04/24/zelenskiys-populism-2-0-what-it-means-for-ukraine.

127 This 2019 electoral revolution is also known as 'Zelenskyy revolution', 'green revolution' (derived from the president's surname Zelenskyy and the corresponding of his campaign colours – nothing to do with green politics per se), or 'electoral Maidan', see, for instance: Vasyl Cherepanyn, 'The people's rebellion, or why a showman became president in Ukraine' (2019) *OpenDemocracy,* 24.04.2019, https://www.opendemocracy.net/en/odr/the-peoples-rebellion-or-why-a-showman-became-president-of-ukraine.

128 According to the law of Ukraine, the next parliamentary elections were originally scheduled for 27 October 2019.

129 Рішення Конституційного Суду України no. 6-p/2019, 20.06.2019, https://ccu.gov.ua/docs/2770

130 Mikhail Minakov, 'Democratisation and Europeanisation in 21st century Ukraine' (2020) *3DCFTAs Working Paper,* 9.06.2020, https://3dcftas.eu/publications/democratisation-and-europeanisation-in-21st-century-ukraine, at 6–14.

al electoral system was finally introduced that now bounds the members of the parliament stronger to their parties and party leaders. For the first time, the law on the impeachment of the president was introduced. Last but not least, the re-start of the judicial reform in late 2019, in spite of some good initial progress[131] and even bigger a promise, proceeded at a half-hearted pace and soon needed yet another re-start. In June 2020, President V. Zelenskyy initiated a new draft law on (new) judicial reform[132]. One of the achievements of the 2016–2018 judicial reform, that is, the establishment (in 2018) and operation (since September 2019) of the Supreme Anti-Corruption Court (SACC), soon became, however, contested. On 17 July 2020, 49 parliamentarians filed a petition to the Constitutional Court of Ukraine questioning the constitutionality of the Law on the SACC No. 2447-VIII claiming that such a special court is not foreseen in Ukraine's Constitution and, thus, allegedly contravenes it[133].

The looming constitutional crisis only exacerbated as, on 27 October 2020, the CCU ruled the powers of another anti-corruption institution, the National Agency for Preventing Corruption (NAZK) to be unconstitutional, and with it the system of e-declarations for public servants[134]. The end of 2020 saw a whole new dimension of the constitutional crisis, and the standoff between the President and the CCU, as President Zelensky (temporarily) dismissed, on 29 December 2020, the CCU's Head Justice O. Tupytskyy 'for sake of restoring justice'[135].

Thus, thirty years past, Ukraine is still struggling to get its constitutional justice right. With judiciary reforms attempted in 1992, 2002, 2010, 2016, the mission is far from being complete. In early 2021, President V. Zelenskyy announced yet another – radical

131 Venice Commission, 'Opinion on amendments to the legal framework governing the Supreme Court and judicial governance bodies', Strasbourg, 6–7.12.2019, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)027-e, at 15.

132 Draft Law of Ukraine No. 3711 from 22.06.2020 'On the judiciary and the status of judges', see: Проект Закону про внесення змін до Закону України 'Про судоустрій і статус суддів' та деяких законів України щодо діяльності Верховного Суду та органів суддівського врядування, No. 3711 від 22.06.2020, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69228.

133 For arguments that defy such an allegation and point to the constitutionality of the contested law, see: The *Amicus Curiae Brief* developed by international technical assistance projects (EU Anti-Corruption Initiative in Ukraine, USAID New Justice Program, and IDLO) as part of general support for anti-corruption and judicial reforms in Ukraine, Kyiv, 1 October 2020, https://pravo.org.ua/img/zstored/files/AmicusCuriae_ВАКС_en%20(1).pdf.

134 Emily Channell-Justice, 'Ukraine's Constitutional Court Crisis, Explained' (2020) *HURI Blogpost,* 19.12.2020, https://huri.harvard.edu/ukraine-constitutional-court-crisis-explained; Микола Хавронюк, 'В очікуванні "неконституційності" всього …' (2020) *Дзеркало Тижня,* 09.09.2020, https://zn.ua/ukr/article/print/LAW/v-ochikuvanni-nekonstitutsijnist-vsoho.html.

135 Decree of the President of Ukraine No. 607/2020 from 29.12.2020 'On Dismissal of Constitutional Justice of Ukraine from his duties', 29.12.2020, https://www.president.gov.ua/documents/6072020-36197.

and digital – reform of Ukraine's judiciary, aiming at the so-called 'court in a smartphone' as a new face(t) of Ukraine's justice[136]. This sad state of Ukraine's constitutional justice, along with the undoing of major (anti-corruption) reforms, have so far not only caused a constitutional retrograde, or backtracking – they also have shaken the achievements of the 2014 Euromaidan revolution. Caught in the state of a permanent crisis, Ukraine's revolutionary constitutionalism is in an urgent need of a constitutional revolution in order to modernize and finally transition to a liberal-democratic European-style version of constitutional arrangement. It is yet unclear whether the newly proposed constitutional amendments (beyond the matters of decentralization, as defined in constitutional amendment law from 31.10.2020[137]) are capable of driving such a transition to a fully-fledged constitutional democracy.

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136 See Лілія Ржеутська, 'Судова реформа 2.0: що пропонує Зеленський, аби українці довіряли судам' (2021) *Deutsche Welle Українською,* 02.03.2021, https://www.dw.com/uk/судова-реформа-20-що-пропонує-зеленський-аби-українці-довіряли-судам/a-56745315. On the impossibility of a profound judicial reform according to the presidential project, see: Галина Чижик, Михайло Жернаков, Катерина Бутко, 'Судова реформа Зеленського: очищення судів не буде' (2021) *Дзеркало Тижня,* 18.02.2021, https://www.pravda.com.ua/articles/2021/02/18/7283907/.

137 Юрій Ганущак, 'Новий проєкт змін до Конституції від президента. Які можуть бути міни цього разу?' (2021) *Дзеркало Тижня,* 02.03.2021, https://zn.ua/ukr/internal/novij-proekt-zmin-do-konstitutsiji-vid-prezidenta-jaki-mozhut-buti-mini-na-tsej-raz.html.

DAVIT ZEDELASHVILI

Constitutionalism in Georgia

Internal Contradictions and Confrontations with Abuse

1. Introduction

Georgia's journey on the road to constitutional democracy remains largely aspirational. In its protracted "transition to democracy," something quite different from constitutional democracy has emerged and stabilized. On the level of constitutional text, we encounter familiar forms and the substance of liberal democratic constitutionalism. In reality, however, their workings constitute an altogether different polity from what their normative aspirations require.

Going beyond the "transition paradigm" is essential to appreciate the state of constitutionalism in Georgia, adaptation to the local context of constitutionalism's values and the constitutional and political system that has been created following the reception of constitutionalism's ideals. Dropping the expectation bias from the "transition paradigm", it is attempted in this chapter to connect with contemporary debates on hybrid regimes, democratic decay and abusive constitutionalism, through a detached and interdisciplinary appraisal of Georgian constitutionalism.

Georgia's written constitution contains all the essentials of modern constitutionalism and coexists with a defective democracy under which the major liberal elements of constitutionalism are broken. The central internal contradiction between the aspirations of constitutional text and political reality is intensified at the level of underperforming liberal elements of constitutionalism.

The contradiction between liberal constitutional aspirations and illiberal political practices is best captured by reference to the practice of abusive constitutionalism and confrontation with this abuse. It is argued throughout this chapter, that since constitutional founding in 1995, Georgia's political elites have been abusing constitutionalism's values and institutions to stabilize illiberal democracy, a political regime that best served their interests.

2. Beyond Transition Paradigm: Constitutional correlates of the hybrid regime

Georgia, formerly a union republic of the USSR, joined the ascendant third wave of democratization after gaining sovereign statehood in 1991.[1] At that time, the dominant paradigm in political science for the analysis of "transitions to democracy" had been "transitology".[2] Transitology applied its central assumptions to otherwise very different countries of the third wave.[3] The only similarity of these states had been their authoritarian or totalitarian past and pivot towards democratization following the opening of the window of liberalization and collapse of the old regime.

These profound differences resulted in divergent paths of transition, many of which did not follow the linear predictions of transitology. Apart from a few early success stories, mostly in Central and Eastern Europe, the political regimes that emerged and stabilized following the starting point of transition were best described in the political science term as hybrid regimes.[4]

The growing scholarship on hybrid regimes understood such political regimes mostly as either a diminished subcategory of democracy or diminished subcategory of autocracy.[5] Even the most recent multi-dimensional and integrated methodologies for the study of hybrid regimes take this diminished subtype approach as a point of departure.[6] Various regime subtypes developed by scholars of hybrid regimes provide an important analytical toolkit for the analysis of third wave transition cases, where something other than a fully-pledged constitutional democracy has emerged and stabilized.

Studies of constitutional transitions too can benefit from the methodology of hybrid regimes. Constitutionalism as a normative theory is not lacking in qualitative benchmarks that can be employed to assess and analyze constitutional transitions. However, it is often the case that these criteria could (at most) guide us to understand what went wrong or what is missing, but they cannot answer the questions of how it went wrong and what we actually got as a result.

1 Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991).
2 Guillermo A O'Donnell and Philippe C Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies.* (Johns Hopkins University Foreign Policy Institute 1986).
3 Thomas Carothers, 'The End of the Transition Paradigm' (2002) 13 Journal of Democracy 5.
4 Leonardo Morlino, 'Are There Hybrid Regimes? Or Are They Just an Optical Illusion?' (2009) 1 European Political Science Review 273.
5 Matthijs Bogaards, 'How to Classify Hybrid Regimes? Defective Democracy and Electoral Authoritarianism' (2009) 16 Democratization 399.
6 Leah Gilbert and Payam Mohseni, 'Beyond Authoritarianism: The Conceptualization of Hybrid Regimes' (2011) 46 Studies in Comparative International Development 270.

When studying constitutional transitions, political science methodologies are essential in grasping realities on the ground. Jurisprudential tools alone are unable to fully appreciate the workings of a constitutional order. Constitutional texts are important starting points, but their jurisprudential exploration is insufficient for understanding fuller picture.

Comparative constitutional methodologies that operate on the background of normative constitutional theories, run risk of universalizing subsumptions of local phenomena.[7] Furthermore, comparative methodologies that employ checklists to assess the conformity of constitutions to their requirements can be extremely misleading.[8] The reasons for this are manifold: written constitutions have achieved near universal proliferation. Even closed autocracies and absolute monarchies have written constitutions. Majority of these constitutions mimic the structure and content of the constitutions of constitutional democracies to some extent.[9]

Therefore, ensuring conformity of the constitutional text to this or that checklist, is relatively easy task for all sorts of defectively democratic and hybrid authoritarian regimes, who aspire to gain legitimacy bonus by camouflaging their political regimes in the skin of constitutional democracy. As a result, the checklist approach might detect substantial convergence across the countries and polities. When judging merely in accordance with the constitutional text against one or another standard checklist based on the western constitutional canon, erroneous judgements are the likely outcome. Checklists are especially prone to miss the abusive deployment of constitutional toolkit for authoritarian and/or illiberal ends.[10]

For the purposes of this chapter, an integrated interdisciplinary approach is adopted to examine the state of constitutionalism in Georgia. Georgia's constitutional transition is analyzed based on its founding constitutional document: the 1995 constitution and its many amendments. Drawing from the resources of constitutional practice and jurisprudence as well as political developments, the constitutional system and political regime type that this constitution has created are brought to the view.

7 Vicki Jackson, 'Comparative Constitutional Law: Methodologies', *The Oxford Handbook of Comparative Constitutional Law* (2012).

8 Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 International Journal of Constitutional Law 563.

9 Tom Ginsburg and Alberto Simpser, *Constitutions in Authoritarian Regimes.* (Cambridge University Press 2014).

10 Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 Governance – An International Journal of Policy Administration and Institutions 559.

Assessing Georgia's 1995 constitution against the standard checklist of constitutional democracy, it has from its adoption throughout all of its many amendments had all the substantive and structural features of liberal constitutionalism. The political regime it produced, however, falls far behind the standard of constitutional democracy.

Since gaining independence, major democracy rating agencies have consistently placed Georgia among hybrid regimes[11], albeit in the diminished subcategories of democracy. In the literature of hybrid regimes, Georgia has been cited as an example of a stable hybrid regime, among the several post-soviet transition states, which over time have not experienced major movements in either democratic or autocratic directions.[12]

From among the various categorizations and methodologies of the hybrid regimes, we choose the analytic framework of embedded and defective democracies developed by Wolfgang Merkel.[13] The major methodological reason for this choice is Merkel's heavy reliance on the normative resources of constitutionalism in constructing his criteria for the root concept of embedded democracy. Shortcomings that render democracies defective under Merkel's analysis, are measured against the benchmarks derived from normative constitutional theory, making such judgements readily accessible for cross disciplinary analysis of both political science and constitutional theory.

Merkel takes "embedded democracy" as a root concept that includes all "partial regimes" of liberal (constitutional) democracy. If any of the partial regimes is insufficiently institutionalized and its basic norms are violated, the result is defective democracy. Partial regimes themselves are each connected to major elements of modern constitutionalism (electoral regime, political participation, civil rights, horizontal accountability, and the effective power to govern).[14] Failure of any of these partial regimes is echoed in the constitutional architecture of the polity. Defective democracies insufficiently institutionalize one or more elements of constitutional democracy and therefore each defective regime has its correlate in constitutional architecture.

However, in terms of overall constitutional architecture, defective democracies are not distinct from constitutional democracies. Constitutionally speaking their institutional

11 'Freedom in the World – Georgia Country Report' (Freedom House) <https://freedomhouse.org/country/georgia/freedom-world/2020> accessed 2 January 2021.
Tiulegenov Medet and others, 'Georgia: A Country Report Based on Data 1900–2012' (2013) No. 3, October 2013. <https://www.v-dem.net/media/filer_public/16/9c/169c383f-72a1-4564-8b22 f34369 02779f/cr003__georgia_v10.pdf> accessed 2 January 2021.

12 Aurel Croissant and Wolfgang Merkel, 'Defective Democracy', *The Handbook of Political, Social, and Economic Transformation* (Oxford University Press 2019).

13 Wolfgang Merkel, 'Embedded and Defective Democracies.' (2004) 11 Democratization 33.

14 Ibid.

make-up includes familiar elements of constitutional democracies, and it is only the quality and degree of institutionalization that is different.

Following Merkel's categorization, Georgia falls under the category of defective democracy, or more specifically, under illiberal democracy. Illiberal democracy as a regime type has insufficiently institutionalized partial regimes of civil rights and horizontal accountability.[15] The characteristic feature of such regimes is withholding, or systematic breach of civil rights coupled with the disregard of the core elements of the rule of law. Failures of separation of power is manifested in the subversion of mechanisms of checks and balances that ensure that institutions of public power reciprocally check each other, preventing any of them from achieving the dominance over others.[16]

Failures of these partial regimes in Georgian constitutional architecture are not exclusively attributable to the defects of constitutional design. While causes of the failure run deeper than constitutional design, the defects of constitutional design provide an outward manifestation and clearly demonstrable symptom of the malaise of the defective Georgian democracy. Major outward symptoms of illiberal democracy in Georgian constitutional order include the following:

a) large scale breaches of civil rights and the denial of the core of the rule of law are connected to the weak constraining power of the constitutional rules and compromised supremacy of the constitution.

b) supremacy of the constitution and the rule of law are undermined due to the captured constitutional court and ordinary judiciary, which are not loyal to the constitution and the rule of law.

c) supremacy of the constitution is further undermined by the weak constitutional entrenchment which is the outcome of the combination of the constitutional amendment procedure and electoral rules that tend to produce one-party supermajorities in the legislature.

d) undermined constitutional supremacy and weak rule of law contribute to the subversion of separation of powers. As a result, the executive branch, and the legislature act largely outside judicial checks. Checks and balances between political branches are further degraded. The executive dominates the political branches and the judiciary.

e) Executive dominance is usually the symptom of the problems with other "partial regimes" of constitutional democracy (electoral democracy, the effective power to

15 Ibid.
16 Ibid. n 12.

govern). It either drags the regime towards "delegative democracies"/plebiscitary presidencies with authoritarian tendencies (the case of Mikheil Saakashvili's second term in office) or "tutelary interference"[17], where unelected actors hold outsized grip over elected institutions (the case of billionaire tycoon Bidzina Ivanishvili, who has governed Georgia mostly from outside the formal institutions since 2012).

As the foregoing chapter will attempt to expose, defects in constitutional design have not been accidental and the forces wielding constitution-making power have consistently abused their authority to pursue their own political ends through constitutional means. All three political forces and their leaders who have dominated Georgian politics since 1995 and simultaneously held constitution-amending authority (respectively: Eduard Shevardnadze and his allies in 1992 constituent legislature, Mikheil Saakashvili and his "United National Movement", and Bidzina Ivanishvili and his "Georgian Dream Party") have deployed constitutional amendments for the purposes of prolonging and strengthening of their grip to power (with varying success). It appears that all these forces found in an illiberal democratic regime a political form most suitable for their purposes, and managed to sell it to the large portions of the society as such.[18]

Therefore, the story of constitutionalism in Georgia is both a history of its abuse and a counter history of the confrontation against this abuse. Failures of partial regimes of civil rights and horizontal accountability that contributed to the stabilization of illiberal democratic regime in Georgia over years have close causal connection to the practice of abusive constitutionalism. The term "abusive constitutionalism" has been coined and introduced by Landau. He defines it as a practice of employing the mechanisms of constitutional change (amendment, replacement) to undermine the democratic qualities of constitutional order.[19]

Weak constitutional entrenchment, a characteristic feature of Georgian constitutional order and its illiberal democratic political regime provide fertile ground for abusive constitutionalism. It will be argued in this chapter that abusive constitutionalism in Georgia has been used by major political forces in Georgia over years to bolster the foundations of the illiberal political regime. In order to understand the attractiveness of illiberal democracy for Georgian political elites, this general remark by Croissant and Merkel on the social foundations of illiberal democracy is especially helpful:

17 Mariam Mufti, 'What Do We Know about Hybrid Regimes after Two Decades of Scholarship?' (2018) 6 Politics and Governance 112.

18 "In socio-economically less developed societies with low educational levels, long traditions of clientelism, and a particular accumulation of political problems, such regimes often appear to the subjects-citizens as the more appropriate and preferred form of political regime." n 12, 445.

19 David Landau, 'Abusive Constitutionalism' (2020) 4 Revista Juridica da UFERSA 17.

> *"Where informal institutions such as clientelism, patrimonialism, and corruption shape the patterns of interaction between elites and the population at large, the more difficult it is for the new 'formal' institutions to be institutionalized. Informal institutions threaten to crack the functional code of formal, democratically legitimized institutions, deforming and displacing them. In the essential domain of decision making, the democracy then largely functions according to non-legitimized informal institutions and rules that contradict democratic principles."*[20]

By 1918, at the eve of the collapse of Tsarist Russia, Georgia had emerged from the empire with largely pre-modern social structures. Serfdom had been abolished only for a few decades and majority of the former serfs were still dependent on their previous masters for their livelihood. Between 1918–1921, Georgia went through a brief experiment of democracy under Menshevik Social democrats.[21] This experiment had been promptly aborted by the Bolsheviks of the Soviet Russia, who occupied Georgia in 1921 and incorporated it in the USSR.

What communists created during their 70 years in power through a successive series of totalitarian social engineering efforts emerged by the end of communist rule as a social system of "communist patrimonialism".[22] By 1991, when the Soviet regime finally broke down, it had been these hierarchies of "communist patrimonialism" and their clientelist networks which remained as the only more or less organized and recognizable social force in Georgian society.

It is thus no surprise that the dominant forces of the patrimonial power pyramid in Georgian society would have been attracted to illiberal democracy. The advantages for this choice from their "rational" perspective are manifold: by adopting constitutional forms of liberal democracy, they expected to reap benefits from the global forces of democracy promotion, in the form of political and economic support. At the same time, by abusing these constitutional forms they could make sure that their status privileges remained entrenched in social hierarchies and would be preserved by undermining the rule of law and civil rights, as well as ensuring that underprivileged groups and individuals would enjoy diminished, "second-grade" rights under the legal system. Finally, based on their outsized social power and manipulation of electoral rules and other abusive constitutional measures, they could perpetuate their grip on power without compromising the overall democratic credentials of the electoral regime of the constitutional order.

20 N 12, 444.

21 SF Jones, *Socialism in Georgian Colors: The European Road to Social Democracy, 1883–1917* (Harvard University Press 2005).

22 Henry E Hale, 'Regime Cycles: Democracy, Autocracy, and Revolution in Post-Soviet Eurasia' (2005) 58 World Politics 133.

Therefore, unlike more established constitutional democracies, or other defective democracies, where abusive constitutionalism reveals itself mostly in the practice of constitutional change, in Georgian context, it has been present from the very founding. During the constitutional founding, the major forces of constitution-making process aspired to establish an illiberal democratic polity by abusing constitutional forms of liberal democracy. However, in Georgia too, the abuse had not been restricted to the founding moment and has continued throughout the entire constitutional history through standard means of constitutional change.

3. Georgia's 1995 constitution at its founding: laying the constitutional superstructure for the illiberal political regime

By 24 August 1995, the day Georgia's most recent founding constitution was adopted, the USSR was long extinct. Georgia had been accepted in the United Nations, however internally it was being torn apart by Russian-instigated civil strife pitting warring factions against each other along political and ethnic lines.[23] The void of both legality and legitimacy for the forthcoming constitution to fill was enormous and could not be underestimated.

The path of peaceful transition from Soviet constitutional legality to sovereign statehood under the modern constitution, comparable to the Eastern Europe's success stories, was initiated, but it soon met a violent end. In October 1990, the communist party held the first multiparty elections to the Supreme Soviet (highest representative body under the constitution of Soviet Georgia). The elections were overwhelmingly won by nationalist forces under the leadership of Zviad Gamsakhurdia. Gamsakhurdia called a referendum on national independence on 31 March 1991 and ratified its results in the proclamation of independence by the Supreme Soviet on April 9 the same year.[24]

Technically, Soviet constitutional legality allowed the union republics to secede unilaterally from the Soviet Union.[25] However, like in the case of Baltic states, such declarations were met with resistance in Moscow. Western powers refrained to recognize Georgia's and other union republics' sovereignty until the conclusive breakup of USSR in December 1991. Gamsakhurdia amended the 1978 Constitution of Soviet Georgia several times, most notably, introducing the office of the president elected under direct universal suffrage. He confidently won the Presidential elections in spring 1991.[26]

23 Stephen Jones, *Georgia: A Political History Since Independence* (IBTauris & Co Ltd 2013).
24 Darrell Slider, 'The Politics of Georgia's Independence' (1991) 40 Problems of Communism 63.
25 Constitution of the Union of Soviet Socialist Republics 1977, Article 72.
26 Ibid.

However, Gamsakhurdia never reached the point of founding a new constitution for sovereign Georgia. He was ousted in a coup in January 1992.[27]

Between January and October 1992, Georgia was governed by a "council" of warlords who succeeded in the coup of December 1991. The October 1992 parliamentary elections was the first step towards filling this legitimacy void.[28] The representative body that was elected became Georgia's constituent legislature.

Eduard Shevardnadze, former USSR Foreign Minister and Communist party boss of Soviet Georgia since 1972 was entrusted by the warlords to the political leadership of the process and was elected chairman of the constituent legislature and head of state. Shevardnadze thus emerged as the towering founding father of the constitution of 1995. He skillfully moderated various forces inside the constituent legislature and saw the entire process to the ratification of the 1995 constitution.[29]

The forces in the constituent legislature and their basis in wider society had distinct objectives for the constitution-making. Some of these objectives coincided with the normative aspirations of constitutionalism, while others were at odds with it. Understanding these contradictions is important for grasping their unfolding in Georgian constitutional practice for the last three decades.

Even though the constituent legislature was patchworked by many political parties, its outward image of the representativeness covered up a major democratic defect – the political supporters of the ousted President Gamsakhurdia were barred from the ballot in October 1992. The image of multiparty constituent legislature was also misleading in terms of plurality of social groups and the interests it represented.

Hierarchically-organized formerly communist elites and their clientelist networks emerged as the only powerful social force in post-independence Georgia. They overwhelmingly backed the coup against President Gamsakhurdia and a predominant majority of the political parties in constituent legislature were ultimately answerable to this social hierarchy.

In the broadest terms, constitution-makers of the constituent legislature perceived their exercise as both state-building and nation-building. While these objectives are connected to constitution-making, they are not always immediately intertwined with the ends

27 N 21.

28 Ibid.

29 For extensive eyewitness account of the process, Wolfgang Gaul, *Verfassungsgebung in Georgien :Ergebnisse Internationaler Rechtlicher Beratung in Einem Transformationsstaat/*, vol Bd. 20. (Berlin : Berlin Verlag Spitz ; Baden-Baden : Nomos, 2001).

of constitutionalism.[30] To fully appreciate these divergences and convergences the motivations and interests of founding political forces and their social power base should be given proper weight.

As to state-building and constitutionalism, it should be noted that, the foremost hallmark of the project of modern constitutionalism is laying a foundation for the comprehensive regulation of public power.[31] If state-building precedes constitution-building, the task of the constitution is to integrate and qualitatively transform these institutions. Where such institutions are non-existent or have largely collapsed due to the revolutionary circumstances, constitution-building needs to coincide with the state-building.

When state-building is done through and simultaneously with constitution-making, state institutions that are established must meet the qualitative benchmarks of the modern constitutionalism, which above all implies their comprehensive legal regulation and limitation. While forces of constitution-making are interested in establishing institutions enjoying legal legitimacy, they are not always willing to accept all the costs required for this end, most notably, they are reluctant to acquiesce to meaningful legal checks on their power.

As will be demonstrated throughout this chapter, constitutionalism in Georgian constitution-making projects has always been instrumentalized for ends other than constitutionalism's own. This was the case in 1992–1995 as well, when all forces of constitution-making process shared an interest in establishment of legitimate institutions of state while the proper constitutional limitation and regulation of those institutions was seen as being in the interests of only the relatively weak among them.

By the founding moment, civil war had consumed the remnants of soviet power apparatuses in Georgia and the constitution was expected to build the institutions of state mostly from the scratch. Eduard Shevardnadze, Soviet Georgia's former ruler, rallied segments of the old communist elites behind him with relative ease. While there were no comparable organized social groups who could claim their share in public power, a decision for a unitary locus of public power seemed the most convenient constitutional choice.[32]

With minor resistance, this decision succeeded among framers and ultimately found its way in the constitution.[33] A presidential system was the obvious constitutional choice

30 C. Klein and Andras Sajo, 'Constitution-Making: Process and Substance' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012).

31 Dieter Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World', *The Twilight of Constitutionalism?* (Oxford University Press 2010).

32 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism.* (Oxford University Press 2017), p. 272.

33 N 26.

for those who sought to cement a single apex social power pyramid in constitutional system in former Soviet Republics and Georgia followed the suit. Among the former union republics only the Baltic states diverged from this path.[34] Thus, founders of Georgian constitution only partially shared constitutionalism's central objectives. They wanted to reap its fruits without substantial commitment to any of its preconditions. They sought to establish and constitutionally legitimate institutions of state power, without meaningful constitutional limitations.

Apart from the object of its regulation, the 1995 constitution had to reinvent its constituent power too – the people. The driving force of the Georgian political opposition on the eve of soviet rule, culminating in Georgia's independence referendum of March 31, 1991 and unilateral secession from the USSR on April 9, 1991, was an ascendent wave of Georgian nationalism.[35]

While formerly communist elites in Georgia emphatically rejected more fervent forms of ethno-religious nationalism and even vocally supported violent overthrow of the government that represented these sentiments, they never internalized any form of liberal civic nationalism either unlike their counterparts in Baltic states or Eastern Europe. Their nationalism at the end boiled down to a diminished version of ethno-religious nationalism institutionally fortified in and promoted by the Georgian Orthodox Church (GOC).[36]

Due to GOC's strong ties to the Russian Orthodox Church and through it to the Russian state, the ethno-religious form of nationalism advanced by the GOC became less assertive and more accommodative to resurgent Russian imperial aspirations.[37] In 2002, GOC secured constitutional recognition of its special role of the history of Georgia and entrenched its privileged status and standing through exclusive constitutional agreement with the state.[38] Constitutional agreement not only cemented GOC's privileged status, but also opened up unresolved internal tensions with major aspects of liberal constitutional project, like the secularity of public power, equality before the law, equal liberty for all, and especially equal religious liberty for all.[39]

34 N 29.

35 Jones, n 21.

36 Zaal Andronikashvili, 'Constitution and Fundamental Order- Cultural Preconditions of a constitution' in Vakhtang Natsvlishvili and Davit Zedelashvili (eds), *Georgia's Constitution at 20* (Open Society Georgia Foundation, 2016).

37 On the roots of contemporary Georgian nationalism in Soviet imperialist policies, Giorgi Maisuradze, 'Georgia's Constitution – Nation-State and the Imperial Heritage' in Vakhtang Natsvlishvili and Davit Zedelashvili (eds), *Georgia's Constitution at 20* (Open Society Georgia Foundation, 2016).

38 The Constitution of Georgia 1995, article 8.

39 In a companion cases, decided in July 2018, Georgian Constitutional Court ruled unconstitutional some tax exemptions and other legal privileges held exclusively by the GOC. The court rejected the

Civic or liberal nationalism in post-independence Georgia had been fragile from the very beginning. By 1990, when waning soviet power in Georgia conceded multiparty elections for the highest representative body, predominantly ethnic nationalist forces prevailed. Factions advancing a civic nationalist agenda inside the so-called "Georgian national movement" against the soviet rule were disorganized, scattered and plagued by infighting.[40]

The 1995 constitution incorporated some of the constitutional features of nation-state in a formulaic fashion without self-conscious effort or consistent program of nation-building[41]. Nevertheless, the constitution's language remained an inspiration for those social and political forces who desired nation-state building in Georgia. However, even after these liberal nationalist forces gained momentum and political power following the 2003 rose revolution their nation-building efforts were tainted by the persistent ethno-religious forms of nationalist sentiments that were institutionally fortified and advanced by the resurgent GOC.

4. Electoral rules and weak constitutional entrenchment – the roots of abusive constitutional change

The enduring practice of abusive constitutional amendment in Georgia has been made possible due to the combination of two major constitutional features- entrusting the supermajority of a unicameral legislature with constitution-amending power without any meaningful procedural or substantive constraints on this authority, and electoral rules for the legislative elections that tended to produce one-party supermajorities. The resultant system created strong incentives for abusive constitutional amendment, while providing virtually no safeguards to discourage and/or prevent the abuse.

The choice of electoral system for the unicameral parliament has always been subject to strong contestation and disagreement in Georgia. Mixed member majoritarian system was chosen for its tendency to produce stable governing majorities. In the tumultuous

argument of the Parliament that constitutional recognition of the "special role" of the GOC in the history of Georgia, could in any manner be construed to serve as the basis of exclusive legal privileges for the church. However, the court stopped short at elaborating on the constitutionality of various privileges contained in the text of the constitutional agreement, which enjoys higher rank in the hierarchy of legality standing immediately below the constitution but higher than organic laws and ordinary legislation.
Decisions of the Constitutional Court of Georgia of July 3, 2018 N1/1/811 and N1/2/671, Evangelical and Baptist Church of Georgia and others vs. the Parliament of Georgia.

40 N 21 and 22.

41 For example, the preamble of the Constitution of Georgia 1995 opens with "We, the citizens of Georgia …"

1990's, the pluralist fragmentation of politics was easy to demonize and the supposed cure to overcome it was readily accepted.

In summer 1995, disagreement over the ratio of MPs to be elected through party lists to the single member district MPs almost hijacked the constitution's ratification process. Smaller, mostly urban parties led by the Republican party of Georgia demanded that more MPs should be elected through party lists. Shevardnadze resorted to blackmail to reach the compromise – he threatened that he would submit the constitution to a referendum for ratification, altogether bypassing the constituent legislature. The threat had been realistic and brought parties to compromise – in a 235-member chamber, 150 MP's should be elected through party lists and 85 MP's in single member majoritarian districts.[42]

Shevardnadze, however, never fully digested this compromise. In 2003, he initiated a referendum (with dubious constitutionality, as the Georgian constitution does not envisage constitutional amendment through referendum) on the reduction of the number of MP's to 150. The referendum question was answered in affirmative by the requisite electoral majority.

Mikheil Saakashvili and his UNM have cited this result when enacting it into constitution during 2004 constitutional reform. During Saakashvili's two terms, the ratio between party list and single member seats ranged from 75–75 to 77–73. The latter ratio was adopted by GD constitutional reform too in 2017–2018, until GD was forced to concede to 120–30 ratio for 2020 elections as a result of electoral protest.[43]

Up until the 2016 elections, the single member majoritarian districts were arranged according to the administrative boundaries of cities and municipalities – heavily diluting votes across the districts. In 2015, the constitutional court ruled that this districting plan offended the constitutional principle of equality, demanding strict adherence to the principle of "one person-one vote."[44] 2016 electoral reform redistricted according to the court's judgement and introduced absolute majority requirement for winning the district seat, replacing the plurality rule.

With the electoral threshold of 5 % (7 % for the 1999 elections and 1 % for 2020), a combination of these features tended to produce one-party supermajorities especially after the number of MP's was reduced to 150 by cutting party list seats and the share of

42 Gaul, n 26.

43 Davit Zedelashvili, 'Georgia's Battle on Electoral Rules and the Pivot towards Proportional Representation' (*Voices from the field*, 26 August 2020) <https://constitutionnet.org/news/georgias-battle-electoral-rules-and-pivot-towards-proportional-representation> accessed 2 January 2021.

44 Decision of the Constitutional Court of Georgia of 28 May 2015, N1/3/547, Citizens of Georgia Ucha Nanuahsvili and Mikheil Sharashidze vs. the Parliament of Georgia.

single member seats increased. This gave both UNM in 2008 and GD in 2016 a supermajority in the parliament after winning just a plurality of the proportional vote (GD, for instance, accumulated around 70 % of parliamentary mandates and won only 48 % of the proportional vote in 2016).

Now I turn to the amendment procedures. Despite some modifications, the original design of 1995 constitution still guides this overall constitutional structure and facilitates abusive constitutional amendment. Originally, the 1995 constitution created a 2/3 supermajority requirement to pass constitutional amendment in 235-member unicameral legislature.[45] No other procedural constraint was imposed. Substantive constraints, like eternity clauses were also missing.

The amendment power was deployed for the substantial and systematic redrawing of power balance under the 1995 constitution only in February 2004.[46] Amendments were hastily initiated and pushed through the legislature by the newly elected president immediately after assuming the office. Two major purposes drove 2004 constitutional reform agenda. Firstly, the parliament should be further constrained, secondly, the executive dominance should be consolidated, and the executive power divided and shared between the president and the prime minister. This executive power-sharing was predominantly inspired by personalistic reasons, of accommodating the appetites of two weighty revolutionary leaders, and had little to do with attempts to constrain overly empowered executive branch.

In 2009, towards the end of his second term in office, Saakashvili initiated another constitutional reform and submitted it to a parliament where his party enjoyed solid 2/3 supermajority. The abusive intent of the reform was clearly discernible for his opposition and outside observers. Saakashvili sought to relocate the locus of executive dominance from the office of the President to the office of the Prime Minister. It had been widely anticipated that after the expiry of his second presidential term, he would seek Prime Ministerial office to cling to power. Saakashvili had been deliberately ambiguous on his plans and denied abusive intentions behind the constitutional reform. Whatever his intentions truly had been by then, the defeat of his United National Movement party in 2012 parliamentary elections definitively ended these speculations.

45 Constitution of Georgia 1995, as adopted on 24 August 1995, Article 102.

46 These amendments were passed by the prolonged parliament, extended due to the annulment of party list election results of November 2003 elections. The annulment was the legal formalization of the rose revolution – a popular protest following the massive electoral fraud that ousted President Eduard Shevardnadze from power. Even though the parliament elected in 1999 was dominated by the political forces aligned with Shevardnadze, immediately after the revolution the majority pledged their allegiance to the revolutionary leaders. Mikheil Saakashvili, the revolution's most prominent leader was elected president in snap elections of January 2004 by landslide.

In 2011, a UNM parliamentary supermajority passed another constitutional amendment, modifying the amendment procedure itself. This new procedure kept constitution-amending power in the parliament, though increased the supermajority requirement to ¾ of all the members of the legislature and introduced a delaying mechanism, demanding that between the adoption by the second and the third readings of the amendment bill, at least 3 months should elapse.

This move was widely seen as a step towards enhanced constitutional entrenchment. It was presented as a step forward toward enhanced constitutional stability and scaling down the practice of unilateral abusive amendment. Writing in 2013, this author welcomed the intentions of stronger entrenchment and countering the practice of unilateral abusive exercises in constitution-making using amendment power, however, at the same time warning that the new procedure was ill-suited to achieve these noble ends.[47]

At the time of writing, my diagnosis had been contradicted by the facts on the ground. After winning 2012 parliamentary elections, the Georgian Dream Coalition and its founder, billionaire tycoon Bidzina Ivanishvili, was unable to pass comprehensive constitutional reform due to the lack of a required supermajority in the parliament. It appeared that the restraints imposed by the new amendment procedure were working. My skepticism, however, was based on the remaining mixed member majoritarian electoral system and its tendency to produce one party supermajorities.

It had been already discernible by then that GD would have sought to gain a parliamentary supermajority of ¾ on 2016 general elections. GD's 2016 campaign was explicitly focused on receiving this constitution-amending authority from the electorate. It ultimately gained this mandate, following which GD carried out another unilateral abusive constitutional reform in 2017–2018.

As a part of the reform, GD further changed the amendment rule in the constitution. The new rule introduced two modes of amendment, so called "plural vote" (passage by two readings with 2/3 parliamentary supermajority and confirmation by the next parliament by single vote with 2/3 supermajority support) and retaining the ¾ supermajority passage by the parliament without any delaying mechanism. GD justified the two concurrent rules, among which one provided exit option from the restraints imposed by another, as the persistent need for speedy constitutional reform.

GD has kept the path of expedient unilateral amendment open, considering that it also retained mixed member majoritarian system until 2024 elections. By the 2020 elections,

47 Davit Zedelashvili, 'Constitutional amendment in Georgia – passions of the majorities and the constitutional order' in Ghia Nodia and Davit Aphrasidze (eds), *From Super presidential to Parliamentary Regime – Constitutional Amendments in Georgia* (Ilia State University Press 2013).

GD had been forced to concede to electoral protest demands and alleviate the majoritarian effects of mixed-member system. This amendment was carried out through an expedient procedure, by supermajority under GD umbrella.

Therefore, the key component of the framework for abusive constitutional amendment is one-party supermajority in the legislature. Amendment procedures itself are fine tuned for expediency and at times some restraints to the amending power are also tolerated, so far as their actual restraining power over supermajorities is diminished.

5. Entrenched power of judicial bureaucracy and the consolidation of abusive judicial review

Recent illiberal assaults on the judiciaries of Central and Eastern Europe have attracted considerable attention internationally. Cases like the plight of the Polish judiciary under the resurgent Law and Justice (Polish abbreviation – PiS) party since 2015 have been extensively analyzed in broader contexts of decay and breakdown of recently transitioned constitutional democracies.[48] The villains from these stories are usually political forces and/or leaders, customarily of populist mold, who lead projects of reverse transitions from constitutional democracy.

Yet, they might be villains, but they are not superheroes endowed with superpowers. They attack judicial institutions, especially constitutional courts, and enlist them in abusive undertakings.[49] However, courts cannot be turned into abusive judicial institutions overnight, even with all the court-packing and court-curbing measures available to illiberal forces, armed with constitution-amending powers and/or legislative (super) majorities.[50] The villains succeed also and by large due to their intimate and intricate knowledge of the internal constitution of targeted judiciaries, inherited from the communist rule and even beyond, in the form of hierarchically organized judicial bureaucracies.[51]

Scholars of CEE and post-soviet judicial transitions are acutely aware of the challenge of judicial bureaucracies commanded by hierarchies of powerful court presidents.[52] During communist rule, court presidents have been essential points in the architecture

48 Wojciech Sadurski, *Polish Constitutional Breakdown* (Oxford University Press 2019).
49 Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2018) 11 Hague Journal on the Rule of Law.
50 David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts against Democracy' (2019) 53 UC Davis Law Review 1313.
51 David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016).
52 Ibid.

of notorious "telephone justice".[53] Successful CEE transitions in terms of judicial independence and the rule of law were those, where either political masters stopped "telephone calls" to judicial bureaucrats, or the latter were in a position to disregard such calls, or ideally, the combination of both.

However, the hierarchical judicial bureaucracies remained mostly intact. In certain cases, their institutional insulation from politics and internal hierarchical fortification plunged them into rampant corruption and/or institutional dysfunction. Internally decayed, they were ready-made victims for new political masters who rediscovered the taste for directing judicial bureaucrats.

In contrast, in newly independent former soviet republics, including Georgia, the lines of "telephone justice" were never really severed.[54] In what follows, I will attempt to narrate a tale of post-soviet judicial bureaucracy in Georgia, entrenching itself in judicial power through a series of maneuvers and struggles with successive political masters to secure commodious servitude within the post-soviet patrimonial socio-political order in Georgia.

It is generally an accurate judgement, that currently entrenched judicial bureaucracy in Georgia, or "judicial clansmen" as they are popularly referred, are subservient to the increasingly authoritarian illiberal regime of the billionaire tycoon Bidzina Ivanishvili. Nevertheless, though Ivanishvili did much to entrench the power of the clansmen and his regime benefits greatly from their service, they are hardly his creatures. Nor did Ivanishvili invent the command and control hierarchy of "telephone justice" system that the clansmen run disguised under "Euro models" of judicial institutions. As a man of a deeply ingrained Soviet worldview, Ivanishvili has reconstructed the judiciary in the form that naturally fits there.

Stories of the making of Georgian judicial clansmen and the capture of Constitutional Court of Georgia by Ivanishvili regime both underscore the point that hierarchical judicial bureaucracy is a crucial structural condition for producing judicial dependency to powerful masters from political branches of state power and/or social hierarchies.

At some point, during and afterwards of the post-communist transitions, there was a hope that empowering judicial bureaucracies would bolster their independence *vis a vis* outside masters. There were success stories in this project for sure. Powerful masters

53 Angelika Nußberger, 'Judicial Reforms in Post-Soviet Countries – Good Intentions with Flawed Results?' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer Berlin Heidelberg 2012).

54 Peter H Solomon, 'The Accountability of Judges in Post-Communist States: From Bureaucratic to Professional Accountability' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer Berlin Heidelberg 2012).

from time to time fought with disobedient judicial bureaucrats, in this, they routinely employed anti-bureaucratic rhetoric, disguising their objective to control judicial bureaucrats under the banner of reforming dysfunctional/corrupt system.[55]

This was never their true intention though. Dismantling a bureaucratic pyramid in the judiciary is never the point of the game, the rearrangement of the pyramid is. Top-down bureaucratic control might in the short term empower judicial elites, but overall makes judicial institutions and individual judges more vulnerable to falling into dependency. With a few magic strokes of (constitutional) legislator's pen, entire pyramids of judicial bureaucracy are rearranged, but never demolished.

After the 2003 rose revolution, the government of Mikheil Saakashvili got a strong popular mandate to eradicate corruption and build functioning institutions. Radical measures were deployed immediately in pursuance of this mandate. Part of it was mass cleansing of judicial bureaucracy using both sticks (disciplinary removals and/or prosecutions) and carrots (legislative scheme which kept full judicial salary and benefits for the entire remaining term of office in case of voluntary resignation).[56]

The "rose revolutionaries" cleansed the personnel but did not dismantle the judicial bureaucracy. On the contrary, they made it more hierarchical and strictly disciplined. As a result, judges stopped taking petty bribes, their salaries and benefits increased, they were no longer judging in run-down courthouses from where criminals could abscond at will. However, this came at a price of iron discipline executed by the court presidents. The power of court presidents and their boss – Supreme Court president was formally entrenched and constitutionalized. The MoJ model was replaced by the "Euro Model" of judicial council, *ex officio* headed by the SC president.

Judicial members composed the majority of the judicial council. However, the Supreme Court president was empowered to vet candidacies to be elected to the council by the general assembly of judges. As a result, only court presidents or vice presidents were elected. The power of court presidents over judiciary as entrenched in law appeared ultimate, however, in practice they remained accountable to the powerful minister of justice, who was also superior to the Chief public prosecutor.

Saakashvili's United National Movement (UNM) was electorally ousted by Ivanishvili's GD in 2012. From 2013, Ivanishvili's MoJ has implemented what became known as

55 Ketevan Bolkvadze, 'To Reform or to Retain? Politicians' Incentives to Clean Up Corrupt Courts in Hybrid Regimes' (2020) 53 COMPARATIVE POLITICAL STUDIES 500.

56 Despite the dubious rule of law justification of these measures, actors like Venice commission have accepted that exceptional circumstances demanded exceptional measures. András Sajó, 'The Rule of Law' in Robert Schütze and Roger Masterman (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019).

"four waves" of judicial reforms. Initially, the reforms appeared aiming at dismantling judicial bureaucracy, whose bosses were temporarily left without political masters, and GD even got two cheers from civil society for that. The "first wave reforms" targeted the powers of court presidents – prohibited their election to judicial council, removed the power of SC president to vet judicial candidacies to the council, and empowered every individual judge to forward their own candidacies. The sitting judicial council terms was prematurely terminated, and new elections were scheduled in summer 2013.[57]

GD hoped that leveling the playing field would enable dissenting judges to unseat court presidents in council elections. GD grossly underestimated the grip court presidents had over the rank and file judicial bureaucracy. Though court presidents were barred from ballot, as a compromise measure responding to Venice Commission concerns, court vice presidents could be elected.

As a result, senior judicial bosses were nominally replaced by their junior associates. The latter affirmed their fidelity to the outgoing senior leadership, pledged continuity with them and stated that they spoke in the name and in the interests of Georgia's judiciary. The "judicial clansmen", hitherto obscure judicial bureaucrats, mostly demoted former prosecutors or promoted court clerks, emerged from the shadows, gaining public visibility and political epiphany.

After several meetings between the leader of judicial clansmen, secretary of the judicial council, and then prime minister Ivanishvili, the latter had a sudden change of heart towards judicial bureaucracy, whom he and his media propaganda machine vilified as instruments of the evil ["Saakashvili regime"]. Ivanishvili announced that new judicial leadership had atoned for their sins of collaboration with the "evil regime" and had undergone a thorough process of "self-determination."

Following the power deal with the judicial bureaucracy, GD has constitutionally entrenched the power of "clansmen" through bolstering their control of the judicial council. Following the 2017–2018 reform, detailed provisions relating to the composition of the judicial council were elevated from the Organic Statute to the constitution. The Constitution stipulates that 9 members out of 15 at the judicial council are from the judiciary (eight elected by conference of judges, a judicial assembly of all judges and supreme court chair sitting *ex officio*). Out of 6 non-judicial members, who should supposedly ensure democratic accountability of the council, 5 are elected by a 3/5 vote in the legislature and one is appointed by the president of the republic.[58] Until 2018, the

57 Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8–9 March 2013) 11/03/2013, CDL-AD(2013)007-e.

58 The Constitution of Georgia 1995, article 64.

five non-judicial members were elected by simple majority vote in Parliament (currently GD enjoys 3/5 supermajority of 90 votes required to elect non judicial members of the council).

The non-judicial members have been elected by simple majority in GD dominated parliament, and acted as GD emissaries to the council. To adopt decisions on judicial appointments, the judicial bureaucracy controlling 9 judicial votes in the council still needed at least one non-judicial vote to meet the required 2/3 supermajority. Here, in appointment decisions, the power pact between GD leader and the judicial bureaucracy has become fully demonstrable at work.

The judicial bureaucracy's internal support among judges was contingent on the fulfillment of the promise of reappointment of the fixed tenured judges for life tenure after entry into force of the 2010 reform introducing life tenure (until reaching the age of mandatory retirement) for all judges except Supreme and Constitutional court judges. With the help of GD this promise was largely fulfilled. The reappointment carried out under "GD-clansmen pact" has additionally ensured that untrustworthy judges were filtered out of the judicial system.

The judicial bureaucracy fortified in the judicial council was further given power over the supreme court. GD constitutional reform has changed the nomination rules for supreme court judges, excluding the president from nominations and empowering the judicial council instead.[59] The same constitutional reform has also set the number of Supreme Court judges to no less than 28.[60] By blocking all presidential nominations to the Supreme court between 2015–2018, GD has manufactured surplus supreme court vacancies and cleared the ground for substantial supreme court packing with justices appointed by its parliamentary majority, now serving life tenures thanks to its constitutional amendments.

Judicial clansmen in the council and GD promptly launched the SC packing effort after the new rules entered the force. Following the political and civil society backlash, GD backtracked and introduced legislative procedures for the selection, vetting and confirmation of the SC justices in the council and at the Parliament. However, major shortcomings identified by Venice Commission and OSCE/ODHIR legislative unit reports were not addressed.[61] The packing effort proceeded through the deficient procedures

59 Ibid. article 61.

60 Ibid.

61 Georgia – Urgent Opinion on the selection and appointment of Supreme Court judges, endorsed by the Venice Commission at its 119th Plenary (Venice, 21–22 June 2019), CDL-AD(2019)009-e, <https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)009-e> accessed 2 January 2021.

at accelerated pace. The judicial bureaucracy and GD parliamentary majority had conclusively packed the Supreme Court by December 2019.

While elsewhere in CEE, illiberal regimes captured the constitutional court first (notably Hungary and Poland[62]), in Georgia, Ivanishvili did it in reverse order, only after Constitutional Court of Georgia has crossed the "regime red lines" and frustrated vital regime interests that were realized through the abusive process in ordinary judiciary.

In contrast with judicial clansmen, the judicial bureaucracy at CCG could not be fully compromised. By 2016, the constitutional court had adopted a few high-profile judgements expanding constitutional rights and checking the excesses of political branches. The GD response arrived promptly. Legislative changes targeted the powers of CCG bureaucracy to allocate the cases among its boards and prioritize them, introduced procedural mechanisms for minority judges appointed by the GD to delay the examination of politically sensitive cases.[63]

At the same time, GD intensified the sticks and carrots strategy against the constitutional court judges. As a result, GD mobilized the support of the majority of the court to delay cases sensitive to the GD political red lines. Some of these cases were decided only after their political significance for GD waned, or remain undecided for five or more years. Delaying decisions or evading them through activating procedural obstacles has been the preferred tool of the Georgian constitutional court to remain within the red lines drawn by its political masters.

In the categorization of Dixon and Landau, this practice falls under the "weak" forms of "abusive judicial review".[64] While this remains as the predominant form of abuse, since 2020, the CCG has been taking a more troubling course. During the Covid-19 pandemic, the freshly packed Supreme Court used its constitutional authority and elected

OPINION ON DRAFT AMENDMENTS RELATING TO THE APPOINTMENT OF SUPREME COURT JUDGES OF GEORGIA, Opinion-Nr.: JUD-GEO/346/2019 [AlC], Warsaw, 17 April 2019, <https://www.legislationline.org/download/id/8155/file/FINAL%20ODIHR%20Opinion_Georgia_Supreme%20Court%20Judges%20Appointment_17April2019_ENGLISH.pdf> accessed January 2 2021.

62 Kriszta Kovács and Kim Lane Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union' (2018) 51 Communist and Post-Communist Studies 189.

63 Georgia – Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, endorsed by the Venice Commission at its 107th Plenary Session (Venice, 10–11 June 2016), CDL-AD (2016)017-e, <https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)017-e> accessed January 2 2021.

64 N 46.

two justices to the constitutional court.[65] GD has as a result amassed a solid 5-member majority of loyal judges on the bench of nine judges, installing its staunch loyalist as the President of the Court. Since then in several high-profile cases, the Constitutional Court's incoherent doctrinal and jurisprudential backing of the regime's political expediencies demonstrate the court's move to the stronger forms of the abusive judicial review.[66]

With both the Constitutional court and the ordinary judiciary's independence and impartiality compromised, the rule of law remains precarious, civil rights underenforced and the arbitrariness of political branches and forces controlling them remains on the leash.

6. Checks and balances off the scale – Is executive dominance the root of all the ills of Georgia's constitutionalism?

In 1995, former communist elites were more or less uniformly aligned under Shevardnadze's leadership. This social power pyramid was mirrored in a constitutional disbalance of power. The presidential system that was designed for Shevardnadze's expediency, ensured his dominance from the office of the president. The president was the head of state and the head of a unitary executive branch. In order to govern with "full power", the president needed to command a simple majority in the unicameral legislature.

The president's and the parliament's terms run almost concurrently, making it easier for a popularly elected president to gain a parliamentary majority through his party within one year in office. With no federal arrangements, this effectively meant that by winning two elections within a year, a popular and/or charismatic leader could gain full and centralized political power.

Shevardnadze dominated the political branches with his "Union of Citizens" party holding a parliamentary majority during most of his two incomplete terms in office. While he enjoyed the full powers of the head of unitary executive, he felt uncomfortable with the price the president has to pay in a presidential system: sole accountability

65 According to the Constitution (art. 60 (2), CCG has nine judges serving ten year non-renewable tenure. Three are appointed by the President, three are elected by the Parliament by simple majority and three are elected by the plenary of the Supreme Court.

66 In its most recent Judgement, the CCG has green-lighted sweeping legislative delegation under the law of the Public health, empowering the government to enact all the restrictions of fundamental rights it had previously imposed within the state of emergency regime, by decree without triggering the operation of emergency constitution. Decision of the Constitutional Court of Georgia, № 1/1/1505,1515,1516,1529 of 11 February 2021, Citizen of Georgia Paata Diasamidze and others vs. The Parliament and Government of Georgia.

before the electorate. As the First Secretary of the Communist party in Soviet Georgia, he was accustomed to have scapegoats to shift the blame for government's misdeeds. Those were the heads of the Presidium of the Supreme Council, and Chairman of the Council of Ministers of Georgian Soviet Socialist Republic – who under soviet constitution were heads of the legislative and executive branches, nominally accountable to the people and in reality to the communist party bosses, like Shevardnadze.

Shevardnadze even thought of introducing the office of the prime minister, but was reminded that within the presidential system this would be impossible.[67] On the other hand, he was unwilling to constitutionally share his executive power and with it his political accountability with the prime minister by establishing semi-presidential or another mixed regime. At the end, he found the solution for the scapegoat position by introducing the office of the Minister of State. Minister of State was senior member of the President's cabinet, responsible for its administrative coordination and day-to-day management through the state chancellery.

Like other cabinet members, the Minister of state served at the president's pleasure, however, as a senior cabinet member entrusted with the government's everyday operation he was publicly perceived as the most powerful executive officer below the president and in public eyes bore the responsibility for government's policies. Shevardnadze skillfully manipulated these perceptions and hired and fired Ministers of States in response to growing popular dissatisfaction with the failings of his government.

The February 2004 constitutional reform accomplished what Shevardnadze had rejected – divided executive power between the President and the prime minister. It was intended as a power sharing deal between the two leaders of the rose revolution – President Mikheil Saakashvili and Prime minister Zurab Zhvania. The prime minister was head of government and both were accountable to the parliament.

However, the president's dominance upset the balance of standard semi-presidential arrangement. Prime minister and his government were accountable to the president too. The president could unilaterally dismiss the prime minister and the government and retained the authority to unilaterally dismiss Ministers of Defense and Interior. Furthermore, following the no confidence vote, President could choose between dismissing prime minister and his government and dissolving the parliament and calling snap elections.

This effectively moderated internal power struggles inside Saakashvili's UNM parliamentary faction, reminding them that using a vote of no confidence to unseat the PM without the President's blessing could cost them their parliamentary seats. For the 2004

67 Giorgi Kverenchkhiladze, The Constitutional Status of the Government of Georgia, in Modern Constitutional Law, (Tbilisi, 2012).

proportional list elections, Zhvania merged his party with UNM, ensuring that he had strong faction inside the parliamentary majority. Even with all the constitutional powers of the President, with his base of allies in Parliament he could trigger a crisis and force Saakashvili to hold snap elections in the event of fallout.

Zhvania's stronger position in the executive power-sharing deal with President Saakashvili was thus predominantly backed up by his political influence, not his constitutional powers. Therefore, following Zhvania's untimely death in 2005, all the subsequent prime ministers had been overshadowed by Saakashvili's persona and effectively had become for Saakashvili what Ministers of State were for Shevardnadze, only with more constitutional powers on the parchment.

With the largest opposition groups boycotting the parliament elected in 2008, an effectively one-party legislature dominated by the UNM supermajority lost the last vestiges of its authority. The 2010 constitutional reform and introduction of a Premier-presidential regime[68] has done little to enhance the parliament's stature and powers. Parliament's legislative powers remained severely restricted in budgetary matters, while functions like accountability and control of the government had been further circumscribed.

The constructive vote of no confidence was so complicated and ridden with procedural dead ends that it could not serve any meaningful political purpose at all. Between 2013–2018 no confidence vote had never been initiated, as it has been before, and remains the case by the time of writing this. Regarding parliamentary control of the government, only written questions had found limited use. Interpellation procedures have found their way into the constitution only during the last constitutional reform.

Only from 2019 onwards had ministers started to answer parliamentary summons, a departure from the previous practice of openly defying opposition calls to account to the chamber. Parliamentary majorities had not summoned government and ministers in the chamber until 2019. As a result, the government appeared before parliamentary scrutiny only at occasions of confidence votes. With virtually inexistent parliamentary control and accountability, the mode of the executive has never actually left the confines of presidential like politics of the unitary executive.

This executive dominance has been a constant symptom of the failure of separation of powers in Georgia's constitutional order. However, the symptom has been commonly mistaken for the root cause. The pivot of successive constitutional reforms towards the parliamentary regime has been advertised as the cure for this supposed ill. Predictably, this has done nothing to address the root causes and very little to alleviate the symptom itself.

68 Wolfgang Babeck and others, *Rewriting a Constitution: Georgia's Shift towards Europe* (1. Edition., Nomos 2012).

7. Conclusion

Constitutionalism in Georgia has experienced a complex and controversial fate. While its major institutions and values have found their way into the Constitutional text, their actual institutionalization has suffered abusive instrumentalization. While Georgia's constitution has achieved more or less competitive electoral regime, its compromised and dysfunctional judiciary have been tolerating major denials of the rule of law and civil rights. These failures have greatly contributed to the under institutionalization of checks and balances on the larger constitutional scale, including among political branches.

As a result, the camouflage of constitutional democracy thinly covers the reality of an illiberal political regime. It has been argued throughout the chapter that abusive constitutional change has been deliberately deployed to construct constitutional superstructures of illiberal regime. While in the current academic literature, abusive constitutionalism is mainly discussed in the context of democratic backsliding/decay, as the Georgian experience demonstrates, this practice goes beyond the regime degradation dimension. Rather political forces may desire illiberal political regime as suitable for their purposes, deploy constitutional means for its founding and ensure its continued stability.

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ANAHIT MANASYAN

Constitutionalism in the Republic of Armenia
Contemporary Challenges and Prospects for Evolution

1. Introduction

The constitution is an important indicator of constitutional identity and one of the main tools for guaranteeing systemic stability. Hence, studying contemporary issues of constitutional law and constitutionalism has significant importance for the further development of modern societies and constitutional systems.

Contemporary challenges of constitutionalism in the Republic of Armenia and prospects for its evolution will be studied in this chapter. The history of the Armenian constitutionalism underlies the study of the contemporary issues of existing constitutional doctrines and practices, as well as prospects for their evolution in the Republic of Armenia.

2. History of the Armenian Constitutionalism

Armenian constitutional culture has deep roots. The existence of various "legal monuments" shows that the Armenian constitutional thought dates back to the ancient times. Legal thought in Armenia has particularly flourished since the proclamation of Christianity as a state religion in 301 A. D. In the fourth century, various national ecclesiastical councils enacted canons, which had significance for the development of the Armenian constitutional culture. These canons had a universal and prevailing legal force. From this viewpoint national ecclesiastical councils can be compared with constitutional assemblies and one may conclude that they were the prototypical for the latter[1].

By the end of the 5th century an event took place in Armenia, which was of exceptional importance from the perspective of the subject of this study. Before that, the initiator of national ecclesiastical councils was the church, whereas in the 5th century a similar initiative was set forth by King Vachagan. He convened a populous assembly, the outcome of which was the adoption of the so-called "Canonical Constitution". This event shows that in the 5th century attempts were made in Armenia to address existing conflicts not through the force, but via legal means, by enacting constitutional laws. It is common

1 See Gagik Harutyunyan, *Constitutional Culture: the Lessons of History and the Challenges of Time* (Revised English ed., Yerevan 2017) 68.

for all the above-discussed norms that they had universally binding legal effect, establishing rules for the permissible boundaries of behavior. Moreover, the adoption of a Constitution by constitutional convention was a progressive phenomenon for that time and proves that attempts were made to base the regulation of social relations on the principles of social cohesion[2].

In 1788, in the Indian city of Madras, father and son Shahamirians completed an exceptional monument, a Constitution of a sovereign Armenia they had dreamt of, which they called the "The Entrapment of Vanity." In legal literature, this work is considered to be a unique achievement in the history of the social-legal mind. Experts in constitutional law, studying Armenian constitutional history, state that "[i]t proposes ideas, which, apart from being the result of profound theoretical conceptualizations, also represent a pivotal value in international constitutional developments. The title itself, in the assessment of the renowned expert in constitutional law – professor Dominique Rousseau – represents a whole legal theory. This constitution was called upon to guarantee "the possibility to preserve freedom" and to create an "inescapable entrapment for all evil people, so that they are forced to succumb to the yoke of beneficial activity". It was called upon to play an axial role in governing through fair acts, natural law and justice"[3]. This legal monument was not implemented, as at that moment Armenian statehood was not restored. At the same time, its content shows that the Armenian constitutional culture in the 18th century adhered to the principle of the rule of law, the understanding of the supremacy of natural laws, the separation of powers, and assuring proper equilibrium of checks and balances.

The above-noted legal monuments show that regulation of social relations and the perception with this regard were based on the principles of social cohesion, rule of law, and the separation and balance of powers. Such a culture is important not just from a historical viewpoint, but also from the aspect of the continuity of Armenian constitutional culture. Moreover, those principles and values are axial in the contemporary world and should underlie modern Armenian constitutionalism.

It is remarkable that after the restoration of independence – during the existence of the First Republic of Armenia (1918–1920) – the development of an Armenian Constitution was initiated, but was not completed before the Sovietization of Armenia. At the same time, several legal acts were adopted, which are considered to have a foundational, constitutional character and regulated relations between the state and an indi-

2 See Gagik Harutyunyan, *Constitutional Culture: the Lessons of History and the Challenges of Time* (Revised English ed., Yerevan 2017) 72–73, 80–83, 95.

3 See more about this in Gagik Harutyunyan, *Constitutional Culture: the Lessons of History and the Challenges of Time* (Revised English ed., Yerevan 2017) 86–113.

vidual, as well as the issues with regard to the establishment, authorities and activities of the state power. One of these documents was the Declaration of Independence of Armenia promulgated by the Armenian National Council on 30 May 1918. It declared the Armenian National Council to be the supreme and sole authority of Armenia and temporarily provided the Council with all the governmental functions[4]. It should be noted that, although the Sovietization of Armenia interrupted the development of the national legal and constitutional systems, the historical and democratic traditions of the First Republic have had an important impact on the rebirth of Armenian statehood in the beginning of 1990s. This is the reason that Declaration of Independence of Armenia (dated as of 23 August 1990) made a special reference on democratic traditions of the independent Republic of Armenia established on May 28, 1918 and their development.

3. Armenian Constitutionalism after the Restoration of Independence

3.1 Declaration of Independence of Armenia and 1995 Constitution of the Republic of Armenia

On 23 August 1990, the Supreme Council of the Armenian Soviet Socialist Republic adopted the Declaration of Independence of Armenia[5], which has become a very important constitutional document. It declared the beginning of a process of establishing independent statehood with a democratic society based on the rule of law and also stated the fundamental principles of Armenian statehood and nation-wide objectives.

Further, in 1995, the Constitution of the Republic of Armenia was adopted. The Preamble of the Constitution stated: "The Armenian people – taking as a basis the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in the Declaration on the Independence of Armenia, having fulfilled the sacred behest of its freedom-loving ancestors for the restoration of the sovereign state, committed to the strengthening and prosperity of the fatherland, with a view of ensuring the freedom of generations, general well-being and civic solidarity, assuring the allegiance to universal values – hereby adopt the Constitution of the Republic of Armenia".

The text of the preamble contains provisions with various content, including both historical and national identity aspects, as well as the goals and values of the concrete social society. Moreover, a reference is made to another act – The Declaration of Independ-

4 Գագիկ Ղազինյան, Արթուր Վաղարշյան, *Հայոց իրավունքի պատմության հիմնահարցերը. Հին չրջանից մինչև մեր օրերը* (Երևան 2014) 134–137.

5 See Declaration of Independence of Armenia 1991 <https://www.gov.am/en/independence/> accessed 12 December 2020.

ence of Armenia, more concretely – to the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in it.

In this context, a question arises whether the Declaration of Independence is a part of the Armenian Constitution itself, and whether its regulations acquire a constitutional value. At first, it should be mentioned that the fundamental principles of Armenian Statehood and the nation-wide objectives are referred in the text of the constitutional preamble and not the Declaration of Independence. The study of the Declaration leads to a conclusion that the majority of regulations prescribed in it are such principles and objectives. At the same time, there are also provisions in the text of the Declaration, which are aimed at solving an ongoing issue at a certain historical stage, prescribing regulations different from the ones the current Constitution defines and citing bodies which now, according to the Constitution, do not exist. Hence, they do not define a fundamental principle or a nation-wide objective from this viewpoint. For instance, Article 3 of the Declaration defines that the right to speak on behalf of the people of the Republic of Armenia belongs exclusively to the Supreme Council of Armenia. Article 5 states that the armed forces of the Republic of Armenia can be deployed only by a decision of its Supreme Council. I believe that the content of such provisions is multilayer. Though it mostly contains concrete solutions to ongoing problems, the logic, underling these solutions, is also important. This content is itself expressed in the form of the fundamental principles of the Armenian Statehood and the nation-wide objectives. For instance, the basis for the provision of the Declaration that the armed forces of the Republic of Armenia can be deployed only by a decision of its Supreme Council, is not just the logic to define the concrete body, but the idea that the authority to deploy the armed forces belongs to the body representing the people of the Republic and not external or other bodies. Anyway, it is obvious that there are separate regulations prescribed in the Declaration, which cannot function at this stage and therefore do not have a constitutional value.

At the same time, besides the mentioned legal significance, the Declaration of Independence of Armenia has an important symbolic value for the constitutional system of the Republic of Armenia, which should be taken into account both during its realization and also in the process of the development of the Constitution.

Summarizing the above, I consider that the logic of the preamble of the Constitution with regard to the Declaration is to endow the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in it with a constitutional value[6].

6 See more about this in Anahit Manasyan, *Constitutional Stability as an Important Prerequisite for Stable Democracy* (Yerevan, "Hayrapet" publishing house 2020) 86–91.

This is important also from the viewpoint of studying constitutional identity issues, as well as the interrelations between constitutional law and international law. Constitutional identity is the originality, individuality and uniqueness of the concrete constitutional system[7]. It is important to note that notwithstanding the exceptional significance of the modern international law, it is based on the principle of "state consent". At the same time, according to the Vienna Convention "On the Law of Treaties", a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Hence, the axial issue with regard to the discussed topic is to find proper balance between constitutional identity and international law. From this perspective it is important that, while limiting state sovereignty and undertaking international obligations, national actors should respect the Constitution and constitutional identity in a manner, not violating fundamental principles of international law. This concerns both the content and enshrined procedures. Moreover, Article 46 of the Vienna Convention "On the Law of Treaties" should be paid attention in this regard. It defines: "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith".

The above analysis shows that in the Armenian case constitutional identity includes also the fundamental principles of the statehood and the nation-wide objectives enshrined in the Declaration of Independence of Armenia, which, along with other fundamental constitutional principles and values, comprise rules of internal law of fundamental importance and should be respected while undertaking international obligations. The opposite situation can create problems not just from the aspect of constitutional law, but also from the viewpoint of international law, as discussed above.

3.2 2005 Constitutional Amendments

The 1995 Constitution of the Republic of Armenia is still in force. Two major amendments were made to it in 2005 and 2015. There were several main spheres and ideological dimensions for the 2005 constitutional amendments. In my opinion, the most important of them was the shift of the constitutional text and thought from a power-centered constitutional legal model to a human-centered one. The clear attitude towards the constitutional recognition and stipulation of the human being as the highest value was absent in the wording of the Constitution of the Republic of Armenia

7 Anahit Manasyan, 'The Idea of Constitutional Identity in the Modern Constitutional Thought' (2018) N 3 Pravo. Zhurnal Vysshey shkoly ekonomiki 81, 84

adopted in 1995. Human dignity was not an object for protection under constitutional law, but instead an object of protection within the scope of criminal-law relations and the approach typical to the prior Soviet legal system with respect to this issue was still being applied. As a result of the 2005 constitutional amendments, Article 3 of the Constitution stipulated that the human being, his or her dignity, fundamental rights and freedoms are of the highest value. The State shall be bound by fundamental human and citizen's rights and freedoms as directly applicable law. In addition, the institution of Human Rights' Defender was defined in the text of the Constitution.

There were several amendments in the context of the principle of separation and balance of powers. In particular, the place of the institute of the President of the Republic in the system of State power, his/her authorities in the sphere of executive power, as well as the institute of the Prime Minister in the system of executive power were clarified. The hybrid (semi-presidential) form of government was preserved, at the same time, the authorities of the President of the Republic were essentially decreased.

There were also various amendments and new conceptual approaches for ensuring constitutional safeguards for the independence and systemic integrity of the judicial power. The system of constitutional justice became more operative and efficient by supplementing and completing the list of objects and subjects of constitutional supervision and establishing efficient guarantees for the protection of human rights via the new individual compliant procedure not existing before, etc.

3.3 2015 Constitutional Amendments

The 2015 constitutional reforms introduced significant changes to the constitutional system of Armenia. There were essential transformations both from the viewpoint of the perception of constitutional rights, their restrictions, as well as from the aspect of separation and balance of powers and the form of governance in the Republic of Armenia.

I believe that the key constitutional reform in 2015 concerned the constitutional ideology on strengthening the rule of law and constitutional mechanisms for guaranteeing human rights and freedoms. One of the most important changes from this viewpoint was in Article 3 of the Constitution of the Republic of Armenia. As mentioned above, the 2005 amendments held that the state is bound by fundamental human and citizen's rights and freedoms as directly applicable law[8]. In comparison with the latter, the 2015 amendments stated that public power is bound by fundamental human and citizen's rights[9]. I believe that the mentioned amendment crucially transforms the essence of the

8 Article 3 of the Constitution of the Republic of Armenia in edition of November 27, 2005.
9 Article 3 of the Constitution of the Republic of Armenia in edition of 6 December, 2015.

discussed phenomenon. This is firstly emphasized from the aspect that in this context the requirement of being bound by fundamental human and citizen's rights is extended to all the types of the public power, also to the power of people. The idea of public power includes not just the state, but also people's power[10]. Moreover, the Concept Paper on the Constitutional Reforms of the Republic of Armenia directly emphasizes that the conceptual approach is that when administering power, ***the people and the State*** must be limited by basic human and citizen's rights and freedoms[11]. Hence, no power (be it state or people's power) and its realization can be considered as an end in itself and are therefore bound by fundamental human and citizen's rights and freedoms. Moreover, according to the 2015 constitutional amendments, the human being shall be the highest value in the Republic of Armenia. The inalienable dignity of the human being shall constitute the integral basis of his/her rights and freedoms.

The approach formed as a result of 2015 constitutional amendments with regard to constitutional determination of human and citizens' rights and freedoms, constitutional definition of regulations on necessary for restriction of these rights criteria, i. e. on principles of proportionality, certainty, inviolability of the essence of the provisions on fundamental rights and freedoms, and other analogical constitutional regulations, also had exceptional significance. The new constitutional regulations on the necessary criteria for restriction of fundamental rights are worth mentioning. In particular, the Constitution of the Republic of Armenia defined:

"**Article 78. Principle of Proportionality**

The means chosen for restricting fundamental rights and freedoms must be suitable and necessary for achievement of the objective prescribed by the Constitution. The means chosen for restriction must be proportionate to the significance of the fundamental right or freedom being restricted.

Article 79. Principle of Certainty

When restricting fundamental rights and freedoms, laws must define the grounds and extent of restrictions, be sufficiently certain to enable the holders and addressees of these rights and freedoms to display appropriate conduct.

10 Public power consists of the following three structural elements: power of people, state power, local self-governance power (see Сурен Авакьян, 'Публичная власть: конституционно-правовые аспекты' (2009) N 2 Вестник Тюменского государственного университета 5, 6).

11 Specialized Commission on Constitutional Reforms adjunct to the President of the Republic of Armenia, *Concept Paper on the Constitutional Reforms of the Republic of Armenia* (Yerevan, September 2014), <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2014)033-e> accessed 16 December 2020.

Article 80. Inviolability of the Essence of the Provisions on Fundamental Rights and Freedoms

The essence of the provisions on basic rights and freedoms enshrined in this Chapter shall be inviolable.

Article 81. Fundamental Rights and Freedoms and International Legal Practice

… 2. Restrictions on fundamental rights and freedoms may not exceed the restrictions prescribed by international treaties of the Republic of Armenia".

The next essential change of the constitutional system of Armenia was the shift of the form of governance from a semi-presidential system to parliamentarian one. The main reason for this amendment was the inner dualism of the executive power conditioned by the functional powers of the President of the Republic and the Government, as a result of which the Government did not perform with full and complete responsibility the functions typical to the executive power. This is considered to be one of the main shortcomings of the semi-presidential form of governance in general. Under the semi-presidential system of government in Armenia, the President of the Republic possessed unbalanced powers within the executive branch without adequate political accountability. Moreover, this system of government did not ensure the necessary stability and mechanisms for overcoming possible conflicts when the president was not supported by the parliamentary majority.

The parliamentary form of government was considered to be able to overcome the conceptual shortcomings of the above-mentioned semi-presidential system, noting that in any case it is rather an issue of political choice. It was considered that such a choice would further streamline the functional separation of powers between the three constitutional bodies of the state power, and there shall be no connection in terms of establishing a "supreme" body conditioned by Soviet mentality. Under the system established in the Constitution after 2015 constitutional reform, the National Assembly (the legislative power) was considered to oversee the highest body of the executive branch (the Government), while the President of the Republic oversees the compliance of the legislature and the executive with the rules prescribed by the Constitution and the courts are accountable only to the law and exercise justice independently. Moreover, the Government was afforded the functional authorities of the executive power, reserving to the President of the Republic counterbalancing and restraining powers, typical for the head of the state. The power of seeking a no-confidence vote against the Prime-Minister by the National Assembly was introduced in the Constitution in comparison with the absence of such a constitutional and political accountability for the heads of the executive power in previous constitutional regulations.

Before the 2015 constitutional reform, there was no effective system for the ***legal*** resolution of disputes between state bodies in matters concerning constitutional powers. Noting the fact that systemic conflicts should be precluded to the extent possible at the level of the Constitution and the utmost goal of legal regulation should be to safeguard dynamic functional harmony, a new authority of the Constitutional Court was introduced for settling disputes arising between constitutional bodies with respect to the constitutional powers thereof.

One of the primary conceptual issues of constitutional reforms regarding the judiciary was the establishment of an independent, autonomous and accountable judiciary. In this sense, the efficiency of reforms was not associated with the establishment of new institutions, but rather with the improvement of already-existing structures. The establishment of the Supreme Judicial Council is worth mentioning in this context, which substituted the Council of Justice and became an independent constitutional body that guarantees the independence of courts and judges.

The full-fledged use of the potential of direct democracy and reasonably combining it with the potential of representative democracy were considered to have significant importance for ensuring stable constitutional developments in the country. Hence, the institute of popular initiative was introduced in the result of 2015 constitutional reforms both for proposing draft laws and draft constitutional amendments. Moreover, before the 2015 constitutional reforms there was a possibility of constitutional amendments via only a referendum. The 2015 amendments created the possibility of amending several constitutional regulations also by the National Assembly of the Republic of Armenia. In particular, according to Part 1, Article 202 of the RA Constitution, the Constitution and amendments to Chapters 1–3, 7, 10 and 15 of the Constitution, as well as to Article 88, to the first sentence of part 3 of Article 89, to part 1 of Article 90, to part 2 of Article 103, to Articles 108, 115, 119–120, 123–125, 146, 149 and 155, and to part 4 of Article 200 of the Constitution *shall be adopted only through a referendum*. At least one third of the total number of Deputies, the Government or two hundred thousand citizens having the right of suffrage shall have the right to the initiative of adopting or amending the Constitution. The National Assembly shall adopt the decision on putting the draft to referendum by at least two thirds of votes of the total number of Deputies.

At the same time, Part 2 of the same article defines that except for the Articles specified in part 1 of this Article, *amendments to other Articles of the Constitution shall be adopted by the National Assembly, by at least two thirds of votes of the total number of Deputies*. At least one fourth of the total number of Deputies, the Government or one hundred fifty thousand citizens having the right of suffrage shall have the right to corresponding initiative.

Moreover, in case the National Assembly does not adopt the draft amendments to the Constitution provided for in part 2 of the mentioned Article, it may be put to referendum upon the decision adopted by at least three-fifths of votes of the total number of Deputies[12].

4. Contemporary Challenges of the Development of the Armenian Constitutionalism

4.1 The Balance Between Constitutional Stability and Constitutional Development

A new constitutional reform process was initiated by the Government of Armenia in 2020. A Professional Commission on Constitutional Reforms was formed by the decree of the Prime-Minister of the Republic for the development of the concept paper and draft constitutional amendments of the Republic of Armenia. I have also been a member of this commission. Hence, along with the history of the Armenian constitutionalism, I consider it necessary to discuss the issues and criteria, which should underlie constitutionalism and any constitutional reform process in order to contribute to constitutional stability, proper constitutional development and constitutional symbolism.

I have been studying the phenomenon of constitutional stability for several years. My main conclusion with this regard is the following: constitutional stability should not be considered as the unchangeability of constitutional regulations, and "stability", "changeability" and "development" should not be perceived as mutually exclusive terms. The essence of stability is not based on the idea of preserving the system from changes, but on the idea of establishing opportunities for taking the mentioned changes into account.

Hence, the main issue in this context is to reveal the criteria, which should underlie any constitutional development in order to preserve constitutional stability and constitutional symbolism.

In this regard it should firstly be noted that the above does not presuppose a possibility to thoroughly change the "core", "kernel", or essence of the Constitution. The reason is that each system has a concrete integrative quality, which forms the mentioned whole system and the initial condition, from which the transition to new positions takes place. Hence, in case of the absence of the noted features, the object ceases to be the men-

12 *Concept Paper on the Constitutional Reforms of the Republic of Armenia* (Yerevan, September 2014) is available at the following link: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2014)033-e> accessed 16 December 2020. English version of the Constitution of the Republic of Armenia is available at the following link: <https://www.president.am/en/constitution-2015> accessed 16 December 2020.

tioned concrete system and it is obvious that in these conditions it is not possible to speak about the viability and stability of the latter at all.

The above leads to the conclusion that the term "stability of the Constitution" presupposes a possibility of changes, but such changes which maintain the main quality of the system – the "core" of the Constitution. In this regard, Article 203 of the Constitution of the Republic of Armenia should be noted, according to which Articles 1, 2, 3 and 203 of the Constitution shall not be subject to amendment. Article 1 describes the Republic of Armenia to be a sovereign, democratic, social state governed by the rule of law. Article 2 prescribes that in the Republic of Armenia, the power belongs to the people. The people shall exercise their power through free elections, referenda, as well as through state and local self-government bodies and officials provided for by the Constitution. Usurpation of power by any organisation or individual shall be a crime. Article 3 states that the human being shall be the highest value in the Republic of Armenia. The inalienable dignity of the human being shall constitute the integral basis of his or her rights and freedoms. The respect for and protection of the basic rights and freedoms of the human being and the citizen shall be the duty of public power. Public power shall be restricted by the basic rights and freedoms of the human being and the citizen as a directly applicable law.

Therefore, the constitutional legislator considers these provisions as the basis for social relations and the fundamental elements, constituting the constitutional identity of the concrete constitutional system, hence also, prohibiting their amendment.

At the same time, notwithstanding their unchangeability, those provisions are subject to *dynamic interpretation*. Undoubtedly, such concepts, as, for instance, "democracy", "sovereignty", "fundamental human rights and freedoms", etc., have been and are continuously developing during a time. In the 21st century, their perception does not thoroughly coincide with the one, which was, for instance, in 19th or 20th centuries. The perception of many terms was essentially changed even during a few decades. Hence, I believe that from this aspect, a key point should be the following: the mentioned principles are subject to dynamic interpretation, within the frame of which there can be changes in the perception of certain elements of the latter, but at the same time, the elements, constituting the basis for these principles, should stay unchangeable.

In this context, I consider necessary to touch upon one more important circumstance with regard to the discussed issue – the possibilities of amendment of the Armenian constitutional preamble and the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in the Declaration of Independence of Armenia.

The Constitution of the Republic of Armenia, defining regulations with regard to the adoption and amendment of the Constitution, does not affect the preamble of the Basic

Law. This concerns both the unchangeable constitutional articles and also the peculiarities of amendment of various constitutional norms. Hence, in this context, a question arises whether the preamble to the Constitution can be subject to changes both from the viewpoint of making textual amendments and from the aspect of developing the content of the latter via alternative ways.

The content of the Armenian Constitution, its logic and terminology lead to a conclusion that historical, national identity aspects, goals and values of a concrete social society are listed in the preamble of the Constitution, as well as a reference is made in it to the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in the Declaration of Independence. The main goal of listing all these elements is to point out what the Armenian people took as a basis, when adopting the RA Constitution.

To my mind, the peculiar text prescribed in the preamble of the Constitution of the Republic of Armenia form the "core" or "kernel" of the Basic Law. Hence, this text cannot be subject to fundamental changes. It is also obvious that the constitutional preamble enshrines the values and goals of the given social society, which underlie the adoption of the Constitution, and after the adoption of the Basic Law it is not logical from the chronological viewpoint to speak about their amendment. Hence, the preamble is the qualititive peculiarity of the Constitution of the Republic of Armenia, in the absence of which it is impossible to speak about the discussed concrete system – the Armenian acting Constitution and constitutional system.

At the same time, notwithstanding the mentioned conclusion on the prohibition of the textual changes of the preamble, I consider that the preamble, besides the declaratory significance, has a constitutional value, practical importance, and can be developed via other alternative ways, for instance, via interpretation. Moreover, as in the case of other unchangeable constitutional articles, the key point should be the circumstance that notwithstanding the prohibition of textual changes, the above-mentioned regulations are subject to *dynamic interpretation*, within the frame of which changes of perception of their separate elements are possible, at the same time, the elements, constituting the "core", "kernel" of these principles, should be unchangeable.

Moreover, this conclusion concerns also the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in the Declaration of Independence of Armenia, which, in my opinion, cannot be subject to changes at least in the frame of the acting Constitution and constitutional system.

As a result of the 2015 constitutional reforms, a new authority of the Constitutional Court was introduced and Article 168 of the Constitution of the Republic of Armenia

defined that prior to the adoption of draft amendments to the Constitution, as well as draft legal acts put to referendum, the Constitutional Court determines the compliance thereof with the Constitution. In other words, the determination of constitutionality of draft constitutional amendments became an object of preliminary mandatory constitutional review. In the case of proper implementation of the discussed authority, it can become a very important and interesting tool from the viewpoint of guaranteeing constitutionality of constitutional amendments, hence also constitutional stability and stable democracy.

Moreover, the recently amended Article 72 of the RA Constitutional Law "On the Constitutional Court"[13] prescribes that the constitutionality of the draft amendments to the Constitution is assessed from the perspective of compliance of the draft with the unamendable articles of the Constitution. Certainly, such a provision on the criteria for the assessment of constitutionality of constitutional amendments is necessary from the aspect of the legal certainty. The reason is that the consideration of the mentioned cases should have definite limits, and the constitutionality of the discussed draft cannot be assessed from the aspect of all the norms of the Constitution. At the same time, the defined criteria cannot be interpreted as narrowly as to include just Articles 1, 2, 3, 203 of the Constitution.

The above-presented analysis shows that the preamble to the Constitution with all its elements should also be included in the perception of the unamendable constitutional provisions. Moreover, constitutional amendments should be assessed also from the aspect of whether the constitutional procedure for constitutional amendments was observed. Hence, in my opinion, the presented legal regulations and their perception need further improvement. On this point, it should be noted that the majority of constitutional courts possessing such an authority examine the noted cases from the viewpoint of compliance of constitutional amendments with the procedure for constitutional amendments, for instance, the Constitutional Courts of the Republic of Turkey[14] Hungary[15], Ukraine[16].

Hence, in my opinion, the two main criteria for the assessment of constitutionality of constitutional developments are 1. unamendable constitutional provisions, including the constitutional preamble and the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in the Declaration of Independence of Arme-

13 The Law was adopted on 17 January 2018, the mentioned amendments were made on 03 June 2020.
14 See Article 148 of the Constitution of the Republic of Turkey.
15 See Article 24 of the Fundamental Law of Hungary.
16 See Articles 157, 158 of the Constitution of Ukraine.

nia; and 2. the compliance with the constitutional procedure for constitutional amendments prescribed in the Constitution[17].

4.2 Visible Constitutional Necessity as a Fundamental Precondition for Textual Constitutional Amendment

The next issue, which should be discussed in the mentioned context, is the circumstances when there is a real need for a textual constitutional amendment. The issue is particularly important from the aspect that in reality the Constitution can be amended continuously and this is a common situation for new democracies. There is a notion in many such societies that the social progress is reached by improving the existing formal norms and by creating new ones. Hence, we are constantly changing the legal text, believing that this "unique" technique is able to take us to the improvement of systems and progress. The paradox is that, although the problems of this approach are continuously approved by a number of concrete examples of various scale in different countries, this "normative fetishism" continues to exist.

There are certainly some situations, when it is necessary to amend the constitution or establish a new one. At the same time, in the majority of cases real progress is impossible via this means and needs implementation of other steps. The reason is that, as a rule, such a textual amendment becomes just an expression of the discussed "normative fetishism" or a means for satisfaction of certain political interests and preferences.

Hence, the main challenge here should be the following: how to find a proper balance between the need for constitutional development and the values, underlying constitutional stability and symbolism?

In my opinion, textual constitutional amendment should take place only when there is a *visible constitutional necessity* assessed on the basis of the following criteria: properly discovering the existing problems, revealing their roots and real reasons, proposing solutions, measuring possible risks in case of implementing the proposed solutions and finding proper balance between all the presented criteria. Moreover, not just the legal aspect should be taken into account, but the mentioned constitutional necessity should be assessed through the whole picture of reality and comprehensively, i. e. noting also political, economic, social, psychological and other circumstances. For instance, I voted against the decision of the Professional Commission on Constitutional Reforms on including the idea of elimination of the Constitutional Court and Cassation Court, establishment of a unified Supreme Court and changing the model of constitutional justice

17 See more on constitutional stability issues in Anahit Manasyan, *Constitutional Stability as an Important Prerequisite for Stable Democracy* (Yerevan, "Hayrapet" publishing house 2020) 28–67.

in the concept paper of constitutional reforms, using the discussed method. On the basis of this my professional impression was the following: 1. the roots and reasons of the defined problems are not connected with the proposed solution of unification of the highest courts, hence, the real roots and reasons of the problems are not eliminated and will continue to exist, 2. the proposed model is not without shortcomings either as any other model of constitutional justice, hence, without the proper assessment of the risks of introduction of the new model the possible outcome cannot be seen and guaranteed, 3. the problems should be defined properly, 4. there is no visible link between the problems, their reasons and proposed solutions, 5. political, economic, social, psychological circumstances are not properly taken into consideration, 6. hence, a proper balance wasn't found between the mentioned criteria. On the basis of this assessment I drew a conclusion that, although the Armenian justice system should certainly be improved, there is no *visible constitutional necessity* for such a change of models, the latter is not directly connected with the solution of existing problems, moreover, can itself become a reason for many new ones[18].

4.3 The Role of the Constitutional Court in contributing to the Development of the Constitution

The next issue, which should be taken into account in the mentioned context, is the following: the perception of constitutional development should not be limited just by the concept of textual constitutional amendment. It is not necessary that the change be implemented within the frame of the text in order to be considered as a development. Development and change can also concern the perception of the norm. Hence, making amendments in the text of the Constitution is not the only way to effectively ensure the proper constitutional development. There are also alternative ways for developing the Fundamental Law, which should also be paid due attention. In other words, all the discussed techniques should be combined and effectively balanced while developing the Basic Law. Otherwise, the essence of constitutional stability and constitutional symbolism will be distorted, in conditions of which it is not possible to speak about proper constitutional development.

In this regard, the official interpretation of the Constitution by the Constitutional Court is an important and essential way for constitutional development. The proper use of peculiarities and possibilities of this technique can greatly contribute to eliminating the

18 See more on the issue Анаит Манасян, 'Смена модели не станет решением проблем, но приведет к новым' *Голос Армении* (Ереван, 9 сентября 2020) <https://www.golosarmenii.am/article/93843/anait-manasyan-smena-modeli-ne-stanet-resheniem-problem--no-privedet-k-novym> accessed 22 December 2020.

shortcomings of permanent textual constitutional amendments and to strengthening constitutional stability and constitutional symbolism.

In some cases, the Constitutional Court of the Republic of Armenia has played a role in developing the Constitution and contributing to its development. The CC decision DCC-934 (dated as of 04.02.2011) can be mentioned with this regard. After the 2005 constitutional reforms, the Prosecutor General was provided with an authority to apply to the Constitutional Court on the constitutionality of provisions of normative acts concerning a specific case pending before him/her. At the same time, on the basis of the RA Law of 28.11.2007 "On making amendments in the Criminal Procedure Code of the Republic of Armenia" the Prosecutor General does not have the authority to implement preliminary investigation and therefore cannot undertake or implement proceedings on any case. If the term "on the case, pending before him/her" used in Point 7, Part 1, Article 101 of the RA Constitution would be perceived just in its criminal-procedural sense, then it would lead to the situation where implementation of this authority of the Prosecutor General becomes impossible. The reason is that in order to implement this authority, the RA Prosecutor General should undertake the given case within his/her proceedings and become a body, implementing the proceeding, which authority he/she did not have. Noting this, the Constitutional Court of the Republic of Armenia, by its decision DCC-934, gave a broad interpretation to the mentioned constitutional regulation, factually developing the Basic Law and solving the constitutional problem. In particular, revealing the constitutional-legal content of the expression "specific case, pending before the Prosecutor General" defined in Point 7, Part 1, Article 101 of the RA Constitution, the Court stated that the latter should not be interpreted on the basis of the legal methodology used in other branches of law, and it should be interpreted in accordance with its constitutional meaning – in the framework of constitutional authorities of the RA Prosecutor's office. The Court emphasized that the RA Constitution, recognizing the Prosecutor General as a subject which may apply to the RA Constitutional Court in the frames of concrete judicial constitutional review, firstly took into account the provision of Part 1, Article 103 of the Constitution, according to which "The Prosecutor's office of the Republic of Armenia is a unified system headed by the Prosecutor General". Hence, in constitutional-legal sense, the term "proceeding before the Prosecutor general" is adequate to the term "proceeding before the RA Prosecutor's office". Summarizing the above, the Constitutional Court of the Republic of Armenia stated that while interpreting the term "on the case, pending before him/her" used in Point 7, Part 1, Article 101 of the RA Constitution the constitutional-legal meaning of this notion should be taken as a basis, noting the content of constitutional authorities of the RA Prosecutor's office prescribed in Article 103 of the RA Constitution.

At the same time, there has been no unified and comprehensive perception and practice on recognizing constitutional interpretation as an important mean for constitutional development in Armenia, which has very often lead to permanent textual amendments, distortion of constitutional stability and symbolism, as well as improper perception of the role of the Constitutional Court in modern societies. For this reason, I propose to include the discussed idea on balancing all the ways of constitutional developments in the concept paper for constitutional reforms of the Republic of Armenia and to define the mission of the Constitutional Court on contributing to the development of the Constitution in the text of the Basic Law.

4.4 Constitutional and Political Culture as an Important Element for Proper Constitutional Development

The next important issue is the constitutional and political culture of a society, which is directly connected with proper constitutional developments, constitutional stability and constitutional symbolism. The significance of the constitutional culture can be found in two main dimensions. First, the proper implementation of the Constitution, its proper development and all the other constitutional issues depend on the corresponding level of constitutional and political culture of the society. Second, constitutional development is possible also via development of corresponding constitutional customs.

It should be noted that after the emergence of many written constitutions, the significance of constitutional customs as a source of constitutional law was decreased over time. They particularly exist in countries where there are no radical changes or frequent changes of the social relations for long periods of time and where aged constitutions and stable constitutional systems exist (for instance, in UK, US, Sweden, Norway, etc.). A custom becomes a source of constitutional law when an issue is not regulated by the Constitution or any other formal source of constitutional law and the custom does not disagree with the principles of the existing constitutional law[19].

Noting the above, I believe that constitutional custom can play a proper role for regulation of constitutional relations just in conditions of a stable constitutional system and corresponding level of constitutional culture in the society. This is testified also by the examples and context of countries where it exists. Hence, in case of a corresponding level of constitutional and political culture, constitutional custom can become an important subsidiary source of constitutional law and constitutional developments can take

19 See Blerton Sinani and Alba Dumi, 'A View on the Customs and the Constitutional Conventions as Subsidiary Sources of the Constitutional Law' (2012) Vol. 3(2) Mediterranean Journal of Social Sciences <https://www.richtmann.org/journal/index.php/mjss/article/view/11006/10619> accessed 30 November 2020.

place also via their development. On the other hand, the evolution of relevant constitutional traditions can, in turn, contribute to the development of the constitutional and political culture of the society. Hence, I believe that the Armenian constitutionalism can also be strengthened by the evolution of adequate constitutional customs and traditions, which will, in turn, lead to the development of the constitutional and political culture of the society.

With regard to the role of constitutional and political culture on the implementation of the Constitution and proper constitutional developments, it should be noted that culture in general plays an essential role in constitution-building. It is likely to be part of the context for constitution building, informing the substance and process of constitutional change. There is sometimes pressure for aspects of culture to be explicitly reflected in the terms of a Constitution, including in a preamble, in institutional design, in the framing of rights provisions and the relationship between religion and the state. On the other hand, effective implementation of new constitutional arrangements might require cultural change on the part of constitutional actors (legislators, executives, courts, etc.) and in the wider community. An appreciation of culture and the challenges and opportunities it presents may be critical to the outcome of a constitution building[20].

The above shows that culture, in particular, constitutional and political culture, has an essential and two-fold role in constitution building. First, effective and successful constitutional development is possible just in case of a proper level of constitutional and political culture of the society. Second, on the other hand, properly implemented constitutional development promotes the evolution of the culture of the society, including constitutional and political culture.

From the viewpoint of the discussed issue it is particularly important to take into account the fact that the Constitution should not be subject to amendment parallel to every change of political situation of the state or formation of a new political majority merely conditioned by the mentioned changes. The Constitution has a fundamental role from the aspect of regulating social relations and cannot be used just as a tool for solving ongoing political problems. The Constitution is not just a document with a highest legal force, but also a symbol of a concrete constitutional system. Hence, the Constitution should in reality be perceived by the society as a fundamental document, a symbol of the constitutional system, should create a feeling of the factually existing constitutionalism, and not of a political declaration accidentally adopted or amended parallel to each political event. Hence, the frequency of constitutional amendments

20 The third Melbourne Forum on Constitution Building in Asia and the Pacific, *Implications of Culture for Constitution building* (Colombo, Sri Lanka, 16 October 2018) <https://www.idea.int/sites/default/files/events/Concept-note-MF-2018-FINAL-formatted.pdf> accessed 20 December 2020.

cannot be conditioned just by the balance of political forces and its mathematical calculation. Constitutional amendments and the process of their realization should form such a public perception that the Constitution is a stable document, a symbol of a concrete constitutional system and cannot be amended just based on the political will of the political majority of the day. The opposite situation can make the proper realization of constitutional norms impossible and lead to the distortion of values underlying constitutional stability, constitutional symbolism and the rule-of-law state. Moreover, history shows that in all the situations, when political elites have been trying to use the Constitution with the aim to gain political dominance, the final result has been the paradox "Constitution without constitutionalism"[21].

Here the concept of "democratic ethics" becomes essential. I define it as the guiding philosophy, the set of principles and values, governing the exercise of the power of people and the state power. This philosophy, its principles and values set the limits, beyond which the exercise of any power becomes inadmissible. It concerns both the state and the people's power. Hence, any power should follow concrete principles and values, which were studied also in the frame of the chapter. Moreover, deviation from them should be considered as a breach of democratic ethics, disturbance of constitutional and political culture. In my opinion, "democratic ethics" should be the ideal and the level of the constitutional and political culture, which any society should seek and in which conditions only we will be able to speak about a strengthened and developed constitutionalism.

5. Conclusion

Armenia, with a rich history of constitutionalism, faces various challenges and trends in its contemporary stage of constitutional development. In order to ensure the proper evolution of constitutionalism, several fundamentals should underlie those processes. In particular, the values underlying constitutional stability and symbolism should be given due attention in any constitutional development process. Textual constitutional amendment should be possible just in case of a visible constitutional necessity assessed on the bases of the criteria discussed in the article. The core of the Constitution should not be fundamentally changed in reform processes. Moreover, in the frame of the existing constitutional system the core includes not just the formally unchangeable constitutional provisions, but also the constitutional preamble and the fundamental principles of the Armenian Statehood and the nation-wide objectives enshrined in the Declara-

21 Issues on differentiation of constitutional policy from ongoing politics are presented in more details in Anahit Manasyan, *Constitutional Stability as an Important Prerequisite for Stable Democracy* (Yerevan, "Hayrapet" publishing house 2020) 46–53.

tion of Independence of Armenia. All the ways for constitutional development should be properly used and a due balance should be found between them. Constitutional interpretation should also become an important tool for constitutional development. Constitutional and political culture should be raised to such a level as to ensure constitutional stability, constitutional symbolism and constitutional development, leading to democratic ethics in society and strengthening Armenia's constitutional traditions.

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The Constitutional Development of the Republic of Azerbaijan

1. The Historical Roots of Constitutionalism in Azerbaijan

The modern values of constitutionalism in Azerbaijan have historical roots. They began to form with the gaining of independence at the beginning of the twentieth century.

On May 28, 1918, the National Council adopted the Declaration of Independence of Azerbaijan. This significant document stated: "From now on, the Azerbaijani people is the holder of the sovereign rights and Azerbaijan, embracing Eastern and Southern Transcaucasia, is a fully independent state." The National Council immediately organized the first government and the elections of the parliament of the Democratic Republic of Azerbaijan.

Thus, the first democratic republic in the Muslim East, established in Azerbaijan in 1918, decentralized state power and guaranteed certain liberal values for the legal system of the country.

Although the Constitution was not adopted, the parliament managed to implement many legislative acts of a constitutional nature. The main significance of democratic reforms was the declaration of the principle of separation of powers in the legal system. The law "On incompatibility of positions" adopted on January 25, 1919 included the key terms for the separation of powers especially the separation of the executive power from the legislative one. According to this law, a member of the ADR Parliament could not perform the functions of a civil servant, with the exception of the post of minister. Of course, the partial combination of posts was observed, but only in the initial stage of the establishment of parliamentary power.

From 1920 to 1991 there was a one-party system of the Communist Party of the Azerbaijan SSR. After the restoration of independence, new political parties emerged on the political scene. At the beginning of the 20th century, Taraggi, Ittihad, Ahrar, Musavat, Hummet and other parties were active in the political system. At present, the constitutional system of Azerbaijan is formed on a multi-party basis. Approximately 55 political parties are now officially registered. The New Azerbaijan Party (Yeni Azərbaycan Partiyası) has the largest number of members and is also the ruling party.

During the Soviet period, four constitutions were adopted in the Azerbaijan SSR that duplicated USSR constitutions and they were very formal with no mechanism to protect human rights such as constitutional court. They stood on a formal nature and none was implemented in practice.

After the collapse of the Soviet Union, the constitutions of former union republics lost their influence on public life. All public institutions were subordinated to the state and only state and collective (collective farm) ownership was recognized. Under this system, the main fundamental branch was state law. The last Soviet Constitution in Azerbaijan, adopted in 1978, reflected provisions of the 1977 Union Constitution.

In August 1991, the Supreme Consul of the country proclaimed a decree on restoring state independence of Azerbaijan based on the Act of 1918. The Constitutional Act on State Independence of the Republic of Azerbaijan was adopted on October 18, 1991. These legal acts replaced the Constitution of independent Azerbaijan Republic for a certain period of time.

Azerbaijan's constitutional (state) law has undergone radical changes since the beginning of 90's. Ideological and political pluralism, a socially oriented market economy, the priority of human and citizen's rights and freedoms and the strengthening of their guarantees predetermined the foundation of new institutions of constitutional law (presidency, parliament, local self-government, constitutional control, etc.).

With the gaining of independence, a process of decentralization of power and the principle of separation of powers have been restored and the institutions of local self-government are rapidly evolving. Constitutional relations go beyond state regulation and the period of advance of the modern constitutional law of Azerbaijan begins. On the other hand, the political crisis of the early 1990s almost paralyzed the process of development of constitutional relations and restoration of constitutional legality.

At the beginning of the 1990's the establishment of constitutional institutions was complicated due to the inexperience of the Popular Front party in state governance, from one side and the Armenian-Azerbaijani conflict in Nagorno-Karabakh, on the other hand. Thus, the key provisions of the Constitutional Act "On State Independence" adopted by the Supreme Council of the Republic of Azerbaijan on October 18, 1991 remained unimplemented.

The close connection of constitutional norms with politics, necessitated the social forces perceive not only secular ideology but also the values of constitutionalism for the restoration of legitimacy in constitutional relations. In order to succeed, authority had to shift to an effective and strong working regime that could protect law itself. Thus, to stabilize political relations in accordance with expression of will of the population, a

professional politician, public and political figure Heydar Aliyev was elected to parliamentary leadership in 1993.

Heydar Aliyev's efforts had a positive effect and in short time the Nagorno-Karabakh conflict was suspended. The state goal was to strengthen the country economically and politically and while guaranteeing the maintenance of independence the establishing and developing constitutional relations. However, to maintain independence it was necessary to have perfectly organized power based on democratic and legal principles.

The development of world constitutionalism shows that one of the primary measures in shaping a fair, modern, strong, stable power is to create a "social contract". (According to proponents of liberal theory a "social contract" means a contract between the people and the state of a Basic Law – the Constitution). So, the efforts of the Azerbaijani public were focused on the creation of a new, modern Constitution. But the adoption of the new Constitution dragged on until 1995 because Azerbaijan confronted the occupation of 20 % of its territories. Within the country, the political situation was tense and there were several military coup attempts.

2. The Main Provisions of the Modern Constitution of Azerbaijan

At last, on 12 November 1995 the people adopted the Constitution of the Republic of Azerbaijan in a referendum. Traditional ideas of constitutionalism: priority of human rights and freedoms; political pluralism; separation of powers; institutions of constitutional oversight, etc. are reflected in the Constitution, and as a "social contract" the Constitution defines the relationship between the state, society and the individual, securing the priority of human rights. Article 12 of the Constitution states that "securing the rights and freedoms of man and citizen is the supreme goal of the state".

The Constitution reflects the principle of the separation of powers and the adopted constitutional mechanism allows for mutual control between the branches of power whose primarily goal is to protect the human rights. Article 7 of the Constitution of the Republic of Azerbaijan states that different branches of power should cooperate with each other being independent within the limits of their authority. Legislative power is vested in the Milli Mejlis, while executive power – in the President of the Republic, and judicial power – in the courts of Azerbaijan. This modern principle of power organization is an inviolable foundation of statehood and democratic structure of society.

3. Legal Basis for Changes and Amendments to the Constitution

The adoption of the new Constitution contributed to an increasing urgency for the constitutional reforms. However, taking into account that the Constitution of the Republic of Azerbaijan provides a strict mechanism for amending its text (only through a referendum), constitutional and legal reforms were carried out in an integrated order.

According to Article 152 of the Basic Law, amendments to the AR Constitution can be made only through referendum, however, the initiative of amending the Constitution is burdened with a number of conditions. For example, according to Article 155 it is prohibited to make amendments to the articles of the Basic Law providing for the principles of national and popular sovereignty, democracy, unitarianism, republicanism, separation of state power, prohibition to repeal the human and civil rights and freedoms which are included in the original Constitution or their "limitation to a higher extent than it is provided for by the international treaties to which AR is a party".

The AR Constitutional Court also plays an important role in the process of amending the text of the Constitution. Thus, if amendments are proposed by the Parliament (Milli Mejlis) or the President of the AR, their further consideration requires a respective positive opinion of the AR Constitutional Court. At the same time, the Constitutional Court of the AR is limited in its powers, namely: it "cannot take decisions on amendments to the text of the Constitution of the Azerbaijan Republic, adopted by referendum" (Article 154). It should be noted a rather high prevalence of similar cases in foreign countries: as an example is "the legal system of Russia which does not provide for the possibility of authentic interpretation of the Constitution due to the fact that it was adopted by referendum."[1]

Distinct from amendments, additions to the text of the Constitution of the Republic of Azerbaijan are carried out by means of constitutional laws. Constitutional laws, principally, supplement the Basic Law. Article 156(5) of the Constitution specifies that "Constitutional laws are an integral part of the Constitution of the Republic of Azerbaijan." A number of constitutional laws have strengthened the provisions of the Constitution and an example is the Constitutional Law "On Additional Guarantees of Ensuring the Right to Decide on the Issue of Milli Mejlis' Confidence in the Cabinet of Ministers of the Republic of Azerbaijan" adopted on December 24, 2002 which monitors the executive power. In addition to the Constitution, to strengthen guarantees and protection of

1 Кравец И. А. Конституционное правосудие: теория судебного конституционного права и практика судебного конституционного процесса. Учеб. пособ. / И. А. Кравец – М. : Юстицинформ, 2017. – С.85.

human and civil rights and freedoms constitutional acts were adopted on 28 December 2001 on the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan and 24 December 2002 – on the regulation of the process of ensuring human rights and freedoms in the Republic of Azerbaijan. These constitutional laws included a number of provisions of the European Convention on Human Rights into Azerbaijani constitutional law.

However, not all important issues, especially constitutional relations, are regulated by constitutional laws. For example, the legal status and powers of the Judicial-Legal Council, a body which is very important for ensuring the independence of judges, are regulated by ordinary law.

It should also be noted that the Constitutional Court of the AR is not involved in the process of amending the text of the Constitution. However, in practice, in the three "constitutional referenda" not only additions were made to the Basic Law of the AR, but also accompanying amendments. As a result, in all cases where the text of the AR Basic Law is subject to revision, the Constitutional Court becomes a party to the process.

4. The Main Stages and Directions of Constitutional Reforms in Azerbaijan

Until February 1, 2021, the 1995 AR Constitution had been amended three times. Practice shows that it is impossible to distinguish between additions and amendments to the Constitution as both amendments and additions have been made to the text of the Basic Law each of these three times. Thus, three statewide referendums were held first in August 24, 2002 then in March 18, 2009, and at last in September 26, 2016.

Until now, at the three referendums more than 100 amendments and additions have been incorporated into the main text of the Constitution and more than half of the changes and additions are related to the improvement of the procedure of human rights protection. As well, a large group of amended norms is related to the improvement of state administration and electoral process, moreover there are technical amendments to the constitutional norms in the set of changes and additions.

In order to improve the procedure of the protection of human and civil rights and freedoms, 24 amendments and additions were submitted to a referendum in 2002. The most significant change for the legal system was granting the right to everyone independently to appeal to the Constitutional Court in order to restore their violated rights and freedoms. The mechanism of individual complaint in the institution of constitutional control has increased the activity of the Constitutional Court. Although the Constitutional Court is a subsidiary body in the human rights protection system, it becomes

an effective means for protecting constitutional human rights, as in the Azerbaijani legal system is given high powers.

Several amendments and additions have been made to the Constitution based on the results of the referendum in 2002. This includes a list of issues on which a referendum cannot be held: the issue of taxes and state budget, amnesty and pardon as well as the election, appointment or officials approval, the election, appointment or approval of those which are under the authority of the legislative and (or) executive power bodies respectively (part III of Article 3); in Art. 95, the powers of the Parliament were extended under the conditions of election of the Ombudsman and the solution of the amnesty issue; in Art. 105 the Prime Minister replaces the President upon his resignation, instead of the Speaker of the Parliament; in Part II of Art. 76 an addition was made, whereby active military service could be replaced by alternative service, etc.

Summarizing all economic and social reforms made during last 10 years, the 2009 referendum included 29 amendments to the Constitution. The most important of these is the provision stating that the economic development of Azerbaijan has a social orientation. These reforms were basically a transition to a new stage of social state development. Overall, the 2009 referendum was related to the improvement of the mechanism of human rights protection, expanding the guarantee of social rights and mostly strengthening the social state.

The rapid growth of Azerbaijan's economy contributed to a more than ten-fold increase in the country's budget. The high rate of economic growth allowed the state to take a close look at addressing itself to ensure the social rights of its citizens. The Constitution emphasizes that the social nature of economic policy is the core basis of government activity. Therefore, the amendment in Article 15, indicating that the economy of the Azerbaijani state has a social orientation, was a logical step.

To broadly ensure the principle of equality, Article 25 of the Constitution was supplemented with a provision that "everyone has to be ensured equal rights in their relations with the state bodies and the bearers of state power, who are responsible to make decisions related to rights and obligations." The guarantees for the protection of private life were significantly expanded in Article 32, and safeguards to protect the environmental rights of citizens were included in Article 39 of the Constitution. With the inclusion in Article 48 of the ban on forced participation in religious rituals, the supplementary constitutional guarantee was given to the right to freedom of conscience. The constitutional guarantee, included in Article 67, gives an accused person in criminal proceedings the right to be heard before being convicted. In order to strengthen the system of state power during an armed conflict or war, the Constitution was supplemented with the provisions that during martial law elections are not held, and the powers of the highest

elected bodies are prolonged until the end of the special regime. The restrictive procedure for the election of the head of state was removed from Article 101 of the Constitution, however the Constitution provides for a 7-year term of office for the President.

In accordance with the 2009 referendum, the responsibility of municipalities (suspension, termination and premature dissolution of municipalities) should be established by law, and the procedure for publishing normative legal acts should be regulated by the Constitutional Law. It is worth noting, that a special law regulating the accountability and responsibility of municipalities to the Parliament has not yet discussed in draft form, while the Constitutional Law "On normative-legal acts" which was adopted on December 21, 2010 raises a lot of questions.

Both above mentioned referendums expanded in stages the range of institutions with legislative initiative. While in the first referendum of 2002, the right of legislative initiative was granted to the Prosecutor General of the Republic of Azerbaijan, in the second referendum of 2009 a group of 40,000 citizens of the Republic of Azerbaijan with the right to vote were added to the text of the Constitution as able to introduce legislative initiatives.

The judiciary was partially reformed in both referendums. Thus, in 2002, through the amendment of articles 125 and 132 of the Constitution, new judiciary bodies – Courts of Appeal – were established in Azerbaijan. The 2009 referendum toughened the responsibility for the non-execution of court decisions, which, in turn, should be based on law and evidence (Article 129). In Article 131 of the Constitution, the compulsory publication of decisions of the Supreme Court addendum was included. In turn, this compulsory publication of Supreme Court judgments, on the one hand, creates conditions for free, independent monitoring and generalization of published Supreme Court judgments and, on the other hand, allows a clear understanding of the legal position of the Supreme Court in a particular case it has considered. All these ensure the principle of legal certainty operates more efficiently.

5. The Constitutional Significance of Strengthening the Principle of Legal Certainty

From the point of view of Azerbaijani judicial and constitutional practice, court decisions from the standpoint of the *res judicata* position and subject to the principle of legal certainty – should be reviewed very carefully (even "cautiously").

Starting in 2000, the newly adopted codified procedural legal acts have established special terms of control mechanism for judicial decisions, which is currently established as a supplementary cassation. The supplementary cassation can be initiated by the Chairman of

the Supreme Court, the Prosecutor General or a complaint of the parties within strictly established procedural deadlines and can be considered only on the authority of the Plenum of the Supreme Court. Undoubtedly, both cassation and supplementary cassation proceedings are limited to legal analysis and are not entitled to consider the facts of the case.

In accordance with Article 131 of the RA Constitution, the Supreme Court provides explanations on issues of judicial practice and its powers are limited only by a legal analysis of the case. In this regard the AR Constitutional Court, in its judgment "On Interpretation of Article 420 of the Civil Procedure Code of the Republic of Azerbaijan" of February 28, 2012, assessing the constitutional limit of cassation proceedings the RA Constitutional Court, declares that "from the point of view of the provisions of Articles 407.1.4, 407.2, 408.1.5, 416 and 420 of the CPC the cassation court cannot give any instructions beyond the case consideration at its discretion, including which circumstances must be proved or denied, which evidence shall be collected and examined during retrial, and which conclusion the retrial court must come to. But giving such instructions contradicts the constitutional principles of judicial independence".[2]

Thus, at the period of cassation proceedings the factual circumstances of the case are not considered. Hence, the task of individual panels and the Plenum of the Supreme Court of the AR is almost identical and consists in preventing repetition of mistakes made in the acts of the appellate court, checking the correctness of application of law and explaining it not only the correction of mistakes made in the case, but also the direction of judicial practice to exact and unified application of law norms. The only difference is that the Plenum of the Supreme Court in its decision on a certain case is based on the generalized practice of application of a certain rule of law in identical cases and sets forth a legal position mandatory for all courts. Such two-stage cassation instance was established in order to ensure the normative prescriptions in judicial practice to be complied with the principle of legal certainty.

For quite a long period in Soviet era, there was general supervision over court decisions in Azerbaijan carried out both by the prosecution bodies and the Supreme Court of the Azerbaijan SSR. This institute of general supervision over court decisions existed until the end of 1990s when judicial control took its place, as a result of the next stage of judicial reform.

From the constitutional point of view, judicial control is viewed as control over the revision of court decisions (more than 10 % of decisions of the AR Constitutional Court are

2 Konstitusiya Məhkəməsi Plenumunun "Azərbaycan Respublikası Mülki Prosessual Məcəlləsinin 420-ci maddəsinin şərh edilməsinə dair" 28 fevral 2012-ci il tarixli Qərarı // http://www.constcourt.gov.az/decision/230.

related to the protection of the principle of legal certainty), as well as the constitutional principle of *due process of law*.

Starting in the 1990s, the development of the institute of judicial review in the constitutional law of Azerbaijan, is still relevant nowadays. The institute of judicial review in the branch of criminal procedural law, in the context of modern positions of the European Court of Human Rights remains formal nearly in all post-Soviet countries, including Azerbaijan. The reason for this may be the fact that judicial review at the stage of pre-trial proceedings is a relatively new institution in the criminal procedural legislation of almost post-Soviet countries, including the Republic of Azerbaijan.

Part VII of Art. 71 of the Constitution permits courts to determine legality of restrictions on human and civil rights and freedoms by the courts. According to this provision of the Constitution, disputes related to violations of human and civil rights and freedoms are resolved by the courts. Everyone should be assured that, in case of any legal prosecution by state bodies, there is a special control by an independent judicial body over this action.

Some of the most significant constitutional norms emphasize the need for judicial control in restricting human rights and freedoms. For example, Part II of Article 33 of the Constitution states that no one has the right to enter a dwelling against the will of its occupants, except in cases prescribed by the law or on the basis of a court decision. In this case judicial control functions to a certain extent as a procedural guarantee of the home inviolability.

6. Judicial review as a constitutional value

Judicial control is one of the independent forms of judicial activity in criminal proceedings, which serves to prevent illegal interference with the rights and freedoms of man and citizen, and restore the violated rights as a result of the activities of the inquiry officer, investigator or prosecutor, who have control over the preliminary investigation. The obligation of judicial control to guarantee the right to liberty and security is directly prescribed in article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

Given the importance of constitutional reforms in strengthening the guarantees of the protection of constitutional rights in criminal proceedings, the AR Constitutional Court has adopted a number of important decisions in this field.

For example, in the Decision of the Plenum of the AR Constitutional Court of December 12, 2015 in reviewing an appeal from the Gabala District Court it was approved that after taking urgent measures the procedure for notifying the court about the measures

taken by way of judicial control is applied in different ways in practice. The reason for this is a completely ineffective approach of the parties applying the law to the requirements of the norm.

The Constitutional Court of the AR noted that in case of a formal approach to the issue, the court has to issue an appropriate decision, while verifying the necessity of the operative-search measure in accordance with the law. A copy of this decision is sent to the body which carries out the operative-investigative activity and the prosecutor who is in charge of the preliminary investigation. Hereinafter, the case is being considered on the merits and the results of this operational-investigative measure should be thought through in accordance with the general procedure. That is, the results of operational-investigative measures are verified and evaluated, just like any other evidences.

Ineffectiveness of judicial control leads to the fact that the mechanism of judicial control will be as "passive legitimation". For this reason, the Plenum of the Constitutional Court, taking into account the fact that the criminal procedural legislation practically lacks procedural legal powers of the judge in terms of judicial control before consideration of the case on the merits (pre-trial stage), noted in the above mentioned decision that the judge at the pre-trial stage of judicial control has the following powers: to authorize an operational and investigative measure and grant or deny the petition made in connection with the measure; extend the validity of the decision on the legal restriction of the constitutional rights and freedoms of a person; request additional materials on the grounds for operational and investigative measures; listen to the person whose rights and freedoms are limited and, if necessary (depending on covert or open operational and investigative measures) to inform the applicant of the reasons for conducting investigative measures against him; take other measures to guarantee the constitutional rights and freedoms of the person.

Thus, the Constitutional Court of the AR, while testing the practice of judicial control, basically created a certain procedural order of due process for the courts in the field of judicial control of a case at the stage of pre-trial proceedings. At present, this stage of the judicial process requires legislative improvement. In the pre-trial practice of the courts, especially, when choosing preventive measures or judicial control in the field of operational and investigative activities, the courts are mostly guided by criminal procedure legislation, that, unfortunately, provides in this stage of the process insufficient procedural opportunities for the courts to efficiently protect the constitutional rights and freedoms of an individual.

7. Constitutional growth of the judicial system in Azerbaijan

According to the principle of separation of powers, the judiciary in Azerbaijan is an independent branch of power. Its central task is administration of justice. In accordance with the Constitution, judicial power is accomplished by means of constitutional, civil, criminal and other forms provided for by law.

The foundations of the judicial system are confirmed in Chapter VII of the Constitution and in the special Act on Courts and Judges of 10 June 1997. Judicial power in the Republic of Azerbaijan is implemented only by courts: Constitutional Court, Supreme Court, Courts of Appeal, Administrative-Economic Courts, General Courts and Serious Crimes Court, etc. The use of legal means, which is not stipulated by law for the purpose of changing the powers of courts and creating extraordinary courts, is prohibited (Article 125 of the Constitution).

The judicial body of constitutional control in Azerbaijan is the Constitutional Court *(active since 1998)*, which is designed to protect human rights, legal protection, and the supremacy of the Constitution. It consists of nine judges, who are appointed by the Milli Mejlis on the proposal of the President for a 15-year term.

The Constitutional Court, on the basis of inquiries, appeals and complaints received from special constitutional bodies, decides on the conformity of legal acts with the Constitution, gives official interpretation of legal norms, performs special functions (approves elections, gives constitutional opinions, etc.). An important function of the Constitutional Court is to resolve disputes related to the separation of powers between the legislative, executive and judicial powers.

At the beginning of 2005, the Judicial-Legal Council was established in Azerbaijan to implement self-administrative functions. Under "The Judicial and Legal Council" Act of 28 December 2004, the Council comprises 15 members and is mainly composed not only of judges (nine), but also of representatives of other branches of government, the public prosecutor's office and the Bar. The main functions of the Council are: organization of training of judges, evaluation of their performance, promotion, encouragement, bringing to disciplinary responsibility, etc.

In the period from 2007 to 2012, new regional courts were established, a new form of judicial proceedings – an administrative process – appeared, and the number of judges was increased three times. More than 70 % of administrative court decisions are issued in the interests of individuals.

8. 2016 Constitutional Reforms: Main Goals and Objectives

As for the 2016 constitutional referendum, it touched to a greater or lesser extent on a set of measures which aimed to provide the mechanism of human rights protection and increase the accountability of the public administration to the economic development of the country. In outline, the 2016 stage of reforms can be divided into four main groups.

8.1 Constitutional Reinforcement of Social Justice

The first group of changes was related to the strengthening of social justice. In Azerbaijan, the socialist past to a certain extent deformed the traditions of private property rights. At present sometimes the right of property is perceived as an absolute right, independent of social obligations. In particular, large plots of land acquired as private property were not used for their social purpose – thus damaging the agrarian, agricultural policy of the country.

The amendments made in Article 29 of the Constitution represent the next stage in ensuring constitutional social justice. In the 2009 referendum, it was added to part 2 of Article 15 of the Constitution that the Azerbaijani state creates the conditions for the development of a socially oriented economy based on market relations. Thus, the entire responsibility for improving the welfare of society became the responsibility of the state.

Conversely, the 13th and 29th articles of the Constitution provide different types of property (state, private, municipal) constituting the basis of economy. Consequently, each type of property should be burdened to a certain extent with social obligations. Thus, the supplemented paragraphs to Article 29 at the constitutional level ensured social burdening of the right of land ownership and as a result contributed to legal reforms in the sphere of agrarian policy of the state.

Such a function of property existed in Ancient Rome. For example, the recognition of ownership of land by others obliged the landowner to use the land for its intended purpose for at least two years (i. e., using the land for social purposes). As early as 1909, a law on obtaining consent for housing planning, was passed in Great Britain. That is, if a landlord built himself a house, he had social obligations to his neighbors.

It should be noted that after World War II, social responsibility was used extensively in the constitutions of European countries. The Italian constitution of 1947 contains provisions for the socially fair and rational use of land (limit of land in private ownership, agricultural land zone, etc.). The1949 German Constitution states that property creates an obligation to use it for general social welfare and that there is a legal possibility

for this property to become public property. Analogous provisions are reflected in the Spanish Constitution. Provisions for the purpose and use of land for social purposes also exist in such countries as Switzerland, France, and Norway.

In Azerbaijan, ownership may be restricted only through judicial procedures. The Constitution permits that a privately owned plot of land may be acquired for state needs subject to compensation through the courts. At the same time, even if there is no state need for privately owned land, the landowner must use the land for its intended purpose, that is, to meet social needs. Otherwise, according to the additions to Article 29 of the Constitution, there is a legal basis for restricting the right of ownership of land.

8.2 Modernizing the electoral process

To create a common basic document that would be based on a uniform electoral system and to create a professional administration (electoral districts) for organizing and conducting elections, a unified Electoral Code was adopted in Azerbaijan in 2003. By now, more than 300 articles of the Electoral Code have been amended and supplemented with new provisions that provide for the use of modern electoral technologies. In accordance with the amendments of 2008, the implementation of electoral system gave an opportunity to start using transparent ballot boxes; abandon the use of envelopes for ballot papers; establish an independent commission of experts at the central electoral commission to consider individual complaints; include in the Code the procedure for finger marking of voters and the procedure for participation of "ExitPol" organizations, etc.

The Electoral Code has shortened the term of 120 days before polling day to 75 days and further to 60 days, considering the relatively low number of polling stations within Azerbaijan's borders. Comparing with such large countries as Russia and Ukraine, there this period is 90 days.

The second set of changes of reforms 2016 was related to the reform of the electoral process. In particular, age restrictions on the passive suffrage (i. e. the right to be elected) of citizens were excluded from the Constitution and the age qualification for the election of the President, the Prime Minister, judges and deputies was eliminated.

Thus, the age limitation of passive suffrage was excluded from a number of articles of the Constitution, including Article 85. In modern constitutional law there are social and legal conditions that positively justify this issue.

In the scope of electoral law there has long been an accepted common voting age (21–23 years). The main argument in favor of age is the condition under which people express a well-considered, mature, objective will to assess political processes. However, American constitutional law in 1971 lowered the common age limit on the basis that if

citizens were called up for military service at age 18 to defend their country, why they should be deprived of participating in governing the country. In the 1970s, as a result of the youth movement, most countries were forced to lower the common age limit to18 (Great Britain, Germany in 1970, the United States in 1971, France in 1974, Italy in 1975). Even today there are countries where active suffrage begins at age 16 (Brazil, Cuba, Iran, and Nicaragua).

It is obvious that the age restriction for passive suffrage sometimes creates an artificial barrier to young people's political activity.

8.3 Provide the mechanism for the protection of human rights and freedoms

The third group of amendments and additions to the 2016 Constitution was related to the enhancement of the mechanism for the protection of human rights and freedoms. For example, Part VI, added to Article 25, states that people with physical and mental disabilities have legal opportunities to the full extent to enjoy their constitutional human rights and freedoms. The recognition of the legal status of persons with physical and mental disabilities at the constitutional level is of fundamental significance and principally reflects the publicly oriented policy of the Azerbaijani state. At the same time, this new provision provides a solid basis for the proper implementation of the 2006 UN Convention on the Rights of Persons with Disabilities, which the Republic of Azerbaijan acceded to, in 2008.

There is no distinctive law in Azerbaijan regulating the rights to privacy. For this reason, each constitutional referendum, taking into account the development of information technology, to a certain extent expanded the right to privacy guaranteed by Article 32 of the AR Constitution. Thus, considering that the rapid development of information technologies and their penetration into all spheres of life, the 2016 referendum included in Article 32 of the Constitution an effective procedure for protecting the right to respect for private and family life.

As well the 2009 referendum introduced substantial amendments to Article 32, establishing two rights: 1) the right of everyone to become familiar with the information collected about him/her; 2) the right of everyone to demand correction or removal (*annulment*) of information collected about him/her that is inaccurate, incomplete, or obtained in violation of the law.

The last additions to Article 32 of the Constitution serve to prevent illegal intrusions into people's personal and family life through the use of information technologies. In Azerbaijan, the ASAN service provides citizens with prompt and transparent services

based on the "one-stop-shop" principle. This service, providing a wide exchange of information in the administrative sphere, has become a wide user of personal data. For this reason, the additions to Article 32 give constitutional meaning to the requirements to ensure information security and protection of personal data of citizens.

Among the constitutional norms ensuring the rights and freedoms of man and citizen, the most efficient is Article 71, which establishes the limit of state intrusion in human rights and sets permissible limitations on these rights. In a 2009 referendum, two very important principles were added to this article: in the absence of a prohibition in law, a person is free to choose, and the state can only act within the limits of its authority. Later, the 2016 constitutional referendum enhanced the principle of proportionality to Article 71, which is of key value in constitutional law.

The state's legal intervention in any rights, including property rights, must be proportionate with a nondiscriminatory balance between the public, state, and legitimate interest of the individual.

The present-day constitutional requirement of Article 71 is that any measure restricting the rights and freedoms of a person or legal entity must be consistent with the goal set by the administrative body. Restrictive measures, applied by the administrative body as needed, must be the most lenient and obligatory to achieve the goals set forth in the absence of less restrictive legislative means. The suitability criterion implies the non-application of any excessive administrative measures that are disproportionate to the stated goals and balances them with the public interest.

During the discussion of the principle of proportionality at the 6th summit of the Joint Council for Constitutional Justice of the Venice Commission, it was noted that proportionality is to some extent a factor emerging between the concepts of "more" and "less". The main purpose of the principle of proportionality is to create a common denominator between law and duty, duty and property, purpose and means. Consequently, the scope of measures taken by an administrative body must be assessed with regard to necessity, and such disputes can be resolved through administrative or constitutional proceedings.

8.4 Development and improvement of the constitutional system of public administration

The fourth group of changes in 2016 was related to institutional changes in the constitutional system of public administration.

Along with establishing the legal freedom of the individual, the Constitution of the Republic of Azerbaijan defines structure of state power and local self-government bodies.

As well as in all democratic constitutions, the constitutional language of the state power in the Constitution of Azerbaijan is clear. Article 1 of the Constitution states that "The people of Azerbaijan are the only source of state power in the Republic of Azerbaijan." Section 3 of the constitution, which establishes the system of state authority, highlights the representative, legislative power of the parliament.

The Constitution of the Republic of Azerbaijan regulates the following fundamental aspects of the organisation and activity of state bodies: consolidation of the general function of state bodies as the means and instruments of implementing the sovereignty of the people (Article 2); organisation and activity of state bodies (separation of powers, participation of citizens in the government of the state, legality of their activity, etc.) (Article 7); formation of the structure of state bodies and the legal status of the highest state bodies – the President, the Milli Mejlis, the Council of Ministers (Article 7); – and describing the head of state power (Article8).

The Constitution and constitutional laws of the Republic of Azerbaijan determines a special procedure establishing state bodies. Apart from this, a state body cannot appear. "Not a single part of the people of Azerbaijan, not a single social group or organization, not a single person can appropriate the authority to exercise power". (Clause 1, Article 6).

The Constitution stipulates that the President of the Azerbaijani State embodies the unity of the people as the guarantor of the independence and territorial integrity of the Azerbaijani State, and the independence of the judiciary (Article 8). Milli Majlis is defined as the parliament of Azerbaijan and its representative and legislative body. The Government is accountable to the President, as an executive body.

An important principle establishing the constitutional system of bodies of Azerbaijan is the principle of separation of powers. In order to implement the functions of state power, its individual parts are endowed with a set of powers and have the right to act independently, maintaining the levers of mutual restraint and control. The separation of powers as one of the foundations of the constitutional order of Azerbaijan determines the separation of legislative, executive and judicial powers in the state mechanism. Despite the specialization of the branches of power and corresponding state bodies, they remain the links of a single system in need of daily coordination.

In Azerbaijan, the function of coordination of state power is performed by the President – the head of state. The post of the president was introduced in Azerbaijan in 1990. Initially, the institution of the presidency pursued the goal of embodying the state and state power as a whole, not as one of its branches. Restoration of sovereignty and development of an independent state based on democratic principles originally required

a strong state authority. Therefore, the function of the president as head of state was designed to consolidate and coordinate the efforts of the people and the authorities to achieve a stable and strong constitutional order. The President in Azerbaijan is elected by direct popular vote. He has wide powers in the state administration. Overall form of government in Azerbaijan is recognized as a presidential republic.

In the primary test of Article 101 of the Constitution there was a norm that limited the possibility of re-election to the post of the President to more than twice. This restriction was removed from the Constitution in a 2009 referendum.

The restriction of the ability to be elected president more than once or twice is sometimes described as the "*American model*". This restriction was first introduced in the United States in 1947 as a result of the internal political struggle between Democrats and Republicans through the 22nd Amendment to the Constitution. Franklin Roosevelt had previously been elected president four times (last time in 1944). A conflict arose between Republicans and Democrats because Republicans could not nominate a more powerful candidate. As a result, the Republicans, who had a majority in Congress, proposed a famous amendment to the Constitution. The amendment was ratified in 1951 and entered into force. Remarkably, two U. S. states have not ratified the amendment to this day[3].

Nevertheless, not all countries accept this restriction. Neither international normative documents nor the experience of other countries in the world give grounds to consider this restriction as a characteristic element of democracy. There are countries where there are no such restrictions (Iceland, Cyprus, etc.) and in many parliamentary republics (Austria, Germany, Italy, etc.) there are no restrictions on the term of office of the prime minister, which means that the leader of the political party who wins each parliamentary election can continue to serve as prime minister without any restraints. There are such examples, Konrad Adenauer in Germany held office for 14 years, Helmut Kohl – for 16 years, and Margaret Thatcher in Britain – for 11 years.

The experience of other countries shows that the existence of such a restriction in a state doesn't mean that state is a democratic state (even is considered to be democratic). There are moreover many cases of authoritarian regimes in countries that apply this restriction.

In turn, enforcing this restriction can become an obstacle to stability and sustainable development in a country because sometimes people want to see their president again on his post as a person who has earned their true trust and respect.

3 See https://en.wikipedia.org/wiki/Twenty-second_Amendment_to_the_United_States_Constitution.

The 2016 reforms brought into the Constitution the new constitutional institution of the vice president. In the development of the institution of the vice president, world constitutionalism also refers to American experience.

In the United States, the vice president is the second most important person in the executive branch of the U.S. federal government after the president and the primary function of the vice president is to replace the president in the event of his death, resignation, or removal from office. Since the vice president of the United States also heads the Senate, the upper house of the U.S. Congress, it remains controversial whether he belongs to the executive or the legislature branch.

In Azerbaijan the transition to the next stage of fundamental economic reforms has resulted in need to create this institution. It should be noted that it is the President who has initiated economic reforms and carried out under his direct control. Then, the question arises what the role and functions the Cabinet of Ministers exercises for the period of the implementation of reforms.

The Cabinet of Ministers of the Republic of Azerbaijan is a high executive body of the President of the Republic of Azerbaijan. The Cabinet of Ministers is created by the President of Azerbaijan and is directly subordinated and accountable to the President. According to Article 119, it has a certain independence in budgetary matters, operative matters of economic, cultural and social management.

In view of that economic reforms in Azerbaijan, which are carried out directly under the control of the President, there is a need of an operative and flexible management. The Cabinet of Ministers, almost duplicating the structure of the Presidential Administration, functions in a passive form. In its turn, the activity of the Cabinet of Ministers, by its nature, is an institutional collegial establishment, unable to take flexible and urgent measures. For this reason, the ability of this structure to make important decisions for a long period of time, can significantly slow down the implementation of active economic reforms in the country.

The formation of the institution of the Vice-President made it possible to monitor the implementation of the relevant Decrees and Orders of the President, as well as to carry out economic reforms at a high-quality level.

On the other hand, changes in the system of executive power, did not affect the status of other branches of government and did not worsen the functionality of the Cabinet of Ministers, which coordinates complex, traditional areas of governance (tariffs, tax relations, financial policy, etc.)

More importantly, it should be noted that constitutional reforms consolidated the continuity in the institution of the presidency and security guarantees for the ex-president. Additions to Article 108 of the Constitution provide the existence of a constitutional law establishing the legal status of the ex-president, his social security and safety.

This constitutional addition is of great legal and political importance. The continuity of the institution of the head of state and its security and protection after the end of the constitutional term allows the incumbent President to be independent and objective.

The constitutional reforms have also affected the Milli Majlis of Azerbaijan. Milli Mejlis of the Republic of Azerbaijan (one chamber parliament) is the only legislative body elected by overall, equal and direct elections by secret ballot for 5 years. It consists of 125 deputies, which are at this time elected under the majoritarian electoral system (afore the third convocation of deputies (2005), deputies were elected under the mixed electoral system. 100 deputies were elected under the majoritarian system, 25 deputies were elected under the proportional system based on party lists.)

The majoritarian electoral system indicates that candidates who receive a majority of votes are considered elected. In Azerbaijan, plurality system is applied in which a candidate who receives more votes than his rival is considered elected.

Along with organizational and structural changes (for example, permanent commissions were changed into committees; the number of committees of the Parliament increased, etc.), the powers of the Parliament have correspondingly increased.

The 2009 constitutional referendum empowered the parliament to ratify or annul intergovernmental agreements that contain conditions contradicting the laws of the Republic of Azerbaijan.

There are three types of international agreements in Azerbaijan's legal system: inter-state agreements, inter-governmental agreements, and inter-agency agreements. The legal force of these agreements varies and is determined by the constitutional status of the body that ratified them. Respectively, the legal force of intergovernmental agreements approved by the Milli Majlis is higher than the legal force of intergovernmental agreements approved by the President.

Of course, the most important issues of Azerbaijan's relations with other states are regulated by interstate agreements (treaties). These agreements must be ratified by Milli Mejlis.

Interstate agreements approved by Milli Mejlis and enacted with regard to Azerbaijan have higher legal power than the laws of the country adopted before the ratification of this treaty. Thus, if there is a contradiction between an interstate agreement and the law,

then the agreement will be applied (Article 151 of the Constitution). In consequence, the Constitution recognizes that an interstate agreement can contradict the legislation of the Republic of Azerbaijan.

And prior to the constitutional reforms of 2009, intergovernmental agreements that contradicted legislation could not be ratified. The Milli Mejlis did not have a right to approve intergovernmental agreement submitted for approval either for political or legal reasons when it contradicted the law.

Of course, the Milli Majlis could refer an intergovernmental agreement to the Constitutional Court to verify its compliance with the Constitution of the country (see Article 130(3)(6) of the Constitution) but this does not give the right to ratify intergovernmental agreements that do not comply with the laws.

The subject matter of intergovernmental agreements are issues that are mainly attributed to the competence of the Cabinet of Ministers of the Republic of Azerbaijan. Agreements on friendship, cooperation and mutual assistance, peace agreements or agreements on territorial and border issues cannot be concluded between the government of Azerbaijan and the governments of other countries. Intergovernmental agreements regulate cooperation in various management fields (railway transport, air transport, elimination of double taxation on income and property taxes, sports, tourism, etc.). Intergovernmental agreements are signed by the prime minister or other official authorized by the head of state (deputy prime minister, minister, committee chairman, etc.). Consequently, ratification of an intergovernmental agreement gives it the status of a legislative act. This, in turn, allows to solve the contradiction in the legal system through the principle "the subsequent law excludes the previous one".

Thus, the inclusion in the Constitution of a provision giving the right to ratify or annul intergovernmental agreements with conditions inconsistent with the laws of the Republic of Azerbaijan serves the following main purposes:

- To ensure parliamentary control over the practice of intergovernmental agreements;
- To ensure the hierarchy of normative acts;
- To ensure proper implementation (enforcement) of intergovernmental agreements in the territory of Azerbaijan that stipulate conditions different from the law.

By means of the constitutional reforms of 2009, the mechanism of a people's legislative initiative was introduced in the Constitution. Article 96 of the Constitution provided the right of legislative initiative, i. e. the right to submit bills to Milli Majlis, deputies of Milli Majlis, President of the Republic of Azerbaijan, Supreme Court, Prosecutor's Office, and Supreme Assembly of Nakhchivan Autonomous Republic. The referendum added 40,000 citizens to the subjects of legislative initiative.

The right of legislative initiative does not mean the people have the right to put an issue to a referendum. According to the Constitution, only Milli Mejlis or the President of the Republic of Azerbaijan can decide to hold a referendum. However, according to Article 122.2 of the Election Code, a citizen of the Republic of Azerbaijan, with at least 300,000 active voting rights, may apply to the President of the Republic of Azerbaijan or Milli Majlis with a proposal to hold a referendum and it is Milli Mejlis or the President of the country who have right to put the issue to a referendum.

There is one more restriction on the right of legislative initiative which does not give citizens the right to propose constitutional laws. Amendments to the Constitution can only be proposed by the President or at least 63 deputies of Milli Mejlis (Article 157 of the Constitution).

Yet, the right of citizens' legislative initiative promotes the development of democratic institutions. It should be noted that the right of citizens' legislative initiative (institute of "people's initiative") is provided in almost 15 Council of Europe member countries (Austria, Georgia, Hungary, Italy, Poland, Spain, etc.).

Unfortunately, in Azerbaijan this institution remains on paper. So far, citizens have not shown such an initiative. But at the level of civil society and nongovernmental organizations, work is underway to activate the people's legislative initiative.

One of the latest constitutional reforms is the emergence of the institution of dissolving parliament which serves to improve the constitutional system of power. The new Article 98–1 of the Constitution provides a mechanism of mutual control in order to ensure a fair balance of branches of government in the system of separation of powers.

Article 107 of the Constitution determines the constitutional responsibility (impeachment) of the president. The second paragraph of the same article says that "the President of the Republic of Azerbaijan may be impeached only by a decision adopted by a majority of 95 deputies of Milli Majlis of the Republic of Azerbaijan". At that, the Constitution did not provide a constitutional mechanism of dissolution of parliament by the President.

Analyzing above mentioned, Azerbaijan is a presidential republic, and the President is recognized as the head of state, though, the parliament is beyond the President's control. In this case, a violation of the balance of power between the branches can be assumed.

It's clear that without a mechanism for the dissolution of Parliament, an intra-parliamentary political confrontation can make the legislative branch ineffective, and a constitutional solution to the crisis is to be impossible.

The dissolution of parliament has a long history. As early as 1653, England dissolved a long-standing parliament, and in 1784 Pitt William dissolved parliament for the second time. This institution in the XIX century was widely used in France, Hungary, Japan, and in the XX century (Russia, Germany, Belgium, Ukraine, Kyrgyzstan, etc.).

Such institute of dissolution of Parliament exists in the constitutions of different countries, regardless of whether the republics are presidential or parliamentary. As well as balancing the system of power, the mechanism of dissolution of parliament is more focused on preventing a political crisis. If parliament is unable to act due to internal political conflict, the head of state is to be able to dissolve the legislature and call early elections. Constitutional reforms have also given parliament the power to hear reports from municipalities.

8.5 Constitutional Development of Local Self-Government in the Republic of Azerbaijan

Local self-governance in the Republic of Azerbaijan is a system of organization of citizens' activities, which gives them the opportunity to exercise the right, within the framework of the law, to independently and freely decide issues of local importance and to carry out part of public affairs in the interests of the local population.

Municipalities are not accountable to any body but are registered and coordinated through the Ministry of Justice.[4] Municipalities are elected for 5 years and are not accountable to any public authority. Municipalities are independent in the implementation of their powers, which does not exclude their responsibility toward the citizens living in their territory.

Therefore, the main purpose of public hearings of municipalities in the Parliament is to ensure transparency of municipal activities and increase their accountability to the representative body. These discussions help to eliminate negative facts in the activities of municipalities, as well as to disseminate positive experience.

Of course, there is an assumption that not all municipalities of Azerbaijan will be heard annually in the Milli Mejlis. Circumstances and procedure of presenting reports to Milli Mejlis by municipalities will be regulated in detail by a separate Law.

Thus, a draft law on the reporting of municipalities is at this time being developed. However, the reporting is likely to be considered only within the delegated authority,

4 3-cü maddəsi; "Bələdiyyələrin statusu haqqında" Azərbaycan Respublikasının 2 iyul 1999-cu il tarixli Qanunun // http://www.e-qanun.az/framework/4770.

which provides for certain state allocations from the national budget to the budget of the municipalities.

In conclusion, constitutional reforms have a certain cyclicality in their dynamics of development. It depends to a greater extent on the political, economic, social and societal level of development of the country. Undoubtedly, the constitutional development of Azerbaijan has a multi-vector dynamic and covers almost all modern trends of economization, socialization of constitutional law. Unfortunately, the limited volume of the presented section gives possibility only to cover the most important modern constitutional transformations.

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MUNKHSAIKHAN ODONKHUU

Judicial Independence and Accountability in Mongolia

1. Introduction

Mongolia completed a peaceful transition to constitutional democracy in 1990. In 1992, the People's Great *Khural*, a deliberative body elected by the people, adopted the first liberal democratic constitution, which, unlike the former socialist constitutions, has been reasonably followed and enforced in the last three decades.[1] The 1992 Constitution embodies fundamental rights and limitations on the exercise of political power, and establishes a parliamentary democracy based on the separation of powers, checks and balances.

The 1992 Constitution institutes an independent judiciary. Articles 47.1, 49.1 and 50.3 of the Constitution provide that "the judicial power shall be vested exclusively in courts," "Judges shall be independent and subject only to law" and judges "shall have no right to apply laws that are unconstitutional or have not been promulgated." The rights of every Mongolian to a fair and impartial judiciary are entrenched in Article 16.14 of the Constitution.

Following the 1992 Constitution, the first Law on the Judiciary was enacted in 1993, and it was fully revised in 2002. The State Great *Khural*, the Parliament of Mongolia, enacted judicial reform laws again in 2012: Law on Courts, Law on Judicial Administration, Law on Legal Status of Judges, Law on Legal Status of Citizens' Representatives, Law on Reconciliation and Mediation, and Law on Legal Status of Lawyers.[2] Despite these judicial reforms, the public has no confidence that the judiciary upholds the principles of independence, impartiality and accountability, and it perceives the judiciary as one of the most corrupt institutions in the country, because they think the courts do not apply laws equally to ordinary citizens and those with powers and privileges.

1 Ch. Enkhbaatar, Tom Ginsburg, P. Amarjargal, M. Batchimeg, Ts. Davaadulam, O. Munkhsaikhan, and D. Solongo, Assessment of the Performance of the 1992 Constitution of Mongolia (UNDP 2016) <https://www.mn.undp.org/content/mongolia/en/home/library/AssessmentofthePerformanceofthe1992ConstitutionofMongolia.html> accessed 16 February 2021.

2 The following researches were conducted before the judicial reforms of 2012: Б.Чимид, *Үндсэн хуулийн үзэл баримтлал: Хүний эрх, шүүх эрх мэдэл,* Хөдугаар дэвтэр (2004); USAID, *Mongolia Judicial Reform Program* (2007); Brent T. White and P.Badamragchaa, *Report on the Status of Court Reform in Mongolia* (UB 2008); Н.Лүндэндорж, Ч.Өнөрбаяр, М.Батсуурь, *Монгол улсад шүүхийн хараат бус байдлыг бэхжүүлэх нь* (УБ 2010); Ж.Амарсанаа, Б.Чимид, Р.Мухийт, Л.Төр-Од, *Монгол улсын шүүх эрх мэдлийн шинэтгэл* (УБ 2010).

On 14 November 2019, the State Great *Khural* enacted the second set of amendments[3] to the 1992 Constitution, which were novel because these amendments were the result of innovative deliberation, public engagement and broad political consensus.[4] The 2019 constitutional amendments include four important clauses to improve the judicial independence and accountability in Mongolia. First, the amendments bar the extension of the powers of the President of Mongolia through laws (statutes). Second, the amendments fix the membership and term of the Judicial General Council that has the mandate to select judges from among lawyers. Third, the amendments establish a new constitutional body, the Judicial Disciplinary Committee, which will make decisions on the suspension or dismissal of judges and imposition of other disciplinary sanctions. Fourth, overriding the several judgments[5] of the Constitutional Court, the amendments establish courts with jurisdictions over several provinces and districts, which would allow the even spreading of caseloads, easy creation of specialized courts and improve access to courts. In order to implement the constitutional amendments, the State Great *Khural* enacted a new Law on the Judiciary on 15 January 2021, and the Standing Committee of Legal Affairs, the State Great *Khural,* adopted the Rules on the Selection of Non-Judge Members of the Judicial General Council and the Judicial Disciplinary Committee on 10 March 2021.

This paper aims to introduce and explain how the 2019 constitutional amendments and the 2021 Law on the Judiciary regulate presidential powers regarding the judiciary, the Judicial General Council, and the Judicial Disciplinary Committee. This paper has six sections: (I) Introduction, (II) Destroying "the Tunnel of Injustice:" the President and the Chief Judges, (III) Judicial Councils in Comparative Perspective, (IV) The 2019 Constitutional Amendments: The Judicial General Council, Judicial Selection and Appointment, (V) The 2019 Constitutional Amendments: The Judicial Disciplinary Committee and the Judicial Disciplinary Procedure, and (VI) Conclusion.

2. Destroying "the Tunnel of Injustice:" the President and the Chief Judges

Citizens of Mongolia have low trust in judiciary and the rule of law. It is often claimed that judicial independence is declared in the Constitution, but it is not fully implemented in practice. Mongolia has been ranked low in terms of the judicial independence.

3 The 1992 Constitution of Mongolia was amended for the first time in 2000.

4 Munkhsaikhan Odonkhuu, 'Mongolia's Long, Participatory Route to Constitutional Reforms' (*Voices from the Field*, ConstitutionNet, 20 January 20 2020) <https://constitutionnet.org/news/mongolias-long-participatory-route-constitutional-reforms> accessed 16 February 2021.

5 *Nomiinbayaslgan S v the State Great Khural*, Resolution 1, the Constitutional Court (*Tsets*) of Mongolia (17 January 2018).

For example, Mongolia' rank is the 57th of 128 countries globally and the 4th of 30 lower middle-income countries according to the Rule of Law Index in 2020.[6] Moreover, Mongolia is the 120th of 141 countries in terms of judicial independence according to the Global Competitiveness Report.[7]

Serious violations of judicial independence occurred in the last 30 years. For example, when revising the Law on the Judiciary in 2002, the State Great *Khural* suddenly reduced the number of chief justice and justices on the Supreme Court from 17 to 11, and it increased it from 11 to 17 by amending this law latter in the same year. The 2012 Law on Judiciary also increased the composition of this court from 17 to 25 (chief justice and no less than 24 justices). Therefore, court packing has been a means by which politicians influence the highest court on ordinary cases in the country.

While implementing the reorganization of court structure in 2013 and 2015, the President of Mongolia dismissed 13 judges without any reason, and the President and the Judicial General Council transferred numerous judges to other courts without their own consents. The ordinary courts and the Constitutional Court rejected the claims of these judges. In 2015, the State Great *Khural* also abolished a statutory prohibition on reducing the amount of judicial budget and judges' salary from the previous year. As a result, the percentage of judicial budget in the state budget was reduced from 0.82 to 0.66 per cent in 2016.[8] The government also tried to reduce the amount of judges' salary in 2015, but it failed to do so due to public and professional criticism.

There has been an ordinary legal procedure to prosecute judges alleged of bribery and other crimes with the permission of the Judicial General Council. However, politicians abused a bribery case to weaken judicial independence. On 27 March 2019, the State Great *Khural* enacted one of the most scandalous statutes, which empowered the National Security Council to suspend any judges and dismiss chief judges, the Prosecutor General and the Head of the Anti-Corruption Agency. The National Security Council, which is headed by the President and composed of the Speaker of the State Great *Khural* and the Prime Minister as members, makes such decisions to suspend or dismiss without any reason. Using this new law, the President suspended 17 judges on 26 June

6 *The Rule of Law Index 2020* (World Justice Project 2020), 108, <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online0.pdf> accessed 16 February 2021.

7 *The Global Competitiveness Report 2019*, Klaus Schwab (eds) (World Economic Forum 2019), <http://www3.weforum.org/docs/WEFTheGlobalCompetitivenessReport2019.pdf> accessed 16 February 2021.

8 О.Мөнхсайхан, 'Монгол Улсын шүүх эрх мэдлийн хөндлөнгийн судалгаа, дүн шинжилгээ' *Шүүхийн захиргааны хөгжлийн чиг хандлага: олон улсын онол-практикийн бага хурлын эмхэтгэл* дотор (ШЕЗ), 59.

2019.[9] Seven of these 17 judges were re-instated on 10 January 2020,[10] and three of them have been found guilty and sentenced by the court.[11]

In Mongolia, there is a popular phrase, "the tunnel of injustice," which basically means the high risk to improperly influence the adjudication of cases related to big political or economic interests. This risk has been created by statutory regulations that concentrate too many powers in the President, chief judges, the Judicial General Council and the Supreme Court.[12] The rest of this section of the paper talks about the President and the chief judges, and other sections discuss the Judicial General Council.

According to the Constitution, the people directly elect the President of Mongolia. The President's powers, such as vetoing legislation, initiating bills, and appointing all judges upon the proposal of the Judicial General Council, and appointing the Prosecutor General in consensus with the State Great *Khural*, are much broader than the conventional powers of heads of state in parliamentary or semi-presidential systems. Moreover, Article 33.4 of the 1992 Constitution said that "Specific powers may be vested in the President only by law." Due to the broader application of this clause, the powers were concentrated in the President of Mongolia, which undermined judicial independence. Accordingly, the President was given statutory powers such as nominating the head of the Anti-Corruption Agency and one of three members of the National Human Rights Commission, and appointing all the chief judges of courts, and all the members and heads of the Judicial General Council and the Judicial Ethics (Disciplinary) Committee until 2021.

The 2019 Amendments to the Constitution do not remove constitutional powers from the presidency, but they preclude the extension of the powers of the president through law (statutes). Article 33.4 of the 1992 Constitution was clarified as follows: "specific powers may be vested in the President by law only within the scope written in this article." This clause authorizes the President to exercise constitutional powers such as vetoing the legislation and granting a pardon, but the President would not exercise additional powers that are not explicitly specified in Article 33 of the Constitution.

9 "Монгол Улсын Ерөнхийлөгч зарлиг гаргаж зарим шүүхийн шүүгч, Ерөнхий шүүгчийн бүрэн эрхийг түдгэлзүүллээ," 2019.06.26, <https://president.mn/9749/> accessed 16 February 2021.

10 "Бүрэн эрхийг нь түдгэлзүүлсэн 17 шүүгчийн долоогийнх нь эрхийг сэргээжээ," 2020.01.13, <https://ikon.mn/n/1rni> accessed 16 February 2021.

11 "Ш.Мөнгөншагайнартхолбогдоххэргийгхянанхэлэлцэв,"2020.10.16,<http://www.supremecourt.mn/news/538>; "Салхитын мөнгөний орд"-ын гэх хэрэгт холбогдсон шүүгч нарт хоёр жил хорих ял оноов," 2020.07.30, <https://gereg.mn/news/60099> accessed 16 February 2021.

12 О.Мөнхсайхан, 'Шүүхийн тухай хуулийн төслийн хүрээнд шүүхийн хараат бус, хариуцлагатай байдлыг хангах нь' (2020) 79/4 Хууль дээдлэх ёс 11, 12–21; А.Бямбажаргал, 'Улсын дээд шүүхийн чиг үүргийн талаар харьцуулсан шинжилгээ' (2020) 79/4 Хууль дээдлэх ёс 114.

According to the amended Article 33.4 of the Constitution, the State Great *Khural* has removed statutory powers given to the president that are not enumerated in the Constitution. For example, the Law against Corruption was amended on 31 December 2020 so that the State Great *Khural* appoints the head of the Anti-Corruption Agency for the term of six years after conducting a public hearing on the candidate proposed by the Prime Minister. The President also has no power to nominate or appoint any of the five members of the National Human Rights Commission, who are selected through open nomination and public hearing by a balanced working group and appointed by the State Great *Khural* according to the 2020 Law on the National Human Rights Commission. Moreover, the 2021 Law on the Judiciary implemented Article 33.4 of the Constitution: the President no longer has the powers to appoint or propose the heads and members of the Judicial General Council and the Judicial Disciplinary Committee or to make the final judgment to dismiss or suspend a judge. The chief judge (except the chief justice of the Supreme Court) is directly elected by the judges of each of these courts according to the 2021 Law on the Judiciary. Allowing the judges of the particular court to elect the court's chief judge is considered a good option to promote the judicial independence.[13]

According to Article 51.2 of the Constitution, "the President shall appoint the Chief Justice of the Supreme Court upon the recommendation of the Supreme Court from among its justices for six years." The 2012 Law on the Status of Judges had no time limit on the appointment of the Chief Justice of the Supreme Court. The President sometimes refused to appoint the Chief Justice recommended by the Supreme Court without any reason.[14] Article 36.7 of the 2021 Law on the Judiciary says that the President shall appoint the Chief Justice of the Supreme Court within 14 days after the recommendation of the Supreme Court from among its justices for the single term of six years. This clause specifies the time period to appoint the Chief Justice and makes the term non-renewable and the appointment obligatory.

Under the 2012 Law on the Judiciary, chief judges had powers such as chairing a court hearing; chief judges of the Supreme Court and the courts of appeals had the power to review and resolve disputes over the jurisdiction of lower courts or chambers; and the Chief Justice of the Supreme Court had powers such as participating in the court hearing of any chamber of the Supreme Court and supervising the work of respective chambers. According to the 2021 Law on the Judiciary, all of these powers of chief judg-

13 OSCE/ODIHR and Max Planck Institute, 'Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Judicial Administration, Selection and Accountability' (Kyiv, 23–25 June 2010) para 16; Venice Commission, 'Opinion On The Judicial System Act of Bulgaria' CDL-AD(2017)018, 7.

14 О.Мөнхсайхан, 'Шүүхийн тухай хуулийн төслийн хүрээнд шүүхийн хараат бус, хариуцлагатай байдлыг хангах нь' (2020) 79/4 Хууль дээдлэх ёс 11, 16.

es, which created the risk to influence the adjudication of other judges and to affect the substantive adjudication according to the ODIHR,[15] are transferred to a consultative session of judges of each court. The Kyiv Recommendations said that the chief judges may "only assume judicial functions which are equivalent to those exercised by other members of the court," and "court chairpersons must not interfere with the adjudication by other judges."[16]

3. Judicial Councils in Comparative Perspective

There are four main models of judicial administration: the Northern European model, the Southern European model, the Ministry of Justice model and the hybrid model.[17] Under these four models, there is no one organization charged with all the powers related to the judicial administration. In the first two models, there are one or several judicial councils, independent institutions specifically charged with the different functions of judicial administrations. Under the Northern European model (Denmark, Ireland, Norway, and Sweden), the judicial council is empowered only with the functions to determine judicial policy, to implement judicial management, and to implement judicial budget and finance, and separate, independent institutions have the functions related to the judicial selection and judicial discipline. Under the Southern European model (France, Italy, Spain and Portugal), the judicial council is in charge of the judicial selection and judicial discipline, but the ministry of justice discharges the functions such as the judicial policy, the judicial management and the judicial budget and finance. Under the ministry of justice model (Germany, Austria and Finland), the ministry of justice does not exercise all the functions of judicial administration. Even though the ministry of justice performs the functions such as judicial selection, judicial policy, judicial management, judicial budget and finance, judicial selection and judicial evaluation, the judges participate in these functions. The ministry of justice does not discipline judges. The fourth model of judicial administration is "a hybrid model" that combines various components of the previous three models in such a way that it significantly district from

15 ODIHR, 'Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia,' JUD-MNG/352/2020 para 171–174; 'Anti-Corruption Reforms in Mongolia: Fourth Round of Monitoring of the Istanbul Anti-Corruption Action Plan' (OECD 2019) 16.

16 OSCE/ODIHR and Max Planck Institute, 'Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Judicial Administration, Selection and Accountability' (Kyiv, 23–25 June 2010) para 11,12.

17 Michal Bobek and David Kosar, "Global Solutions, Local Damages: a Critical Study in Judicial Councils in Central and Eastern Europe," German Law Journal 15, no. 07 (2014): 1265–1268; Wim Voermans and Pim Albers, Councils for the Judiciary in EU Countries (European Commission for the Efficience of Justice, 2003), 12–13; О.Мөнхсайхан, Г.Цагаанбаяр, Ж.Алтансүх, Монгол Улс дахь шүүхийн захиргааны загвар: тулгамдсан асуудал, шийдвэрлэх арга зам (Нээлттэй нийгэм форум 2015) 21–24.

each of them, as Michal Bobek and David Kosar wrote: "They include judicial appointment commissions that deal only with the selection of judges up to a certain tier of the judicial system, whereas the rest of the court administration is vested in another organ (England and Wales); countries where the judicial council coexists with another strong nationwide body responsible for court administration (Hungary since 2011); countries where the Minister of Justice shares power with judges of the Supreme Court (Cyprus)."[18]

Many of the judicial councils consist of judges in the majority and were given too many powers primarily in appointing, promoting and disciplining judges and in the areas of administration, court management and budgeting of the courts. The concentration of powers and the judicial dominance in the judicial council created judicial corporatism and threatened judicial independence not only in countries like Italy, but also in the post-communist countries.[19] Countries such as Slovakia, Hungary, Bulgaria, or Romania established strong judicial councils, which told the same story that "granting extensive self-administration powers to the judiciary before its genuine internal reform is dangerous."[20] "Judicial councils in Moldova, Georgia and Ukraine, responsible both for appointing and promoting judges and for initiating and conducting disciplinary proceedings including the final imposition of sanctions on these very same judges, risk lacking accountability in the long run."[21]

To improve both the judicial accountability and independence, the powers concentrated in the judicial councils should be distributed among separate different organizations. The Kyiv Recommendation said as follows: "In order to avoid excessive concentration of power in one judicial body and perceptions of corporatism it is recommended to distinguish among and separate different competences, such as selection …, promotion and training of judges, discipline … professional evaluation … and budget … A good option is to establish different independent bodies competent for specific aspects of

18 Michal Bobek and David Kosar also wrote about "the socialist model of court administration concentrated the power over judges and the judicial system in general in three institutions – the General Prosecutor (procurator), the Supreme Court and court presidents – which are then, however, themselves controlled by the communist Party." Michal Bobek and David Kosar, "Global Solutions, Local Damages: a Critical Study in Judicial Councils in Central and Eastern Europe," German Law Journal 15, no. 07 (2014): 1265–1268.

19 О.Мөнхсайхан, Г.Цагаанбаяр, Ж.Алтансүх, Монгол Улс дахь шүүхийн захиргааны загвар: тулгамдсан асуудал, шийдвэрлэх арга зам (Нээлттэй нийгэм форум 2015) 27–34.

20 Bobek and Kosar, 'Global Solutions, Local Damages: a Critical Study in Judicial Councils in Central and Eastern Europe,' (2014) 15, no. 07 German Law Journal 1265, 1283–1288; Zdenek Kuhn, 'Judicial Administration Reforms in Central-Eastern Europe: Lessons to Be Learned' in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 618.

21 Muller, "Judicial Administration in Transitional Eastern Countries" in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 944.

judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task."[22] The balance between judicial independence and accountability is provided in the countries where the separate organizations exercise different functions of judicial administration as in the Denmark, Norway, Sweden, Poland, and Estonia.[23]

The constitutional entrenchment of the composition of the judicial council, which is the case in France, Italy and Spain, would provide stability and reduce risk to abuse the appointment powers. The numbers of the most judicial councils' compositions are above ten so that it reflects the diversity and reduces the improper influence in the council. For example, the number of members of the judicial council is 10 in Sweden, 17 in Ireland, 13 in Denmark, 22 members in France, 33 in Italy, 17 in Portugal, 21 in Spain, 11 in Estonia, 15 in Hungary, 18 in Slovakia, 15 in Romania, and 23 in Poland.[24] The European Commission for Democracy through Law (the Venice Commission) suggested the non-renewable term: "Councilors who are not *ex officio* members may be elected for a five-year term, with no possibility for re-election. The preclusion from immediate re-election is destined to enhance the guarantees of independence of the Council's members."[25]

If the head of the judicial council is directly elected from among its members by a majority of their votes, the council tends to become more independent and more immune from improper influence. The Kyiv Recommendations said that "The president of the Judicial Council should be elected by majority vote from among its members."[26] "To decrease the dependence of the chair on any particular person or branch of power," it

22 OSCE/ODIHR and Max Planck Institute, 'Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Judicial Administration, Selection and Accountability' (Kyiv, 23–25 June 2010) para 2.

23 О.Мөнхсайхан, Г.Цагаанбаяр, Ж.Алтансүх, Монгол Улс дахь шүүхийн захиргааны загвар: тулгамдсан асуудал, шийдвэрлэх арга зам (Нээлттэй нийгэм форум 2015) 27–34; Adam Bodnar and Lukasz Bojarski, 'Judicial Independence in Poland' in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 667–738; Ligi, 'Judicial Independence in Estonia' in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 744–748.

24 Violaine Autheman and Sandra Elena, 'Global Best Practices: Judicial Council (Lessons Learned from Europe and Latin America)' IFES Rule of Law White Paper Series (2004) 25.

25 Venice Commission, 'Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania' CDL-INF(1998)009 para 20.

26 OSCE/ODIHR and Max Planck Institute, 'Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Judicial Administration, Selection and Accountability' (Kyiv, 23–25 June 2010) 3; ODIHR OSCE and Max Planck Institute, 'Meeting Report on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Challanges, Reforms and Way Forward' (Expert meeting in Kyiv23–25 June 2010).

was recommended that the chairperson of the council would be elected by the council members themselves by secret and majority vote.[27] For example, the head of the council is selected in this way in Moldavia and Slovenia.

If the judges dominate the composition of the judicial council, it tends to overprotect the corporate interests of judges under the name of judicial independence and weaken judicial accountability. The UNODC concluded that "… worries have been expressed in some countries (such as France, Italy and Spain) that in national councils where the majority of their members is composed of judges elected by their colleagues, the corporate interests of the judiciary might prevail over the protection of other important values for the proper working of the judicial system such as that of judicial accountability."[28] Therefore, France initiated a legal reform in which the representatives of the magistrate will not comprise a majority in the two sections of the French Superior Council of the Magistracy. If the judicial councils include only a minority of judges as in Kazakhstan and Ukraine, they are at risk either of being dominated by the executive or of remaining merely advisory organs of the President.[29] Moreover, Spain introduced a judicial reform in which the judge members of the judicial council are elected by the parliament. The GRECO expressed some concerns with respect to the real and perceived independence of the Spanish judicial council whose judge members are elected by the parliament.[30] The Venice Commission and OSCE/ODIHR also noted that when judge members of a judicial council are elected by Parliament, this places the selection process under the influence of the Parliament, which means that political considerations may prevail when electing the council members.[31] Even if the judges, who are not selected by the peers, but by the parliament, are a majority in the judicial council, the judicial council might be influenced politically.

The judges are still the majority in the judicial councils in many countries. For example, the Italian Supreme Council of the Magistracy is dominated by judges:

> *The role of the SCM and the developments of judicial governance in Italy seem fully to validate the worries frequently expressed in several countries with regard to the actual*

27 Lydia F. Muller, 'Judicial Administration in Transitional Eastern Countries' in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 958.

28 UNODC, *Resource Guide on Strengthening Judicial Integrity and Capacity* (New York 2011) 15.

29 Lydia F. Muller, 'Judicial Administration in Transitional Eastern Countries' in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 954.

30 GRECO, 'Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Spain' (15 January 2014) para 80.

31 OSCE/ODIHR, 'Final Opinion On Draft Amendments To The Act On The National Council Of The Judiciary And Certain Other Acts Of Poland' JUD-POL/305/2017; Venice Commission, 'Opinion on the Constitution of Serbia' CDL-AD(2007)004 para 70.

> *functioning of national judicial councils composed of a majority of magistrates, namely that the value of independence be used as a means to pursue the corporate interest of magistrates to the detriment of an effective balance between the values of independence and accountability, a balance which is necessary for the proper and efficient functioning of the judicial system.*[32]

The judge-dominated councils also create judicial corporatism in post-communist countries such as Moldova and Russia.[33]

The composition of the judicial council should reflect both judicial independence and judicial accountability. There can be two ways to prevent judicial corporatism and protect judicial independence. First, the judges are a majority in the judicial council, but the head of the council is elected from non-judges members by a majority of votes. The Venice Commission said the following:

> *It is necessary to ensure that the chair of the judicial council is exercised by an impartial person who is not close to party politics. Therefore, in parliamentary systems where the president/head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the chair of the council could be elected by the Council itself from among the non judicial members of the council. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council.*[34]

Second, a balanced composition of the council may protect both judicial independence and accountability. For example, the composition that has equal numbers of judges and non-judges in the judicial council is chosen in Malta (5 + 5),[35] Slovakia (9 + 9), and Belgium (22 + 22). The following composition, which seems to increase judicial accountability without violating judicial independence, was also adopted in Moldova:[36]

> *Currently the SCM has 12 members, elected for a mandate of four years, three of whom are ex officio members – the President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General; five members are elected from among the judges by secret ballot by the General Assembly of Judges of Moldova and four members are elect-*

32 Giuseppe Di Federico, 'Judicial Independence in Italy' in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 397.

33 Lydia F. Muller, 'Judicial Administration in Transitional Eastern Countries' in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 953.

34 Venice Commission, 'Judicial appointments' CDL-AD(2007)028, 8.

35 Constitution of Malta, 101A.

36 Parliament Of The Republic Of Moldova, Law On The Superior Council Of Magistracy.

> *ed from among the profesori titulari (teaching professors) by the Parliament by a simple majority, on a proposal from at least 20 members of Parliament.*[37]

This kind of a balanced composition "would avoid both extremes, either councils or qualifications collegial which become uncontrollable due to their having too many judges as members, or judicial councils acting under a strong executive influence."[38]

At least the half of the members of the judicial council should be judges who are directly elected by the judges and proportionally represent the judges from all the levels of the courts. The Venice Commission recommended that "A substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself.[39] According to the Kyiv Recommendations, "Where a Judicial Council is established, its judge members shall be elected by their peers and represent the judiciary at large, including judges from first level courts. Judicial Councils shall not be dominated by appellate court judges."[40]

The judicial council should have the non-judge members in order to ensure the judicial accountability and public check on the judiciary. The Venice commission recommended a balanced composition of the council that represents the judiciary and other institutions as follows:

> *In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that "the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised." Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management".*[41]

The Kyiv Recommendations also noted that "Apart from a substantial number of judicial members elected by the judges, the Judicial Council should comprise law professors

37 Nadejda Hriptievschi and Sorin Hanganu, 'Judicial Independence in Moldava' in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 1126.

38 Lydia F. Muller, 'Judicial Administration in Transitional Eastern Countries' in Anja Seibert-Fohr (ed) *Judicial Independence in Transition* (Springer Science & Business Media 2012) 954.

39 Venice Commission, 'Judicial appointments' CDL-AD(2007)028, 7; Venice Commission, 'Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria' CDL-AD(2002)015, para 5.

40 OSCE/ODIHR and Max Planck Institute, 'Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Judicial Administration, Selection and Accountability' (Kyiv, 23–25 June 2010) 3.

41 Venice Commission, 'Judicial appointments' CDL-AD(2007)028 para 30; Venice Commission, 'Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania' CDL-INF(1998)009 para 12.

and preferably a member of the bar, to promote greater inclusiveness and transparency."[42] For example, law professors and members of the bar are represented in the judicial councils in Belgium and France.

The parliament is entitled to elect the non-judge members of the council, which would express democratic legitimacy. The Venice commission expressed this view: "In a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament."[43] For example, the parliament elects the part of the members of the high judicial council among legal professionals in Bulgaria ("practicing lawyers of high professional and moral integrity with at least 15 years of professional experience"), Italy ("among full university professors of law and lawyers after fifteen years of practice") and Slovenia ("Five members shall be elected by the vote of the National Assembly on the nomination of the President of the Republic from amongst practicing lawyers, professors of law and other lawyers. Six members shall be elected from amongst judges holding permanent judicial office.")[44]

The appointment of the non-judge member of the judicial council by a qualified majority in the parliament reduces the politization of the appointment. The Venice Commission is strongly in favor of the depolitisation of such bodies by providing for a qualified majority for the election of its parliamentary component because "this should ensure that a governmental majority cannot fill vacant posts with its followers" and "a compromise has to be sought with the opposition, which is more likely to bring about a balanced and professional composition."[45] For example, such qualified majority in the parliament is required to elect the members of the judicial council in Spain (3/5) and Italy (2/3). The super-majority appointment system is suitable in a competitive multi-party system rather than one or two party systems due to the following reasons:

> *In most cases, especially in a competitive multi-party system where legislative elections are conducted by proportional representation, a two-thirds majority rule should ensure that no single party is able to make appointments unilaterally, and that agreement would have to be reached with at least some of the opposition parties. However, in countries*

42 OSCE/ODIHR and Max Planck Institute, 'Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Judicial Administration, Selection and Accountability' (Kyiv, 23–25 June 2010) 3.

43 Venice Commission 'Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania' CDL-INF(1998)009 para 9.

44 Venice Commission, 'Judicial appointments' CDL-AD(2007)028 para 31.

45 Venice Commission, 'Judicial appointments' CDL-AD(2007)028 para 32; Venice Commission, 'Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria' CDL-AD (2002) 015 para 5.

> *with majoritarian electoral systems, or with a dominant party, a two-thirds majority rule may fail to protect the opposition's interests. In Hungary, for example, the prosecutor-general and the commissioner for fundamental rights are appointed by a two-thirds majority vote of Parliament, but recent governments have enjoyed a two-thirds majority, giving them control over such appointments without having to consider the opposition.*[46]

In the majoritarian electoral systems that tend to create two-party system, it is important to create a system, in which neither the majority party nor the opposition party in the parliament dominates in the selection and appointment by the parliament. Not only the parliamentary majority but also the parliamentary opposition should play important roles to construct a balanced composition of the judicial council. For example, two of the ten members of the judicial council of Malta are lay members, one appointed by the Prime Minister and one appointed by the leader of the opposition.

In order to achieve the depolitisation of the judicial council, the candidates to the non-judge members of the judicial council could be filtered or selected by a working group who consists of representative from the state organs and civil and professional organizations. For example, the Netherlands has a Council for the Judiciary, which consists of five members who are appointed by Royal Decree on the recommendation of the Minister for a term of six years (renewable once for a term of three years), and of the five members of the Council, three are judicial officers and the other two are not judicial officers.[47] Before making the recommendation to the King, the Minister must "draw up, in agreement with the Council, a list of not more than six persons who appear eligible to fill the relevant vacancy," and "the list must be made available to a committee of recommendation," which "must consist of a president of a court, a representative of the Dutch Association for the Judiciary, a member of the Board of Delegates, a director of operations of a court and a person designated by Our Minister" and is "chaired by the president."[48] The committee must recommend no more than three persons from the list and it must send this recommendation to the Minister no later than eight weeks after adoption of the list.

The independence of the judicial council is likely to be promoted if the civil society organizations of human rights and professional organizations of law participate in the

46 Elliot Bulmer, "Independent Regulatory and Oversight (Fourth-Branch) Institutions," International IDEA Constitution-Building Primer 19 (2019), 26.

47 Kingdom of the Netherlands Act of 18 April 1827 on the Composition Of The Judiciary And The Organisation Of The Justice System (Text applicable on 22 February 2008) section 84.

48 Kingdom of the Netherlands Act of 18 April 1827 on the Composition Of The Judiciary And The Organisation Of The Justice System (Text applicable on 22 February 2008) section 85.

selection and appointment of the non-judge members of the council.[49] "The process of selection, election or appointment of non-judicial members should be merit based and transparent," and "Civil society should be involved in one or more of the above-mentioned stages (selection, election or appointment), including the possibility to propose appropriate candidates for consideration."[50] The Advocates' (Bar) Association (Finland, France, Malta, Estonia, Georgia, Romania, and Ukraine), the universities (Netherlands, Georgia, Bulgaria, Croatia, Romania, and Ukraine), organizations of legal research and training (Finland), or civil society organizations (Georgia, Bulgaria, and Romania) play crucial roles in the appointment of non-judge members of the judicial council by commenting, nominating, proposing, selecting or even appointing the candidates to this position.

The president, the ministry of justice, members of the parliament, and the prosecutor general should be prohibited to be a member of the judicial council in order to reduce improper influence on the council. The Kyiv Recommendations said that "Prosecutors should be excluded where prosecutors do not belong to the same judicial corps as the judges. Other representatives of the law enforcement agencies should also be barred from participation. Neither the State President nor the Minister of Justice should preside over the Council."[51] The Venice Commission said that "in order to insulate the judicial council from politics its members should not be active members of parliament."[52]

4. The 2019 Constitutional Amendments: The Judicial General Council, Judicial Selection and Appointment

Article 49.4 of the 1992 Constitution of Mongolia creates the Judicial General Council that "without interfering in the judicial proceedings of courts and judges, shall discharge duties such as concerning the selection of judges from exclusively amongst lawyers, protection of their rights, and other matters pertaining to providing the conditions that guarantee the independent functioning of judges." However, the original text of this Constitution was silent on the composition of this council and had no limit on the powers that could be given to this institution through the statutes.

49 Ц.Цогт, 'Монгол Улсын шүүхийн тухай хуулийн төсөлд хүргүүлэх санал' (2 *Эрх зүй ба Инновации* 2000) 3 <https://legaldata.mn/buteel/pdf?id=773> accessed 16 February 2021.

50 European Network of Councils for the Judiciary (ENCJ), 'Project on Non Judicial Members in Judicial Governance 2015–2016' para 2.1, 2.2.

51 OSCE/ODIHR and Max Planck Institute, 'Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Judicial Administration, Selection and Accountability' (Kyiv, 23–25 June 2010) 3.

52 Venice Commission, 'Judicial appointments' CDL-AD(2007)028 para 32.

The Judicial General Council of Mongolia has been given not only constitutionally mandated powers such as judicial selection and projection of legitimate interests of the judges, but also statutory powers such as judicial management, judicial finance and judicial discipline. The law (statute) that allowed the Ministry of Justice the powers related to judicial management and finance was constitutional according to the 1996 rulings of the Constitutional Court of Mongolia,[53] but all the latter laws transferred these powers from the Ministry of Justice to the Judicial General Council. In 1994, the Constitutional Court ruled that it was unconstitutional to allow the Judicial General Council to exercise a judicial disciplinary function, but this ruling was not followed in the subsequent laws of 2002 and 2012.[54] For example, according to Article 18.2 of the 2012 Law on the Status of the Judges, this council decided to dismiss the judges who were engaged in activity incompatible with the judicial position or were made liable again with a disciplinary sanction within one year from the previous one. The administrative office of the Judicial Ethics Committee was also subordinated to the administrative office of the Judicial General Council. The concentration of the judicial administration powers in the Judicial General Council that was dominated by the judges created the risks of violating judicial independence and weakening the judicial accountability.

The composition and structure of the Judicial General Council were changed four times respectively in 1993, 1996, 2002, and 2012 as shown in the Table 1.

The frequent changes in the composition and structure of the Judicial General Council of Mongolia created risks of improperly influencing the council and the judiciary, reduced continuity, and produced instability. The changes shown in Table 1 had four features.

First, the number and term of the composition were changed. The Judicial General Council had 12 members (part time) between 1993–2002, 14 member (part time) between 2002–2013 and 5 members (full time) between 2013–2021. The term of the members was six years between 1993–2002, and was three years between 2002–2013 and 2013–2021 (renewable once).

Second, non-judge members were a minority and the rules of selecting these members were changed twice. Between 1993–2013, one member was appointed by the State Great *Khural*, one member appointed by the President; Minister of Justice, and Prosecutor General were the ex officio members. Between 2013–2021, two of five in the

53 *Ganbold G v the State Great Khural*, Conclusion 7, the Constitutional Court (*Tsets*) of Mongolia (04 September 1996).

54 *Zorig S, Enkhbat A v the State Great Khural*, Resolution 1, the Constitutional Court (*Tsets*) of Mongolia (04 February 1994).

Table 1: Changes in the Composition of the Judicial General Council of Mongolia

	Judicial General Council (1993–2002)	Judicial General Council (2002–2013)	Judicial General Council (2013–2021)
Full or part time	Part time	Part time	Full time
Number of composition	12	14	5
Appointment of members	– 1 member appointed by the State Great *Khural*; – 1 member appointed by the President – Minister of Justice; – Prosecutor General; – Secretary of the Judicial General Council; – Chief Justice of the Supreme Court; – 2 justices from the Supreme Court; – 2 judges from the appellate courts (courts of province and capital city); – 2 judges from the courts of the first instance.	– 1 member nominated by the Speaker of the State Great *Khural* and appointed by the State Great *Khural*; – 1 member appointed by the President of Mongolia; – Minister of Justice; – Prosecutor General; – Secretary of the Judicial General Council; – Chief Justice of the Supreme Court; – 2 justices from the Supreme Court; – 2 judges from the courts of province; – 2 judges from the court of capital city; – 2 judges from the courts of the first instance.	The President appointed all the members on the proposal of the following: – 1 candidate proposed by the conference of judges from the court of the first instance; – 1 candidate proposed by the conference of judges from the appellate courts; – 1 candidate proposed by the conference of judges from the court of the cassation; – 1 candidate proposed by the Lawyers' (Bar) Association; – 1 candidate proposed by the Ministry of Justice.
Term of members	6 years	3 years	3 years (renewable once)
Head of the Judicial General council	– Elected from among its members by a majority of their votes (1993–1996); – Ministry of Justice (1996–2002) as the ex officio head.	– Chief Justice of the Supreme Court as the ex officio head.	– Nominated from among its members by a majority of their votes and appointed by the President.
Administrative Office	– Annexed to the Secretariat of the Supreme Court (1993–1996); – Under a division of the Ministry of Justice (1996–2002).	– Annexed to the Supreme Court.	– The Judicial General Council had its own administrative office

	Judicial General Council (1993–2002)	Judicial General Council (2002–2013)	Judicial General Council (2013–2021)
Executive Secretary	– Nominated by the head of the Judicial General Council and appointed by the Judicial General Council	– Appointed by the Judicial General Council	– Nominated by the head of the Judicial General Council and appointed by the Judicial General Council

council were members (not representing judges), one proposed by the Lawyers' Association and one proposed by the Ministry of Justice.

Third, judges or their representatives always dominated the Judicial General Council for 28 years. 8 of 12 members between 1993–2002 and 10 of 14 members between 2002–2013 were mostly senior judges, who were predominantly selected by the higher courts. Between 2013–2021, three of five members were proposed by the separate conferences of judges from the courts of the first instance, appeals and cassation. One of these five members was also proposed by the President of Lawyers' Association from among three candidates selected by the Board of Judges Committee of the Association, which consisted of all judges only. Therefore, the judges selected in fact four of five members of the Council between 2013–2021.

Fourth, the way of selecting or appointing the head of the Judicial General Council, which was changed four times, created improper influence on the Council. In 1993–1996, the head was elected from among any of its members by a majority of their votes. Since 8 of 12 members were representatives of judges, the Chief Justice of the Supreme Court was elected as the first head of the Council in 1993. In 1996–2002, the Council was under the strong influence of the Ministry of Justice, a politician who was the ex officio head of the Council. In 2002–2013, the Council was under the strong influence of the Chief Justice of the Supreme Court, who was the ex officio head of the Council. Even though the Judicial General Council was separated from the Ministry of Justice and the Supreme Court between 2013–2021, it came under influence of the President who appointed the head of the Council proposed by a majority vote of members of the Council and all the members, three of whom were proposed by the conferences of judges, one by the Ministry of Justice, and one by the Lawyers' Association.

The 2019 Amendments to the Constitution of Mongolia entrench the most crucial parts of the composition of the Judicial General Council. These amendments fix the membership of the Judicial General Council of Mongolia at 10, filling the gap in the current constitution where political actors could influence the Council by merely changing the number and term of members and improving diversity and quality of decisions in

the council. The members of the Judicial General Council have a non-renewable term of four years according to the 2019 Amendments. Thus, the State Great *Khural* can no longer change the terms through law. The term was made non-renewable so that it aims to reduce influences from those who appoint or elect the members of the council, which led to increase the term from 3 to 4 years.

According to the Constitutional Amendments, the head of the Judicial General Council will be directly elected by its members, instead of appointed by the President of Mongolia, which reduces the risk of political influence in the judiciary, improves the independence of the council, and promotes the legitimacy of the head. The 2019 Amendments also equalize the judges and the non-judges at the Judicial General Council, saying that five of the ten members are judges and the rest are the non-judges. The five judge members in this council may prevent the violation of judicial independence. A majority of vote is required to make a decision in this balanced composition so that the judge members can block any attempt to violate judicial independence, but they cannot make major decisions such as judicial selection without support of non-judge member, the representatives of the public. Since the council makes a decision by a majority of votes, the judge and the non-judges have to cooperate.

Under the 2019 Constitutional Amendments, five of 10 members of the Judicial General Council are to be directly elected from among judges. Electing five judges to the council by judges themselves would reduce the risk to politically influence the judiciary through the council. If the appellate court judges dominate the council, the internal independence would be at risk. Therefore, five judge-members in the Judicial General Council proportionally represent the courts of different levels according to Article 77 of the 2021 Law on the Judiciary: one judge from the court of cassation, two judges from the appellate courts, and two judges from the courts of the first instance are elected by a majority of votes in the meeting of all the judges of the courts. Any judge with judicial experience of no less than ten years may publicly nominate himself/herself within 21 days after the announcement of vacancy to the judge-members of the Judicial General Council. CVs and other related documents of each candidate are published online, and within 14 days, anyone is entitled to submit their opinions and questions, to which the candidates have to respond during the meeting of all the judges. The candidates who received a majority of votes in the meeting of all the judges are elected to the Judicial General Council.

Five of 10 members of the Judicial General Council would be non-judges, who will be appointed through open and inclusive procedure, which would prevent the dominance of judges and improve judicial accountability without sacrificing judicial independence. Even though the Constitutional Amendments are silent on how to appoint non-judge

members, the conception of appointment through open and inclusive procedure needs to be elaborated in the laws (statutes). According to Article 76 of the 2021 Law on the Judiciary, these five members are required to be citizens with higher qualification in law and professional experience of no less than ten years, which means recognized jurists like law professors and members of the bar. Even though the State Great *Khural* appoints the five non-judge members of the Judicial General Council, Article 77 of the 2021 Law on Judiciary incorporates five mechanisms that will reduce partisan political influence in the appointment of the non-judge members, which are the synthesis of the best practices of establishing the judicial council as explained in the previous section of this paper. First, those who have hold any political position such as a member of the State Great *Khural* in last five years are prohibited from becoming a member of the Judicial General Council.

Second, the nomination and selection are open and transparent. Any citizen with higher qualification in law and professional experience of no less than ten years may nominate himself/herself within 21 days after the announcement of vacancy to the non-judge members of the Judicial General Council. CVs and other related documents of each candidate are published online, and within 14 days, anyone is entitled to submit their opinions and questions.

Third, the non-judge members of the Judicial General Council would be selected by a balanced working group that researches each candidate, conducts interview with the candidate and other related persons and reflects opinions and questions received from the public. According to the 2021 Law on the Judiciary and the 2021 Rules on the Selection of Non-Judge Members of the Judicial General Council and the Judicial Disciplinary Committee, the working group consists of 11 members, who are appointed by the Standing Committee of Legal Affairs, the State Great *Khural,* on the proposal of the following 11 different subjects: (1) the Speaker of the State Great *Khural,* (2) the parliamentary majority, (3) the parliamentary minority or opposition, (4) the Government of Mongolia, (5) the President of Mongolia, (6) the meeting of the National Human Rights Commission, (7) the Board of the Lawyers' Association, (8) the Board of the Advocates' Association, (9) the National Legal Institute, (10) the School of Law, the National University of Mongolia, and (11) the non-state owned schools of law. The candidates who receive a majority of all vote casts by secret ballot in the working group are recommended to the State Great *Khural*.

Fourth, the Standing Committee of Legal Affairs organizes public hearings on the candidates recommended by the working group. Reports on the candidates prepared by the working group are published online, and within 14 days, anyone is entitled to submit their opinions and questions that could be raised or asked during the public hearing.

Interested individuals and legal persons can join the public hearing, and the members of the Standing Committee of Legal Affairs may ask questions from the candidates.

Fifth, the plenary session of the State Great *Khural* appoints a candidate as a member of the Judicial General Council after a public hearing. The idea to appoint the non-judge members by a qualified majority at the plenary session was recommended,[55] but it was rejected by the working group of the MPs to prepare the draft Law on the Judiciary. The super-majority appointment may fail to safeguard the participation of the opposition party in the Mongolian unicameral parliament that has two party system due to the majoritarian electoral systems. For example, the Mongolian People's Party gained 65 of 76 parliamentary seats in the 2016 election and 62 of 76 seats in the 2020 election, so it could easily appoint all the non-judge members of the Judicial General Council even if there were super-majority appointment. The initial selection of the non-judge members by the balanced working group composed of not only the representatives of the majority but also the representatives of the opposition, the President, and other professional organs might serve to promote a balanced composition in the Judicial General Council.

Since the judge members and the non-judge members are equally represented, the judges are no longer dominant in the Judicial General Council, which might increase the tensions between this council and the courts, in particular the Supreme Court. Subsequently, the reports on the Judicial General Council's activities related to judicial independence will be submitted to the Supreme Court according to the 2019 Constitutional Amendments, which would increase accountability of the council and promote cooperation of two institutions, the Council and the Supreme Court, but would not mean to make the Judicial Council under the supervision of the Supreme Court.

Articles 13–15 of the previous 2012 Law on the Status of Judges regulated the selection and appointment of judges, which are summarized as follows. The Judicial General Council published an announcement specifying the vacancy, and any citizen, who met the requirement, had the right to nominate himself/herself to the position of judge. After assessing the qualifications of candidates through written and oral exams, the Judicial Qualification Committee, which was established by the Judicial General Council on proposal by the Lawyers' Association, submitted the ranking of the candidates to the Judicial General Council. The Judicial General Council exercised discretion to propose a candidate to the appointing authority, the President of Mongolia, from the ranking list submitted by the Judicial Qualification Committee. The scholars and lawyers often criticized the fact that the Judicial General Council did not follow the ranking of the

55 О.Мөнхсайхан, *Монгол Улсын Шүүхийн тухай хуулийн төслийн талаарх санал* (Нээлттэй нийгэм форум 2020) 26–27.

candidates by the Judicial Qualification Committee.[56] The ODIHR also recommended Mongolia: "The legal drafters should consider such a modality of limiting the Council's role to verifying the compliance by the Judicial Qualifications Committee with procedural requirements and thus following the ranking proposed by the Committee, unless there are some clear and duly documented written justifications to depart from such a ranking. Alternatively, the Law should clarify the respective weight of the assessments done by the Judicial Qualifications Committee, by the Bar Association and by the Judicial General Council."[57]

The Judicial General Council's majority voting of the candidates to be recommended for appointment did not match with the ranking of the candidates made by the Judicial Qualification Committee. The Venice Commission criticized a similar system in Ukraine: "while the recommendation by the High Qualifications Commission is to be based exclusively on objective criteria, the High Council of Justice can apparently disagree with a recommendation for reasons that are not determined by the law. This opens the door to arbitrary decisions."[58] The Kyiv Recommendations also said that "a separate expert commission should be established to conduct written and oral examinations in the process of judicial selection," and "in this case the competence of the Judicial Council should be restricted to verifying that the correct procedures have been followed and to either appoint the candidates selected by the commission or recommend them to the appointing authority."[59]

While making the 2021 Law on the Judiciary, the recommendation to require the Judicial General Council to propose according to the ranking of the candidates by the Judicial Qualification Committee was rejected because it would violate Article 49.4 of the Constitution, which clearly says that the Judicial General Council shall discharge the duties such as "the selection of judges exclusively amongst lawyers." If a body that conducts written and oral examinations in the process of judicial selection proposes the candidates to the appointing authority according to the ranking based on its own assessment, the merit-based selection of judges would be fulfilled. The Judicial General Council could be such a body to conduct judicial exams. Mongolia, whose population is just 3.3 million, lacks enough citizens with higher qualification in law, who need to be

56 Ж.Хунан, П.Баттулга, М.Мөнхжаргал, *Шүүхийн бие даасан, шүүгчийн хараат бус байдлын баталгаа: шүүгчийн томилгоо* (Нээлттэй нийгэм форум 2015) 67–74.

57 ODIHR, 'Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia,' JUD-MNG/352/2020 para 121.

58 Venice Commission 'Draft Joint Opinion On The Law On The Judicial System And The Status Of Judges Of Ukraine' CDL-AD(2010)026 para 50.

59 OSCE/ODIHR and Max Planck Institute, 'Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Judicial Administration, Selection and Accountability' (Kyiv, 23–25 June 2010) para 3.

appointed to not only the Judicial General Council and the Judicial Disciplinary Committee, but also the Supreme Court, the Constitutional Court and the National Human Rights Commission. Therefore, there may not be enough professionals to be members of the Judicial Qualification Committee. Moreover, the number of members of the Judicial General Council was doubled from five to ten and all of them are full time. Therefore, the 2021 Law on the Judiciary fully charges the Judicial General Council with its constitutional mandate to select judges from among lawyers through the ranking based on the assessment of the exams, abolishing the Judicial Qualification Committee. The candidates who receive the highest score in the exams conducted by the Judicial General Council are proposed to the appointing authority.

The previous exams of the judicial candidates were briefly mentioned in the 2012 Law on the Status of Judges and largely regulated by the decrees of the President, and they mainly focused on the legal knowledge and skills and did not take the judicial temperament and ethics of candidates seriously. The written exams of legal knowledge and skill could not fully assess fully the qualifications of judges.[60] Therefore, the new exams, which are regulated in detail under the 2021 Law on the Judiciary, are constructed to assess fully not only the legal knowledge and skills, but also the judicial expertise, temperament and ethics.

Article 51.2 of the Constitution says that "The President shall appoint the judges of the Supreme Court upon their presentation to the State Great *Khural* by the Judicial General Council, and appoint the judges of other courts upon the proposal by the Judicial General Council." The previous laws (1993, 2002 and 2012) were silent on how and when the President appoints the judges.[61] Therefore, the President sometimes refused to appoint judges proposed by the Judicial General Council without any reason although presidential appointment was formulated in an obligatory manner in the Article 51.2 of Constitution. Without explicit reasons, the presidents rejected 27 candidates proposed by the Council in 1997–2017,[62] which was against the good practices. The Kyiv Recommendations told as follows:

> *Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, Qualification Commission or Expert Commission …). Refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned. In this*

60 О.Мөнхсайхан, *Монгол Улс дахь шүүгчийн сонгон шалгаруулалт: шүүгчид нэр дэвшигчийг унэлэх ажиллагаа* (Нээлттэй нийгэм форум 2015).

61 П.Баттулга, 'Монгол Улсын шүүхийн томилгооны системийг боловсронгуй болгох нь' (2020) 79/4 Хууль дээдлэх ёс 127, 136.

62 Ж.Хунан, П.Баттулга, М.Мөнхжаргал, *Шүүхийн бие даасан, шүүгчийн хараат бус байдлын баталгаа: шүүгчийн томилгоо* (Нээлттэй нийгэм форум 2015) 75.

case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote. All decisions have to be taken within short time limits as defined by law.

The Venice Commission also noted that "the proposals from this council may be rejected only exceptionally …" and "As long as the President is bound by a proposal made by an independent judicial council …, the appointment by the President does not appear to be problematic."[63]

Article 36 of the 2021 Law on the Judiciary limits the President's discretion to appoint the judges. The President is required to appoint judges of the first instance and appellate courts on proposal by the Judicial General Council within 14 days. The President also has to appoint the justices of the Supreme Court on proposal by the Judicial General Council and upon introducing them at the State Great *Khural*, which has to conduct public hearing on candidates within three months. Within 14 days, the President may only reject to appoint candidates if there are reasons that they do not meet the qualifications, such as judicial knowledge, skills and ethics, written in Article 31 of the 2021 Law on the Judiciary. If the reasons of rejecting to appoint the candidate by the President are not proven, the Judicial General Council recommends again the candidate to the President.

5. The 2019 Constitutional Amendments: The Judicial Disciplinary Committee and the Judicial Disciplinary Procedure

The composition of the Judicial Disciplinary (Ethics) Committee was changed three times in the last three decades. In 1993–2002, the Judicial Disciplinary Committees composed only of the judges from the Supreme Court and the appellate courts. In 2002–2012, there was a unitary body, the Judicial Disciplinary Committee, which was composed of 15 members who were appointed by the President on the proposals of two nominated by the Prosecutor General, two nominated by the Board of the Advocates Association, five nominated by the Presidium of the Municipal Council of the Capital City (the Council of Citizen Representatives), and six judges nominated by the Judges' Council. In 2012–2021, the Judicial Ethics Committee consisted of nine members: the President of Mongolia appointed all the members of the Judicial Ethics Committee, three of whom were proposed by the conferences of judges, three by the Ministry of Justice, and three by the Lawyers' Association, and the head of the Committee on the proposal of a majority vote of members.

63 Venice Commission, 'Judicial appointments' CDL-AD(2007)028 para 14.

In order to stabilize the judicial disciplinary system, the 2019 Amendments to the Constitution establish a new constitutional body, the Judicial Disciplinary Committee, which will make decisions on the suspension or dismissal of judges and imposition of other disciplinary sanctions. Establishing the Judicial Disciplinary Committee requires removing all disciplinary powers from the Judicial General Council so that the powers of the Judicial General Council would be distributed. In addition to removing the roles of the Judicial General Council and the President in matters relating to judicial discipline, this amendment nullifies the much-criticized law empowering the National Security Council to suspend judges and dismiss chief judges without mentioning reasons. The Judicial Disciplinary Committee is constitutionally mandated to fulfill the functions of judicial discipline, so other institutions are prohibited to take disciplinary measures against the judges.

The 2019 Amendments to Article 49.6 of the Constitution says that for the Judicial Disciplinary Committee, "the powers, organizational structure, operation rules of procedure, requirements on the composition and rules on the appointment shall be determined by law." Therefore, the law must regulate all of these relations. Before this amendment, the brief guidelines on organizational structure and operation rules of procedure concerning the judicial discipline were inserted into statutes, but the details of these were regulated by the President's decrees.

Even though Article 49.6 of the Constitution is silent on the term and composition of the committee, the parliamentary resolution dated on January 9, 2020 determined general principles to legislate the composition as follows: "the Judicial Disciplinary Committee would be composed of lawyers with judicial adjudication experience, citizens with good reputation and scholars with higher qualification in law, who are openly nominated and appointed through balanced participation of relevant institutions." A balanced composition of the judicial disciplinary committee is considered a good practice. According to the Kyiv Recommendations, "Bodies competent to hear a disciplinary case and to take a decision on disciplinary measures … shall not exclusively be composed of judges, but require representation including members from outside the judicial profession."[64]

The 2021 Law on the Judiciary rules that the Judicial Disciplinary Committee consists of nine members who work for the non-renewable terms of six years, and its members will elect the chairperson of the Committee among themselves. Four of the nine members are the four judges with the judicial (judge's) experience of no less than ten years,

64 OSCE/ODIHR and Max Planck Institute, 'Kyiv Recommendations On Judicial Independence In Eastern Europe, South Caucasus And Central Asia: Judicial Administration, Selection and Accountability' (Kyiv, 23–25 June 2010) para 9.

who are one from the court of cassation, two from the appellate courts and one from the courts of the first instance, and they are elected by a majority of votes in the meeting of all the judges. Five of the nine are non-judge members, the citizens with the higher qualification in law and professional experience of no less than ten years. These non-judge members are to be appointed by the State Great *Khural* on the proposal of the working group and after the public hearing by the Standing Committee of Legal Affairs. The judge members and the non-judge members of the Judicial Disciplinary Committee are elected and appointed in the exactly same open and participatory manners of electing and appointing the members of the Judicial General Council, which was explained in the previous section of this paper.

Judicial accountability has been weak in Mongolia. In 2014–2018, the Judicial Ethics Committee imposed disciplinary sanctions in 71 cases of judges, but only 15 of them were finalized because the appellate court of administrative cases and the administrative law chamber of the Supreme Court nullified most of them.[65] Even though some of disciplinary cases were annulled due to the flawed judgments of the committee, others were invalidated due to the poor regulations in the 2012 Law on the Status of Judges, which the 2021 Law on the Judiciary aims to fix in order to maintain a proper balance between the judicial independence and accountability.

The disciplinary violations were not explicitly defined in the law, but the violations of any provision of the Code of Judicial Ethics, which included vague principles such as the rule of law, the judicial independent and the human dignity, generated disciplinary sanctions. The ODIHR recommended Mongolia that legal provisions that refer disciplinary sanctions as the result of the Code of Judicial Ethics or ethical rules should be deleted because they are "vague and overly broad to fulfill the requirement of foreseeability."[66] "The conduct giving rise to disciplinary action [should] be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of his or her actions and thereupon regulate his or her conduct."[67] "More specific and detailed description of grounds for disciplinary proceedings would also help limit discretion and subjectivity in their application."[68] Moreover, the General Comment No. 32 of the Human Rights Committee on Article 14 of the ICCPR stated that "States should

65 О.Мөнхсайхан, 'Шүүх эрх мэдэл дэх шүүхийн захиргааны асуудал' *Монгол дахь ардчиллын хөгжил, бэхжилт, асуудал, сорилт (1990–2019)* дотор (Konrad Adenauer Stiftung 2019) 95.

66 ODIHR, 'Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia,' JUD-MNG/352/2020 para 147.

67 Venice Commission and OSCE/ODIHR, 'Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova' CDL-AD(2014)006 para 16.

68 Venice Commission and OSCE/ODIHR, 'Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic' CDL-AD(2014)006 para 24.

take specific measures guaranteeing the independence of the judiciary … through the constitution or adoption of laws establishing clear procedures and objective criteria for … dismissal of the members of the judiciary and disciplinary sanctions taken against them."[69] Therefore, the 2021 Law on the Judiciary deleted all the references to the Code of Judicial Ethics or ethical rules, and it lists 45 explicit prohibitions (such as ex-parte communication, the misbehaviour with the parties and other persons, discrimination, harassment, and the violation of explicitly clear clauses of the law) as disciplinary violations. If the judges violate these prohibitions, they are punished according to the principle of proportionality by one of five disciplinary sanctions, which are closed warning, open warning, reduction of a salary for up to 20 per cent during a period for up to six months, suspension for up to three month with the mandatory training (with salary reduced for 50 per cent) and dismissal from the official position.

In the 2014 Code of Judicial Ethics approved by the Board of Judges Committee of the Lawyers' Association, the judges adopted a statute of limitation, by which judges who committed a disciplinary violation would not be sanctioned if 6 months passed after the violation. Due to this short prescriptive period, many of the most serious disciplinary cases were dismissed in the past.[70] Hence, the 2021 Law on the Judiciary extends the statute of limitation so that judges who committed disciplinary violations would not be sanctioned by dismissal if five years have passed after the violation and judges who commit other disciplinary violations would not be sanctioned if two years pass after the violation.

Under the 2012 Law on the Status of Judges, the former Judicial Ethics Committee lacked the power to investigate the complaints against the judges. Because of this lack of investigative powers, this committee could not fully investigate and prosecute the disciplinary violations.[71] The 2021 Law on the Judiciary give the Judicial Disciplinary Committee full investigate powers such as summoning witnesses to appear and testify under oath, compelling the production of documents and other evidences and appointing experts.

There were a few clauses concerning the disciplinary procedure in the 2012 Law on the Status of Judges, which were supplemented by the Rules of the Judicial Ethics Committee approved by the President of Mongolia. One of nine members of the Judicial Ethics Committee was appointed as a reporter to investigate the complaint, but he/she did not

69 UN Human Rights Committee, 'The General Comment No. 32 on Article 14: the Right to equality before courts and tribunals and to a fair trial' CCPR/C/GC/32 (23 August 2007) para 19.

70 О.Мөнхсайхан, 'Монгол Улс дахь шүүгчийн сахилгын процедур: амжилт ба сорилт' *'Шүүгчийн ёс зүй ба сахилга' олон улсын бага хурал: илтгэл, зөвлөмж, судалгаа* дотор (Шүүхийн ёс зүйн хороо 2017) 80–83.

71 Id 77–79.

have investigative powers. A panel of three members including the reporter conducted a hearing to decide whether to dismiss the complaint or initiate the disciplinary case against the judge. If the disciplinary case was initiated, the full bench of the Judicial Ethics Committee, which included the reporter and all other members, conducted a hearing to decide to impose the disciplinary sanction or dismiss the case. There was no separation between investigation and adjudication of the disciplinary violations because the reporter joined the panel of three members and the full bench of the committee.[72] A judge or the complainant appealed to the appellate court of administrative cases and then the chamber of administrative cases of the Supreme Court.

The judicial disciplinary procedure is written in detail for the first time under the 2021 Law on the Judiciary. One of nine members of the Judicial Disciplinary Committee is randomly appointed as a reporter to investigate and prosecute the complaint (called petition or information). If the complaint is within the jurisdiction and submitted by specific individual or legal person, the reporter initiates the disciplinary case against the judge within 30 days. If the reporter issues the ordinance to reject to initiate the case against the judge, the complainant may appeal the ordinance to a complaint panel of two members, and the ordinance is valid unless the two members of the panel decide unanimously to initiate the disciplinary case. Given the full investigative powers, the reporter investigates the complaint within 30 days (plus 30 days if necessary) after the ordinance to initiate the disciplinary case. Concluding the investigation, the reporter makes a proposal to prosecute or dismiss the case, which will be decided by a main panel that consists of two non-judge members and one judge member in order to provide judicial accountability. The main panel makes a judgment to impose a disciplinary sanction, dismiss the case, or return the case to the reporter for reinvestigation. The respondent judge or the reporter may appeal the judgment to the review panel of the Judicial Disciplinary Committee. The review panel is composed of two judge members and one non-judge member, which are designed to protect the judicial independence. For the sake of the principles of impartiality and fairness, the members who joined the main panel are prohibited to participate in the review panel unless there is no other member. The reporter is strictly prohibited to participate in the complaint panel, the main panel and the review panel, so the investigation and prosecution are separated from the adjudication in the disciplinary procedure. The respondent judge or the reporter may appeal the resolution of the review panel to the Supreme Court only if he/she proves that the procedural rights of the respondent judges are violated or the hearing of the review panel was not notified properly according to the law. Only on the procedural grounds (not the substantive ones) may the Supreme Court approve the resolution of the review panel, nullify resolution, or return the case to the Judicial Disciplinary Committee.

72 Id 73–77.

6. Conclusion

Judicial independence is necessary to the rule of law and the protection of individual rights. Every Mongolian citizen has the right to an independent and impartial judiciary. The judges must decide cases impartially on the basis of law and evidence without external influence, pressure or fear of interference. Judicial independence and impartiality were enshrined in the 1992 Constitution for the first time in Mongolia, but they are hard to be attained in practice. The State Great *Khural,* the Parliament of Mongolia, has revised several times laws on the judiciary to implement these constitutional ideals and principles in the last three decades. Despite the enactments of laws, the public lost trust in the judiciary and the legal profession. The 2019 amendments to the Constitution of Mongolia included clauses to strengthen independent judiciary and the rule of law. To comply with these amendments, the State Great *Khural* passed the final revision of the Law on the Judiciary in 15 January 2021.

The Constitution allowed giving additional powers to the President of Mongolia by the statutes. As a result of this lack of constitutional limit on the presidential powers since 1992, the President gained too much power that undermined the judicial independence in Mongolia, which was called "the Tunnel of Injustice." Although the amendments do not remove constitutional powers from the presidency, they preclude the extension of the powers of the president, who are directly elected by the people, through laws (statutes). Accordingly, the president lost the former statutory powers such as appointing all the chief judges of courts except the chief justice of the Supreme Court, and all the members and heads of the Judicial General Council and the Judicial Disciplinary Committee.

The Judicial General Council currently selects and presents Supreme Court judicial candidates to State Great *Khural,* who are then appointed by the President, and the President also appoints judges of other courts upon the proposal of the Council. The 1992 Constitution was silent on the composition of Judicial General Council, so those who dominate the composition of the council were able to influence the judiciary or weaken the judicial accountability. The composition of the Council has been changed four times between 1993–2021 so that it was dominated or influenced by the Supreme Court (1993–1996), the Minister of Justice (1996–2002), the Supreme Court (2002–2013), and the President (2013–2021). The constitutional amendments fix the membership of the Council at 10 with a non-renewable term of four years, filling the gap in the current constitution where political actors could influence the Council by merely changing the number and term of members. Five of the 10 members would be directly elected among judges, and the other five members, who must be citizens with higher qualification in law and professional experience of no less than ten years, will be ap-

pointed by the State Great *Khural* on the proposal of a balanced working group through open nomination and the public hearing. In addition, the chairperson of the Council will be elected by its members, instead of appointment by the president, which reduces the risk of political influence in the judiciary. Under the amendments, reports on the Council's activities related to judicial independence will be submitted to the Supreme Court.

In order to stabilize the judicial disciplinary system that has changed three times since 1993, the amendments establish a new constitutional body, the Judicial Disciplinary Committee, which will make decisions on the suspension or dismissal of judges and imposition of other disciplinary sanctions. This amendment deletes the roles of the Judicial General Council, the President, and the National Security Council in matters relating to judicial discipline. According to the 2021 Law on the Judiciary, this committee is composed of nine members, of which four members are judges directly elected by the meeting of all the judges and the other five non-judge members are citizens with higher qualification in law, are be appointed by the State Great *Khural* on the proposal of a balanced working group through open nomination and the public hearing. In addition, the chairperson of the Committee will be elected by its members. The 2021 Law on the Judiciary also aims to improve judicial disciplinary enforcement in various ways.

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IKHYEON RHEE / HWANYONG CHOI

The Constitutional Court of Korea
Its Role for Constitutionalism

1. Introduction

With the enactment of the Current Constitution (hereafter "the Constitution") in 1987, the Republic of Korea (hereafter "Korea") is generally regarded as a country where democracy and constitutionalism have been taking root. The Constitution stipulates provisions characteristic of a modern democratic constitution. It includes provisions of popular sovereignty, a charter of basic rights, separation of power, and judicial independence. The Constitution particularly establishes the Constitutional Court (hereafter "the Court") as a constitutional review institute. If having a written constitution, a charter of basic rights, a system of checks and balances and an effective constitutional review system is interpreted as a country of constitutional democracy, Korea would be a model country of constitutional democracy.

Since its establishment in 1988, the Court has shaped the political landscape of Korea by effectively intervening in the exercise of political power. It has set aside a range of past authoritarian statutes, defeated the government's policy of relocating the capital city, dissolved a political party, and mandated the incumbent president to step down from power. As such, the Court has secured its status as the arbiter of constitutional issues and protector of basic rights. This trend would be not temporal but expected to continue. What the Court has accomplished so far is indeed surprising, and many observers wonder how it succeeded in such a short time.

No system can be born without toil and struggle. The story of the Court could be better understood when approached from a broader perspective. This paper endeavors to look through the history focusing on dynamics of constitutional revisions, taking a quick glance at the general democratization of society, and organizational advantages for achievement of the Court. I did not conduct any new empirical research. Nonetheless, this paper is a genuine dossier of as a person who participated in and witnessed the protests against the government and political events as a student, a government officer and a citizen, I would like to present my views based on these experiences.

In chapter 2, I briefly describe the Court, its composition and jurisdiction, focusing the histories of the constitutional review bodies as a background of the Court. In chapter 3, achievements will be researched in terms of the number of cases handled and the im-

pact on the society. Possible factors of achievement of the Court would be an intriguing topic, but this will require another full-fledged research. Thus, I will just briefly mention if required. Despite the success, I will also see what concerns there are. Chapter 4 concludes the articles by examining the challenges to the Court.

Before proceeding with the discussion, I would like to briefly address the concept of constitutionalism in Korea and how scholars understand constitutionalism. "[C]onstitutionalism is nowhere defined"[1] and "[n]o consensus exists what the ideal constitutionalism requires"[2], but it is generally considered as something valuable to pursue in Korea. Most constitutional textbooks refer to constitutionalism as a proper goal to pursue. Constitutionalism in textbooks can be summarized as follows: constitutionalism is the rule of the constitution. The constitution is not a political statement but the supreme law. Since it is the supreme law, the government must comply with duties and limitations the constitution imposes. Statutes and exercises of power that violate the constitution must be determined unconstitutional, and there should be an independent constitutional review institute to guarantee its implementation. In addition, a democratic constitution must require particular contents such as popular sovereignty, a charter of human rights, checks and balance system, the rule of law, an independent judiciary and so on. In Korea, a written constitution is included as an element of constitutionalism.[3] This paper will be discussed based upon this understanding of constitutionalism.

2. Establishment of the Court and History of the Constitutional Review System

2.1 Composition and Jurisdiction

The Court was established in 1988 for the first time in Korea as a constitutional review body under the Constitution.[4] The Constitution was enacted in 1987 as the 9th revision and the 6th Republic Constitution. Consisting of a preamble, 10 chapters, 130 articles and addenda, it includes key elements of the modern constitution.

1 Louis Henkin, *A NEW BIRTH OF CONSTITUTIONALISM: GENETIC INFLUENCES AND GENETIC DEFECTS, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES* in Norman Dorsen et al., COMPARATIVE CONSTITUTIONALISM cases and materials (WEST GROUP, 2003), P. 11.

2 Norman Dorsen et al., pp. 10–11.

3 See, CHEOL-SOO KIM, Introduction to Korean Constitution (Seoul: Parkyoung Publishing & Company, 2005); Nak-In Sung, Constitutional Law (Seoul: Bubmun-Sa, 2016); Jong-Sup Chong, Constitutional Law (Seoul: Parkyoung Publishing & Company, 2016); Young Huh, Korean Constitutional Law (Seoul: Parkyoung Publishing & Company, 1990); YOUNG-SUNG KWON, Constitutional law: A textbook (Seoul: Bobmun-Sa, 1981).

4 CONST § 111–113(The Constitution of the Second Republic established the Constitutional Court,

The Court consists of 9 Justices, 3 Justices appointed by the President, the National Assembly, and the Chief Justice of the Supreme Court respectively. As such, three branches of government are all involved in the formation of the Court. This is to ensure that no branch has a superior position to others. The Chief Justice of the Court is appointed by the President with the consent of the National Assembly from among Justices. The term of Justice is six years with the possibility of reappointment. Nomination to justices is limited to persons qualified as judges, having successfully passed the state bar examination.

The Court has jurisdiction over the constitutional review of statutes, constitutional complaints, competence disputes between governmental entities, the impeachment of high-ranking government officials, and dissolution of political parties.[5] A decision of the Court binds all state agencies and local governments and cannot be challenged.

Adjudication on the Constitutionality of Statutes is a means to protect the constitution by setting aside arbitrary legislation. The subject of this adjudication includes statutes, emergency presidential decrees, treaties, and universally accepted international laws, but excluding sub-legislations.[6] The Court only conducts a concrete review of constitutionality and does not have abstract review power. The review is initiated when a case is litigated before an ordinary court. If the ordinary court determines that a statute on the premise of the litigation is unconstitutional, then it refers to the Court to determine its constitutionality. The request may be made only through the Supreme Court. An ordinary individual may also request a review of the constitutionality of statutes through the constitutional complaint. The Court may decide on the case (statute or provision of statute) as unconstitutional, nonconforming to the constitution, unconstitutional in part, or constitutional in part. The provision or the statute determined as unconstitutional loses its effect from the day on which the decision is made.

Adjudication on Constitutional Complaints is a system where any person asserting a violation of constitutional rights by the exercise of public power may seek relief to the Court. There are two types of complaints: Article 68–1 and Article 68–2.[7] Article 68–1 type is a complaint filed by a person whose basic rights are infringed by the exercise

and the Constitutional Court Act was enacted. However, the act was abolished before the court was actually established. Therefore, the Constitutional Court was in reality first established under the current Constitution).

5 CONST § 111.

6 CONST § 107(2) (The Supreme Court shall have the power to make final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial).

7 Article 68 refers to Article 68 of the Constitutional Court Act.

(or non-exercise) of the public authorities, excluding judgments of ordinary courts. This complaint can be filed after exhausting all remedies provided by other laws. Article 68–2 type is a request for review of constitutionality of statute by an ordinary individual. The ordinary court can file a request review for the constitutionality of statute ex officio or on demand by a party of litigation. When demand by a party is rejected by the ordinary court, Article 68–2 allows the party to file a constitutional complaint with the Court. If the request of Article 68–2 type is found reasonable, the court declares the concerned statute unconstitutional.

Adjudication on Impeachment Procedure is a means for protecting the constitution by holding high-level public officials accountable to their legal obligations through a special process of the indictment. The National Assembly may start the impeachment process by passing a motion to impeach, and the Court has the power to adjudicate the charges brought by the National Assembly. When a request for impeachment is upheld, the Court pronounces a decision that the respondent is to be removed from the office. The impeached official cannot serve as a public official for 5 years from the date of the impeachment decision.

Adjudication on Dissolution of Political Party is a means to protect the constitution by unconstitutional political parties. The government may request the dissolution of a political party when the purposes or activities of a political party are contrary to the fundamental democratic order.[8] When the government's request is found to have grounds, the Court makes a decision and orders the party dissolved. The decision of the Court is executed by the National Election Commission.

Adjudication on Competence Disputes is a system to maintain checks and balances within the government structure and ultimately to secure the normative power of the Constitution by clarifying the competence and jurisdictional boundaries of agencies exercising public power. According to the Constitutional Court Act, petitions for a competence dispute may be filed only when the Constitutional or legal right of the petitioning agency has been violated or is in clear danger of being violated by an action or non-action of the responding agency.

8 CONST § 8(4).

2.2 History of the Constitutional Review System

The *Founding Constitution*[9] promulgated on July 17, 1947[10] established the Constitutional Committee as constitutional review body. The U. S. model authorizing the ordinary court as a constitutional review body was rejected for the reasons that judges of the ordinary court at that time lacked knowledge of public law, that the U. S. model was uniquely applicable to U. S., and that it was not appropriate for judges without democratic legitimacy to decide constitutionality of statutes enacted by the National Assembly.[11] In fact, the ordinary court was not trusted by the people because of its service for the colonial government.[12] The Committee was composed of 11 members including chairmen: 5 justices of the Supreme Court and 5 members of the National Assembly. The Vice President of Korea took the chairmanship of the Constitutional Committee.[13] The Constitutional Committee had jurisdiction over the constitutional review of statutes, but the ordinary court was authorized to review the constitutionality of sub-legislations according to Yu Jin-o's idea, then leading public law scholar.[14] The impeachment procedure was handled by the Impeachment Committee separately established. The constitutional review could be initiated only when the ordinary court made a request.[15] For about ten years, the Constitutional Committee reviewed only six cases, and two of them were unconstitutional. Overall, the Constitutional Committee failed to control exercise of power. During the First Republic, there were two constitutional revisions initiated for the president to stay in power, but the Constitutional Committee remained without change.

The *Constitution of the Second Republic* was enacted on June 15, 1960. The first Republic ended as the President, Rhee Syng-man, stepped down by nationwide democratic movement against the government triggered by a rigged election. The new constitution changed the governance structure of the government by introducing a parliamentary cabinet system. The constitution established a constitutional court. Not only was the Constitutional Court supported by academia, but it was considered more appropriate

9 Founding Constitution consisted of the preamble, 10 chapters and 103 articles. It included provisions characteristic to modern democratic constitution such as popular sovereignty, a charter of basic rights, separation of power, rule of law and so on. These basic elements are maintained in subsequent revisions.

10 There are arguments that the constitution of the provisional government established in 1919 in the wake of 3.1 Independence Movement should be the first constitution.

11 See, Kim Ha-yeol, Constitutional Litigation Law (Seoul: Parkyoung Publishing & Company, 2014), p. 63.

12 Kim Ha-yeol, ibid p. 64.

13 Founding CONST § 81(3).

14 Kim Ha-yeol, ibid p. 64.

15 Founding CONST § 81(2).

than the ordinary court, to regulate the exercise of political power.[16] The Constitutional Court consisted of 9 justices, 3 justices appointed by the President, the Supreme Court and the Upper House of the National Assembly respectively. The Chief Justice of the Constitutional Court was elected from among the justices by majority of the incumbent justices. The Constitutional Court was authorized to review the constitutionality of statutes, to deliver a final interpretation of the constitution, to adjudicate impeachment procedure, the dissolution of political parties, and the competence dispute[17]. The Constitutional Court Act allowed not only the ordinary court but a party to make a request for constitutional review of statutes.[18] The statute to establish the Constitutional Court was enacted in on Apr. 17, 1961 but was not actually established by the military government of the Third Republic.

The *Constitution of the Third Republic* abolished the parliamentary cabinet system, reinstated the presidential system, and adopted the U.S. model constitutional review system. The government of the Second Republic was too weak to create a new order and too fragile to handle disorder caused by an explosion of the diverse desire of people that had long been suppressed by authoritarian rule. The military, led by General Park Chung-hee, seized the power through a coup on May 16, 1961 on the cause of social order and security. After seizing power, the Military Revolutionary Council[19] headed by Park Chung-hee promulgated a new constitution on December 26, 1962. Concerning the constitutional review body, predominant number of public law scholars were in favor of establishing a constitutional court, but the Supreme Council for National Reconstruction ultimately chose the U.S. model.[20] The Supreme Court had jurisdiction over constitutionality of statutes and sub-legislations, and dissolution of political parties. The Impeachment Tribunal was separately created.

The attitude of the courts at that time toward the constitutional review was generally passive[21] but the court made efforts to preserve its independence in some case, such as the decision of constitutionality on the Criminal Act provision on rape,[22] Decision of

16 The Constitutional Court of Korea, Thirty Years of the Constitutional Court of Korea (Seoul, 2018), pp. 75–76.
17 CONST of the Fourth Revision § 83–3.
18 The Constitutional Court Act of 1961 § 9 and § 10.
19 The National Assembly was dismissed by the military regime, and all political activities were banned. Therefore, the Military Revolutionary Council (later, the Supreme Council for National Reconstruction) replaced the National Assembly.
20 The Constitutional Court of Korea, ibid pp. 78–80.
21 Kim Ha-yeol, ibid p. 67.
22 67Do1, Feb 28, 1967.

Unconstitutionality on the State Compensation Act.[23] The courts failed to constrain political power and to protect the rights of the people. There was one more constitutional revision during the Third Republic to remove the limitation of presidential terms. The constitutional review system was sustained without change.

The *Constitution of the Fourth Republic* took away the status of constitutional review body from the Supreme Court and conferred it on the Constitutional Committee which was established under the revised constitution. The revision was initiated by then president, Park Chung-hee to perpetuate his power and pushed ahead through the procedure without constitutional and legal ground. This was the seventh constitutional revision and the constitution of the Fourth Republic, so called the "Yushin"[24] Constitution. The Constitutional Committee was composed of 9 members appointed by the President. Three of them were elected by the National Assembly and three recommended by the Supreme Court.[25] It had jurisdiction over the constitutional review of statutes, the dissolution of political parties and impeachment.[26] The review of constitutionality could be initiated only when the Supreme Court proffered a request to the Constitutional Committee. The trial court, seeking to file a request to the Constitutional Committee, had to go through the Supreme Court first. Upon receipt of a request of a trial court, the Supreme Court decided whether to send it to the Constitutional Committee or not, if decide to proceed then send it with a written opinion of the Chief Justice of the Supreme Court attached. This procedure was an institutional obstacle that prevented the constitutional review system from smoothly working.[27] It was said that the Constitutional Committee was designed to check the Judiciary which had delivered decisions in opposition to the will of the government.[28] Expectedly, during the whole period of the Fourth Republic, the Supreme Court did not make a single request to the Constitutional Committee.

23 70Da1010, Jun 22, 1971 (Under the State Compensation Act, members of armed forces and civilian employees of the military who died in action or were injured in the performance of their official duties were barred from seeking damages from the state, in case they or their family had received indemnity in the form of disaster compensation or lump sums or annuity for the bereaved as provided by other laws. The Supreme Court held relevant proviso was unconstitutional, for the reasons that disaster compensation or annuity payments are entirely different from damages which are awarded in order to make up for losses sustained as a result of an unlawful act of the state. Following this decision, the Constitution of the Fourth Republic explicitly prescribed the contents of the Act, precluding any further debates over the unconstitutionality of such measures. The constitutional provision is still retained in the Constitution (CONST § 29(2)).

24 The meaning of "Yushin" is equivalent to "reformation" or "revitalizing reform".

25 CONST of the Seventh Revision § 109(2)–(4).

26 CONST of the Seventh Revision § 109(1).

27 Kim Ha-yeol, ibid p. 70.

28 The Constitutional Court of Korea, ibid p. 85.

The *Constitution of the Fifth Republic* kept the Constitutional Committee as the same as the "Yushin" Constitution. The authoritarian rule under the "Yushin" Constitution had led to chronic people's protest. Eventually, there were nationwide anti-government demonstrations in the late 1970s and the president was assassinated on Oct 26, 1979, ending the Fourth Republic. The National Assembly prepared for the constitutional revision reflecting people's expectations. However, Chun Doo-hwan, then military general, took power through a military coup, suppressed the May 18 Democratization Movement in Gwangju, pushed ahead revision of the constitution, which was promulgated on Oct 27 1980. This was the eighth revision and the constitution of the Fifth Republic. The constitutional review system remained unchanged, and not a single case was filed with the Constitutional Committee.

The *current Constitution* (*of the Sixth Republic*) has established the Court as a review body, taking after a model of the Second Republic. The constitutional revision process was different from the previous revisions in that it was made through agreement between the ruling and opposition parties for the first time in the Korea history, and the National Assembly led the process. It can be said the Constitution is a truly democratic constitution earned by the people, with no democratic legitimacy problems remaining.[29]

2.3 Past Experiences Reflected in the Constitution and the Court

As we have seen so far, the constitutional revisions saga in Korea would be also a history of experimentation with the constitutional review system. The provisions of the Constitution and the Constitutional Court Act bear these past failed experiences, fears and pains in the composition, the jurisdiction and the adjudication procedures of the Court.

The Constitutional Committee of the First Republic consisted of both judges and members of the National Assembly. It was vulnerable to political influence because the Vice President was not only the chairman of the Constitutional Committee, but also half of the members were at the same time members of the National Assembly. In the end, the Constitutional Committee failed to play a role in controlling political power. The Second Republic established the Constitutional Court with the support of the people, but then the low democratization level of general society and incapacity of the government were not able to implement it and the act was abolished by the military government. The U.S. model of the Third Republic did not work as intended due to the government's oppression. In several cases, the courts made efforts to seek independence, but the court was easily tamed by the administration. Eventually, constitutional cases were

29 Yoon, Dae-Kyu, Korean Development of Democracy and Law (Seoul: Korea Legislation Research Institute, 2008), pp. 25–27.

avoided, and the function of constitutional review became dormant. The government of the Fourth and the Fifth Republic devised many veto gates to reach the relief of constitutional review. The Constitution established the Court reflecting these failed experiments. Structural independence was strengthened. The ordinary court still has to file a request through the Supreme Court, but the veto gates of the fourth and fifth republic are in reality removed or significantly reduced by providing a new means to the constitutional relief.

3. Role of the Court for the Development of Constitutionalism in Korea

3.1 Achievements: Central Player for the Development of Constitutionalism

Contrary to the concerns of many observers[30] when it was established, the Court has produced remarkable results showing a different mindset than ever before. Even before the Court, there had been the constitutional review body, but only a handful of numbers were dealt with over 4 decades. Although the Constitution was enacted by agreement between the ruling and opposition parties, it could still be considered an extension of the military government. Under these circumstances, it would be natural not to expect much from the Court. However, the newly started Court has achieved amazing results not only in the number of cases handled but also in the impact on society. As it showed different attitude by delivering a meaningful decision, the people's skepticism decreased, and requests began to be filed.[31] Thus, in a short period of time, it has played a central role in the development of constitutionalism and democracy, influencing the social and political landscape.

Firstly, the number of cases handled has significantly increased. As of October 31, 2020, it has received 40,613 cases and settled 39,280 of them since its establishment in 1988. Among the 39,280 settled cases, the largest number of cases are cases of constitutional complaint accounting for 38,219. The following are cases of the constitutionality of statutes, accounting for 950. The Court's activities are primarily concerned with the review of the constitutionality of statute and constitutional complaint. To date, only 107 cases of competence disputes have been filed, with 2 cases on impeachment and 1 case

30 Ibid p. 157. (At the time the Act was passed, the introduction of the distinction between standing and non-standing Justices seems to have lacked any rationale beyond the expectation that the number of cases referred to the Constitutional Court would not be so large as to require the full-time service of all mine Justices in consideration of the passivity and dormancy of previous organs.); Jung Jong-sup, Constitutional Study Vol 4 (Seoul: Parkyoung Publishing & Company, 2003), p. 277.

31 See, Jung Jong-sup, ibid p. 277.

on the dissolution of political parties.[32] As statistics shows, the numbers of the constitutional complaint is dominant. This system was first introduced in the Constitution to protect individuals whose rights have been violated by the exercise of public power. Particularly, as seen above, Article 68–2 type of complaint allows a way for individuals to file a review of constitutionality of statute with the Court, when the ordinary court rejects to file a review to the Court. The number of Article 68–2 type accounts for 7,743. Among them, 404 cases unconstitutional (274), nonconforming to the Constitution (104), unconstitutional in part (32), or constitutional in part (21). This would mean that the previous procedure, which allows only the court to make a request to the Court, has operated as an obstacle for relief of constitutional review of arbitrary statutes, and enactment of this clause worked as a system improvement. As result, the constitutional complaint system has greatly contributed to the revitalization of the Court.

Since establishment of the Court, many statutes enacted in the past authoritarian era have been ruled unconstitutional. To name a few, the Court struck down the requisite protection and treatment of Social Protection Act, provisions of Criminal Procedure Act because of infringement of bodily freedom. It also rendered decisions of unconstitutionality in the cases on electoral districting, on motion picture censorship, on the prohibition of marriage between people with the same surname and origin.

In construction of the constitutional provisions, the Court has been active and flexible. It invoked not only foreign precedents but also international norms, was not been obsessed with the literal meaning of provision but showed activism and boldness. Even the Court has "[c]reated by reading the text of the constitutional document quite broadly."[33] The concept of a customary constitution was introduced. In the case on the Relocation[34] of the Capital,[35] the Court adopted the concept of the customary constitution to set aside the statute. The Court held that matters not explicitly stated in the text of the Constitution may have the same normative authority as the written text of the Con-

32 The data is cited in the reports submitted to the National Assembly for an audit of the Constitutional Court in 2020.

33 Tom Ginsburg, Constitutional Court in New Democracies: Understanding Variation in East Asia. Global Juris Advances, Volume 2, Issue 1, 2002 (http://www.bepress.com/gj/advances/vol2/iss1/art4). P. 7.

34 The plan of relocation of the capital city was a controversial issue. As the government pushed ahead amid controversy, citizens who opposed the relocation plan files a complaint with the Court, claiming that the special law was unconstitutional in its entirety as it was an attempt to relocate the nation's capital without revision of the constitution, and that it violated the right to vote on referendums and the right of taxpayers. (See, Yoon Dae-Kyu, ibid p. 118.).

35 16-2(B) KCCR 1, 2004Hun-Ma554 et al., October 21, 2004.; See, Yoon, Dae-Kyu, ibid p. 119. (There was severe criticism on the decision and the concept of customary constitution. The concept and scope of customary constitution is very vague and fluid, and not in line with a system based on a written constitution.)

stitution with certain strict standards being met. It argued that although there was no stipulation on the capital in the Constitution, the status of Seoul as a capital city should be regarded as a constitutional status, and a new constitutional provision is required to move it. The relocation plan of the capital was defeated by this decision. It resulted in the establishment of Sejong City forcing half of the government to move.[36]

Modified decisions such as "nonconforming to the constitution", "unconstitutional in part", or "constitutional in part" have been adopted despite debates regarding their legal grounds. This was rendered out of respect for the legislature's formative powers or to avoid confusion that may arise from the gap in the legal system which will be created if the entire statute would be struck down.[37]

The Court did not abstain from handling politically sensitive issues. It was involved in cases related to prosecuting former president Chun Doo-hwan and Roh Tae-woo.[38] In 2014, it decided to dissolve Unified Progressive Party and strip its affiliated lawmakers of their National Assembly seats on the grounds that its objectives and activities were against the fundamental democratic order.[39] The most sensitive political cases that drew people's attention were the impeachment cases against President Roh Moo-hyun in 2004 and President Park Geun-hye in 2017. Both presidents insisted that the petition of impeachment adjudication was illegitimate, but the Court rejected the arguments and judged the cases on their merits. The Court interpreted the impeachment provision of the constitution that violation of law must be grave enough to justify the removal of the President from office. According to the Court, a "violation of law grave enough to justify the removal of the President from office" means such circumstances where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution or where the president has lost the qualification to administer state affairs by betraying the people's trust.[40] The petition against Roh was rejected.[41] The petition against Park was upheld and Park was removed from office.[42] The case against President Park led to the 19th presidential election, candidate Moon Jae-in was elected president.

36 As the plan of relocation was defeated by the Court decision, the government planned to move the majorities of the government. A new bill to create a new city was enacted and implemented. The new statute was also challenged its constitutionality, but the Court held that such a move does not amount to relocation of the capital. (2005Hun-ma579 et al., November 24, 2005).

37 The Constitutional Court of Korea, ibid pp. 151–156.

38 7-1 KCCR 15, 94Hun-Ma246, January 20, 1995.

39 26-2(B) KCCR 1, 2013Hun-Da1, December 19, 2014.

40 The Constitutional Court of Korea, pp. 285–286.

41 16-1 KCCR 609, 2004Hun-Na1, May 14, 2004.

42 29-1 KCCR, 2016Hun-Na1, March 10, 2017.

There were sometimes controversies over decisions, but the government agencies including the legislature and the executive complied with decisions.[43] In fact, if the National Assembly, the Judiciary, and the Executive try to ignore or resist the Court's decision, there would be various means to sabotage the Court's decisions. However, except for some tension between the Court and the government agencies and the Supreme Court, so far, it can be said that the Court's decision has been effectively implemented.[44] The Court has been one of the most popular places for interest groups to seek to solve their issues. Government agencies alike call for the Court's review. Political circles also rely on the Court to solve disputed issues. As such, the Court has secured its position in Korean society as a key player for expansion of constitutionalism. As the Court itself evaluates, the Court has earned recognition for having firmly established the constitutional adjudication system.[45]

3.2 Some Concerns

Despite successful results in a short period of time, it is also true that there are concerns. First, judicial activism or judicialization of politics are pointed out as an issue to be wary of. The Court has played a role in solving political issues by active interference. As the Court itself evaluates, now the Court has become an arena even political circle rely on, and a preferred place for interest groups to pursue their interests.[46] Now it may have to worry more about the influence of the public than the influence from politicians. Doubts have also been raised about the court's active role. Political problems would be in nature the question of value judgment and policy decision making. It would be more desirable to adjust diverse interests through negotiations and compromises rather than deciding all or nothing based on solely legal standards. In the same context, composition of the Court is also criticized. Under the current act, only those qualified as judges passing bar examination may be nominated as justices. The Court not only deals with politically sensitive cases but also with cases significantly affecting society as whole. Therefore, its composition should be able to represent diverse interests by improving the system so that it can recruit people with different skills and perspectives. The more the Court deals with the cases of value judgement and policy making, the more often the matter of democratic legitimacy would be raised. Although not directly elected by the people, efforts to supplement democratic legitimacy will be required.

43 See, Yoon, Dae-Kyu ibid; Jung Jong-sup, ibid.

44 Despite criticism on several decisions, general authority and reputation of the Court have not been damaged. The political deadlock and the negative image of the previous constitutional review body, which used to be dormant, can be seen as still making people accept activism of the Court. (See, Yoon Dae-Kyu, ibid pp. 152–153).

45 The Constitutional Court of Korea, ibid p. 107.

46 See, Yoon, Dae-Kyu, ibid pp. 151–152.

An active interpretation of the Constitution is desirable, but there are concerns that it goes beyond the reasonable construction of provisions. The Court held that a new provision must be written in to change customary constitution in its decision on the case of relocating the capital city of Korea.[47] As we have seen above, there was severe criticism on the concept of the customary constitution and the decision.[48]

Jurisdiction of the Court is also an area to be improved through consultation with relevant agencies. The Court exercises final authority in reviewing the constitutionality of statutes, subordinate legislations are still excluded from the subject matter of review. Instead, the Supreme Court has the authority to review the constitutionality of subordinate legislation. This division began with the Founding Constitution, since then, it is said that this provision was remained to protect ordinary courts from political interference when the past authoritarian government created a special judicial body such as Constitutional Committee.[49] Whatever its original aim was, this division will inevitably cause inconsistencies in constitutional interpretations and conflicts between the Constitutional Court and the Supreme Court. Another issue is the exclusion of the court's decision from the scope of subject matter of constitutional complaint. Because the Court has no jurisdiction over the ordinary court's decision, the constitutional complaint procedure has been invoked most often in circumstances where ordinary judicial review has been unavailable. The Court has broadened the scope of remedy by accepting exhaustive exceptions.[50]

3.3 In summary

Since its opening, the Court has achieved more than expected. There would be diverse answers over how it could be possible. An independent specialized organization would have advantages over other types of institute. People thought the Constitutional Committee and the Supreme Court as an institute of the constitutional review were tainted and were not able to offer adequate guarantees of independence. Starting fresh with a new organization and a new slate of judges who shared a new vision for constitutional justice would reflect the new moment Korea was about to be in. To implement the assignments given by the people strongly required moving away from the long-standing mindset. The new era required a new organization and new people who were willing to embrace changes and desires of people. Under these circumstances, it would have been a natural choice to adopt the Court.

47 16-2(B) KCCR 1, 2004Hun-Ma554 et al., October 21, 2005.
48 See, footnote 34–36.
49 Yoon, Dae-Kyu, ibid p. 160.
50 Ibid p. 167.

The dedication and efforts of the Justices and officials of the Court in the early stages who have successfully carried out demands of the times should be respected. On the one hand, they were also educated and trained in the same environment as those of the ordinary court. Thus, other factors such as changes of society, global trend of democratization, and the changes of political landscape might have exercised as supporting forces. As Tom Ginsburg argued that the emergence of a middle class and a vigorous civil society may be the necessary conditions for a constitutional review to thrive,[51] the base of Korean society in the late 1980s, might be already transformed into different society compared with that of the 1960s and 1970s, providing sufficient conditions for the Court work well as designed. Changes in political landscapes already occurred changing the majority in the National Assembly from the ruling party to the opposition parties.[52] Tom Ginsburg argued that "the more diffuse political environments of Thailand and Korea, wherein multiple political parties were competing for power, may have contributed to more powerful court design."[53]

All this considered, the Court, through their toil and struggle, secured its status as effective constitutional review body that is practically constraining the exercise of power.[54] This achievement must be attributed to the Court. The efforts and dedication of the Court deserve people's praise. With elevated status, the Court has been impacting on the society as whole changing people's attitudes toward constitutional values. In the 1970s and 1980s, textbooks in Korea only introduced dogma and a handful of foreign cases. Now the books are filled with the cases of the Court monthly released. Students and young generation learn them in the schools. The officers in the Legislature and the Executive refer to cases of the Court when they draft and review legislative bills and regulations. As such, the Constitutional Court is influencing everyday life. There may be still a need for improvement, but there will be no disagreement over the assessment that the Court has played and will play a central role in terms of the development of democracy and constitutionalism in Korea.

51 Tom Ginsburg, ibid p. 22.

52 In the general election held in 1985, three opposition parties won the majority of the National Assembly making the regime change a possible scenario.

53 Tom Ginsburg, ibid p. 17.

54 Michel Rosenfeld and András Sajó, The Oxford Handbook of Comparative Constitutional Law, Oxford university press, 2012, p. 826. (Ranked in terms of effectiveness, the author placed the systems of South Korea on top of the list together with other 9 countries).

4. Conclusion: Challenges and Expectations

As we have seen so far, the Court has firmly taken root in Korean society and highly trusted by the people[55] and political circle, but there are not a few challenges.

The history of revisions of the constitution tells that the constitution was largely violated by those in power. This may not be just a problem in Korea. Throughout the history of the East and the West, power has been likely to be abused in its nature. Even in advanced democratic countries, the constitution and the rule of law have been often violated by the very person who the people elected to protect the constitution and themselves. If this is the case even in developed countries, it would be too optimistic to expect that such a thing would not happen anymore in Korea, which has a short history of democracy and constitutionalism. As the Court plays more important role in resolving political cases, the political circle may become even more uncomfortable, political power may be more tempted to take control of the Court. Therefore, there would be constant risks of infringement of the Constitution by the power. Recently, high political figures, who are supposed to protect the constitution, tend to belittle the constitution by making despising remarks against the Constitution.

It is not unusual that people in responsible positions of an organization are easily succumbing to the influence of political power under the pretext of benefiting of the organization, despite the obvious conclusion that it may help expand the expansion of the organization in the short term, but it often leads to the closure of the organization in the long term. The political polarization of the people by extremists including both far-right conservatism and far-left liberalism, combined with economic polarization, threatens democracy and constitutionalism. The threat becomes more serious when used by a demagogue who tries to grip power by taking advantage of the trend. When combined with ideology and religion, situation will be aggravated, and policy decisions may be made not based on constitutionality and legitimacy, but on being my side or other side. The development of technology provides a way for people to participate in government policies effectively, but also provides governments with effective control. As it becomes a hyperconnected society through social media, groundless fake news is sometimes distributed as if it were true. Such fake news also is actively used by those in power to entrench his power. In this regard, it can be said challenges always and everywhere exist.

55 The Court generally gains high scores in public confidence. According to a survey conducted by a research center called KTMM in 2017, the Court received the highest score among government agencies. (Economic Review, March. 19 2017).

The Court, as Hamilton said, may be the weakest organization[56] without any effective measure except delivering the decision, and not easy for the Court to prevent raw power from openly intervening. To protect the Court itself from power, the people could be the basis. In the late 1980s, Korean society might be already transformed into such a society as Tom Ginsburg mentioned.[57] Particularly, in Korea, the people have served as the actual driving force behind social changes.

The Court, as a public institution, although it does not secure legitimacy through elections, will be able to secure democratic legitimacy with a different mechanism. It has a duty to respond to the demand of the people and a duty of accountability to explain its activities. The people's demand will be a fair decision in accordance with the Constitution and its provisions. The Court responds to the people through decisions. It persuades the people with wisdom and long-term public interest, and gains trust. The virtuous circle between the people and the Court will give the foundation for mutual trust and legitimacy. The history of the Court is still short and in the maturing process, accumulated precedents are not sufficient to endure serious political stress. However, now young generations are learning the decisions of the Court at school, government officials refer to the decision as criteria of legislations and regulations. The Court is laying standards and guidelines that make abstract constitutional norms applicable to everyday life. It is up to the Court to provide a sustainable direction for society by accumulating precedents containing wisdom that can be a landmark. If such efforts and practices continue and exemplary precedents are sufficiently accumulated, the values are instilled into the people and they take firm roots in their mind, the resilient power and driving force of Korea, the people, will be legitimate foundation for the Court and constitutionalism, protecting the Court from the power.

Finally, I conclude this paper by quoting Judge Learned Hand's statement, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can do much to help it. While it lies there it need no constitution, no law, no court to save it"[58].

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56 Hamilton said in Federalist No. 78 that the Judiciary branch of the proposed government would be the weakest of the three branches because it had "no influence over either the sword or the purse" like the Court.

57 Tom Ginsburg, ibid p. 22.

58 L. Hand. The Spirit of Liberty. – The Spirit of Liberty, Knopff 1952, p. 190.

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ALIIA MARALBAEVA

Constitutional Review in the Kyrgyz Republic*

1. Introduction

In 1991, Kyrgyzstan's transition occurred at the time when the wave of democratization was sweeping across the post-Soviet space. Since independence, Kyrgyzstan has sought to transition to a democratic, social and law-based state. This transition is characterized by a transformation of the political, economic, and legal system and is influenced by both internal and external factors. Transformation means deep changes in state, law, and society which result from a transition from communist system toward democracy. Similarly, with other post-Soviet countries, the first Constitution of the Kyrgyz Republic (1993) was influenced by Western constitutional design.[1] It implemented the doctrine of separation of powers and institutional checks and balances. One of the steps toward separation of powers was the establishment of the Constitutional Court.

In 2010, a political crisis caused the adoption of a new Constitution of the Kyrgyz Republic and the abolition of the Constitutional Court. According to the 2010 Constitution, constitutional review is exercised by the Constitutional Chamber of the Supreme Court, the institutional design of which presents a unique model of constitutional justice in Central Asia. Meanwhile, the Constitutional Chamber has limited powers in comparison with the Constitutional Court. Since 2013, it has adopted 104 decisions, among them 34 overturning legislation[2]. These decisions of the Constitutional Chamber have protected fundamental human rights and freedoms, the separation of powers, and have brought changes to the political system (e. g., ex-presidential immunity cases).

Contemporary comparative constitutional law scholarship examines constitutional development in Central Asia through the prism of "Eurasian constitutionalism"[3], "tran-

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1 William Partlett, *Reforming Centralism and Supervision in Armenia and Ukraine*, *Annual Review of Constitution-Building Processes: 2015 (Stockholm: International IDEA, 2016)*, at: https://www.idea.int/sites/default/files/publications/chapters/annual-review-of-constitution-building-processes-2015/annual-review-of-constitution-building-processes-2015-chapter-5.pdf/ accessed on February 1, 2021.

2 *Resheniya Konstitutsionnoi palaty Verkhovnogo Suda Kyrgyzskoi Respubliki* at: http://constpalata.kg/ru/category/akty/resheniya/accessed on October 20, 2020.

3 William Partlett, *Reforming Centralism and Supervision in Armenia and Ukraine*, *Annual Review of Constitution-Building Processes: 2015 (Stockholm: International IDEA, 2016)*, at: https://www.idea.int/

sitional constitutionalism"[4], "post-Communist constitutionalism"[5], and "post-Soviet constitutionalism"[6]. Kyrgyzstan shares some common features of these theories. Nevertheless, constitutional review in Kyrgyzstan also displays some elements of transformative constitutionalism, in contrast to other Central Asian countries, which built centralized super-presidential systems. In this case, it is important to analyze the extent to which the concept of transformative constitutionalism is applicable in the context of Kyrgyzstan. Analysis of constitutional review in Kyrgyzstan from transformative constitutionalism perspective adds value to the existing discourse on comparative constitutional law.

The chapter argues that the concept of transformative constitutionalism could contribute to socio-political change through law and improve judicial adjudication of fundamental rights and freedoms in Kyrgyzstan in transitional period. This chapter consists of three sections. The first section examines the concept of transformative constitutionalism and a brief history of constitutional review in Kyrgyzstan. The second section explores the institutional design of the Kyrgyz Constitutional Chamber. The third section examines transformative constitutionalism in the context of Kyrgyzstan.

2. The Concept of Transformative Constitutionalism

In comparative constitutional law the concept of transformative constitutionalism has emerged in 1998[7]. Klare defines transformative constitutionalism as a long-term project concerned with the realization, interpretation and application of the Constitution; with the objectives of transforming political, institutional and power relationships to-

sites/default/files/publications/chapters/annual-review-of-constitution-building-processes-2015/annual-review-of-constitution-building-processes-2015-chapter-5.pdf/accessed on February 1, 2021; Petra Stykow, *The devil in the details: constitutional regime types in post-Soviet Eurasia, Post-Soviet Affairs, 35:2,* (2019), 122–139; Yu. Skuratov, *'Problemi Konstitutsionnoi Reformi v Rossiiskoi Federacii i Evraziiskii Konstitutsionalism', Sovremennoe Pravo, № 6* (2020), 5–32.

4 Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective, Columbia Human Rights Law Review, Vol. 26:167* (1994) at: https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1319&context=fac_articles_chapters/accessed on February 1, 2021.

5 *Ibid.*

6 Peter Van Elsuwege, *'The Law and Politics of Post-Soviet Constitutionalism'* in: *Arkady Moshes, Adras Racz (eds.) What has remained of the USSR. Exploring the erosion of the post-Soviet space, FIIA Report, February, 2019,* at: https://biblio.ugent.be/publication/8600553/file/8600556.pdf/ accessed on January 20, 2021.

7 Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South (May 9, 2016). American Journal of Comparative Law, Volume 65, Issue 3, 13 November 2017,* 1, at: SSRN: https://ssrn.com/abstract=2777695/ accessed on February 1, 2021

wards a democratic society[8]. The concept of transformative constitutionalism is usually associated with constitutional development of transitional societies in Global South. However, Hailbronner argues that the concept of transformative constitutionalism can be applicable not only for Southern jurisdictions, but also globally. Transformative constitutions cherish a broader emancipatory project, which attributes a key role to the state in pursuing change[9].

There are several forms of transformative constitutionalism such as "transformation of a colonial rule to self-governance" (e. g., African countries, India) and "Eurasian constitutionalism" (e. g., post-Soviet countries)[10]. Legal scholars agree that each state has its own peculiarities. For that reason, there is no single accepted definition of transformative constitutionalism[11].

Transformative constitutionalism is characterized as "a model for social and political change" and "law is recognized as an instrument for social and political change"[12]. A number of elements of transformative constitutionalism are deduced. Firstly, protection of positive rights and broad access to court(s), by broadly construing individual standing, allowing for public interest litigation or by conceding other state institutions a right to bring cases (abstract review)"[13]. Secondly, protection of socio-economic rights[14]. Thirdly, judicial activism that can stand up to the Parliament[15].

8 Karl E Klare, *Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights, 14:1,* (1998), 146, 150.

9 Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South (May 9, 2016). American Journal of Comparative Law, Volume 65, Issue 3, 13 November 2017,* 7,8, at: SSRN: https://ssrn.com/abstract=2777695/ accessed on February 1, 2021

10 William Partlett, *Reforming Centralism and Supervision in Armenia and Ukraine*, *Annual Review of Constitution-Building Processes: 2015 (Stockholm: International IDEA, 2016)*, at: https://www.idea.int/sites/default/files/publications/chapters/annual-review-of-constitution-building-processes-2015/annual-review-of-constitution-building-processes-2015-chapter-5.pdf/accessed on February 1, 2021.

11 Justice Pius Langa, *Transformative Constitutionalism, 17 Stellenbosch L. Rev. 351* (2006), at: https://www.sun.ac.za/english/learning-teaching/ctl/Documents/Transformative%20constitutionalism.pdf/ accessed on January 20, 2021.

12 Eric Kibet and Charles Fombad *Transformative constitutionalism and the adjudication of constitutional rights in Africa. Afr. hum. rights law j. vol. 17, n. 2,* 2017, pp. 340–366, at: http://www.scielo.org.za/pdf/ahrlj/v17n2/02.pdf/ accessed on January 10, 2021.

13 Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South (May 9, 2016). American Journal of Comparative Law, Volume 65, Issue 3, 13 November 2017,* 19, at: SSRN: https://ssrn.com/abstract=2777695/ accessed on February 1, 2021

14 Karl E Klare, *Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights, 14:1,* (1998), 153.

15 Eric Kibet and Charles Fombad *Transformative constitutionalism and the adjudication of constitutional rights in Africa. Afr. hum. rights law j., vol. 17, n. 2,* 2017, pp. 340–366, at: http://www.scielo.org.za/pdf/ahrlj/v17n2/02.pdf/ accessed on January 10, 2021.

Thus, transformative constitutionalism uses value-based approach to the interpretation and enforcement of the Constitution and human rights. This raises a question: To what extent is the concept of transformative constitutionalism applicable in Kyrgyzstan?

3. Brief History of Constitutional Review in Kyrgyzstan

Constitutional law scholarship identifies the emergence of a constitutional court as one of the main features of constitutional change in transitional states. According to Ruti Teitel "through constitutional review, the courts enable enforcement of a new governmental system of separated powers"[16]. The analysis of the historical development of constitutional review reveals three constitutional cycles influenced by Kyrgyzstan's transit out of a Soviet-style governmental system of state power toward democratization. Andrei Medushevsky argues that constitutional cycles allow to understand the relationship of the dominant phases of constitutional process in transitional period[17]. In Kyrgyzstan, the dominant phases of constitutional process are characterized by adoption of a new Constitution, political turmoil, and constitutional amendments.

The *first constitutional cycle (1989–1993)* is characterized by the establishment of the Kyrgyz SSR Committee of Constitutional Supervision (Kyrgyz SSR CCS) in 1989[18]. The Law "On Constitutional Supervision in the Kyrgyz SSR" was adopted in 1990. The main aims of the Kyrgyz SSR CCS were to ensure compliance of acts of state bodies and public organizations with the Kyrgyz SSR Constitution, protecting constitutional rights and freedoms of individuals, rights of peoples living in Kyrgyz SSR, and democratic foundations of Soviet society. According to Article 17 of the Kyrgyz SSR Law "On Constitutional Supervision in the Kyrgyz SSR", the Kyrgyz SSR CCS's opinions (*zaklyucheniа*) on draft laws of the Kyrgyz SSR and other acts submitted to the Supreme Council of the Kyrgyz SSR, laws of the Kyrgyz SSR and other acts adopted by the Supreme Council were submitted to the Supreme Council of the Kyrgyz SSR. The adoption of the aforementioned opinions by the Kyrgyz SSR CCS did not suspend application of the Kyrgyz SSR laws and other acts adopted by the Kyrgyz SSR Supreme Council or their individual provisions. The opinion of the Kyrgyz SSR CCS on the constitutional inconsistency of an act adopted by the Supreme Council of the Kyrgyz SSR or its individual provisions

16 Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective, Columbia Human Rights Law Review, Vol. 26:167* (1994), 174, 176 at: https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1319&context=fac_articles_chapters/accessed on February 1, 2021.

17 E. Tsybulevskaya, *'Obschestvo Perehodnogo Tipakak Fenomen. Harakteristika Sotsialnoy Tranzitivnosti', Izvestiya Tomskogo Politehnicheskogo Universiteta, T. 309, №* 3 (2006), 203.

18 *Zakon Kirgizskoy SSR ob izmeneniyah i dopolneniyah Konstitutsii (Osnovnogo Zakona) Kirgizskoy SSR* ot 23 sentyabrya 1989 goda [the 1989 Law of the Kyrgyz SSR on Amendments and Adenda of the Constitution of the Kyrgyz SSR, Sept. 23, 1989].

might be rejected by a resolution of the Supreme Council adopted by two-thirds of votes of the total number of people's deputies of the Kyrgyz SSR. The opinion of the Kyrgyz SSR CCS was put on discussion and voting on the next meeting of the Supreme Council[19]. Thus, socialist constitutional doctrine opposed judicial review of legislation[20]. On 14 December 1990, according to the Law "On Reorganization of the System of State Bodies and Administration in the Kyrgyz SSR and Amendments and Addenda to the Kyrgyz SSR Constitution (Basic Law)", in order to ensure the supremacy of the Constitution, protecting the constitutional order, and rights and freedoms of citizens[21] the Kyrgyz SSR CCS was abolished and replaced by the Kyrgyz SSR Constitutional Court[22].

The *second constitutional cycle (1993–2010)* started with adoption of the first Constitution of the Kyrgyz Republic (1993) implementing the separation of powers doctrine and establishing the Kyrgyz Constitutional Court with extensive powers of constitutional review[23]. The Kyrgyz Constitutional Court was based on Austrian (Kelsenian) model for organization of constitutional review. It consisted of 9 justices nominated by President and elected by Parliament for 15-years term. Judicial supremacy was clearly recognized in the Constitution (1993) and the Law "On Constitutional Proceedings of the Kyrgyz Republic" (1993) which stated that "establishing of unconstitutionality of laws and other normative legal acts cancels their effect on the territory of the Kyrgyz Republic, as well as cancels the effect of other normative acts based on act recognized unconstitutional[24]. The Kyrgyz Constitutional Court exercised both powers of *ex ante* (reviewing constitutional amendments) and *ex post review* (reviewing over constitutionality of legislation), as well as abstract and concrete review. The Kyrgyz Constitutional Court also had other powers such as to settle the disputes relating to validity, application and interpretation of the Constitution; to give an opinion on legality presidential elections; to give an opinion on the impeachment of President, dismissal judges of the Constitutional Court, Supreme Court, Supreme Arbitration Court; to give consent to

19 *Zakon Kirgizskoj SSR o Konstitucionnom Nadzore v Kirgizskoj SSR* N 52-XII (1990), at: http://cbd.minjust.gov.kg/act/view/ru-ru/783/ accessed on March 7, 2021.

20 Mauro Cappelletti, William Cohen, *Comparative Constitutional Law: Cases And Materials. Indianapolis: Bobbs-Merrill,* 1979.

21 Ch. Baekova '*O konstitutsionnom pravosudii v Kyirgyizskoy Respublike*', at: http://www.concourt.am/hr/ccl/vestnik/4.14-1.15/baekova.htm, accessed on February 1, 2021.

22 *Zakon Kirgizskoy SSR o Reorganizatsii Sistemyi Organov Gosudarstvennoy Vlasti i Upravleniya v Kirgizskoy SSR i Vnesenii Izmeneniy I Dopolneniy v Konstitutsiyu (Osnovnoy Zakon) Kirgizskoy SSR* N 260-XII (1990), at: http://cbd.minjust.gov.kg/act/view/ru-ru/910/ accessed on January 20, 2021.

23 *Konstitutsia Kirgizskoy Respubliki* (1993), at: *http://cbd.minjust.gov.kg/act/view/ru-ru/1/30?cl=ru-ru/* accessed on January 20, 2021.

24 *Zakon Kirgizskoy Respubliki o Konstitutsionnom Sudoproizvodstve Kyirgyizskoy Respubliki* № 1337-XII (1993, utratil silu), at: http://cbd.minjust.gov.kg/act/view/ru-ru/777?cl=ru-ru/accessed on January 20, 2021.

prosecution of judges of local courts; to cancel decisions of local self-government bodies, contradicting the Constitution; to decide the constitutionality of law enforcement practices affecting the constitutional rights of citizens. The decisions of the Kyrgyz Constitutional Court were final and no appeal was possible[25].

The Kyrgyz Constitutional Court was premised on a normative constitutional complaint and *a quasi actio popularis*. According to the Venice Commission the *quasi actio popularis* means that the applicant needs to prove that he or she has a certain legal interest in the general norm. The rules of standing are closely related to those applicable to a normative constitutional complaint, except for the fact that an applicant does not need to be directly affected. They only need to establish that the legal provision interferes with their rights, legal interests or legal position[26]. Analysis of the Kyrgyz Constitutional Court's decisions reveal that between 1995 and 2010, the Constitutional Court delivered 170 decisions overall, among them 91 decisions on the constitutionality of law enforcement practice affecting the constitutional rights of citizens, 60 decisions examining constitutionality of legislation, 4 decisions giving an opinion on the constitutionality of presidential elections, 9 decisions giving consent to prosecute judges of local court, 3 decisions on the interpretation of Constitution, and 3 decisions giving an opinion on amendments and additions to the Constitution[27]. Thus, the Kyrgyz Constitutional Court as a check on parliamentary power was evident on actual cases on human rights protection[28]. However, in politically sensitive cases caused by political turmoil, the Kyrgyz Constitutional Court demonstrated loyalty to authority. In 2010, as a result of political crisis the Constitutional Court was abolished and replaced by the Constitutional Chamber. The Venice Commission of the Council of Europe criticized the decision to dissolve the Constitutional Court, noting that this could be viewed as a step backward[29].

25 *Zakon Kirgizskoy Respubliki o Konstitutsionnom Sudoproizvodstve Kyirgyizskoy Respubliki* № 1337-XII (1993), at: http://cbd.minjust.gov.kg/act/view/ru-ru/777?cl=ru-ru/accessed on January 20, 2021.

26 *Council of Europe Venice Commission CDL-JU (2010)018rev,* 2010, 5, 21, at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2010)018rev-e/ accessed on March 2, 2021; Member of the Venice Commission Gagik Harutyunyan, *Individual Constitutional Complaint: European Tendencies of System Development*, 2011, 2 (https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2011)018-rus)/ accessed on March 2, 2021; Tom Gerald Daly, *A Constitutional Court for Sri Lanka? Perceptions, Potential & Pitfalls, CTN Policy Paper № 1,* May 2017, 22, at: https://law.unimelb.edu.au/__data/assets/pdf_file/0006/2408541/CTN-Policy-Paper-Series-No-1-Constitutional-Courts.pdf/ accessed on March 2, 2021.

27 TsentralizovannyiyBankDannyihPravovoyInformatsiiKyirgyizskoyRespubliki,at:http://cbd.minjust.gov.kg/ru-ru/sud/search.

28 Ch. Baekova, '*O konstitutsionnom pravosudii v Kyirgyizskoy Respublike'*, at: http://www.concourt.am/hr/ccl/vestnik/4.14-1.15/baekova.htm, accessed on February 1, 2021.

29 *Opinion on the Draft Constitution of the Kyrgyz Republic (version published on 21 May 2010) adopted by the Venice Commission at its 83rd Plenary session* (Venice, 4 June 2010), at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)015/ accessed on February 1, 2021.

The *third constitutional cycle* (2010-present) started after the political turmoil which led to adoption of new Constitution and establishment of a Constitutional Chamber with limited powers of constitutional review in comparison with Kyrgyz Constitutional Court. However, the Constitutional Chamber through constitutional review not only enables enforcement of fundamental human rights and freedoms, but also defends the separation of powers, and brings changes in a political system (e. g., case on ex-presidential immunity). Analysis of the Constitutional Chamber's decisions shows the application of judicial restraint (e. g., Decrees of Provisional Government case (2014)), judicial activism, and relying on legal positions of Kyrgyz Constitutional Court in rendering decisions.

Thus, since the transition, Kyrgyzstan has strived to uphold democracy, rule of law, and develop constitutionalism in challenging times of political turmoil. The Constitutional Chamber has played a significant role in socio-political transformation. The next section discusses the institutional design of the Constitutional Chamber and procedure of appointment of justices.

4. Institutional Design of the Kyrgyz Constitutional Chamber

4.1 The Institution of the Constitutional Chamber

The structure of Kyrgyz Constitutional Chamber of the Supreme Court is unique for the Central Asian region. The 2010 Constitution and Constitutional Law "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" both recognize the Constitutional Chamber as the highest judicial body that independently exercises constitutional review[30]. According to the Constitution (2010), the Constitutional Chamber has the power to review constitutional amendments and international treaties that have not entered into force for Kyrgyzstan (*ex ante review*) and the power to review the constitutionality of legislation (*ex post review*) (among them abstract and concrete review)[31]. In comparison with the Constitutional Court, the powers of the Constitutional Chamber were significantly limited. Comparative analysis of Constitutional Court and Constitutional Chamber provides an analytical framework for examining their institutional design (see Table 1).

The Constitutional Chamber is premised on a normative constitutional complaint and *a quasi actio popularis.* The latter means that applicant does not need to be directly af-

30 *Konstitutsionnyiy zakon o Konstitutsionnoy Palate Verhovnogo Suda Kyirgyizskoy Respubliki* (2011), at: http://cbd.minjust.gov.kg/act/view/ru-ru/203281?cl=ru-ru/ accessed on February 1, 2021.

31 *Konstitutsia Kirgizskoy Respubliki* (2010), at: http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru/ accessed on February 1, 2021.

Table 1. Comparative table of institutional design of Kyrgyz Constitutional Court and Constitutional Chamber

	The Constitutional Court	The Constitutional Chamber
Duration	1993–2010	2010–2021
First hearing	1995	2013
Tenure	15-years term	Firstly for 7 years, then if re-elected upon reach mandatory retirement age (70 years)
Number of Justices	9	11
Appointment mechanism	Nominated by President and elected by Parliament	1) Council for Selection of Judges submits candidates to President, then 2) President nominates candidates to Parliament, then 3) Parliament elects justices
Quasi actio popularis	Yes	Yes
Total number of decisions	170	104
Review of legislation ex post/ex ante	Ex post (reviewing over constitutionality of legislation) Ex ante (reviewing constitutional amendments)	Ex post (reviewing over constitutionality of legislation) Ex ante (reviewing constitutional amendments, international treaties that have not entered into force).

Source: Author's compilation based on the 1993 Constitution, 2010 Constitution, Law "On Constitutional proceedings of the Kyrgyz Republic" (1993, invalidated), Constitutional Law "On Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" (2011).

fected. He or she only need to establish that a normative legal act violates the rights recognized by the Constitution. The applicant has a right to challenge a normative legal act if there is uncertainty of its constitutionality (Article 24)[32]. Along with the natural persons and legal entities, the right to bring a case belongs to Parliament (*Zhogorku Kenesh*), a faction or factions of Parliament, the President, the Government, the Prime-Minister, judge or judges, local self-government bodies, the Attorney General, and the Ombudsman[33]. Analysis of the Constitutional Chamber's decisions reveal that a majority of them were held on cases submitted by natural persons. However, the Government, Chief Justice of the Supreme Court, judges of local courts, and Ombudsman also challenged the legislation under the Constitutional Chamber's power of abstract judicial review. The decisions adjudicated in the framework of abstract judicial review

32 *Konstitutsionnyiy zakon o Konstitutsionnoy Palate Verhovnogo Suda Kyirgyizskoy Respubliki* (2011), at: http://cbd.minjust.gov.kg/act/view/ru-ru/203281?cl=ru-ru/ accessed on February 1, 2021.

33 *Ibid.*

shaped political system and defended separation of powers. Analysis of the Constitutional Chamber's decisions revealed that 30 % of contested normative legal acts were overturned: out of 104 decisions, 34 overturned legislation, whereas 70 found the contested act to be compliant with the Constitution[34].

4.2 Appointment of Justices

The Constitutional Chamber consists of 11 Justices, which elect Chairperson and Deputy Chairperson for 3-years term. The Constitution, the Constitutional Law "On Constitutional Chamber of the Supreme Court of the Kyrgyz Republic", and the Constitutional Law "On the Status of Judges in the Kyrgyz Republic" stipulate criteria for the candidates for the position of justice. The candidate should be a citizen of the Kyrgyz Republic, must have reached 40–70 years of age, has a higher legal education, and minimum 15-year professional legal experience.

The election of justices follows three stages. On the *first stage*, the Council for Selection of Judges of the Kyrgyz Republic (hereinafter, the Council) submits the candidates for the position of justice to President. The Council consists of 9 members elected for 3-years term. Each of 1/3 members of the Council are elected by the Council, parliamentary majority and parliamentary opposition, respectively. On the *second stage*, the President nominates candidates to Parliament. However, the President has the right to return documents on submitted candidate giving the reasons for his decision to the Council. On the *third stage*, Parliament elects candidates for the position of justices nominated by President[35]. The Constitutional Law "On the Status of Judges in the Kyrgyz Republic" establishes that justices are elected for 7-years term for the first time, then if re-elected, until they reach mandatory retirement age (70 years). In comparison, the judges of the Supreme Court are appointed until they reach mandatory retirement age (70 years). Analysis of elections of justices' procedure creates a vast risk for the judicial independence of justices, which may occur when the Constitutional Chamber examines the cases on political sensitive issues involving Parliament. In other words, if justices would hold a decision not in favor of Parliament, there is a risk that they may not be re-elected. In this case, the institutional checks and balances between Parliament and the Constitutional Chamber is not applicable. Moreover, most recently, in November 2020, the deputy has initiated an amendment to the Constitutional Law "On Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" in order to reduce

34 *Resheniya Konstitutsionnoi Palaty Verkhovnogo Suda Kyrgyzskoi Respubliki* at: http://constpalata.kg/ru/category/akty/resheniya/accessed on October 20, 2020.

35 *Konstitutsionnyiy Zakon Kyirgyizskoy Respubliki o Statuse Sudey Kyirgyizskoy Respubliki* (2008), at: http://cbd.minjust.gov.kg/act/view/ru-ru/202352?cl=ru-ru/ accessed on February 1, 2021.

a number of justices from 11 to 9[36]. The next section examines the application of the concept of transformative constitutionalism in Kyrgyzstan.

5. Transformative Constitutionalism in the Context of Kyrgyzstan: Human Rights Adjudication and Separation of Powers

5.1 Access to justice and the right to effective remedy cases

The first main feature of the transformative constitutionalism is the protection of positive rights and broad access to court(s) by broadly construing individual standing, allowing for public interest litigation or by giving other state institutions a right to bring cases (abstract review)[37]. In Kyrgyzstan, the right to apply to the Constitutional Chamber is enjoyed by natural persons, legal entities, Parliament, faction or factions of Parliament, President, Government, Prime-Minister, judge or judges, local self-government bodies, Attorney General, and Ombudsman[38].

In transition societies like Kyrgyzstan, where constitutionalism is fragile, access to justice and right to effective remedy are essential for state-building and establishing the rule of law. Access to justice is a fundamental right that allows individuals to use legal tools and mechanisms to protect their rights[39]. The Constitution of the Kyrgyz Republic establishes access to justice and the right to effective remedy which cannot be restricted (Article 20, Article 40)[40]. In the framework of most recent judicial and legal reform, new Civil Procedural Code (2017), Administrative Procedural Code (2017), and Code on offences (2019) were enacted. However, legal practice revealed that several legal provisions of new codes restrict access to justice and the right to effective remedy. In a series of cases examined below, the Constitutional Chamber defended access to justice and the right to an effective remedy.

36 Deputat predlagaet sokratit chislo sudey Konstitutsionnoy Palatyi, at: https://24.kg/vlast/173136_deputat_predlagaet_sokratit_chislo_sudey_konstitutsionnoy_palatyi/ accessed on February 1, 2021.

37 Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South (May 9, 2016). American Journal of Comparative Law, Volume 65, Issue 3, 13 November 2017,* 19, at: SSRN: https://ssrn.com/abstract=2777695/ accessed on February 1, 2021.

38 *Konstitutsionnyiy zakon o Konstitutsionnoy Palate Verhovnogo Suda Kyirgyizskoy Respubliki* (2011), at: http://cbd.minjust.gov.kg/act/view/ru-ru/203281?cl=ru-ru/ accessed on February 1, 2021.

39 Valesca Lima, Miriam Gomez, *Access to Justice: Promoting the Legal System as a Human Right, in: Peace, Justice and Strong Institutions. Springer International Publishing, Cham*, 2019, 1.

40 *Konstitutsia Kirgizskoy Respubliki* (2010), at: http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru/ accessed on February 1, 2021.

5.1.1 The torture case

Most recently, on February 17, 2021, the Kyrgyz Constitutional Chamber reached a landmark decision in a torture case. The representatives of the human rights movement "One World Kyrgyzstan" ("Bir Duino Kyrgyzstan") contested part 3 of article 430 of the Criminal Procedural Code, which does not allow challenges to decisions of the court of appeal made on complaints against the decisions of investigating judge in the Supreme Court. The applicant stressed that in cases of torture and cruel treatment, such restrictions in advocacy lead to violation of one of the fundamental human rights – access to justice. Moreover, it contradicts to Kyrgyzstan's international obligations as far as Kyrgyzstan acceded to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1996. The Constitutional Chamber relying on the right to effective remedy and the right to retrial by a higher court – held that decisions of the court of appeal made on complaints against the decisions of investigating judge, adopted on the basis of results on consideration of the complaint against the decision of authorized official to terminate a criminal case in pre-trial proceedings, can be challenged in the Supreme Court[41]. Thus, the Constitutional Chamber ensured access to justice not only for victims of torture and other cruel treatments, but also for all citizens[42].

5.1.2 The state duty cases

In 2017, the state duty (*gosudarstvennaya poshlina*) was increased to 10 % for civil lawsuits over 10, 000 soms ($ 145). The plaintiff should pay it in advance. The main reason for increasing the amount of state duty was to decongest the judicial system from an increased number of unreasonable claims. In 2018, Mr. Samedov representing the interests of Ms. Beyshembaeva challenged the State Duty Rates (*Stavki gosudarstvennoi poshliny*)[43] that established disproportionately high state duty for civil lawsuits. On 16 January 2019, the Kyrgyz Constitutional Chamber – relying on access to justice and the right to effective remedy (Article 20, Article 40) – held that establishment of unreasonably high state duty for civil claims in relatively low level of income and living

41 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po delu Ahmatova T. (2021),* at: http://constpalata.kg/wp-content/uploads/2021/02/114.-Vahitov-V.A.-ot-17.02.2021-g.pdf/ accessed on March 7, 2021.

42 Konstitutsionnaya palata prinyala reshenie v polzu pravozaschitnikov, at: https://24.kg/obschestvo/183801_konstitutsionnaya_palata_prinyala_reshenie_vpolzu_pravozaschitnikov/.

43 *Postanovlenie Pravitel'stva Kyirgyizskoy Respubliki ob Utverzhdenii Stavok Gosudarstvennoy Poshlinyi* № 521 (1994) (utratilo silu), at: http://cbd.minjust.gov.kg/act/view/ru-ru/37346/ accessed on January 8, 2021.

standards of the population is unconstitutional[44]. As a result, in 2019 the Government of the Kyrgyz Republic enacted a decree "On Approval of the State Duty Rates" which decreased the state duty for civil claims[45]. Thus, the Constitutional Chamber ensured access to justice to citizens in civil trials.

On 5 August, 2019, Mr. Shvaiberov – a member of LLC "GIT for EP" – contested part 4 of article 106 of Civil Procedural Code which excludes legal entities and entrepreneurs from filling a motion for postponement or installment of state duty payment. On 16 September 2020, the Kyrgyz Constitutional Chamber – relying on the equality before the law (Article 16), social justice, and the right to effective remedy (Article 40) – held that legal entities and entrepreneurs have equal rights with other litigants to fill a motion for postponement or installment of state duty payment. The Constitutional Chamber argued that "the legislator, having a sufficient margin of appreciation in regulating methods and procedures of effective remedy, nevertheless, is obliged to provide litigants with equal opportunities both when applying to the court and when using procedural remedies"[46]. However, the decision was not taken unanimously. Three justices expressed a common dissenting opinion. Thus, the Constitutional Chamber ensured equality before the law and access to justice to citizens in civil trials.

5.1.3 The right to retrial by a higher court cases

The Kyrgyz Constitutional Chamber has played a significant role in cases involving the right to retrial by a higher court (paragraph 3 of part 5 of Article 20[47]). In 2019, Mr. Zhorokulov, Ms. Tishinina, Ms. Dzhanykulova, and Open Joint Stock Company Construction Firm "Bishkekkurulush" contested part 3 of article 333 of the Code on Offences which does not allow an appeal to a higher court from decisions of the district (city) court on offences. According to the case, the Interregional Department of the State Inspection for Environmental and Technical Safety under the Government of the Kyrgyz Republic in Bishkek city issued an order of administrative penalty to the Open Joint Stock Company Construction Firm "Bishkekkurulush". The latter filled a lawsuit

44 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po delu Beishembaevoi N.* (2019), at: http://constpalata.kg/wp-content/uploads/2019/01/Samedov_S.A._russ.pdf/ accessed on January 8, 2021.

45 *Postanovlenie Pravitel'stva Kyirgyizskoy Respubliki ob Utverzhdenii Stavok Gosudarstvennoy Poshlinyi № 159* (2019), at: http://cbd.minjust.gov.kg/act/view/ru-ru/13491?cl=ru-ru/ accessed on January 8, 2021.

46 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po delu Shvaiberova* (2020), at: http://constpalata.kg/wp-content/uploads/2020/09/102.-SHvajberov-S.A.-ot-16.09.2020-g.pdf/ accessed on January 8, 2021.

47 *Konstitutsia Kirgizskoy Respubliki* (2010), at: http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru/ accessed on February 1, 2021.

to the Interdistrict court of Bishkek city in order to invalidate the order. By the ruling of the Interdistrict court of Bishkek city the administrative case was transferred according to the jurisdiction to the Pervomaisky District Court of Bishkek city, which upheld the order issued by the Interregional Department of the State Inspection for Environmental and Technical Safety under the Government of the Kyrgyz Republic, and denied the applicant's complaint. On this order of the Pervomaisky District Court of Bishkek city the applicant filed an appeal, which was returned on the basis of part 3 of article 333 of the Code on Offences stating that the decision of the court is final. On 11 September 2019, the Constitutional Chamber – relying on the fact that Kyrgyzstan is a law-based state (Article 1), right to effective remedy (Article 40), and right to retrial by a higher court (paragraph 3 of part 5 of Article 20) – held that the decision of the district (city) court on offences can be appealed to the higher court[48]. However, the decision was not taken unanimously. There were two dissenting opinions. Thus, the Constitutional Chamber defended the right to retrial by a higher court.

In 2019, Mr. Muratbaev representing the interests of Ms. Aribzhanova and LLC "Malatash Gold" contested the normative provision of an article 271 of Administrative Procedural Code of the Kyrgyz Republic which establishes that an application for revising a judicial act in the light of newly discovered or new circumstances should be submitted within three months from the date of establishing circumstances that serve as the basis for retrial, but no later than three years from the entry into force the trial judgement. According to the case, LLC "Malatash Gold" submitted an application for review of the ruling of the Supreme Court on invalidating the protocol of the Commission on licensing of subsoil usage that canceled its license for mining to the Supreme Court. At the same time, it also submitted a motion on restoring a missed deadline of applying for review of judicial act in the light of newly discovered circumstances to the Supreme Court. LLC "Malatash Gold" indicated that these circumstances occurred only after three years from the date of challenged judicial act was issued. The Supreme Court refused to restore the missed deadline relying on the contested normative provision of Article 271 of the Administrative Procedure Code. On 26 June 2019, the Constitutional Chamber – relying on the fact that Kyrgyzstan is a law-based state (part 1 of Article 1), supremacy and direct effect of the Constitution (part 1 of Article 6) right to effective remedy (Article 40), as well as principle of legal certainty – held that the right to retrial judicial act

48 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po delu Zhorokulova M., Tishininoi K. Dzhanykulovoi B., OAO Proizvodstvenno-stroitel'noi firmy Bishkekkurulush (2019)*, at: http://constpalata.kg/wp-content/uploads/2019/09/94…ZHorokulov-M.M.-s-osob.-mn.pdf/ accessed on January 20, 2021.

in the light of newly discovered or new circumstances cannot be restricted[49]. Hence, the Constitutional Chamber ensured a petitioners' right to appeal the judicial act.

Thus, these cases illustrate that the Constitutional Chamber enforced rights such as access to justice and right to effective remedy, and served as a credible check on the Parliament in transitional period.

5.2 Socio-economic rights cases

The concept of transformative constitutionalism is also focused on enforcement of socio-economic rights[50]. These rights are embodied directly in the Constitution, which states that Kyrgyzstan is a "social state". The contribution of the Kyrgyz Constitutional Chamber to enforcement of socio-economic rights is examined through actual cases involving state pensions for special merits and payments of compensatory damage. Analysis revealed two important issues. Firstly, there are less cases involving socio-economic rights than cases on access to justice and right to effective remedy. Secondly, cases involving state pensions for special merits and payments of compensatory damage illustrate that the Constitutional Chamber does not follow the same approach in defending socio-economic rights. Hence, application of the concept of transformative constitutionalism in the Constitutional Chamber's decisions could anchor protection of socio-economic rights in Kyrgyzstan.

5.2.1 Pension for special merits case

In 2013, a group of deputies challenged the legal provision of the Regulation "On Pensions for Special Merits to the Kyrgyz Republic" which established that

senior officials of state bodies appointed to senior political positions according to the Register of Political and Special Public Offices of the Kyrgyz Republic, deputies of Parliament and chairman of the Federation of Trade Unions of Kyrgyzstan, will receive increased payments to assigned pension for special merits only upon leaving their positions. On 16 November 2013, the Constitutional Chamber – relying on the fact that Kyrgyzstan is a social state (Article 1), state pensions (Article 9), guaranteed social security (Article 53), principle of non-discrimination (Article 16), equality before the

49 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po delu Abirzhanovoi A.* (2019), at: http://constpalata.kg/wp-content/uploads/2019/06/Aribzhanova-A.-rus.-ispr.pdf/ accessed on January 20, 2021.

50 Karl E Klare, *Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights, 14:1,* (1998); Eric Kibet and Charles Fombad *Transformative constitutionalism and the adjudication of constitutional rights in Africa. Afr. hum. rights law j. vol. 17, n. 2,* (2017), pp. 340–366, at: http://www.scielo.org.za/pdf/ahrlj/v17n2/02.pdf/ accessed on January 10, 2021.

law (Article 16) – held that increased payments to assigned pension for special merits cannot be restricted[51]. However, two justices expressed common dissenting opinion relying on ILO Convention N° 102 "On minimum standards of social security" (1952) which state that such restrictions can be imposed in order to ensure targeted social assistance, to determine the categories of individuals who need such assistance, and differentiate them according to socially justified criteria[52]. Thus, the Constitutional Chamber defended the right to pension for special merits for people who were awarded increased payments to assigned pension.

5.2.2 Payment of compensatory damage case

In contrast, payment of compensatory damage case revealed opposite approach to enforcement of socio-economic rights. This case involved Ms. Dzhenalieva whose husband died in the line of duty on September 17, 1991. The compensatory damage was ordered to Ms. Dzhenalieva's disabled son. According to the Labor Code of the Kyrgyz SSR adopted in 1972 (invalidated in 2004) the payment for compensatory damage was calculated from the salary of her deceased husband. In 2008, new amendments to Civil Code and Labor Code changed the method of increasing the compensatory damage. Before the amendments, the Civil Code and Labor Code established that payments for compensatory damage increase with the growth of minimum wage (*minimalnyi razmer oplaty truda*). Since new amendments were enacted, the payments for compensatory damage increases proportionally to increase of calculated indicator (*raschetnyi pokazatel*). However, since 2006, the calculated indicator – 100 soms ($ 1.18) – has not increased. On 23 September 2013, Ms. Dzhenalieva contested the new amendments to Civil Code and Labor Code. On 19 February 2014, the Kyrgyz Constitutional Chamber held that new amendments to Civil Code and Labor Code do not violate the Constitution. This decision reveals a lack of one of the core elements of transformative constitutionalism – substantive protection of socio-economic rights. It is important to stress that the decision was not taken unanimously. In a dissenting opinion, the Judge indicated that the state should ensure social security in old age, in case of illness and disability, and loss of the breadwinner (Article 53)[53]. "Pensions and social assistance, based on economic opportunities of the state, must ensure a standard of living not lower than

51 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po Obrascheniyu grazhdan Baltabaeva T., Isakova I. I., Artyikova A., Mamyitova T. B., Korkmazova H. Z.* (2013), at: http://constpalata.kg/wp-content/uploads/2013/11/o-pensiyah-za-osoby-e-zaslugi.pdf/ accessed on January 20, 2021.

52 Ibid, *Osoboe Mnenie Sudei Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki E. Zh. Oskonbaeva i K. S. Sooronkulovoy.*

53 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po delu Dzhenalievoi* (2014), at: http://constpalata.kg/wp-content/uploads/2014/03/Reshenie-po-delu-Dzhenalievoj-I.pdf/ accessed on January 20, 2021.

the subsistence minimum established by law"[54]. Hence, the dissenting opinion reflects the concept of transformative constitutionalism.

Thus, analysis of socio-economic rights adjudication revealed a lack of common approach to their enforcement. The concept of transformative constitutionalism could anchor better prospects for protection of socio-economic rights in challenging times of transformation.

5.3 Separation of powers cases

The Kyrgyz Constitutional Chamber's readiness to stand up to the Parliament illustrates the cases involving separation of powers and institutional checks and balances. Analysis of these cases revealed two important issues. Firstly, the Constitutional Chamber does exercise its independence and is able, to some degree, to serve as a credible check on the Parliament. Secondly, decisions of the Constitutional Chamber involving separation of powers bring changes in a political system in period of transformation. This constitutional justice limits higher governmental bodies within their powers established by the Constitution on basis of separation of powers[55].

5.3.1 The Supreme Court vs. Parliament case

On 24 April 2019, the Kyrgyz Constitutional Chamber reached an important decision on separation of powers and institutional checks and balances. The Chief Justice of the Supreme Court challenged the legal provision of the Law "On Regulation of the Zhogorku Kenesh of the Kyrgyz Republic" stating that parliament has a power to hear a report of the Chief Justice of the Supreme Court on the functioning of judicial system. The Constitutional Chamber – relying on the fact that Kyrgyzstan is a democratic and law-based state (Article 1), separation of powers (Article 3), concept of parliamentarism, legal positions on checks and balances and judiciary independence expressed in its earlier decisions, and the UN Basic Principles on the Independence of the Judiciary (1985) – held that parliament does not have authority to hear annually a report on judicial system's functioning as far as it violates judicial independence and separation of powers. At the same time, the Constitutional Chamber stated that information on judicial system's functioning should be open to public and Parliament (Article 3). This

54 Ibid, *Osoboe Mnenie Sudyi Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki E. Zh. Oskonbaeva,* at: http://constpalata.kg/wp-content/uploads/2014/03/Reshenie-po-delu-Dzhenalievoj-I.pdf/ accessed on January 20, 2021.

55 Ch. Musabekova, *'Obzor Praktiki Konstitutsionnoy Palatyi Verhovnogo Suda KR po Delam, Svyazannyim s Printsipom Razdeleniya Gosudarstvennoy Vlasti, Materialyi Mezhdunarodnoy Konferentsii Mesto i Znachenie Organa Konstitutsionnogo Kontrolya v Effektivnom Funktsionirovanii Sistemyi Sderzhek i Protivovesov Mezhdu Vetvyami Gosudarstvennoy Vlasti,* (2016), 151.

information can be provided to Parliament exclusively by initiative of judiciary[56]. Thus, the Constitutional Chamber through judicial activism defended the principle of separation of powers.

5.3.2 The Government vs. Parliament case

On October 9, 2013, the Government contested the legal provisions of Law "On Republican Budget of the Kyrgyz Republic for 2013 and forecast for 2014–2015" and Law "On Republican Budget of the Kyrgyz Republic for 2014 and forecast for 2015–2016" stating that Ministry of Finance should agree on the planning of capital investments from the republican budget with a special committee of Parliament in an enlarged format. On 11 April, 2014, the Constitutional Chamber – relying on separation of powers (Article 3) and institutional checks and balances – held that

capital investments' planning from republican budget on the stage of its execution approval with special committee of Parliament in an enlarged format violates principle of separation of powers and institutional checks and balances established by the Constitution[57]. The Constitutional Chamber stated that the legislator, granting the right to the special committee of Parliament in an enlarged format to approve the planning of capital investments from the republican budget at the stage of its execution, went beyond the constitutional provisions in terms of delimiting the functions and powers of public authorities[58].

5.3.3 Judge vs. Prosecutor's Office (Prokuratura) case

On 16 October 2012, the prosecutor of Osh region (*oblast*) initiated a criminal prosecution against K. Sultanov – the Chairperson of Uzgen district court of Osh region (*oblast*). On 23 March 2013, Mr. Mironov representing the interest of judge Sultanov contested part 1 of the Article 30 of the Constitutional Law "On the Status of Judges in the Kyrgyz Republic" stating that the right to initiate a criminal prosecution against a judge is granted to the Prosecutor General and prosecutors of regions, Bishkek and

56 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po Obrasheniyu Predsedatelya Verkhovnogo Suda Kyirgyizskoy Respubliki (2019), at:* http://constpalata.kg/wp-content/uploads/2019/04/predst.-Verhovnogo-suda.pdf/ accessed on February 1, 2021.

57 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po Predstavleniyu Pravitelstva Kyirgyizskoy Respubliki* (2014), at: http://constpalata.kg/wp-content/uploads/2014/04/reshenie-po-predstpavleniyu-Pravitel-stva.pdf/ accessed on February 1, 2021.

58 Ch. Musabekova, *'Obzor Praktiki Konstitutsionnoy Palatyi Verhovnogo Suda KR po Delam, Svyazannyim s Printsipom Razdeleniya Gosudarstvennoy Vlasti, Materialyi Mezhdunarodnoy Konferentsii Mesto i Znachenie Organa Konstitutsionnogo Kontrolya v Effektivnom Funktsionirovanii Sistemyi Sderzhek i Protivovesov mezhdu vetvyami Gosudarstvennoy Vlasti,* (2016), 155.

Osh cities. The Constitutional Chamber – relying on the fact that a judge has a special status established by the Constitution and the Constitutional Law "On the Status of Judges in the Kyrgyz Republic", as well as judicial independence (Article 94) – held that prosecutors of regions (*prokurory oblastei*), Bishkek and Osh cities cannot initiate a criminal prosecution against a judge[59]. Thus, this decision illustrates Constitutional Chamber's contribution to ensure judicial independence. However, trust in the judicial system remains low[60].

5.3.4 Ex-Presidential immunity cases

Ex-presidential immunity cases present one of landmark cases that bring changes to Kyrgyzstan's political system. In 2018 and 2019, Constitutional Chamber reached important decisions involving ex-presidential immunity. On 18 April 2018, the first case was brought by Mr. Toktakunov who contested the Article 12 of the Law "On Guarantees of the Activity of President of the Kyrgyz Republic" stating that the ex-president of the Kyrgyz Republic has immunity to criminal and administrative suits for actions or omissions committed during the presidential term. Ex-presidential immunity applies to his residence, office, vehicles, communications equipment, archives, other property, documents, luggage and correspondence. On 3 October 2018, the Kyrgyz Constitutional Chamber – relying on equality before the law (part 3 of Article 16), separation of powers (Articles 1, 3), status of ex-president (parts 1,2 of Article 69) – held that contested Article 12 of the Law "On Guarantees of the Activity of President of the Kyrgyz Republic" contradicts the Constitution as far as it does not determine a procedure for ex-presidential accountability. Hence, this procedure should be established by the Law "On Guarantees of the Activity of President of the Kyrgyz Republic"[61]. As a result, Parliament enacted amendments to the Law "On Guarantees of the Activity of President of the Kyrgyz Republic" which not only established the procedure of lifting immunity from ex-president and impose accountability, but also established restrictions on ex-president's rights. These facts led to a second case on ex-presidential immunity.

The second case on ex-presidential immunity went before the Constitutional Chamber on 24 October, 2019. According to aforementioned amendments of the Law "On Guar-

59 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po delu Sultanova* (2013), at: http://constpalata.kg/wp-content/uploads/2013/12/reshenie-po-delu-Sultanova-1.pdf/ accessed on February 1, 2021.

60 *Action Document for EU-Central Asia Rule of Law Programme for the period 2014–2020*, at: https://ec.europa.eu/international-partnerships/system/files/aap-financing-central-asia-annex3-c-2018-7651_en.pdf/ accessed on March 7, 2021.

61 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki v svyazi s obrashcheniem Toktakunova N.* (2018), at: http://constpalata.kg/wp-content/uploads/2018/10/Toktakunova-N.A.-resh.pdf/ accessed on February 1, 2021.

antees of the Activity of President of the Kyrgyz Republic" the ex-president is restricted from holding political and special governmental positions, as well as positions in the governing bodies of a political party or otherwise participate in the activities of political party; the President is granted the right to terminate all guarantees provided to ex-president upon the Prosecutor General's request; the procedure of lifting ex-presidential immunity and imposing accountability is vested with *ex-post facto* effect. On 24 October 2019, Kyrgyz Constitutional Chamber held that these amendments do not violate the Constitution, except legal provision that granted the right to terminate all guarantees provided to the ex-president[62]. This controversial decision caused heated discussions in society.

Thus, analysis of these cases revealed that in times of political stability the Constitutional Chamber defended separation of powers. However, in challenging times of political turmoil it became embroiled in political struggle.

6. Conclusion

The chapter explores the development of constitutional review in Kyrgyzstan from the perspective of transformative constitutionalism. This analysis provides three main conclusions. First, constitutional review in Kyrgyzstan helps us better understand application of the concept of transformative constitutionalism and its effect on state-building in Kyrgyzstan. The study revealed that the Constitutional Chamber defendes rights such as access to justice and the right to effective remedy. The Constitutional Law "On Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" provides a right to bring cases for individuals, legal entities and other state institutions. Hence, the Constitutional Chamber is able, to some degree, to serve as a credible check on the Parliament.

Second, the application of the concept of transformative constitutionalism in the context of Kyrgyzstan is constraint. In particular, one of the core elements of transformative constitutionalism – enforcement of socio-economic rights – does not fully apply in Kyrgyzstan. Analysis of the Constitutional Chamber's decisions on protection of socio-economic rights showed a lack of common approach to this issue. Application of transformative constitutionalism should help to better enforce socio-economic rights in Kyrgyzstan.

Third, according to the concept of transformative constitutionalism, judicial activism not only plays significant role in the adjudication of human rights, but also brings changes to the political system. In order to ensure judicial activism, it is important to

62 *Reshenie Konstitutsionnoy Palatyi Verhovnogo Suda Kyirgyizskoy Respubliki po Obrascheniyu grazhdanina Kasyimbekova N. A., Koduranovoy A. S., Karamushkinoy I. Yu., Mademinova M. G., Artyikova A., Orozovoy K. B., Usubalieva T. B.* (2019), at: http://constpalata.kg/wp-content/uploads/2019/10/resh-Kasy-mbekov-N-A-i-dr-poslednij-12–05ch-25-10-2019.pdf/ accessed on February 1, 2021.

strengthen judicial independence by amending the procedure for electing the Constitutional Chamber's justices. In particular, after they are elected, they should be appointed until they reach mandatory retirement age. Judicial independence is important to establish rule of law and law-based state in challenging times of transformation in Kyrgyzstan. However, judicial independence is more than a legal problem; it also implicates the transformation of state-building in order to ensure independent and effective judicial system, as well as increase legal culture. Thus, the concept of transformative constitutionalism could contribute to socio-political change through law and improve the judicial adjudication of socio-economic rights in Kyrgyzstan.

Appendix

Table 2. Comparative table of functions of Kyrgyz Constitutional Court and Constitutional Chamber

#	The Constitutional Court of the Kyrgyz Republic (1993)	The Constitutional Chamber of the Supreme Court of the Kyrgyz Republic (2010)
1.	Recognizes unconstitutional laws and other normative legal acts in case of their discrepancies with the Constitution;	Recognizes unconstitutional laws and other normative legal acts in case of their contradiction with the Constitution;
2.	Settles the disputes relating to the validity, application and interpretation of the Constitution;	Gives an opinion on the constitutionality of international treaties that have not entered into force for the Kyrgyz Republic;
3.	Gives an opinion on the legality of the election of the President;	Gives an opinion to the draft law on amendments to the Constitution.
4.	Gives an opinion on the issue of impeachment the President, dismissal judges of the Constitutional court, Supreme Court, Supreme Arbitration Court;	
5.	Gives the consent to prosecution of judges of local courts;	
6.	Gives an opinion on amendments and addenda to the Constitution;	
7.	Cancels decisions of local self-government bodies, contradicting the Constitution;	
8.	Decides the constitutionality of the law enforcement practices affecting the constitutional rights of citizens.	

Source: Author's compilation based on the 1993 Constitution, 2010 Constitution, Law "On Constitutional proceedings of the Kyrgyz Republic" (1993, invalidated), Constitutional Law "On Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" (2011).

Table 3. The jus standi requirement before the Kyrgyz Constitutional Court and Constitutional Chamber

	The Constitutional Court of the Kyrgyz Republic		The Constitutional Chamber of the Supreme Court of the Kyrgyz Republic
1.	President of the Kyrgyz Republic	1.	Natural person (persons) or legal entity (entities)
2.	Parliament (*Zhogorku Kenesh*) of the Kyrgyz Republic	2.	Parliament (*Zhogorku Kenesh*)
3.	Members of Parliament of the Kyrgyz Republic	3.	Faction (factions) of Parliament
4.	The Cabinet of the Kyrgyz Republic	4.	President
5.	Prime-Minister of the Kyrgyz Republic	5.	The Cabinet
6.	Attorney General of the Kyrgyz Republic	6.	Prime-Minister
7.	Central Commission for Elections and Referenda	7.	Judge (judges) of the Kyrgyz Republic
8.	Ombudsman of the Kyrgyz Republic	8.	Local self-government bodies
9.	Local councils (*keneshs*)	9.	Attorney General
10.	Courts of the Kyrgyz Republic	10.	Ombudsman
11.	Legal entities and natural persons		

Source: Author's compilation based on the Law "On Constitutional proceedings of the Kyrgyz Republic" (1993, invalidated) and the Constitutional Law "On Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" (2011).

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AKMAL SAIDOV

Constitutional Development of Uzbekistan and Japan
Comparative Analysis

Outline

A comparative analysis of two regimes that are markedly different in the construction of government and society as a whole provides for significant differences and interesting parallels. The author aims to highlight commonalities brought into the governance and functioning of two countries by examining the constitutional regime. The work is dispersed in three sections, first of which very briefly highlights the most important historical and thematic trends in the development of constitutional regimes and their differences from each other. Three distinct generations of constitutions drawn up and implemented around the world are differentiated chronologically and characteristically at the same time.

The second part of the paper looks at the historical development of the constitution of the Republic of Uzbekistan and highlights the historical, cultural and social realities affecting the structure and content of the constitution. This part clearly highlights how the constitution of Uzbekistan benefited from global experience and expertise in the process and provides a breakdown of the structure of Uzbek constitution with the aims of such division.

Further discussion in the third part is focused on the constitution of Japan in similar fashion to the second part. Initially, historical developments affecting the themes, characteristic and content of the Japanese Constitution are provided.

Two distinct stages of history that produced two essentially different constitutions during Meiji Japan and post-WWII Japan are compared within the section. At the same time, these two stages are seen as evolutionary events complementing each other. While recognizing the sources of the text in Japanese constitution as of American and European constitutions, the paper clearly demonstrates the factors that set this constitution apart from all other in a ten-step procedure.

The final part of the section outlines the impact of the second Japanese constitution on the structure of government, legal atmosphere in the country and social life.

In a democratic society based on the rule of law, the role of the Constitution is paramount. But it increases even more during periods of reform, when we are talking about

fundamental changes not only in the political system of society, but also to its economic infrastructure. Only a Constitution that is adequate to the new social needs can provide the optimal combination of dynamism and stability necessary for the success of major socio-economic and political-legal reforms.

Nowadays, there are about 500 constitutions in the world, including about 200 constitutions of independent states and 300 constitutions of federal subjects.

World constitutions can be roughly divided into three generations:

first generation includes the US Constitution and pre-World War II state constitutions;

second generation – constitutions adopted between 1946 and 1990;

third generation – the constitutions adopted after the 1990s, as a result of the fall of the "Berlin Wall" and the elimination of the socialist system in many states.

The last decade of the twentieth century will go down in the world legal history as a period of deep qualitative changes in the constitutional worldview and in the state structure of the members of the world community. The world has entered a new constitutional era. Its distinctive features are:

first, strengthening legal integration processes and cooperation between States and peoples, creating common political, economic and legal spaces, and moving to common international norms, rules and standards;

second, the emergence of constitutions of new independent States on the constitutional map of the world as a result of the collapse of the socialist camp and the elimination of totalitarian regimes. This is evidence that the problems of constitutional reconstruction and the reform of all spheres of public life of newly formed sovereign States have outgrown the scope of purely national ones and are rightfully global;

third, the expansion of the subject of constitutional regulation of public relations, the constitutionalization of public consciousness, the emergence of the "third generation" of world constitutions.

As part of the former USSR, Uzbekistan was among the first to declare its goal of achieving true state sovereignty. In Uzbekistan, earlier than in other union republics, the post of President was introduced, a Commission on State Symbols was created, a Declaration of Sovereignty was adopted, a Constitutional Commission was formed, and the first Constitution of an independent state was developed and adopted.

1. Trends and features of the constitutional development of Uzbekistan

The idea of the need to develop a new Constitution of Uzbekistan was voiced at the first session of the Supreme Council of the Republic of the twelfth convocation in March 1990.

In the *Declaration of Sovereignty* proclaimed on June 20, 1990 by the Supreme Council of Uzbekistan, it was said that this document should be the basis for the development of a new Constitution of the Republic. On the same day, the Supreme Council, headed by the President of Uzbekistan, formed a Constitutional Commission of 64 people.

On August 31, 1991, the state independence of the Republic of Uzbekistan was proclaimed and the Constitutional Law "On the Foundations of State Independence of the Republic of Uzbekistan" was adopted. The provisions fixed in it were tested in practice, and the process of drafting the Constitution of Uzbekistan started. When preparing the project, the constitutions of the countries of Asia and Europe, Africa and America were studied, and the Uzbek Constitution was developed taking into account fundamental ideas and principles of the Universal Declaration of Human Rights and other international acts on human rights.

It is necessary to note the following features of the preparation and adoption of the first Constitution of Independent Uzbekistan.

The first feature: the ideas and norms of the Constitution are based on the deep historical roots of the Uzbek people, it has absorbed centuries of experience and spiritual values, and the rich historical legal heritage of our great ancestors.

The second feature: the Constitution has absorbed all the best from global constitutional experience.

The third feature: the Constitution contains, like other constitutions of democratic countries, a mechanism for ensuring and protecting human rights and freedoms based on international standards.

On September 8, 1992, the Constitutional Commission approved most of the work done and decided to publish the draft Constitution for public discussion**.**

The nationwide discussion of the draft Basic Law acquired an exceptionally broad character. It took place from late September to early December 1992 in an atmosphere of political activity, creative enthusiasm of citizens and became an effective and efficient school for the development of democracy in Uzbekistan. Almost the entire adult population of the country took part in it. In the press, in radio and television broadcasts,

active discussions developed, numerous meetings were held and conversations were organized on issues related to the draft Constitution.

After the publication of the draft, the Constitutional Commission received about 600 letters with feedback and comments. In the republican press more than a hundred materials on the draft Constitution were published. The total number of proposals and comments received exceeded five thousand. Taking into account the discussion, the draft Constitution was significantly adjusted, finalized and on November 21, 1992, again published for the second time in newspapers for further discussion**.**

Thus, there was a legal precedent – the national discussion took place in two stages. This circumstance was a powerful incentive to activate the participants in the discussion, thanks to which it gave a new character to the national exchange of views. The purpose of this action was that citizens could see the fruits of their participation in the discussion of the draft Constitution in the revised version. Many comments and suggestions received at the initial stage of the national discussion were implemented in the new version.

The draft Constitution has been thoroughly reviewed by experts from the most authoritative international organizations and democratic states, such as the United Nations, the Organization for Security and Co-operation in Europe, the United States, Great Britain, and France.

World constitutional experience was reflected in the Constitution of Uzbekistan through:

first, a republican form of government – as one of the forms of direct democracy;

secondly, the classical principles of constitutional regulation – separation of powers, human rights, adherence to the norms of international law, stability of the Constitution;

thirdly, the organization of the text of the Constitution in the Preamble and into sections, chapters and articles, as well as the logic of their arrangement;

fourthly, the brevity of the content – so as not to create unnecessary regulation that fetters real state and public life; The absence in the Constitution of reference norms for future laws is subordinated to the same task;

*fifth***,** rejection of ideologization, that is, rejection of the monopoly of one ideology, freedom of thought, speech, conscience and belief;

*sixth***,** constitutional guarantees of the supremacy of the Constitution, the creation of a Constitutional Court, a special procedure for changing the Basic Law;

The 1992 Constitution became the official "calling card" of sovereign Uzbekistan. Based on our interests and aspirations, the Constitution adopted the progressive constitutional experience accumulated by the most diverse countries of the East and West, South and North.

Thus, the Constitution of Uzbekistan embodies the traditions of its own centuries-old legal history and the principles of the world's constitutional experience. If we consider the Constitution of Uzbekistan of 1992 in connection with world constitutional development, we can say that it consistently fits into a number of new, "third" generation constitutions adopted in the world in the last decade of the twentieth century.

Weighing the provisions enshrined in the Constitution on the strict "scales" of democracy, we can say with full confidence that it is one of the most democratic in the world. The *current* Constitution of Uzbekistan consists of the Preamble, the main part, represented by 128 articles, combined into five sections, consisting of 26 chapters, as well as the final provisions, which is the sixth section. The Basic Law is preceded by a short Preamble, the essence of which is: The Constitution is adopted by the people – the sovereign master of the country, expressing their will in it. If the first section is a set of basic principles of the constitutional order, then the second section is the Uzbek Bill of Rights, in other words, an integral and comprehensive system of personal, political, economic, social and cultural rights. Naturally, the section on human rights precedes the section on the system of government bodies. It is not the state that grants rights, but the citizen consciously and responsibly uses the set of inalienable natural rights given to him by freedom**.**

The third section is unusual, perhaps this is not found in any of the constitutions of the countries of the world. The main goal of this section is to revive the traditions of civil society, to legalize public associations, political parties, the media and other institutions of civil society, ensuring their real and sustainable development**.**

The fourth section is devoted to the state and administrative-territorial structure. There is a separate chapter on the Republic of Karakalpakstan.

The fifth section establishes a new system of government bodies based on the principle of separation of powers, reveals the structure of the highest and local government bodies.

The sixth section contains the procedure for amending the Constitution.

The structure of the Constitution of the Republic of Uzbekistan shows its focus on achieving:

first, civil peace, that is, national and social harmony;
secondly, freedom of the individuals and freedom of choice;
third, ideological pluralism and political stability;

fourth, sustainable economic growth and prosperity;
fifth, the fulfillment by the state of its obligations both to its citizens and to the world community.

The constitution can be changed by a two-thirds majority of the members of both houses of parliament or by referendum (art. 127); rejected amendments may be resubmitted after a year (art. 128).

A dynamic and evolutionary process of approval and implementation of constitutional principles and norms is underway in Uzbekistan. On this path, the country has advanced as far as it has ever advanced in its entire history.

Since its adoption, that is, since December 8, 1992, the Constitution has been amended and supplemented 16 times.

Amendments were made in 1993, 2003, 2007, 2008, 2011, 2014, 2017, 2018, 2019 and 2021.

Of the 128 articles of the 1992 Constitution, 35 articles were amended 78 times, including 16 articles were amended and supplemented 1 time, 10 articles – 2 times, 5 articles – 3times, 3 articles (80, 98 and 117) – 5 times, and 1 article (93) – 9 times.

Significant changes and additions to the Constitution of the Republic of Uzbekistan have been made in order to ensure a balanced distribution of powers between three subjects of state power: the President – the head of state, legislative and executive power, the introduction of the institution of a vote of no confidence in the Prime Minister and a number of other innovations.

The most significant of the amendments to the 1992 Constitution was associated with the establishment of a bicameral parliament, an increase in the role and responsibility of the legislative and executive branches of government, as well as a clear definition and legal limitation of the functions of the President of the Republic of Uzbekistan.

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2. Features of the constitutional history of Japan

The history of constitutional development of Japan knows two constitutions: the Meiji Constitution of 1889 and the current Constitution of 1947.

Unlike most modern states, Japan has not had numerous constitutional acts in its history. For over 300 years, it remained isolated from the Western world and lived according to its own way of life and traditions. As a result of government changes caused by events known in history as the Meiji Revolution, the first Constitution of the Empire of Japan was adopted in 1889.

The Meiji Constitution consolidated the elimination of feudal relations in the country and the strengthening of national unity. The Constitution was promulgated by the Emperor, who also announced a number of other important state decisions. It became the legal "supporting structure" of the new Japanese state and society.

Simultaneously with the Constitution, the most important laws were promulgated – on the imperial family, on Parliament, on the House of Peers, on elections to the Chamber of Deputies, on finance, which entered into force in 1890.

The 1889 Meiji Constitution consisted of 76 articles grouped into seven chapters. In accordance with it, the form of government of Japan acquired the features of a dualistic monarchy. Imperial power was almost unlimited: it had Supreme power as head of state, and had the right to exercise legislative powers in agreement with the Imperial Parliament[1], approving laws and ordering their execution, or imposing an absolute veto. It also had the right to convene and dissolve the lower house of Parliament and issue decrees that had the force of law, subject to the approval of the Parliament

The emperor was empowered to establish various bodies of state power, appoint and dismiss civil and military officials, and was the Supreme Commander of the Army and Navy. The emperor relied on the Privy Council, whose members he appointed from among the highest officials. This body gave recommendations on the main directions of the administration of the country, and in addition, had the right to interpret the Constitution. The judiciary also depended to some extent on the Emperor.

The Meiji Constitution – the first constitution in Asia – was stable and did not change until the second Japanese Constitution of 1947 was adopted. The first Japanese Constitution of 1889 was "modernized but not completely".

1 The Japanese Parliament was the first Parliament in Asia. The first General election was held on 1 July 1890, and the first session of Parliament was called on 29 November 1890.

Preparation and adoption of the Japanese Constitution of 1947. The current Constitution of Japan was approved on October 7, 1946. The Constitution was promulgated by Emperor Shōwa on November 3, 1946, and came into force on May 3, 1947. During this period, a significant number of laws of constitutional significance were also passed: Law on the Imperial Family, Law on Parliament, Law on the Cabinet, Law on the Judiciary.

In 1946, several drafts of the Constitution were developed. While the Japanese project proposed the preservation with minor changes to the constitutional system that operated in the country in accordance with the Meiji Constitution, the allied powers prepared their own project based on the principles of Anglo-Saxon law.

In April 1946, the first postwar general election were held, as a result of which the new Parliament formed the post-war Government. This Parliament adopted the new Constitution on October 7, 1946. In the text of this Constitution:

firstly, it is a transplant, since it is compiled from the provisions of American and European constitutional law[2]. The influence of the US Constitution can be traced in the consolidation of rights and freedoms, especially personal rights, based on the concept of individualism, on the structure and functioning of the institution of constitutional control[3];

secondly, the Constitution of Japan shows a certain continuity in relation to the previous Japanese Constitution, which can be seen in its structure[4]. While the Meiji Constitution of 1889 sets out only the structure and powers of the Central government, the Constitution of 1947 begins with an extensive Preamble, which includes the Declaration of General principles of the structure of the state, as well as the conceptual values of the rights and duties of the people.

Despite this continuity in a number of provisions of the new Constitution in comparison with the Constitution of 1889, the Constitution of 1947 differs in the following features.

2 During the occupation of Japan, the headquarters of American General Douglas MacArthur prepared a draft of a new Constitution that takes into account the provisions of the US Constitution of 1787 and the USSR Constitution of 1936. For example, the consolidation of the equality of men and women in the Japanese Constitution took place, according to some researchers, precisely under the influence the Stalinist Constitution of the USSR in 1936. See: V.M. Kuritsyn, D.D. Shalyagin. The Experience of constitutionalism in the USA, Japan and the Soviet Union. – M.: Academic project, Trixsta, 2004. – P. 232–271.

3 Okudaira Y. Some Consideration of the Constitution of Japan. Tokyo, 1988. P. 2–3.

4 When comparing the texts of the two Constitutions of 1889 and 1947. it is impossible not to notice some continuity and similarity of their structures. However, it seems controversial to say that the 1947 Constitution "is formally a series of amendments to the Meiji Constitution, but traditionally considered a separate constitution".

The *first feature*. The Constitution was intended to create a liberal democratic state of the Western European model, although preserving the monarchical form of government, which was a tribute to the centuries-old tradition. The synthesis of new democratic and traditional legal values in the Constitution of Japan in 1947 was very successful.

The *second feature*. The Constitution established the people's sovereignty, which was a fundamentally new provision for Japan. The principle of popular sovereignty as the basis of state power did not previously exist in Japanese constitutional history. The fact that state power emanates from the people, not from the Emperor[5], radically influenced the wording of the Constitution, including those relating to the legal status of the Emperor, the rights and freedoms of individuals, elected public officials, the formation of chambers of Parliament.

The *third feature*. The principle of the divine origin of the imperial power was excluded, and the Emperor became nothing more than a "symbol of the state and the unity of the nation" and performs mainly ceremonial functions. The Constitution emphasizes that the Emperor is not vested with powers related to the exercise of state power (Article 3). The property of the imperial family is the property of the state, and all its expenses are approved by Parliament as part of the budget (Article 88). The status of the Emperor is determined by the common will of the people, who have sovereign power. The order of succession to the throne in accordance with the Constitution is determined in accordance with the Imperial House Law of 1947.

The Emperor can only carry out state actions that are provided for by the Constitution, and is not vested with the powers to exercise state power (Article 4). The imperial throne is inherited through the male line by the eldest son[6]. The importance of the Emperor of Japan is close to the status of the English monarch, i. e. the status of the head of a monarchical country with a parliamentary form of government.

*The fourth feature***.** The second Chapter of the Constitution is called "Renunciation of war" and consists of one article (Article 9), which sets out the principle of renouncing

5 See: Durdenevsky V. N., Lundshuveit E. F. Constitution of the East. – L., 1926.-- P. 166.

6 The Imperial Dynasty of Japan is considered the oldest surviving monarchy in the world and has ruled over Japan since 660 BC. and goes back to its ancestor – the supreme Shinto goddess Amaterasu. The reign of each Emperor is declared a special era, which receives its symbolic meaning. The current era – "the era of Rave" is translated as "order", "harmony", as well as "blooming world". It is taken from the Collection of Myriads Leaves, an old collection of Japanese poetry. For the first time, the source of the name of the era was Japanese literature. Until now, the names have been borrowed from Chinese philosophy and literature. The Era of Reiwa begins on May 1, 2019, from the day Crown Prince Naruhito ascended the throne.

the creation of military forces and the conduct of military operations by the state[7]. For this reason, the Constitution of Japan is called the "Pacifist Constitution" (平和憲法). The historical conditions for the adoption of the Constitution required the inclusion of Article 9, which established the rejection of war as a means of resolving international disputes. The norm was fixed, according to which "right of belligerency of the state will not be recognized".

The norms of Article 9 are exclusively of Japanese, and not of American origin. For the first time, the idea was proposed by the Japanese Prime Minister, Shidehara Kijūrō[8], and not by General MacArthur, the commander of the occupation forces in Japan, who initially hesitated to approve the proposal, considering that the consequences of its implementation could undermine US interests in the far East[9].

It is believed that pronounced pacifism, i. e. the refusal to restore Japan's military potential, became one of the factors of Japan's economic growth after the end of World War II (along with other circumstances).

The *fifth feature*. The Constitution defines the people as the bearer of rights and obligations, who cannot be restricted in the enjoyment of fundamental human rights (article 11) and who must refrain from any abuse of freedoms and rights and be responsible for their use in the interests of the public good (article 12). Thus, the Constitution establishes not only the legal, but also the moral aspect of the enjoyment of fundamental rights.

The *sixth feature*. The Constitution contains many fairly typical provisions that were reflected in the second-generation constitutions adopted in the mid-twentieth century. In particular, it applies to the articles on the rights, freedoms and duties of man and citizen. Provisions on equality before the law, the prohibition of discrimination based on race or nationality, religion, gender, social status and origin, and the rejection of class or other privileges are quite characteristic of second-generation constitutions.

The Constitution contains many fairly typical provisions that were reflected in second-generation constitutions adopted in the mid-twentieth century. In particular, it ap-

7 In September 2015, the upper house of the Japanese parliament passed a law allowing the use of the country's self-defense forces outside the national territory.

8 The rejection of the war, however, was known earlier. This principle was first enshrined in the Decree of the Constituent Assembly of May 22, 1790 during the Great French Revolution. The preamble of the French Constitution of 1946 textually prohibited the principle of 1790. The refusal of aggressive war was contained in the Spanish Constitution of 1931 (Articles 6 and 77), in the Philippine Constitution of 1935 (Article 2), etc. This principle is also included in the Constitution Italy 1977 (Article 11).

9 Auer J. E. Article nine of Japan's Constitution: from Renunciation of Armed Force "forever" to the third largest defence Budget in the world // Law and Contemporary Problems. Vol. 53, Spring 1990. № 2. P. 173.

plies to the articles on the rights, freedoms and duties of man and citizen. Provisions on equality before the law, the prohibition of discrimination based on race or nationality, religion, gender, social status and origin, and the rejection of class or other privileges are a characteristic of second-generation constitutions.

It should be noted that for Japan, these formulations were of particular significance as a reflection of the new values of society, which refused the absolute power of the monarch, granting titles, titles and privileges, and centuries of class inequality.

The *seventh feature*. The Constitution established traditional rights and freedoms in the Western sense – personal, political, economic, social, and cultural. An analysis of the relevant articles of the Constitution (articles 13–40) shows the clear influence of the doctrine of natural rights, as well as the detailed regulation of traditional types of rights and freedoms contained in second-generation constitutions.

The *eighth feature*. According to the Constitution, Japan is a constitutional monarchy with a parliamentary government. According to the Constitution, the Emperor promulgates amendments to the Constitution, laws, government decrees and treaties, convenes Parliament, dissolves the House of Representatives, and announces general parliamentary elections. It also confirms, in accordance with the law, the appointment and resignation of government ministers, the powers and credentials of diplomatic representatives. Any actions of the Emperor must be sanctioned by the government according to the formula "with the advice and approval of the Cabinet", which is responsible for them (Article 7).

The *ninth feature*. The Constitution shows the influence of the Anglo-Saxon model of the separation of powers, proceeding from the recognition of the principle of the supremacy of Parliament over the executive branch. The political system of Japan is based on the principle of separation of legislative, executive and judicial powers, as well as parliamentary democracy. The principle of separation of powers, combined with the recognition of popular sovereignty, the fundamental rights and freedoms of citizens, as well as guaranteeing the foundations of local self-government, establishes the democratic basis for the constitutional order of Japan.

The *tenth feature*. Based on the principles of autonomy of local government bodies and persons residing on their territory, local government bodies are granted independent powers, separate from those of central bodies, in particular with regard to administrative matters (Articles 92–95). The Meiji Constitution lacked local self-government rules.

The constitutional system of government bodies. The Constitution proclaims that sovereign power belongs to the people and specifies that the highest organ of state power is Parliament (Article 41), executive power is exercised by the Cabinet (Article 65), and judicial

power belongs to the courts (Article 76). To ensure the relationship between the Parliament and the Cabinet, the so-called "parliamentary cabinet system" has been adopted.

The Constitution establishes the principles of a parliamentary state system, basic guarantees and rights of citizens. The text of the Constitution has 103 articles, combined into 11 chapters.

Chapter 4 of the 1947 Constitution (Articles 41–64) contains provisions concerning Parliament, Chapter 5 (Articles 65–75) contains provisions concerning the Cabinet, and Chapter 6 (Articles 76–82) contains provisions concerning the judiciary.

Legislature. Parliament (National Diet of Japan) consists of a House of Representatives and a House of Councilors, which are composed of elected members representing the entire people (art. 42 and art. 43 para. 1).

All Japanese citizens, both women and men, over the age of 20 have equal voting rights in elections. Any Japanese citizen over the age of 25 can be elected as a member of the House of Representatives, and individuals over the age of 30 can apply for election as a member of the House of Councilors.

The 1947 Constitution States that the term of office of members of the House of Representatives is four years (but their term ends before the end of the full term if the House of Representatives is dissolved); while the term of office of Members of the House of Councillors is six years (half of the members are re-elected every three years) (articles 45 and 46).

The peculiarity of the Japanese Parliament is that the chambers are not equal. Moreover, the House of Representatives has a significant advantage in its powers compared to the House of Councillors. The government is responsible to the lower house. The order of their activity and responsibility (dissolution) is different – the upper house (House of Councillors) cannot be prematurely dissolved. However, the lower house (House of Representatives) has more weight in the legislative process – for example, the upper house has the right to veto a bill, which can be overcome by a second vote by a qualified majority of the lower house.

Executive power. The Cabinet of Japan was founded in 1885 and approved by the Constitution of the Great Japanese Empire and the Imperial Rescript No. 135 in 1889. According to these decrees, full executive power belonged to the Emperor, who had the right to form and reform the Cabinet and appointed the Prime Minister of Japan, head over other ministers.

The Japanese Constitution of 1947 deprived the Japanese monarch of influence on state administration and transferred the functions of the executive branch to the Cabinet of

Japan, headed by the Prime Minister. The status and powers of the Cabinet are specified by the 1947 Law on the Cabinet. The legal provisions defined in these two documents are valid to this day.

The Cabinet is accountable to the Parliament of Japan, the highest state authority in the country (article 66). The Parliament has the right to express no confidence in the Cabinet, automatically sending all its members to resign (article 70).

Japan has adopted a civil service system in which administrative matters are handled by civil servants working in government at the national level and at the local government level.

Judicial system. The following provisions established by article 76 of the Constitution are fundamental in the judicial system of Japan:

firstly, all judicial power belongs to the courts (article 76, paragraph 1);

secondly, according to the Constitution, all judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws (paragraph 3 of Article 76);

thirdly, judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties.;

fourthly, no disciplinary action against judges shall be administered by any executive organ or agency (article 78).

The Parliament shall form a court from among the members of both chambers to consider impeachment violations of those judges against whom a case for removal from office has been initiated (article 64).

The appointment of justices of the Supreme Court is subject to popular review at the first general election to the House of Representatives since the appointment, and reconsideration at the first general election to the House of Representatives ten years later; this procedure is repeated in the future in the same order. In cases where the majority of voters are in favor of the removal of a judge, that judge is removed (art. 79, paras. 2, 3 and 4).

The judicial system includes the Supreme Court and lower courts (high courts, district courts, family courts, and summary courts). The Supreme Court consists of a chief justice and 14 judges. In principle, a three-stage system of case review has been adopted, and in the presence of certain circumstances provided for by law, a new hearing can be scheduled even after the case has been considered in court. In addition, as a rule, trials shall be conducted and judgment declared publicly (article 82, paragraph 1).

The Supreme Court has the power to exercise constitutional review (according to the American model).

Local government. Japan is a unitary state with well-developed institutions of local self-government. Article 92 of the Constitution States that "regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy"[10], and in accordance with this, the law on local self-government was adopted in 1947.

Constitutional human rights and freedoms. One of the characteristic features of the Constitution of 1947 is the consolidation of a wide range of rights and freedoms of citizens. The fundamental rights and freedoms of the individual are inseparable from the principle of popular sovereignty. Chapter III of the Constitution establishes the legal status of the individual. It is noteworthy that the Chapter is called "Rights and duties of the people", thereby consolidating not only the basic rights, but also the range of responsibilities.

The determining factor in establishing a new constitutional system of human rights and freedoms is the recognition of the role of the individual, not as a passive element in the authoritarian legal order, but as an active bearer of rights and freedoms.

The Constitution provides that fundamental human rights are the "fruits of the age-old struggle of man to be free" and that they are" granted to present and future generations in the hope that they will remain inviolable forever (article 97), and that "the freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people" (article 12).

With regard to equality, the Constitution states that "all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin" (article 14, paragraph 1)[11].

In addition to this, the Constitution:

first, peerage and other aristocratic institutions are prohibited (article 14, paragraph 2).

second, universal suffrage (article 15, paragraph 3) and personal dignity are guaranteed in relation to family matters and the necessary equality of the sexes (article 24).

10 Numata, Chieko. "Checking the Center: Popular Referenda in Japan." *Social Science Japan Journal*, vol. 9, no. 1, 2006, pp. 19–31. *JSTOR*, www.jstor.org/stable/30209791.

11 Introduction – Ministry of Foreign Affairs of Japan, <https://www.mofa.go.jp/policy/human/race_rep1/intro.html#:~:text=Paragraph%201%20of%20Article%2014%20of%20the%20Constitution%20provides%20that,law%20without%20any%20discrimination%2C%20including>.

third, the requirements for members of both houses of Parliament and their electors are specified (article 44);

fourth, equal right to education is provided for (article 26, paragraph 1).

With regard to rights and freedoms, the Constitution establishes freedom of thought and conscience (article 19) (based on the content of article 19, we can talk about the secular nature of the Japanese state structure) and guarantees freedom of religion (article 20) and academic freedom (article 23). Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed (article 21, paragraph 1).

With regard to the right to personal freedom, the Constitution prohibits slavery and forced labor (article 18). No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law (article 31), and person shall be apprehended except upon warrant issued by a competent judicial officer (article 33, etc.)[12].

No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause (Article 34)[13].

The use of torture and cruel punishments by public officials is strictly prohibited (article 36). In all criminal cases, the accused has the right to a prompt and open trial by an impartial court; the accused is given full opportunity to interview all witnesses; he has the right to summon witnesses forcibly at public expense and the right to the assistance of a qualified lawyer (article 37).

Furthermore, no one may be forced to give evidence against himself; a confession made under duress, under torture or under threat, or after unduly prolonged arrest or detention, may not be considered as evidence; and no person shall be convicted or punished in cases where the only proof against him is his own confession (article 38, paragraph 1). No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy (article 39).

The Constitution provides for everyone the freedom to choose and change their place of residence and choice of profession (paragraph 1 of Article 22), the right to property

12 The Constitution of Japan, <https://www.ndl.go.jp/constitution/e/etc/c01.html>.

13 The Constitution of Japan, <https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html>.

(paragraphs 1 and 2 of Article 29), as well as freedom of all persons to move to a foreign country and to divest themselves of their nationality (paragraph 2 of Article 22).

The Constitution provides that "the people have the inalienable right to choose their public officials and to dismiss them" and guarantees universal suffrage for adults and provides for secret voting (article 15).

In addition to the above, the "human rights" referred to in various treaties on this subject to which Japan has acceded are guaranteed by various laws and regulations.

Article 11 of the Constitution states that "the people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights"[14]. Article 12 provides that "the freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare"[15] and Article 13 indicates the following: "all of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs".

Thus, there is no reason to restrict within the framework of the concept of "public welfare" all such human rights that cannot contradict the rights of other people. For example, internal freedom of thought and conscience (article 19) is understood as absolute, and no restrictions are allowed here.

Chapter X "Supreme Law" establishes the priority of the Constitution in the system of national law, which also means that no other laws can contradict it. In case of contradiction with constitutional norms, laws and other state acts "have no legal force".

As stipulated in paragraph 2 of Article 98 of the Constitution ("The treaties concluded by Japan and established laws of nations shall be faithfully observed"), treaties, including human rights treaties that have been ratified by Japan and promulgated, are legally enforceable as part of its domestic law.

Prospects for the constitutional reform of Japan. A characteristic feature of the legal "life" of the Japanese Constitution is the absence of any constitutional amendments during the term of its validity, and this is no less than 70 years. This fact is partly explained by the fact that the procedure for changing the Constitution is very difficult (Chapter IX).

14 Ibid, (Article 11).
15 Ibid 4, (Article 12).

According to article 96, amendments to the Constitution can be made at the initiative of the Parliament and must be approved by both its chambers in the form of a qualified majority of at least 2/3 of the total number of members of each chamber. The next stage is popular approval by a referendum, in which the amendments must receive a majority of votes, or by another electoral method determined by a decision of the Parliament.

Only then will the Emperor promulgate the amendments "in the name of the people as an integral part of the Constitution". Despite the consolidation of this procedure for reviewing the Constitution, the law on the procedure for popular voting on its amendment has not yet been adopted.

From the 1950s through 1980s, the issue of constitutional revison was raised infrequently. In the subsequent period, proposals to change it were periodically discussed by the Parliament, parties, and the public. One of the most controversial was article 9, which prohibits the conduct of war and the use of armed forces as a means of resolving international disputes.

In August 2005, Prime Minister Junishiro Koizumi formulated an amendment allowing the use of the armed forces under the Prime Minister's control for the purpose of "protecting the nation" and their participation in international operations. The amendment sparked a lot of public debate. Proposals were made to strengthen the role of the Emperor, supplement constitutional norms on the status of women, the education system, change the legal status of religious organizations, improve the system of local self-government, and a number of others. The position was expressed about the possibility of introducing an elective post of the Prime Minister, improving the electoral system.

The reform proposals did not escape the rules on the procedure for changing the Constitution. It was proposed to simplify this procedure by replacing a qualified 2/3 majority with a simple majority when voting in Parliament. As for the provisions on popular vote, no political group has so far been willing to change them, perhaps because these provisions are still inoperative.

Despite the active polemics of various forces, as well as the activity of constitutional study committees in both Houses of Parliament since 2000, which have repeatedly held public hearings on this issue, common approaches to changing the Constitution have not been formulated.

The 1947 Japanese Constitution is the most stable constitution of our time. Since its adoption more than 72 years ago, no amendments have been made to it. This is clear evidence of the quality and stability of the Japanese Constitution of 1947. Such stability of

the Japanese Constitution is explained, first of all, by its "indisputable merits: completeness of content, accuracy of wording and skillful framing of constitutional norms"[16].

Indeed, the prestige of the Constitution among the Japanese people is very high. Constitution Day is celebrated in Japan annually on May 3, starting in 1948 – from the first anniversary of the entry into force of the new Constitution, and is a public holiday in the country[17]. The Japanese love this date, because it is included in the "Golden Week" of the holidays[18]. On this day, the Japanese Parliament building is open to visitors. There are also lectures in schools, universities and other institutions on the importance of the constitution for the development of Japan. All this is aimed at the formation of constitutional patriotism among the Japanese.

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16 Lafitsky V. Great constitutions (origins, factors of development and role in the modern world). – M.: Biblio-Globus, 2017. -- P. 359.

17 Holidays and dates in May, available at: <https://staterenta.ru/en/materials/vserossiiskie-prazdniki-v-mae-prazdniki-i-daty-v-mae.html>.

18 The so-called "Golden Week" includes Shōwa Day on April 29, Constitution Day on May 3, Greenery Day on May 4 and Children's Day on May 5.

BOTIRJON KOSIMOV

Constitutional Issues of Ensuring Judicial Independence in Uzbekistan

1. Overview of the Judiciary and Judicial Independence in the Pre-Independence Era

Judicial independence is critical for maintaining the Rule of Law in any country. The Constitution of the Republic of Uzbekistan established the separation of powers and guaranteed the independence of the judiciary. Yet, despite the abundant reforms in the field of the judiciary, judicial independence is still a concern in Uzbekistan.

This article will examine the independence of the judiciary in the pre-independence era and will analyze constitutional reforms made in the attempt of making the judiciary independent in the transition era. Moreover, it will focus on current issues for ensuring judicial independence in Uzbekistan.

The judiciary of Uzbekistan operated under the guidance of the Communist Party in the Soviet era. The way the judiciary was structured and regarded in the Soviet era has affected the further functioning of the judiciary of Uzbekistan. This chapter is aimed at scrutinizing what condition the judiciary was in before achieving independence and what difficulties the country overcame to reach this level from a historical perspective.

After gaining independence Uzbekistan faced a challenge inherited from the Soviet period that people had regarded courts as not a guardian of human rights, but punitive bodies. This is a consequence of the severe repression of millions of human lives in the territory of the Union of Soviet Socialistic Republics in the 1930–40s, the 1950s and in the late of the 1980s. Operation of all state bodies and public officials including courts and judges was under control and pressure of the communist party, the only party in the whole union. The doctrine of separation of powers was abandoned as this concept was claimed to have been developed by bourgeoisie and exist to serve at the pleasure of them. The heads of communist party ran state governance in the union and the whole union based on totalitarianism and bureaucracy, which never met the requirements of a democratic government.

Any kind of opinions for improving the system were viewed as contradicting the political regime of the communist party. The Constitution of the USSR did not include the

notion "Judicial power" in itself. Part VII of the Constitution of the USSR of 1977[1] was titled "Justice and Public Prosecutor's Supervision". The other Union Republics had to adapt their constitutions to the Constitution of the USSR. Part IX of the Constitution of SSR of Uzbekistan of 1978[2] was named "Justice, Arbitration and Public Prosecutor's Supervision". Hence, leaving aside the notion of "judicial independence" alone, even the term "judicial power" cannot be found in the Constitution of Uzbekistan of that time.

We can see horrible data and facts concerning losses of nations including Uzbeks in Soviet Union as a consequence of repression. The fact that judicial independence in Soviet Union never existed was acknowledged by Prosecutor General of the USSR A. Vishiniskiy. He claimed that the judiciary was not independent from the proletariat state, the class of workers and general state policy and under general state policy the possibility of existence of separate judicial policy was denied[3]. Special "troikas" comprising of the head of department of Public commissariat of internal affairs, the first secretary of the regional committee of the political party and the head of regional executive committee were established by the order of Stalin. This means that judicial power was also exercised by other bodies beyond the judiciary. On 18 October 1937, in one day, 551 people's criminal cases "were heard" by a two-person bench consisting of Yejov and Vishinskiy and all the people were sentenced to death penalty. In 1937–1938 the list of "unfriendly people" was made by Stalin and Molotov and 383 people were included as the first category. This meant to expose them to capital punishment[4].

Many people were convicted of attempts to overthrow, divide or weaken the Soviet government. As a result of broad interpretation of criminal code rules, citizens were convicted because of their critical views, jokes and even simple opinions on domestic matters. A person with a good intention could be sentenced to at least a 10-year prison or even death penalty if he or she expressed dissatisfaction of stale bread in the shop or said that Germany was a serious rival. For instance, on 28 October 1937 according to the decision of a troika of collective farmers A. Boymirzayev, N. Murodov, N. Saidmurodov were sentenced to death penalty and N. Shodmonov, R. Kurbonov, Sh. Muminov were sentenced to long-term imprisonment. They were accused of conducting counter-revolutionary propaganda, but when the case was scrutinized it was identified that

1 *Konstitutsiya (Osnovnoy Zakon) Soyuza Sovetskix Sotsialisticheskix Respublik* (Yuridicheskaya literatura 1980), 42–45.
2 *O'zbekiston Sovet Sotsialistik Respublikasining Konstitutsiyasi (Asosiy Qonuni)* (O'zbekiston 1978), pp. 83–86.
3 A. A. Polvon-zoda and others. *O'zbekistonda Sud Hokimiyati: Islohotlar Davri* (Adolat 2002), 6.
4 Ibid 7–8.

their criticism of faulty equipment in the collective farm and improperly functioning of the people in charge were treated as a counter-revolutionary propaganda[5].

In the 1930–40s and early 1950s throughout the union 3,778,234 people became victims of repression and 786,098 people of them were shot to death. There were many Uzbeks among them[6]. In 1983–1989, nearly 4500 people were accused as part of the "cotton case" and were sentenced. On the initiative of First President Islam Karimov until 1994 the Supreme Court of the Republic of Uzbekistan discharged 8050 victims convicted of counterrevolutionary crimes in 1955–1990. The Supreme Court discharged more than 3500 people sentenced as part of the "cotton case"[7]. The deep and careful reviews and examinations of the cases made it clear that people accused as part of the "cotton case" were tortured and denounced while being questioned by the investigation group in order to make them plead guilty. Consequently, people became afraid of the judiciary regarding courts as punitive bodies.

Until the passage of the Constitution of the Republic of Uzbekistan, the judiciary completely depended on the executive branch. According to Article 152 of the Constitution of the Soviet Union[8] and Article 163 of the Constitution of the SSR of Uzbekistan[9] the judges of districts, cities were elected by respective higher Soviets of people's deputies. The elections were organized by the respective executive committees of local soviets. The judges who were selected in this way had to be held accountable to the local bodies electing them. The judges of the Supreme Court, regional courts and court of Tashkent city were elected by the Supreme Soviet of the SSR of Uzbekistan. The judges were accountable to respective soviets and had to give a report to respective soviets they were elected by. Providing judges for accommodation fell within the scope of powers of soviets. It exposed judges to a serious danger as this system made judges servants and actors who must respond to the ideology and policy of the communist party found in the soviets and their executive committees. In other words, judges turned into policy-makers rather than carrying out real justice.

5 Ibid 8.
6 Ibid 9.
7 Ibid 9–12.
8 *Konstitutsiya (Osnovnoy Zakon) Soyuza Sovetskix Sotsialisticheskix Respublik*. (Izvestiya Sovetov narodnih deputatov SSSR 1991), 64–65.
9 *O'zbekiston Sovet Sotsialistik Respublikasining Konstitutsiyasi (Asosiy Qonuni)* (O'zbekiston 1978), 51–52.

2. Judicial Reforms

Reforms in the field of public administration in Uzbekistan are aimed at the gradual implementation of the constitutional principle of separation of powers, the formation of an effective system of checks and balances between the branches of government, liberalization of the judiciary and its independence[10]. Reforms aimed at creating and improving the judiciary and related legislation have been called judicial reforms.

M. Rajabova noted that the main purpose of the reforms in the judicial system was to ensure the real independence of the judiciary[11]. She went on to say, "… like in other areas, all the ongoing reforms in the judicial system are complementary, harmonious, systematic and closely interrelated, and the main criterion that binds them is the interests of the people."[12] In line with these views, A. Azizkhodjaev asserts that "… the main goal of judicial reform is to achieve judicial independence, to raise it to the level so that courts can truly protect the interests of citizens, and to ensure the effectiveness of punishment."[13] H. Odilkariev notes that "judicial reform is an important factor in a strong independent judiciary, equal to the legislative and executive branches of government in the country."[14] However, while national scholars have acknowledged that one of the goals of judicial reform is to ensure the independence of the judiciary, there is no consensus on what the goal of judicial independence is.

On this matter, S. Burbank argues that the independence of the judiciary is not the end result, but the means leading to the end result (outcomes), and the end result (outcomes) may be different[15]. In this regard, D. Hutchinson expressed his views on the "end result", saying that the expected result of the independence of the judiciary is to achieve the rule of law[16]. Commenting on this, S. Abrahamson noted that the main goal of the independence of the judiciary is to achieve justice based on the rule of law[17]. According to D. Pimental, the purpose of ensuring the independence of the judiciary

10 I. Karimov. *Mamlakatimizda Demokratik Islohotlarni Yanada Chuqurlashtirish va Fuqarolik Jamyatini Rivojlantirish Konsepsiyasi* (Uzbekistan 2010), 8.
11 M. Rajabova. *Senat va Sud-huquq Islohotlari* (Adolat 2006), 103.
12 M. Rajabova. *Huquq va Adolat: O'tmish, Bugun, Istiqbol* (Yurist-Media Markazi 2009), 229.
13 A. Azizxo'jayev. *Chin O'zbek Ishi* (O'zbekiston 2011), 304.
14 X. Odilqoriyev. *Konstitutsiya va Fuqarolik Jamiyati* (Sharq 2002), 131.
15 S. B. Burbank, 'What Do We Mean by Judicial Independence?' (2003) 64 Ohio St. LJ 323.
16 D. J. Hutchinson, 'History of Attacks on Judicial Independence' (Presentation at the Workshop for Judges of the United States Court of Appeals for the Fifth Circuit, October 6, 2005).
17 S. S. Abrahamson, 'Keynote Address: Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence' (2003) 64 Ohio St. LJ 4.

is to form a judicial system in which all parties to the dispute (from the author of the dispute) are treated fairly and equitably[18].

So, what are some of the possible or proposed threats to judicial independence, and how should we assess them?

I would argue that the ultimate goal of ensuring the independence of the judiciary should be to achieve justice and the rule of law. Only reforms aimed at achieving this goal will serve to increase public confidence in the judiciary. Consequently, public confidence in the judiciary can be achieved not only through the independence of judges, but also through the fair resolution of disputes by judges. The means leading to this is the independence of the judiciary.

At present, the analysis of the content of normative legal acts enacted in Uzbekistan since 2016 shows that the main purpose of reforms aimed at ensuring the judiciary is to achieve justice in the country and protect the rights, freedoms and legitimate interests of citizens. The fact that about 2,300 people have been acquitted in the past, which has been almost never observed in practice, is a practical manifestation of the desire to achieve justice[19].

In addition to the independence of the judiciary, there are other necessary factors for achieving justice. This includes fairness of judges and the fact that the judiciary is free of corruption. However, the coverage of these issues is a separate research object.

I propose to conditionally divide the tendency to ensure the independence of the judiciary in Uzbekistan from a periodic point of view into the following stages.

The first stage (1992–1999). According to G. Abdumajidov, "the adoption of the Constitution of independent Uzbekistan has given a serious impetus to the process of modernization and democratization of the judiciary."[20] Commenting on this, F. Mukhitdinova noted that the process of radical reform of the judicial system and its result – the formation of an independent judiciary – began with the adoption of the Constitution of the Republic of Uzbekistan[21].

In fact, the formation of an independent judiciary in Uzbekistan is directly related to the following norm in Article 5 of the Law "On the Foundations of State Independence

18 D. Pimentel, 'Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity' (2009) 57 Clev. St. L. Rev 1.

19 Decree of the President of the Republic of Uzbekistan No. PD-6034 of July 24, 2020 '*On additional measures to further improve the activities of the courts and increase the efficiency of justice*' National Database of Legislation 24.07.2020., № 06/20/6034/1103.

20 A. A. Polvon-zoda and others. *O'zbekistonda Sud Hokimiyati: Islohotlar Davri* (Adolat 2002), 13.

21 F. Mihitdinova. *Sudenbno-pravovoya reforma v Uzbekistane* (Yurist-Media Markazi 2008), 20.

of the Republic of Uzbekistan" adopted by the Supreme Council on August 31, 1991: "The system of state bodies of the Republic of Uzbekistan is built on the basis of the order of separation of powers into legislative, executive and judicial branches." It should be noted that this law was given a constitutional status on September 30, 1991, and the provisions enshrined in it were followed during the development of the draft Constitution of the Republic of Uzbekistan.

The adoption of the Constitution of the Republic of Uzbekistan gave constitutional legitimacy to the principle of separation of powers and the principle of independence of the judiciary. After all, in any democracy, the independence of the judiciary is enshrined in the constitution or its substitutes.

Second, on September 22, 1994, the Criminal Code of the Republic of Uzbekistan and the Code of Criminal Procedure of the Republic of Uzbekistan, the Code of Administrative Liability of the Republic of Uzbekistan, the Code of Civil Procedure of the Republic of Uzbekistan and the Code of Economic Procedure of the Republic of Uzbekistan were adopted. In addition to the Constitution, the procedural codes also reflected the principle of judicial independence.

Third, one of the important steps in the first phase of judicial reforms was the adoption of the Law on Courts on September 2, 1993. This law developed constitutional rules related to the independence of the judiciary, the principle of separation of powers. The law also included provisions prohibiting interference in the resolution of court cases, independence, inviolability, material and social inviolability of judges.

Fourth, the law of August 30, 1995 established the Constitutional Court, whose main activity is to assess the constitutionality of the legislation adopted by the legislature and the executive and to interpret the Constitution and laws. The law introduces special rules on the independence of the Constitutional Court.

Fifth, on September 12, 1997, the Association of Judges was established to further improve the performance of judges, their professionalism and qualifications. It should be noted that at this stage, the Ministry of Justice of the Republic of Uzbekistan had a significant impact on the judiciary. In particular, the Ministry of Justice had the authority to develop proposals on the establishment of courts, submit them to the President of the Republic of Uzbekistan, select and train candidates for judges, improve the skills of judges, logistics of courts and create the necessary conditions for their work. Moreover, the Ministry of Justice was empowered to oversee the organization of the judiciary, organize the election of people's advisors, participate in the generalization of judicial practice by the courts, maintain judicial statistics and enforce court decisions, and develop and implement measures to strengthen the independence of judges.

Therefore, in the last years of this phase, attention was paid to the creation of a system aimed at making the judiciary free from the influence of the judiciary. The Presidential Decree of 30 July 1999 "On the Establishment of the Commission to Consider Issues Related to the Appointment and Dismissal of Judges" established a special commission under the President of the Republic of Uzbekistan to appoint and recommend judges.

The second stage (2000–2015). The need for the further judicial reforms in the next stage is based on the need to critically review the laws adopted in the first stage and the procedure for forming the judiciary[22]. The common feature of the reforms at this stage is that they are aimed at improving the judicial system and the formation of the judiciary, freeing the judiciary from the influence of the bodies of the Ministry of Justice and the prosecutor's office.

On May 4, 2000, by the Decree of the President of the Republic of Uzbekistan, the Commission on Appointment and Recommendation of Judges under the President of the Republic of Uzbekistan was reorganized as the High Qualification Commission on Selection and Recommendation of Judges[23]. The main task of the Commission was to improve the democratic basis for the selection and placement of judges, to ensure the rule of law and social justice, as well as the independence of the judiciary in resolving issues of appointment (dismissal) of judges.

Moreover, one of the most important reforms at this stage was the adoption of the Law "On Courts" in a new edition on December 14, 2000. There were a number of changes in the law aimed at guaranteeing the independence of the judiciary. In particular, the powers to nominate candidates for judicial office and to terminate the powers of judges were removed from the Ministry of Justice. These powers were transferred to the High Qualifications Commission under the President of the Republic of Uzbekistan for the Selection and Recommendation of Judges.

The material, technical and financial support of the courts of general jurisdiction is carried out by a specially authorized body under the Ministry of Justice of the Republic of Uzbekistan. According to this requirement, the Department of Organizational Support of Judicial Activities of the Ministry of Justice and its relevant territorial departments were abolished and instead, the Department of Court Decisions Enforcement, Logis-

22 I. Karimov. *Ozod va Obod Vatan, Erkin va Farovon Hayot – Pirovard Maqsadimiz* (O'zbekiston 2000), 66–67.

23 Decree of the President of the Republic of Uzbekistan No. PD-2599 "On the establishment of the High Qualifications Commission for the selection and recommendation of judges." Bulletin of the Oliy Majlis of the Republic of Uzbekistan, 2000, No. 5–6.

tics and Financial Support of Courts under the Ministry of Justice and its territorial units were established.

At this stage, great attention was paid to improvement of the procedure for forming a judicial corpus. Based on the Decree of the President of the Republic of Uzbekistan dated March 17, 2006[24] and the Decree of December 29, 2012[25], the Higher Qualification Commission under the President of the Republic of Uzbekistan for the Selection and Recommendation of Judges was reorganized. The Commission was transformed into a permanent body that implemented a policy of the further democratization of the principles of ensuring the independence of the judiciary, the selection and placement of judges.

In addition, the Law on the Prosecutor's Office, adopted in a new version on August 29, 2001, removed the power of prosecutors to suspend the execution of court decisions. The Constitutional Court of the Republic of Uzbekistan introduced a procedure for the annulment of enactments of the Prosecutor General of the Republic of Uzbekistan if they contradicted the Constitution and laws. Moreover, according to the Law "On Enforcement of Acts of Courts and Other Authorities" adopted on the same date, the task of ensuring the enforcement of court judgements was transferred from the courts to the Department of Enforcement of Judgments, Logistics and Financial Support of Courts under the Ministry of Justice.

It was at this stage that attention began to be paid to the social protection of judges. The Decree of the President of the Republic of Uzbekistan dated August 2, 2012 "On measures to radically improve the social protection of employees of the judiciary" was adopted. The decree introduced a procedure under which judges were provided with long-term mortgage loans for the purchase of housing on favourable terms, as well as monthly monetary compensation for rent.

The third stage (from 2016 to the present). At this stage, constitutional reforms aimed at ensuring the independence of the judiciary were implemented. The Supreme Council of Judges of the Republic of Uzbekistan was established[26], and on April 6, 2017, it was

24 Decree of the President of the Republic of Uzbekistan "On improving the activities of the High Qualifications Commission for the Selection and Recommendation of Judges under the President of the Republic of Uzbekistan." Collection of Legislation of the Republic of Uzbekistan, 2006, No. 12–13.

25 Decree of the President of the Republic of Uzbekistan No. F-3949 "On improving the activities of the High Qualifications Commission for the Selection and Recommendation of Judges under the President of the Republic of Uzbekistan". Collection of Legislation of the Republic of Uzbekistan, 2013, No. 2.

26 Decree of the President of the Republic of Uzbekistan dated February 21, 2017 No PF-4966 "On measures to radically improve the structure and increase the efficiency of the judicial system of the Republic of Uzbekistan." Collection of Legislation of the Republic of Uzbekistan, 2017, No. 8.

given a constitutional status[27] and the Law "On the Supreme Council of Judges of the Republic of Uzbekistan" was adopted, aimed at regulating its activities in detail. In this regard, the High Qualifications Commission for the Selection and Recommendation of Judges was abolished[28].

Article 111 of the Constitution provides that Supreme Judicial Council of the Republic of Uzbekistan functions as a body of judicial community and renders support in observation of the constitutional principle of independence of the judiciary in the Republic of Uzbekistan.

J. Abdurahmonkhodjev noted that the majority of members of the Supreme Council of Judges is a community of judges consisting of full-time judges and at the same time a professional body, which fills the judiciary with highly qualified judges in a timely and effective manner[29]. According to R. Khakimov, the formation of the Supreme Council of Judges "… fully complies with the basic principles of judicial independence, approved by the UN General Assembly on November 29, 1985"[30]. In my opinion, the fact that the function of the Supreme Council of Judges to promote the independence of the judiciary is reflected at the constitutional level is important in protecting the independence of the judiciary. The reason is that the Constitution now includes not only rules declaring the independence of the judiciary, but also the ones concerning a professional body which is responsible for ensuring the independence of the judiciary.

Thus, the Constitution has been amended due to the most recent constitutional reforms. The Supreme Judicial Council has become the only body for judicial selection and in addition, appointments of district and regional level judges. The Supreme Judicial Council is composed of 21 members. The Senate and the President play a major role in the formation of the Supreme Judicial Council. This is to say that the Chair of the Supreme Judicial Council is appointed by the Senate upon the proposal of the President[31]. In addition, the Deputy Chair and the other twenty-one members of the Supreme Judicial Council are also appointed by the President[32].

27 Law of the Republic of Uzbekistan "On Amendments and Additions to the Constitution of the Republic of Uzbekistan". Collection of Legislation of the Republic of Uzbekistan, 2017, No. 14.

28 Decree of the President of the Republic of Uzbekistan dated April 11, 2017 No PF-5007 "On Repeal of Some Enactments of the President of the Republic of Uzbekistan". Collection of Legislation of the Republic of Uzbekistan, 2017, No. 15.

29 J. Abduraxmonxujayev. O'zbekistonda sudyalar korpusini shakllantirishni takomillashtirish va ular mustaqilligini taminlash (PhD dissertation, 2018).

30 Khakimov R, 'O'zbekiston Respublikasi Konstitutsiyasi va O'zbekiston Respublikasini Rivojlantirish Bo'yicha Harakatlar Strategiyasi' (2019) 3 Uzbek Law Review 7.

31 Art. 80, 93 of the Constitution of the Republic of Uzbekistan.

32 Art. 5 of the Law of the Republic of Uzbekistan "On the Supreme Judicial Council of the Republic of Uzbekistan". Collection of Legislation of the Republic of Uzbekistan, 2017, No. 14.

Half of the Supreme Judicial Council is composed of judges. This meets the requirement of the international standard, which says that judges are free to form and join organizations to represent their interests and to protect their judicial independence[33].

On April 12, 2017, a number of amendments and additions were made to the Law of the Republic of Uzbekistan "On Courts" aimed at ensuring the independence of the judiciary[34]. According to the amendments, a 5-year judicial tenure was shifted to the system that judges are appointed or elected for a term of 5 years, then a term of 10 years and then, for an unlimited term. The law stipulated that a judge may not be prosecuted, arrested or prosecuted without the opinion of the Supreme Council of Judges of the Republic of Uzbekistan.

In addition, the Department of Judicial Support under the Supreme Court of the Republic of Uzbekistan is responsible for the logistical and financial support of the courts. Further, the Fund for the Development of Courts and Justice Authorities, established in 2003, was abolished[35] and two separate funds were established on its basis, namely, the Fund for the Development of Judicial Authorities and the Extra-budgetary Fund for the Development of Justice Authorities and Institutions[36]. When once the Fund for Development of the Courts and Justice Authorities was headed by the Supervisory Board chaired by the Minister of Justice, now the Supervisory Board headed by the Chief Justice of the Supreme Court of the Republic of Uzbekistan manages the Fund for the Development of Judicial Authorities and distributes its funds. In addition, the system of material and social protection of judges was revised[37]. These reforms have led to the complete elimination of the justice authorities from the influence on the judiciary.

On May 31, 2017, the Constitution of the Republic of Uzbekistan was amended to strengthen the independence of the Constitutional Court of the Republic of Uzbek-

33 UN GA Res 'Basic Principles on the Independence of the Judiciary' 40/146 (1985).

34 Law of the Republic of Uzbekistan "On Amendments and Addenda to the Law of the Republic of Uzbekistan" On Courts", the Code of Civil Procedure and the Code of Economic Procedure of the Republic of Uzbekistan". Collection of Legislation of the Republic of Uzbekistan, 2017, No. 15.

35 Resolution of the Cabinet of Ministers of the Republic of Uzbekistan dated March 18, 2003 No 147 "On the establishment of the Fund for the Development of Courts and Justice." Collection of Legislation of the Republic of Uzbekistan, 2003, No. 5–6.

36 Resolution of the President of the Republic of Uzbekistan dated August 23, 2017 No PR-3240 "On improving the procedure for logistical and financial support of the courts and the judiciary." Collection of Legislation of the Republic of Uzbekistan, 2017, No. 35.

37 Decree of the President of the Republic of Uzbekistan No. PP-3240 of June 13, 2018 "On measures to further improve the judicial system and increase confidence in the judiciary." National Database of Legislation, 14.07.2018, № 06/18/5482/1506.

istan[38]. Also, the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" was adopted, according to which, the constitutional rules on the Constitutional Court were reconsidered and now the judges of the Constitutional Court Justices are empowered to elect the Chief Justice and his/her deputies from among themselves[39].

The judges were granted the right to appeal to the Supreme Judicial Council against decisions of the Supreme Judicial Qualification Board of the Republic of Uzbekistan and judges of the qualification boards of courts of the Republic of Karakalpakstan, regions and the city of Tashkent. The decree considered the cancellation of the right of the Supreme Court Chairman, the Prosecutor General and his deputies to protest against court decisions in a supervisory order.

Based on all illustrated above, it can be said that the trend of ensuring the independence of the judiciary in Uzbekistan from a periodic point of view includes the following stages:

the first stage was a period of reforms aimed at the formation of the judiciary as a separate independent branch of government;

the second stage was a period of reforms aimed at removing it from the influence of the justice and prosecutor's office;

the third stage was a period of constitutional reforms aimed at enabling the judiciary to participate in self-government through the introduction of a system of forming the judiciary through the judicial community and thereby ensuring the independence of the judiciary.

The first reforms aimed at ensuring the independence of the judiciary in Uzbekistan were aimed at changing the popular view that the judiciary is a punitive body, a serious complication of the former Soviet Union. The essence of the third stage of reforms aimed at ensuring the independence of the judiciary in Uzbekistan and shows that such a goal is aimed at achieving justice.

38 Law "On Amendments to Certain Articles of the Constitution of the Republic of Uzbekistan (Articles 80, 93, 108 and 109)". Collection of Legislation of the Republic of Uzbekistan, 2017, No. 22.

39 Art. 5 of the Constitutional Law of the Republic of Uzbekistan "On the Constitutional Court of the Republic of Uzbekistan". Collection of Legislation of the Republic of Uzbekistan, 2017, No. 22.

3. Reconsidering the Conception of Judicial Independence in Uzbekistan

Now I can turn to the question "What is judicial independence?" First let us look into the lexical meanings of the terms "independent" and "independence" in Uzbek language. Pursuant to interpretation of the word "independent" in an explanatory dictionary[40] it possesses three definitions. The first one is "being at self-discretion; not being dependent", the second one is "being capable of acting without someone else's help and leadership". The last one is "not being under the influence of others". In accordance with the commentary of the word "independence", this means "a state of freedom" and "a state of being free out of dependence".

In an English dictionary[41] the word "independent" is defined as "free from outside control; not depending on another's authority; self-governing, not influenced or affected by others", "not depending on another for livelihood or subsistence; capable of thinking or acting for oneself", "not connected with another or with each other; separate; not depending on something else for strength or effectiveness; freestanding". The word "independence" is determined as "the fact or state of being independent". As for another English dictionary[42], another definition comes saying that "independent" is "unwilling to be under obligation to others".

From the above mentioned definitions from Uzbek, English and American explanatory dictionaries for "independent" the definitions saying "*free from outside control; not depending on another's authority; self-governing, not influenced or affected by others*" and "*unwilling to be under obligation to others*" and for "independence" the definition saying *"the fact or state of being independent"* are likely to be significant for clarifying judicial independence in a legal sense.

"The independence of judicial power" or "judicial independence" means differently to every person since there is no any normative standard definition in laws.

James Melton and Tom Ginsburg explain, "Judicial independence is a complex and contested concept, but at its core, it involves the ability and willingness of courts to decide cases in light of the law without undue regard to the views of other government actors"[43].

40 'Independent', *O'zbek Tilining Izohli Lug'ati* (T. Mirzayev and others 2006), 652.

41 'Independent', *The New Oxford American Dictionary* (2nd edn Oxford University Press 2005), 857.

42 'Independent', *The Concise Oxford Dictionary of Current English* (6th edn Oxford University Press 1976), 548.

43 James Melton, Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence' (2014) Fall Journal of Law and Courts 187.

Gerald N. Rosenberg asserts, "The independence of the federal judiciary from political control is a hallmark of the American legal system. Institutionally separate and distinct from the other branches of the federal government, the judiciary is electorally unaccountable. Judges and justices are insulated from the political process through constitutional guarantees of life appointments and salaries that may not be diminished during their terms of office. … If the judiciary is independent of the executive and the legislature, then independence must at least mean that court decisions are reached freely, without regard for the political preferences of the other branches"[44].

According to analysis of Michael D. Gilbert, "Judicial independence is a state in which a judge cannot be penalized, and knows that he cannot be penalized, by other actors for his official decisions. He cannot receive a penalty such as a salary reduction, loss of his judgeship, imprisonment, a foregone benefit, or any other harm. "Other actors" includes parties to a case, legislators, bureaucrats, voters, interest groups, other judges and so forth. … this definition distinguishes independence from impartiality. … independence empowers judges to act impartiality"[45].

According to Mira Gur-Arie and Russell Wheeler, judicial independence "… refers to the ability of judges to decide disputes impartially despite real, potential, or proffers of favor. It is perhaps most important in enabling judges to protect individual rights even in the face of popular opposition"[46] at the least.

John Ferejohn asserts that "Independence seems to have at least two meanings. One meaning … is that a person is independent if she is able to take actions without fear of interference by another. In this sense, judicial independence is the idea that a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards"[47]. He proceeds with the other meaning that "We might think of a person or an institution as being dependent on another if the person or entity unable to do its job without relying on some other institution or group. In this context, the federal judiciary is institutionally dependent on Congress and the president, for jurisdiction, rules, and execution of judicial orders"[48]. Therefore, he argues that the judiciary is a dependent system with independent judges.

44 Gerald N. Rosenberg, 'Judicial Independence and the Reality of Political Power' (1992) 54 the Review of Politics 369.

45 Michael D. Gilbert, 'Judicial Independence and Social Welfare' (2014) 112 Michigan Law Review 575.

46 Office of Democracy and Governance. Guidance for Promoting Judicial Independence and Impartiality (Technical Publication Series, 2002), 33.

47 John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72:353 Southern California Law Review 353.

48 Ibid.

Thomas E. Plank states, "Judicial independence means a judge's freedom to apply her interpretation of the law to each case before her. … judicial independence requires that a legal system protect its judges from *governmental, business, personal, or social pressures* that could force a judge to deviate from her interpretation and application of the law"[49].

I would like to turn to the research done by Lydia Brasher Tiede. She states that "First, at a minimum, judicial independence is defined as the judiciary's independence from the executive branch in any given country. I define it as independence from the executive rather than the legislative because courts can never be completely independent from the legislature that is supreme in making the laws that judges interpret in particular cases and that provides funding for courts and their personnel. Under this minimalist definition, judiciaries are not considered independent when the executive or its agents, such as ministers of justice, have exclusive control over the judiciary, its recourses, and judges themselves"[50]. I find that there are three approaches to define judicial independence:

1) *The institutional approach*. Definitions of judicial independence by the commentators of this approach are not explicitly expressed, but concentrate on conditions which facilitate judicial independence in the line of governmental branches and society. They are methods of judicial selection, judicial tenure, control over administration and budget, constitutional grants to courts and budget, discipline of judges.

2) *The judicial rulings against government approach* assume that judiciaries can be called independent providing that judges cannot be manipulated and are free to make decisions against the other branches of the government.

3) *The strategic interaction approach* focuses on the relationship among various levels of courts as well as the cooperation between the judiciary and other elected governmental branches. The significance of this approach lies in its attention to what lower instance courts or judges should be independent from higher instance courts or judges.

Judicial independence may be sorted as Martin Redish argues into four kinds of judicial independence: 1) institutional independence (tenure and salary); 2) lawmaking inde-

49 Thomas E. Plank, 'The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia' (1996) 5 William & Mary Bill of Rights Journal 1.

50 Lydia Brasher Tiede, 'Judicial Independence: Often Cited, Rarely Understood' (2006) 15 Journal of Contemporary Legal 129.

pendence; 3) counter-majoritarian independence (a judge's ability to override legislative acts); 4) decisional independence[51].

Definitions and opinions furthered by scholars indicate that judicial independence is firstly understood as existence of real conditions for courts and judges to become free from political pressures made by political actors mainly. Political actors are those who are elected by people. Secondly, it is realized by this notion that individual judges enjoy freedom to interpret and apply laws.

As for definitions and opinions of Uzbek scholars, G. Abdumajidov identifies that "the essence of the principle independence of judges consists in striving for provision of conditions giving a real opportunity to make a decision following laws strictly without outside interference, any oppression or other kinds of influence"[52]. The scholar indicates that judicial independence of the court comprises a combination of two elements. They are:

1. *Structural independence of judicial authority.* This refers to the idea that judicial branch does not obey the legislative and executive branches, and its independence and objectiveness. The other branches cannot decide what belongs to judicial power.

2. *Functional independence of judges.* This refers to judges' following only laws while handling a case.

M. Rustamboyev and E. Nikiforova agree with what has been put forward by G. Abdumajidov in their works[53]. H. Boboev claims, "The independence of the judiciary also means the independence of judges"[54]. F. Muhiddinova thinks, "The independence of the judiciary requires other government branches not to interfere with the business delegated by the Constitution to the judiciary"[55]. O. Husanov said, "The independence of the court means the independence of the judge or vice versa. … The susceptibility of judicial authority depends on the independence of courts and judges first. … Judges are independent. They are free from political parties. They do not obey any bodies or officials. Judges follow only laws. It is prohibited to interfere the business of courts in any kind of way while doing justice"[56]. B. Jamolov specifies that judicial independence possesses two sides such as external and internal. The external side refers to the independ-

51 Martin H. Redish, 'Federal Judicial Independence: Constitutional and Political Perspectives' (1995) 46 Mercer Law Review 697.
52 A. A. Polvon-zoda and others. *O'zbekistonda Sud Hokimiyati: Islohotlar Davri* (Adolat 2002), 35.
53 M. H. Rustamboyev, E. N. Nikiforova. *Huquqni Muhofaza Qilish Organlari* (Zar Qalam, 2005) 94.
54 H. Boboev, 'Sudya mustaqilmi?' (2000) 2 Jamiyat va boshqaruv 24.
55 F. Muhiddinova, 'Sud Mustaqilligi – Adolat Kafolati' (2007) 3 Huquq va Burch 34.
56 O. T. Husanov. *Konstitutsiyaviy huquq*. (Adolat 2013), 527.

ence of the judiciary from other governmental bodies and public organizations whilst the internal one refers to the independence of courts and judges while doing justice[57].

I would suppose that judicial independence can be *structural* and *individual*. The structural judicial independence refers to the whole independence of the judiciary from other governmental and non-governmental agencies and the separate independence of courts from one another within judicial branch.

I think that *structural independence* of the judiciary can be classified as follows:

1. The independence of the judicial authority from legislative and executive branches as a whole.
2. The independence of the judicial authority from state authorities not involved in any branches of the government, but possess a special status.
3. The independence of the judicial authority from any institution of civil society.
4. The independence of the highest bodies of the judicial authority from one another.
5. The independence of lower courts from higher courts.

The *individual judicial independence* refers to the independence of individual judges from other governmental and non-governmental agencies and officeholders and ordinary citizens and even the independence of judges from other judges within the same court and upper courts.

Individual independence of judicial power can also be categorized as follows:

1. The independence of judges from other officeholders of republican and local governmental bodies.
2. The independence of judges from the chief justice of the court.
3. The independence of lower court judges from higher court judges.
4. The independence of judges from the same level judges in the panel.
5. The independence of judges from citizens.

Besides, judicial independence can be *de-jure* and *de-facto*[58]. De-jure judicial independence refers to guaranteed independence specified in laws, whilst de-facto one is what in those laws is really provided in the real life.

Proceeding from the above-mentioned definitions and classifications of judicial independence, I would like to present my own definition for judicial independence.

57 B. Jamolov, 'Sud Hokimiyati' (2008) 11 Huquq va Burch 35.

58 James Melton, Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence' (2014) Fall Journal of Law and Courts 187.

Judicial independence can be looked into from three sides as follows: 1) judicial independence is a constitutional principle; 2) judicial independence is a moral prerequisite for judges to hear and decide a case; 3) judicial independence is a state resulted from de-jure and really de-facto conditions created for the judicial branch and even for the courts and judges within this branch to exercise their powers freely from any outside pressure, interference and influence.

There are some essential de-jure elements, which are necessary to create a real state in which judicial power is independent. Having analyzed scholarly research, I concluded that judicial independence demands essential requirements or conditions to exist and persist. As Peter M. Shane[59] mentions that the presence and level of judicial independence depend on peculiar institutional arrangements. They can be listed as follows: 1) "guarantee of fixed tenure, subject to a limited process of removal or discipline for misconduct or disability; 2) fixed and adequate compensation; 3) sufficiently high minimum qualification in education and experience; 4) limited judicial immunity"[60]. Lydia Brasher Tiede shows them in some difference as follows: 1) judicial selection (judicial appointment and election); 2) judicial tenure; 3) control over administration and budget; 4) constitutional powers granted to courts and judges; 5) discipline of judges[61]. Pursuant to Mira Gur-Arie and Russel Wheeler, measures to preserve judicial independence consist in those as follows: 1) secure tenure; 2) compensation; 3) self-administration[62].

Relying on what has been counted as essential elements for providing judicial independence, I would regard the followings as the most important elements: 1) the order of impartial judicial selection; 2) ensured tenure; 3) the order of impartial judicial discipline and removal; 4) assured salary and material security; 4) self-administration and budget; and 5) the immunity of judges.

59 Peter M. Shane, 'Who May Discipline or Remove Federal Judges? A Constitutional Analysis' (1993) 142 University of Pennsylvania Law Review 209.

60 Thomas E. Plank, 'The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia' (1996) 5 William & Mary Bill of Rights Journal 8.

61 Lydia Brasher Tiede, 'Judicial Independence: Often Cited, Rarely Understood. (2006) 15 Journal of contemporary legal issues 129.

62 Office of Democracy and Governance. Guidance for Promoting Judicial Independence and Impartiality (Technical Publication Series, 2002), 134–137.

4. Current Issues of Ensuring Judicial Independence in Uzbekistan

Yet, despite the abundant reforms in the field of the judiciary, judicial independence is still a concern amongst academics in Uzbekistan. The first concern is related to the perception of judicial independence.

As proposed above, judicial independence is a state resulted from de-jure and de-facto conditions created for the judicial branch and even for the courts and judges within the branch to exercise their powers freely from any outside pressure, interference and influence.

In Uzbekistan, by judicial independence it is important to perceive that the judiciary is independent of policy makers or politicians first. This is a common conception of judicial independence in the world, especially the most developed democratic states. However, no national author has taken the same approach to the understanding of judicial independence in textbooks, articles and dissertations. Although it is regarded as violation of judicial independence in practice when politicians attack judicial independence, relevant cases are not researched in national scholarly works. Since 2016 when the government started ensuring freedom of speech in reality under the new government leadership, cases of judicial independence violations have been publicized mainly by bloggers and non-government mass media in Uzbekistan.

It would be illustrative to recall a recent case concerning judicial independence encroachment from the US. Harvard and the Massachusetts Institute of Technology sued the Trump administration over its guidance not allowing foreign students to take online-only courses in the US a 2020-fall semester due to the pandemic[63].

They argued that it was designed purposefully to place pressure on colleges and universities to open their on-campus classrooms for in-person instruction a 2020-fall, without regard to concerns for the health and safety of students, instructors, and others. In addition, "for many students, returning to their home countries to participate in online instruction is impossible, impracticable, prohibitively expensive, and/or dangerous"[64].

63 Susan Svrluga and Nick Anderson, 'Harvard, MIT sue Trump administration to protect student visas, escalating fight over online learning' (*Higher Education*, 9 July 2020) <https://www.washingtonpost.com/education/2020/07/08/harvard-mit-international-students-ice/> accessed 15 January 2021.

64 Laura Franklin, 'Harvard, MIT Sue to Block ICE Rule on International Students' (*Student Union*, 8 July, 2020) <https://www.voanews.com/student-union/harvard-mit-sue-block-ice-rule-international-students> accessed 15 January 2021.

The court decided the case in favor of Harvard and the Massachusetts Institute of Technology. Based on this vivid example, I would argue that judicial independence is the ability of judges to say "no" to politicians. Judges must be bold enough to do that. For this, the Constitution and relevant laws must create conditions for that.

The Constitution of the Republic of Uzbekistan considers two kinds of judicial independence such as *structural* and *individual*. As discussed, the structural judicial independence refers to the independence of judicial branch of the government and the individual judicial independence refers to the independence of judges. Structural and individual independence must be ensured from de jure and de facto perspectives so that the judiciary can operate fully independently.

Here, I would like to look at some key challenges of securing both structural and individual judicial independence from the perspective of constitutional law. I would like to start with the structural judicial independence.

1) It may be concluded that establishment of the principle of separation of powers in the Constitution is important for judicial independence. Accumulation of all powers in the same hands damages judicial independence.

Based on this doctrine, Article 106 of the Constitution provides that "the judicial authority in the Republic of Uzbekistan shall function independently from the legislative and executive authorities, political parties, and other public associations". However, in Uzbekistan, at present there are some state authorities or public officials, which belong to neither the legislative nor the executive branch such as the President of the Republic of Uzbekistan, the State Security Committee, the Central Election Commission, the Central Bank, the Accounting Chamber, the Prosecutor's Office. One may logically ask whether the judiciary is independent from the President or the State Security Committee. Thus, in order to ensure structural judicial independence from a de jure perspective in full, this constitutional provision (Art. 106) should be reviewed based on the existence of the state authorities with a special status.

2) After the second president took office, he announced the so-called "dialogue with people" policy. This policy is aimed at having a direct dialogue by the government with people. The members of the parliament and executive agency officials started having face-to-face meetings with people in order to familiarize themselves with social problems and to make democratic decisions based on the social needs. As a direction of this policy, representative authorities such as the parliament and local councils heard reports of the heads of the executive agencies on behalf of the people.

However, this policy also applied to the judiciary after amending the Law "On Local State Authorities" and required chairs of the district, regional courts to make a report

before the relevant local councils[65]. The report is the kind of information about judicial protection of the rights and freedoms of citizens, the rights and interests of enterprises, institutions and organizations. The decision of the local representative authority on this issue is sent to the Supreme Judicial Council.

This may pose danger to judicial independence, as local councils are political agencies, which are composed of the deputies keeping promises in an election campaign. The deputies tend to ask chief justices questions and make decisions of a political character whereby they may affect the further judicial decision-making. Making the judiciary accountable in the same way as how the executives are before representative bodies could render judicial independence vulnerable.

3) The Constitutional Court is mainly empowered to interpret the Constitution and Laws and to check the constitutionality of laws. However, the Constitutional Court does not enjoy the power to hear cases arising from the disputes among government branches. It is proposed that the Constitutional Court should be empowered to settle disputes among government branches over constitutional powers. For example, disputes related to judicial independence may arise among government branches; however, in Uzbekistan no court has jurisdiction over these matters. In order to make the judiciary independent from de facto perspective encroachments on judicial independence could be prevented from the other government branches and public officials by providing the Constitutional Court with the power to hear cases arising from constitutional conflicts among the government branches.

Turning to the current issues of ensuring individual judicial independence, the following key challenges could be highlighted.

1) Justices of the Constitutional Court do not enjoy the same conditions to be independent as judges of the other courts. According to the Law "On the Courts", all judges are appointed or elected for a term of 5 years, then a term of 10 years and then, for an unlimited term. Simultaneously, pursuant to Article 6 of the Law "On the Constitutional Court", a tenure for the justices of the Constitutional Court are 5 years and the same person cannot be elected as a Justice of the Constitutional Court more than twice. However, the Justices of the Constitutional Court would be more de facto independent if they enjoyed a longer tenure. If not, they may be in danger of not being elected for the next judicial term in retaliation to their decisions, which politicians might dislike.

2) Security of remuneration is a key feature of judicial independence. In Uzbekistan, the President of the Republic of Uzbekistan determines the amount of the salary of

65 The Law of the Republic of Uzbekistan "On Local Government". Bulletin of the Supreme Council of the Republic of Uzbekistan, 1993, No. 9.

public servants, including judges. In this, the judges should be granted a privilege that their salary cannot be reduced, but increased in the same pace of inflation. The power to determine the amount of judicial salary is suggested to transfer from the President of the Republic of Uzbekistan to the Oliy Majlis – the parliament of Uzbekistan. This change would prevent the single person from framing the amount of judicial salary and promote judicial independence.

3) There are some laws including rules, which contradict the principle of judicial independence. For example, in the Regulation of the Fund for Development of Judicial Authorities there is a provision that the funds are used to make an initial contribution for the purchase of housing by judges[66]. However, the funds are formed at the expense of fines from the cases heard by criminal, civil, administrative, economic and military courts. This provision puts justice at risk as well as judicial independence because judges are not angels and they may tend to focus on penalizing rather than doing justice.

Therefore, contributions like this should not depend on fines, but instead come from the state budget.

4) In Uzbekistan, the activity of judges is affected by public policy. Based on the policy "dialogue with people"[67], judges were forced to conduct mobile trials. However, not all places where mobile trails are conducted meet the requirements of fully providing the security of judges. In this condition, judges may not decide a case independently.

In order to ensure independence for the judiciary, first, the Constitution itself as a fundamental law should involve the rules reflecting the means judicial independence is safeguarded by. However, the constitutional rules concerning judicial independence are limited to the general provisions. These provisions specify that the judicial authority functions independently from the legislative and executive authorities, political parties, other public associations (Article 106) and judges are independent and subject solely to law and any interference in the work of judges in administering law are inadmissible and punishable by law (Article 112). These articles are like two sides of the same coin – structural and individual judicial independence.

Apart from the Constitution, there are three other laws concerning the judiciary, which deal with the measures to make the judiciary independent. In contrast to the Constitution, these laws have been frequently changed.

66 The Resolution of the Republic of Uzbekistan "On improving the order of material, technical and financial support of the activities of courts and justice bodies". Collection of Legislation of the Republic of Uzbekistan, 2017, No. 35.

67 Anthony C. *Bowyer. Political Reform in Mirziyoyev's Uzbekistan: Elections, Political Parties and Civil Society*. (Central Asia-Caucasus Institute & Silk Road Studies Program 2018), 27.

I argue that stable measures ensuring judicial independence should be reflected in the Constitution. Among these, the constitutional rules regarding judicial tenure and financial independence of the judiciary should be regarded as integral part of the Constitution to ensure structural and individual independence for the judiciary. In addition, the Constitution should ensure independence for the Justices of the Constitutional Court at the same level as judges of other courts.

5. Conclusion

Judicial independence is the life blood of a legal system. Without judicial independence, it is impossible to uphold the rule of law and safeguard human rights. After achievement of independence, Uzbekistan faced a challenge inherited from the Soviet era that society had been treating the judiciary as a punitive body. To get rid of this kind of attitude towards the judiciary, Uzbekistan introduced judicial reforms.

In general, judicial reforms are mainly aimed at the achievement of judicial independence. As for judicial independence, it is aimed at upholding the rule of law and achievement of justice. In Uzbekistan, judicial reforms have been conducted in three phases.

The judicial reforms of the first phase reforms were oriented at the formation of the judiciary as a separate independent branch of government. The reforms of the second phase were aimed at removing the judiciary from the influence of the executive and the prosecutor's office. The last phase is a period of constitutional reforms was intended to enable the judiciary to enjoy self-governance.

To make judcial reforms more effective, it is important to understand that judicial independence is the independence of judges and courts from political pressure at first. Academics should research judicial independence in the context of the cases of judicial independence violations related to political pressure. However, they seem to refrain from sheding light on judicial independence from this perspective.

Although a number of judicial reforms have been conducted, the judiciary needs more independence to interpret the Constitution and to do justice. For this, the Constitution is proposed to amend further so that it is not limited to general declarative rules concerning judicial independence.

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AKMAL SODIKOV

Constitutional Control and Efficiency of Law Making

1. Introduction

Legal mechanisms directly applying constitutional control to the law making process have become more important than ever before. The pitfalls and obstacles of the constitutional review power of the Constitutional Court of the Republic of Uzbekistan require systematic research and studies. I argue that the institution of constitutional control needs to improve its mechanism for interacting with the legislative branch.

In addition, it is important to grant citizens and legal entities the right to apply to the Constitutional Court of the Republic of Uzbekistan in order to improve constitutional justice.

Constitutional courts are called upon to protect human rights and freedoms, to ensure the effective functioning of the system of checks and balances between the branches of state power. According to national and foreign experts[1], constitutional control is an important feature of statehood. Constitutional justice is the highest form of constitutional control, a special requirement, a necessary institution of a state, which manifests itself as a reliable guarantee for ensuring the supremacy of the Constitution and creating an environment of legality in the country.

In order to comprehend constitutional control in Uzbekistan, it would be better to employ comparative and theoretical analysis.

Firstly, we should determine which model of constitutional control is established in Uzbekistan. There are two main models of constitutional control in the world. They are American and European models. In particular, a decentralized model of constitutional control was developed in the United States. Federalism is one of the main factors requiring constitutional control in this model. On the other hand, there are countries of the continental legal family where judicial constitutional control is similar to the US, e. g. Switzerland. The main feature of this model is that constitutional control does not stand out from the general justice system and is carried out by courts of general jurisdiction.

1 Smolenskiy M. B., *Konstitutsionnoe (gosudarstvennoe) pravo Rossii:* [Constitutional (state) law of Russia] Textbook. – Rostov-on-Don: Feniks, [2002]. – p. 329.; Xaritonova N. N., "Perspektivi evolyusii konstitutsionnogo kontrolya: zarubejnaya i otechestvennaya praktika" [Prospects for the evolution of constitutional control: foreign and domestic practice] // Pravo i politika. – [2005]. – № 11. – p. 35.

The second model of constitutional control is the European model of constitutional control. Under this model, only a special body deals with constitutional control in the country. Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs "counter" to their constitutions. Typically, this is in contrast to the "American" model, whereby all courts have the authority to adjudicate constitutional issues in the course of deciding legal cases and controversies[2]. Hans Kelsen was the scholar who developed and popularized the European model[3]. The European model of constitutional courts was established after World War I, in particular in Austria and Czechoslovakia in 1920, Liechtenstein in 1921, and Spain in 1931. After World War II, this centralized model expanded to the world particularly among the member states of the European Union.

If we focus on the history of establishment of the Constitutional Court of Uzbekistan, it begins in March 1990, when the Committee of Constitutional Supervision was formed and elected by the Supreme Council. Its responsibility included the examination of the compliance of acts of the bodies of state power and administration with the Basic Law of the state. As can be seen, it was the initial body of constitutional justice.

When the country adopted the Constitution of the Republic of Uzbekistan on December 8, 1992, the Constitutional Court entered the judicial system of the Republic. In accordance with the Constitution (Articles 108–109) and the current Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan", the model of Uzbek constitutional control is operating according to the European model of centralized constitutional review.

Secondly, it would be better if we focus on the formation of institutions of constitutional control in the Post-Soviet states. With reference to "the successor states of the Soviet Union", they especially followed the European centralized model of constitutional control in the form of specialized constitutional courts or councils. If we focus on the following table No. 1, it is possible to comprehend briefly.

Briefly, it is possible to conclude followings: *firstly*, Turkmenistan is the only post-Soviet country, which does not have a special judicial body of constitutional justice in the country. *Secondly*, the Supreme Courts of Kyrgyzstan and Estonia consist of Chambers of constitutional justice, which conducts constitutional control. *Thirdly*, in our opinion, executive branches or presidents play an important role in the formation of institutions

2 See, Louis Favoreu, *Constitutional Review in Europe, in constitutionalism and rights: the influence of the United States constitution abroad* (Louis Henkin & Albert J. Rosenthal eds., Columbia Univ. Press 1989).

3 See, Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. (1942) 183.

Table No. 1. The forms of organization of constitutional control in the successor states of the Soviet Union[4]

No.	Successor state of the Soviet Union	The institution responsible for constitutional control	Composition[5]
1.	The Republic of Azerbaijan	Constitutional Court	9 judges appointed by the Milli Majlis (parliament) on the proposal of the President
2.	The Republic of Armenia	Constitutional Court	9 judges (of them 5 appointed by the National Assembly, 4 by the President)
3.	The Republic of Belarus	Constitutional Court	12 judges (6 appointed by the Parliament of the Republic, 6 by the President)
4.	The Republic of Georgia	Constitutional Court	9 judges (3 judges each are appointed by the President, Parliament and the Supreme Court)
5.	The Republic of Kazakhstan	Constitutional Council	7 members (3 of them by the President, 2 of them by the upper chamber and 2 of them by the lower chamber of the national parliament)
6.	Republic of Kyrgyzstan	Supreme Court	9 judges (elected by the Parliament on the proposal of the President)
7.	Latvian Republic	Constitutional Court	7 judges (appointed by the national parliament, of them 3 on the proposal of a group of at least 10 deputies, 2 on the proposal of the Cabinet of Ministers, 2 on the proposal of the Plenum of the Supreme Court of the Republic from among its judges)
8.	Republic of Lithuania	Constitutional Court	9 judges (appointed by the national parliament, of them 3 on the recommendation of the President, 3 on the recommendation of the Chairman of the national parliament, 3 on the recommendation of the Chairman of the Supreme Court)
9.	The Republic of Moldova	Constitutional Court	9 judges (of them 6 are appointed by the Parliament, 3 by the President),

4 The author developed the table No. 1 by researching the official websites of the countries. Such as, Russian Federation – <http://www.ksrf.ru>, Uzbekistan – <http://ksu.uz>, Ukraine – <http://www.ccu.gov.ua>, Estonia – <https://www.riigikohus.ee>, Tajikistan – <http://constcourt.tj>, Moldova – <https://www.constcourt.md>, Latvia – <https://www.satv.tiesa.gov.lv/en/>, Kyrgyzstan – <http://constpalata.kg/ru/>, Kazakhstan – <http://ksrk.gov.kz/index.php/ru>, Azerbaijan – <https://courts.gov.az> accessed 9 February 2021.

5 The author developed the composition of the institutions responsible for constitutional control in the successor states of the Soviet Union by researching acting Constitutions (9 February 2021).

No.	Successor state of the Soviet Union	The institution responsible for constitutional control	Composition
10.	The Republic of Tajikistan	Constitutional Court	7 judges (approved by the parliament on the proposal of the president), one of whom is a representative of the Mont-Badakhshan autonomous region.
11.	Turkmenistan	No special institution of constitutional control	
12.	The Republic of Uzbekistan	Constitutional Court	7 judges (is elected by the upper house of the parliament on the proposal of the President to whom recommended by the Supreme Judicial Council), including a representative from the Republic of Karakalpakstan.
13.	Ukraine	Constitutional Court	18 judges (6 judges each are appointed by the President, the Parliament and the Council of Judges)
14.	Estonia	Supreme Court	There are 19 justices in the Supreme Court and the Court is composed of the Civil Chamber, Criminal Chamber, Administrative Law Chamber and the Constitutional Review Chamber.
15.	The Russian Federation	Constitutional Court	11 judges, appointed by the Federation Council upon nomination by the President of the Russian Federation

of constitutional control, which can undermine the impartial activity of constitutional institutions.

Nevertheless, the existence of organizations of constitutional justice does not mean effective activity in practice. Although the constitutions of all post-Soviet countries declare the supremacy of constitution and laws, these institutions of constitutional control encounter theoretical and practical stumbling blocks in terms of direct effect on the legislative process, interaction with law making activity and support of constitutional complaints of citizens and others. The same situation can be found in the Republic of Uzbekistan, which can be analyzed in the discussion part of the paper.

2. Methodology

The object of this study is to research the theoretical and practical problems of constitutional justice in the Republic of Uzbekistan. The main goal of the study is to develop proposals for ensuring that the Constitutional Court of the Republic of Uzbekistan can review legislation for constitutionality, effective interaction between Parliament and the Constitutional Court of the Republic of Uzbekistan in terms of law making and support of constitutional complaints of citizens by the Constitutional Court of the Republic of Uzbekistan.

In order to achieve these goals, the author has applied methods of scientific research, such as sociological, analysis, synthesis, and comparative. In addition, to analyze public opinion on constitutional justice in the country the author carried out online questionnaire among students of Tashkent State University of Law (TSUL), Uzbekistan.

3. Literature review

There are a broad range of studies describing constitutional control in countries of CIS. In particular, O.V. Brezhnev[6], A.O. Kazantsev[7], K.M. Khudoley[8], A.A. Klishas[9], O.A. Kozhevnikov[10], V.A. Kryazhkov, L.V. Lazarev[11] have studied the role of constitutional justice and constitutional control in the Russian Federation.

6 Brezhnev O.V., "On some aspects of interaction between the Constitutional Court of the Russian Federation and the Federal Assembly", *Izvestiya Yugo-Zapadnogo gosudarstvennogo universiteta*, [2014], No. 2, pp. 101–105. (In Russian).

7 Kazantsev A.O., "Pravo zakonodatel'noy initsiativy konstitutsionnogo Suda RF" (v kontekste printsipa "Nikto ne mozhet byt' sud'ey v sobstvennom dele") [The right of legislative initiative of the Constitutional Court of the Russian Federation (in the context of the principle "No one can be a judge in one's own case")], Lex Russica, [2017], No. 2, pp. 26–31. (In Russian).

8 Khudoley K.M., "Polnomochiya Konstitutsionnogo Suda RF: problemy teorii i praktiki konstitutsionnogo pravosudiya" [Powers of the Constitutional Court of the Russian Federation: problems of the theory and practice of constitutional justice], Vestnik Permskogo universiteta. Yuridicheskie nauki, [2011], No. 2, pp. 71–84. (In Russian).

9 Klishas A.A., "Konstitutsionnaya yustitsiya v zarubezhnykh stranakh" [Constitutional justice in foreign countries], Moscow, Mezhdunarodnye otnosheniya, [2004], 288 p. (In Russian).

10 Kozhevnikov O.A., "Normativno-pravovoe regulirovanie konstitutsionnogo pravosudiya na sovremennom etape razvitiya RF: problemy i puti ikh resheniya" [Regulatory and Legal Regulation of Constitutional Justice at the Present Stage of Development of the Russian Federation: Problems and Ways to Solve them], Rossiyskiy yuridicheskiy zhurnal, [2013], No. 4, pp. 61–65. (In Russian).

11 Lazarev L.V., "Konstitutsionnaya yustitsiya v Rossiyskoy Federatsii" [Constitutional Justice in the Russian Federation], Moscow, BEK, [1998], 462 p. (In Russian).

Some scholars studied constitutional control of countries of CIS such as M. S. Kurguzikov[12], A. V. Nechkin[13], S. N. Pasternak[14].

In Uzbekistan, several scientists researched the constitutional judicial system in comparison with other CIS countries. In detail, A. Gafurov[15], E. Kh. Khalilov[16] A. Kh. Saidov, M. Kh. Rustamboev, A. S. Tursunov, I. R. Bekov, Sh. G. Asadov, S. M. Khidirov, Sh. Kh. Zulfikorov[17].

Although a lot of scientists and lawyers have studied the constitutional justice in the Republic of Uzbekistan, there is no complex research on interaction between constitutional justice and law making.

4. Discussion

The Constitution of the Republic of Uzbekistan, adopted on 8 December 1992, provides for the establishment and functioning of a special body exercising constitutional control, the Constitutional Court, which deals with the constitutionality of acts of the legislative and the executive bodies.

12 Kurguzikov M. S., "Formirovanie organov konstitutsionnogo kontrolya v stranakh SNG" [Formation of bodies of constitutional control in the CIS countries], Elektronnoe prilozhenie k "Rossiyskomu yuridicheskomu zhurnalu", [2016], No. 1, pp. 31, 37. (In Russian). // Kurguzikov M. S., "Konstitutsionnyy kontrol' v stranakh sodruzhestva nezavisimykh gosudarstv: sravnitel'no-pravovoe issledovanie": avtoref. dis. … kand. yurid. nauk [Constitutional control in the countries of the Commonwealth of Independent States: a comparative legal study: abstr. of diss.], Ekaterinburg, [2016], 25 p. (In Russian).

13 Nechkin A. V., "Konstitutsionno-pravovoy status pravitel'stv stran Sodruzhestva Nezavisimykh Gosudarstv : (sravn. issled.)" [The constitutional and legal status of the governments of the countries of the Commonwealth of Independent States (comparative study)], Moscow, Norma, [2016], 176 p. (In Russian).

14 Pasternak S. N., "Kompetentsiya organov konstitutsionnogo kontrolya v stranakh Vostochnoy Evropy: sravnitel'no-pravovoy analiz" [Competence of bodies of constitutional control in Eastern Europe: comparative legal analysis], Nauchnyy forum: Yurisprudentsiya, istoriya, sotsiologiya, politologiya i filosofiya: sb. st. po materialam IV mezhdunar. nauch.-prakt. konf., Moscow, MTsNO, [2017], No. 2(4), pp. 76–83. (In Russian).

15 Gafurov A., "Constitutional control in Uzbekistan: current state and development prospects". Issue 1 [2020]: Society and Innovation. (In Russian). Available from: <https://inscience.uz/index.php/socinov/article/view/152> accessed 9 February 2021.

16 Khalilov E. Kh., "Na prinsipax verxovenstva zakona i narodavlastiya". [Based on the rule of law and power of the people] // Law. – Toshkent, [2002]. – № 2. – p. 4–9. (In Russian).

17 Saidov A. Kh., Rustamboev M. Kh., Tursunov A. S., Bekov I. R., Asadov Sh. G., Khidirov S. M., Zulfikorov Sh. Kh. *Constitutional law of the Republic of Uzbekistan*. Textbook. – Tashkent. Tashkent State Institute of Law, – 2005. P. 887 (in Uzbek). Available from: <http://library.ziyonet.uz/ru/book/1450> accessed 9 February 2021.

According to the Article 107, the judicial system in the Republic of Uzbekistan shall consist of firstly, the Constitutional Court of the Republic of Uzbekistan, the Supreme Court of the Republic of Uzbekistan, and others[18]. The above mentioned article shows the importance and priority of the constitutional control institution in other judicial systems. Even though the Constitution supports with higher priority of the Constitutional Court in judicial system, some students of TSUL do not believe the Constitutional Court operates effectively.

In order to prove it, within the framework of the research the sociological method was carried out among the students of Tashkent State University of Law. In respect of the sociological method, briefly, it is a set of scientific methods characterized by the accumulation of respondent's answers. One of the popular techniques of the sociological method is a survey in the form of interview (collecting information in real mode) or questionnaire (collection of quantitative answers of respondents). Although there are no ideal methods by which someone can provide reliable information for 100 %, we believe that responses of the future lawyers show atmosphere of popularity, reliability of constitutional justice in the Republic of Uzbekistan. In particular, in order to analyze issues presented in Tables No. 2, 4, 5, 6, 7, 105 undergraduate students participated voluntarily in the questionnaire who are studying Constitutional law of Uzbekistan. The questionnaire was held during January 2021 by the author.

Table No. 2[19]

Question	**Do you think that the activity of the Constitutional Court of the Republic of Uzbekistan is effective?**		
Answers	No	Yes	I am not sure.
In percentage	59	21,9	19

It is apparent that more than half of the respondents are not satisfied with activity of the Constitutional Court of the Republic of Uzbekistan.

However, during the years of its establishment (1995–2021) the Constitutional Court of the Republic of Uzbekistan has heard the following issues.

18 National database of legislation, 05.09.2019, No. 03/19/563/3685. Available from the national database of Uzbek legislation <https://lex.uz> at <https://lex.uz/docs/4032775> accessed 9 February 2021.

19 <https://docs.google.com/forms/d/1WML3KXf_gRiAJchj_bFgwPKTwOUulSsizsFLFVXcrWU/edit#responses> accessed 9 February 2021.

Table No. 3[20]

No.	Types of acts	How many?
1.	Laws	14
2.	Law initiatives	11
3.	Acts of Cabinet of Ministers	3
4.	Acts of local authorities	2
5.	Acts of Ministries	1
6.	Acts of President	0
7.	Acts of State Committees	0
Total		**31**

The table and the cases related to the constitutionality of acts of the legislative and executive authority suggests that the Constitutional Court of the Republic of Uzbekistan is ineffective. During 26 years the Court decided 31 total cases.

This fact suggests that the activity of the Constitutional Court of the Republic of Uzbekistan remains under some doubt. Nevertheless, in order to find out whether the activity of the Constitutional Court of the Republic of Uzbekistan is effective or ineffective we yet need to carry out case quality analysis.

Nevertheless, the Constitution stipulates the following powers of the Constitutional Court of the Republic of Uzbekistan:

1) determine the compliance of the Constitution of the Republic of Uzbekistan with the laws of the Republic of Uzbekistan and resolutions of the chambers of the Oliy Majlis of the Republic of Uzbekistan, decrees, resolutions and orders of the President of the Republic of Uzbekistan, resolutions of the government, resolutions of local bodies of state authority, international treaties of the Republic of Uzbekistan;

2) determine the compliance of the Constitution of the Republic of Uzbekistan with constitutional laws of the Republic of Uzbekistan, laws of the Republic of Uzbekistan on ratification of the international treaties of the Republic of Uzbekistan – before their signature by the President of the Republic of Uzbekistan;

3) determine the compliance of the Constitution of the Republic of Karakalpakstan with the Constitution of the Republic of Uzbekistan, laws of the Republic of Karakalpakstan – to laws of the Republic of Uzbekistan;

20 The table was a result of research of the official web site of the Constitutional Court of the Republic of Uzbekistan – <http://ksu.uz/uz/decisions> accessed 9 February 2021.

4) interpret the norms of the Constitution and laws of the Republic of Uzbekistan;

5) consider appeals from the Supreme Court of the Republic of Uzbekistan, initiated by the courts, on compliance of the Constitution of the Republic of Uzbekistan, normative-legal acts subjects to application in concrete cases;

6) based on summarizing practices of the constitutional legal procedures, represent annually the information on a status of constitutional lawfulness to the Chambers of the Oliy Majlis of the Republic of Uzbekistan and the President of the Republic of Uzbekistan;

7) hear other cases relating to its competence in accordance with the Constitution and laws of the Republic of Uzbekistan[21].

In addition, in 1995, a Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan"[22] was adopted and renewed in 2017. The new version defines the legal status of the Constitutional Court, its judges and the grounds for consideration of constitutional cases. Article 4 of the Law stipulates the same Powers of the Constitutional Court.

However, respondents of the online questionnaire were not aware of real application of some powers of the Court.

Table No. 4[23]

Question	**Do you know that the Constitutional Court of the Republic of Uzbekistan has determined non-compliance of the resolutions of the government to the Constitution of the Republic of Uzbekistan?**		
Answers	No, there has not been such case at all.	I do not know for sure.	Yes, it must have been once or twice
In percentage	39	35,2	25,7

In detail, approximately two thirds of respondents are not sure or do not believe that Constitutional Court of the Republic of Uzbekistan has ever determined non-compliance of the resolutions of the government of the Republic of Uzbekistan.

21 Article 109 of Constitution of the Republic of Uzbekistan. National database of legislation, 05.09.2019, No. 03/19/563/3685. Available from <https://lex.uz/docs/4032775> accessed 9 February 2021.

22 National database of legislative acts, 18.03.2020, № 03/20/612/0326. Available from <https://lex.uz/docs/3221765> accessed 9 February 2021.

23 <https://docs.google.com/forms/d/1WML3KXf_gRiAJchj_bFgwPKTwOUulSsizsFLFVXcrWU/edit#responses> accessed 9 February 2021.

Another important aspect of the Constitutional Court is its power of legislative initiative. According to Article 83 of the Constitution of the Republic of Uzbekistan and Article 14 of the Law "On the Constitutional Court of the Republic of Uzbekistan", the Constitutional Court of the Republic of Uzbekistan has the right to legislative initiative. Legislative initiative shall certainly be in written form with all appendixes and submitted to the Legislative Chamber of the Oliy Majlis (parliament) of the Republic of Uzbekistan.

In accordance with Article 83 of the Constitution of the Republic of Uzbekistan, the following governmental bodies have the right to initiate draft law:

1. the President of the Republic of Uzbekistan;
2. the higher representative body of state authority from the Republic of Karakalpakstan;
3. the deputies of the Legislative Chamber of the Republic of Uzbekistan;
4. the Cabinet of Ministers of the Republic of Uzbekistan;
5. the Constitutional Court;
6. the Supreme Court;
7. the Procurator-General of the Republic of Uzbekistan.

The above-mentioned bodies have the right to initiate legislation by introducing draft laws to the Legislative Chamber of the Republic of Uzbekistan.

However, looking at Table No. 3 only 11 initiatives were made during the activity of 26 years (1995–2021) of the Constitutional Court of the Republic of Uzbekistan. Perhaps, the main problem here is some procedural issues. In detail, there is no direct mechanism to accept the decisions, comments or interpretations of the Constitutional Court of the Republic of Uzbekistan in the current legislation.

Example No. 1. For instance, the decision[24] on 2 May, 2006, finds the mistake in the Law "On Normative-legal Acts" and gives an official interpretation of the Law. However, the decision of the Court was not discussed in the Legislative chamber of the parliament of the Republic of Uzbekistan. Even though the Court found a mistake in 2006, the Legislative chamber adopted the Law[25] in the new edition after 6 years (in 2012) therefore simply ignoring the decision of the Court.

24 Available from. <http://ksu.uz/decisions/20060502uz.pdf> accessed 9 February 2021.

25 Law of the Republic of Uzbekistan "On Normative legal Acts". National database of legislative acts, 09.01.2019., № 03/19/512/2435. Available from. <https://lex.uz/docs/2105726> accessed 9 February 2021.

Example No. 2. In 2006, the Constitutional Court of the Republic of Uzbekistan decided that the contradicting rules of the Laws "On Advocacy[26]" and "On Guarantees and Social Protection of Advocates" should have been unified by the legislator. The legislator kept silence and did not amend two laws. Even after such a court decision, the rights of lawyers were violated.

Example No. 3. The Court found that the legal system for registering people in their living places was unfair and against the constitutional right to freedom of movement (Article 28 of the Constitution of the Republic of Uzbekistan). According to the Constitution, citizens of the Republic of Uzbekistan shall have the right to freedom of movement on the territory of the Republic, as well as a free entry to and exit from it, except in the events specified by law. However, according to the legislative acts people could not live in the Tashkent city without permanent registration. The status of permanent registration was given only to a certain group of people. For ten years, this Constitutional Court decision was ignored and citizens were deprived from living in the capital city of Tashkent without permanent registration. The law was amended by the President on May 13 2020[27].

In order to find out citizens' opinion on the issue, the results of the online questionnaire are as follows.

Table No. 5[28]

Question	**Do you remember that the Constitutional Court of the Republic of Uzbekistan appealed to the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan with legislative initiative?**			
Answers	I have never heard of it.	I don't think it ever applied.	Yes, I know it applied many times.	The Constitutional Court of the Republic of Uzbekistan has no right of legislative initiative.
In percentage	66,7	30,5	2	1

Thus, it is possible to see that a majority of respondents never heard or knew when the Constitutional Court of the Republic of Uzbekistan appealed to the Legislative Chamber of the Parliament with legislative initiative.

26 National database of legislative acts, 11.09.2019., 03/19/566/3734. Available from. <https://lex.uz/docs/54503> accessed 9 February 2021.

27 National database of legislative acts, 14.05.2020., 03/20/616/0580. Available from. <https://lex.uz/docs/4811010> accessed 9 February 2021.

28 <https://docs.google.com/forms/d/1WML3KXf_gRiAJchj_bFgwPKTwOUulSsizsFLFVXcrWU/edit#responses> accessed 9 February 2021.

Another similar question got almost the same results.

Table No. 6[29]

Question	Do you know the law adopted on the initiative of the Constitutional Court of the Republic of Uzbekistan?		
Answers	No. I am not aware of that.	Yes, there are a couple of pieces of legislation.	I do not know.
In percentage	72,4	14,3	13,3

The majority of respondents were not aware of law that adopted on the initiative of the Constitutional Court of the Republic of Uzbekistan.

In order to clarify the issue, it would be better firstly to draw our attention to the following question.

Do the decisions of the Constitutional Court of the Republic of Uzbekistan have direct effect on the Legislative Chamber of Parliament of the country?

Constitutional Law "On Constitutional Court of the Republic of Uzbekistan" (Article 13) stipulates that all decisions of the Constitutional Court are binding on all state authorities and administration, as well as enterprises, institutions, organizations and public associations, officials and citizens[30].

If we analyze the article, generality of the rule does not let us clearly identify whether the Legislative Chamber of Parliament of the country is a state authority or an administration. Many national scientists[31] believe that the Legislative Chamber of Parliament of the country is body of state authority.

However, if we scrutinize other related laws we find out something extraordinary. According to the Law "On the preparation of draft laws and submission to the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan"[32] (Article 27), those with the right of legislative initiative shall submit the following documents:

29 <https://docs.google.com/forms/d/1WML3KXf_gRiAJchj_bFgwPKTwOUulSsizsFLFVXcrWU/edit#responses> accessed 9 February 2021.

30 Available from: <https://lex.uz/docs/3221763> accessed 9 February 2021.

31 Odilqoriev Kh. *Davlat va huquq nazariyasi.* [Theory of state and law]. Textbook. – Tashkent: Adolat, [2018]. p 528. // Saydullaev Sh. Davlat va huquq nazariyasi. [Theory of state and law]. Textbook. – Tashkent: TSUL, [2018]. p. 528. (in Uzbek).

32 Available from: <https://lex.uz/docs/1069264> accessed 9 February 2021.

1) an explanatory note to the draft law outlining its concept;

2) a draft law;

3) a list of by-laws which are subject to amendment, addition, invalidation or adoption;

4) an analytical comparative table indicating in a sequential order the relevant provisions of international documents and legislation of foreign countries, legislation of the Republic of Uzbekistan, reasonable proposals on the acceptability of the application of the relevant international experience in the conditions of the Republic of Uzbekistan.

5) financial and economic justification;

6) the conclusion of the Cabinet of Ministers of the Republic of Uzbekistan on draft laws providing for a reduction in government revenues or an increase in government spending.

7) electronic form of all materials and additional sources.

If we conclude for the given question judging the current legislative acts of the Republic of Uzbekistan, it is blatantly obvious to come into the following summaries:

firstly, the decisions of the Constitutional Court of the Republic of Uzbekistan are theoretically mandatory for the Legislative Chamber of the Republic. But, practically, examples No. 1 and 2 indicate that the Legislative Chamber of the parliament does not consider the decisions of the Constitutional Court in order to improve legislation except from legislative initiative.

secondly, a decision of the Constitutional Court of the Republic is not sufficient to amend, repeal or establish a law. According to the current legislation, the Constitutional Court shall submit a set of documents to the Legislative Chamber of the parliament to implement its decisions[33].

If we raise the second issue of constitutional justice, in Uzbekistan citizens are not allowed to file a constitutional case to the Constitutional Court.

In Uzbekistan, several constitutional rights of citizens are violated, but most notably Article 35 of the Constitution of the Republic of Uzbekistan.

33 Article 27 of Law "On the order of preparation of draft laws and introduction to the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan". Available from: https://lex.uz/docs/1069264 accessed 9 February 2021.

In accordance with constitutional rule, everyone has the right to submit applications, proposals and complaints directly to the competent state bodies, institutions or people's representatives, together with himself and others.

The Law "On Constitutional Court of the Republic of Uzbekistan" restricts citizens' right to petition the Constitutional Court with a claim. According to Article 25, the following have the right to file a case to the Court.

1. Chambers of the Oliy Majlis of the Republic of Uzbekistan;
2. The President of the Republic of Uzbekistan;
3. The Cabinet of Ministers of the Republic of Uzbekistan;
4. Representative of the Oliy Majlis of the Republic of Uzbekistan on Human Rights (Ombudsman);
5. Jogorku Kenesh (parliament) of the Republic of Karakalpakstan;
6. A group of deputies consisting of at least a quarter of the total number of deputies of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan;
7. A group of senators consisting of at least a quarter of the total number of members of the Senate of the Oliy Majlis of the Republic of Uzbekistan;
8. Supreme Court of the Republic of Uzbekistan;
9. Prosecutor General of the Republic of Uzbekistan;
10. Chairperson of the Accounts Chamber of the Republic of Uzbekistan.
11. An issue may also be submitted to the Constitutional Court for consideration at the initiative of at least three judges of the Constitutional Court[34].

Belarus, Russia, Azerbaijan, Kazakhstan laws have similar rules which are against the constitutional rights of citizens.

The issue researched with the aid of social questionnaire among students of Tashkent State University of Law.

34 National Database of Legislation, March 18, 2020, No. 03/20/612/0326 Available from. <https://lex.uz/docs/3221763> accessed 9 February 2021.

Table No. 7[35]

Question	As a citizen, you cannot directly submit to the Constitutional Court of the Republic of Uzbekistan the issue of verifying the constitutionality of normative legal acts. How do you feel about that?		
Answers	I think this is against democratic principles.	I think this is injustice.	That is right.
In percentage	61	25,7	13,3

It is feasible to conclude that most of respondents believe that restriction of filing a constitutional case to the Constitutional Court is against democratic principles.

5. Conclusion

In summary, the above analysis is aimed at improving constitutional justice, increasing its effectiveness in ensuring constitutional legality in the country and protecting the fundamental rights and freedoms of citizens of Uzbekistan. The recommendations and suggestions to improve the direct effect of the mechanism of constitutional control to the legislation and grant citizens right to file a case to the Constitutional Court of the Republic of Uzbekistan have been put forward as follows.

First, amend Articles 108 and 109 of the Constitution of the Republic of Uzbekistan.

Those articles should stipulate that the decisions of the Constitutional Court related to law and normative-legal acts must be automatically amended or revoked by the legislator. This change is necessary because the current legislation of the Republic of Uzbekistan states that the decisions of Constitutional Court are not "enough" to amend, repeal or establish normative legal acts. Thus, I argue that the decisions of the Constitutional Court should be obligatory for the legislators to establish, amend or abolish their normative legal acts.

Second, according to Article 10 of the Constitution of the Republic of Uzbekistan, only the Oliy Majlis and the President of the Republic can act on behalf of the population of Uzbekistan. According to Article 76 of the Constitution, the Oliy Majlis is the highest state representative body and exercises legislative power. According to Article 93 of the Constitution of the Republic of Uzbekistan, the President of the Republic of Uzbekistan guarantees the observance of the rights and freedoms of citizens, the Constitution and laws of the Republic of Uzbekistan.

35 <https://docs.google.com/forms/d/1WML3KXf_gRiAJchj_bFgwPKTwOUulSsizsFLFVXcrWU/edit#responses> accessed 9 February 2021.

According to Article 108 of the Constitution of the Republic of Uzbekistan, the Constitutional Court hears cases on the constitutionality of acts of the legislature and the executive branches. Therefore, in some countries (Russia, Belarus), the Constitutional Court is required by law to prepare an annual report on the state of constitutional legitimacy in the country and submit it to parliament and the president. Such information reflects the constitutional situation in the country, the problems and the ways proposed by the Court to find a solution, and in foreign countries such information serves as a critical factor in the relevant decisions of parliament and the head of state. Thus, we consider that Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" should be amended with addition in this regard. All representatives of executive branch of the Republic should submit annual report on the constitutionality of their acts.

As a result, the Constitutional Court should analyze all data collected all representatives of executive branch and annually provide information to the chambers of the Oliy Majlis and the President of the Republic of Uzbekistan on the state of constitutional legitimacy in the country.

This information will serve as an important factor for the Oliy Majlis in improving the quality of laws and parliamentary control over their implementation, and for the head of state to act as a guarantor of rights and constitution.

Third, citizens of the Republic of Uzbekistan should be granted the right to bring a case to the Constitutional Court.

Many officials have the authority to bring claims to the court, including members of legislative branch.

However, the citizens do not have the right to claim to the Constitutional Court.

At a regular session of the Legislative Chamber of the Oliy Majlis on November 10, 2020, deputies considered in the first reading the draft law "On amendments and additions to the Constitutional Law of the Republic of Uzbekistan" On the Constitutional Court of the Republic of Uzbekistan".

The draft law granted citizens the right to bring claims to the Constitutional Court[36]. However, it was suspended in the level of Senate. It is proposed to abandon the practice of initiating questions by judges of the Constitutional Court, and to endow the structural divisions of the apparatus of the Constitutional Court with the right to preliminary analysis of appeals received from citizens and legal entities, to verify their compliance

36 Official web site of Parliament of the Republic of Uzbekistan <http://parliament.gov.uz/uz/events/chamber/32659/?sphrase_id=6716182> accessed 9 February 2021.

with the requirements of the legislation. All this is aimed at improving constitutional control, increasing its effectiveness in ensuring constitutional legality in the country and protecting the fundamental rights and freedoms of citizens.

Thus, the adoption of the new version of the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" will serve to strengthen constitutional control, constitutional legality in the country, improve constitutional proceedings and ultimately effectively protect the rights and freedoms of citizens guaranteed by the Constitution of the Republic of Uzbekistan.

Fourth, the activity of the Constitutional Court is regulated by the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" adopted on May 31, 2017. However, the procedural rules of the Constitutional Court are determined by the Regulations approved by the Constitutional Court itself.

Most countries' legislation on the constitutional courts stipulates that such provisions shall be established by law and not by the Constitutional Court. This is because the procedural rules are directly related to the implementation of human rights and therefore they should be defined by law.

In addition, the analysis of the practice of constitutional proceedings shows that in our country there are a number of other pressing issues that need to be addressed in order to better protect the constitutional rights of citizens.

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SERIKBEK ALPAMYSOVICH MURATAEV

Problems of Formation of Legal Policy in the Republic of Uzbekistan

The issues of the formation of legal policy are of a complex nature and, accordingly, it should be considered not only from the point of view of law but also from the influence of history, the economy, social status of the population, and other factors.

1. Historical analysis

In our opinion, a scientifically grounded answer to the current situation of the formation of legal policy in Uzbekistan, first, should be sought from a historical perspective. A feature of the development of social relations in the Republic of Uzbekistan is that the country is historically based on administrative-command management[1], as this can be observed from the time of the three khanates, then continued during the Russian colonization and especially intensified during the period of the socialist system. Overcoming attitudes in public relations that have taken root over the past few centuries is not an easy task. In addition, a true legal policy requires from society market relations based on the protection of property rights and the development of fair competition. Moreover, as a retrospective analysis of the past shows, the elements of market relations on the territory of Uzbekistan did not exist until the beginning of the 90s of the last century.

During the time of the three khanates (Khiva, Bukhara emirate, and Kokand khanates), a feudal system "reigned" on the territory of present-day Uzbekistan. The main income-generating industry for the population and the state was agriculture. The peasantry were involved in cattle breeding, fishing, and other economic pursuits[2]. Cotton growing was specially developed by the peasantry, which continues to this day. The economy was not based on production. The main export commodity was cotton and, at best, silk, a semi-finished cotton product. The then-official authorities exploited the local population on cotton plantations. As the famous historian of Uzbekistan Kh.

1 The administrative-command management, also known as the command-administrative system, is the system of management of an economy of a state characterized by the strict centralization of economic blueprinting and distribution of goods, based on the state ownership of the means of production and fulfilled by government bureaucracies in the absence of economic freedom.

2 Kh. Sodikov, P. Shamsutdinov, P. Ravshanov, Q. Usmanov, *New history of Uzbekistan. Turkestan in the colonial period of tsarist Russia* (in Uzbek Ўзбекистоннинг янги тарихи. Туркистон чор Россияси мустамлакаси даврида) [2000]. 464.

Sodikov writes: "The Bukhara Emirate was a state based on the autocracy of the emir."[3] It should be noted that the Khiva and Kokand khanates did not particularly differ from Bukhara. With the arrival of the Russians, production processes began. The construction of a railway began the launch of small factories, in other words, the beginnings of bourgeois society based on the beginning of production. At the same time, the khanates retained a certain autonomy, which hindered the full penetration of the bourgeois system into Central Asia. As a result, in these countries, the predominant part of public life was based on agriculture. It was beneficial both for the local elite and for the tsarist government. The latter seized these territories precisely for the sake of satisfying their need for agricultural products. As a result, the countries of Central Asia met the 20th century as feudal states, while the entire civilized world grew from the bourgeoisie to capitalism. One of the outstanding thinkers of Central Asia in the 19th century, Ahmad Donish, also believed that the main obstacle to social development was the feudal social system, the lack of principles of justice and the presence of greedy officials who put personal interests above the interests of society.[4]

With the collapse of the Tsarist empires and the arrival of the Bolsheviks, the development of bourgeois relations was completely turned towards the construction of communism, where private property was rejected. As a result, at first, all the khanates were transformed into people's republics (Bukhara People's Soviet Republic, Khorezm People's Soviet Republic), and then in 1924 the Uzbek SSR, Kazakh SSR, Turkmen SSR, Kyrgyz ASSR, Tajik ASSR, Karakalpak ASSR were formed. This entire system was built on command-and-control management, and all the property of the country was viewed as socialist property, i. e. common property. Thus, the construction of a capitalist system and the formation of market relations was postponed by almost 70 years.

2. Statistical analysis

It should be noted that everything that happened in history directly affects contemporary life, although attempts are being made to effectively reform the private sector to improve property protection, develop competition and create a favorable investment climate. Many factors contribute to this, and one of them, as already mentioned, is the historical factor of public construction. According to preliminary data from the State Statistics Committee of the Republic of Uzbekistan, 28.1 % of the working-age population of Uzbekistan is still employed in agriculture. However, below is a table for statistical analysis:

3 Kh. Sodikov, P. Shamsutdinov, P. Ravshanov, Q. Usmanov, *New history of Uzbekistan. Turkestan in the colonial period of tsarist Russia* (in Uzbek Ўзбекистоннинг янги тарихи. Туркистон чор Россияси мустамлакаси даврида) [2000]. 464.

4 Dj. Toshkulov, *History of political and legal doctrines.* (in Uzbek) TSIL [2003].

Main macroeconomic indicators of the Republic of Uzbekistan						
	Unit of measurement	2015	2016	2017	2018	2019*
GDP, total	*billion. soum*	210 183,1	242 495,5	302 536,8	406 648,5	511 838,1
including:						
Gross value added of industries	*billion. soum*	190 036,2	220 064,0	267 744,8	361 072,7	465 357,4
Gross value added of industries	*%*	100,0	100,0	100,0	100,0	100,0
agriculture, forestry and fisheries	*billion. soum*	64 680,3	74 779,0	90 983,9	113 660,7	130 599,9
share in the structure of GVA	*%*	34,1	34,0	34,0	31,5	28,1
industry	*billion. soum*	38 466,6	45 397,9	59 570,4	95 803,9	139 812,8
share in the structure of GVA	*%*	20,2	20,6	22,2	26,5	30,0
construction	*billion. soum*	11 382,6	13 148,0	15 228,6	22 101,1	29 891,5
share in the structure of GVA	*%*	6,0	6,0	5,7	6,1	6,4
services	*billion. soum*	75 506,7	86 739,1	101 961,9	129 507,0	165 053,2
share in the structure of GVA	*%*	39,7	39,4	38,1	35,9	35,5

*) preliminary data

Almost 1/3 of the economy is based on agriculture and this is an indirect confirmation of the fact that there are still elements of feudalism and the administrative-command approach in public administration, which prevents the full-fledged formation of the rule of law. Statistics from previous years indicate that the share of agriculture in the economy was higher than in 2019. Agriculture still remains a huge share of the economy, especially as semi-products also show the existence of feudal attitudes, which also affect the rule of law. Uzbekistan did not travel a path to a capitalistic society from the bourgeoisie as the rest of developed and developing countries. During these several decades, instead, it was living in a communistic regime. That is why the characteristics of the modern problems of Uzbekistan have similarities to the period in the bourgeoisie regimes in the 17th and 18th centuries. Figuratively, Uzbekistan is "catching up" after years of socialism.

According to the State Statistics Committee of Uzbekistan, more than 3.5 million people are still concentrated in agriculture.

Attachment-1 to the letter
Goskomstat of the Republic of Uzbekistan
Dated 01.12.2020 No. 01/1-01-19-1055

Employed population by type of economic activity in the Republic of Uzbekistan

	thousand people				
	years				
	2015	2016	2017	2018	2019
Total	13 058,3	13 298,4	13 520,3	13 273,1	13 541,1
of them:					
agriculture, forestry and fisheries	3 601,7	3 646,7	3 671,3	3 537,2	3 544,6
industry	1 768,7	1 802,4	1 826,8	1 802,9	1 821,5
construction	1 222,2	1 263,6	1 290,0	1 205,5	1 324,6
wholesale and retail trade; repair of motor vehicles and motorcycles	1 413,8	1 452,4	1 480,2	1 401,8	1 436,4
transportation and storage	614,7	638,2	654,9	645,2	646,1
accommodation and catering services	297,3	308,0	313,3	301,9	315,3
information and communication	61,7	63,6	64,3	62,7	62,2
financial and insurance activities	69,8	66,5	72,0	73,5	75,8
real estate transactions	68,1	69,3	69,3	66,7	62,4
professional, scientific and technical activities	131,0	135,4	140,9	141,5	140,9
management and provision of support services	71,4	73,6	76,1	76,1	95,4
public administration and defense; compulsory social security	598,1	599,2	577,8	631,7	636,6
education	1 105,3	1 105,6	1 106,6	1 111,7	1 134,4
health care and social services	601,5	601,6	602,6	604,0	616,7
art, entertainment, and recreation	65,0	65,1	65,3	65,6	66,0
provision of other types of services	1 368,0	1 407,2	1 508,9	1 545,1	1 562,2

If we take into account that wholesale and retail trade, transportation and storage, accommodation and food services, as well as education and others, do not belong to production, then we can conclude approximately the following: in 2019, about 1,821.5 people were employed in manufacturing, i. e. e. about 5 % of the total population. The 5 % indicator can be considered an indirect confirmation of the fact that capitalist relations have not yet formed in the country, where much would be based on the principles

of equality, a fair competitive environment, and reliable protection of private property. In many areas of the domestic market economy, the lion's share belongs to state-owned enterprises. For example, "Uzbekiston Temir Yullari" (Uzbek Railways with 100 % state share)[5] Uzbekiston Havo Yullari (Uzbek Airlines), Uzbekneftegaz, Uzavtosanoat (Uzbek car industry)[6], Uzkimyosanoat (Uzbek Chemical Industry), Uzbek Pakhtasanoat (Uzbek Cotton Industry), Uzagroservis, Uzbekugol, Uzbek Commodity, and Raw Materials Exchange, and others. The presence or rather the monopoly position of state-owned enterprises in many areas of the economy will certainly negatively affect the rule of law, which indicates the presence of politicized law, rather than legal policy in the country.

3. Expert analysis

In our subjective opinion, the foundation of lawmaking and law enforcement practice of Uzbekistan is still based on these past bases, where the main philosophical question as interest on the highest legal plane is divided into the interests of the state, society, and the individual. In our opinion, this is not acceptable in modern conditions and is possibly one of the main reasons for the "stumbling block" in the construction of the rule of law. The question arises: What is included in the list of state interests? Why should a mechanism (system) called the state have priority over the interests of the people (person)? Is this not an infringement, a limitation of human rights? Even if the existence of state interest is permissible, should not it be formed based on the interests of the majority of members of society? However, there are enough questions. We believe that it is important to reconsider all notions in the Main law related to interests. To be precise, state and social interests have to be united, and citizens' interests must remain separate. Because logically, the existence and functioning of state bodies have to have activity for providing citizens' rights and legal interests.

For example, article 20 of the Constitution of the Republic of Uzbekistan[7] establishes that the exercise of rights and freedoms by a citizen should not violate the legitimate

5 Articles of Association of the Joint Stock Company "Uzbekiston Temir Yullari" Section III 24 clause. (Устав акционерного общества «Узбекистон темир йуллари» Раздел III 24 пункт.) Available from <http://www.railway.uz/ru/proekty/1917/> accessed 9 February, [2021].

6 For information: Services of the Uzbek car industry is the most critically discussed topic among the population on social networks. Due to the monopoly position of the manufacturer in the country, the low quality of the cars produced, the prices are twice as high as compared with the export options, the issues of corruption in the process of selling cars, the excessively high rate on customs clearance of imported cars, which is a manifestation of "protectionist policy" and others.

7 Available at <https://lex.uz/docs/4032775>.

interests … of the state and society, or Article 54 enshrines the rule that the use of property should not harm … the interests of … the state.

Kh. T. Adilkariev interprets the content of Article 20 of the Constitution of the Republic of Uzbekistan in a rather strange way "There is a general understanding that the period of temporary economic difficulties can be overcome only if the President, the government and the people act in unity, fight with one front and provide each other with mutual support. The provision of Article 20 of the Constitution of the Republic of Uzbekistan is symbolic in this respect."[8] It is difficult to grasp the meaning of what the scientist means by the concept of "providing mutual support to each other" and how it relates to the content of Article 20 of the Constitution.

Questions related to interests are found in thirteen articles[9] of the Constitution of Uzbekistan. We believe that this is our main problem, that a logically unified whole substance as interest, we divide between three subjects: the state, society, and the individual.

One of the domestic scientists of Uzbekistan I. T. Tulteev fairly discussed this issue in the Constitution of Uzbekistan in the following way: "The diversity of the bearers of interests in the public administration system speaks of the complex nature of their relationships, which objectively can sometimes conflict with each other. This means that it is necessary to determine the criteria for establishing a balance of interests, as well as cases when, for example, the public interest may take precedence over private interests[10].

We believe that such an approach to lawmaking is inherited from the old socialist legal system, which, as a result of failure to adapt to the objectively formed realities of modern life, collapsed. For example, in Article 39 of the Constitution of the former USSR, there was such a norm: the use of rights and freedoms by citizens should not harm the interests of society and the state …, which is evidence of the influence of history on the formation of the legal system of Uzbekistan. A similar approach can be seen in one of the judgments of the domestic scientist of Uzbekistan, lawyer Z. M. Islamov, where the spirit of socialism is clearly traced. Therefore, the scientist notes that the state, both in the interests of the citizen and society and in its own interests, follows the path of self-re-

8 Kh. T. Adilkariev, New Constitution is the great symbol of the sovereignty of Uzbekistan (In Russian Новая Конституция – великий символ суверенитета Узбекистана). Adolat, [1993].

9 Articles of the Constitution of the Republic of Uzbekistan 2, 7, 14, 16, 17, 20, 30, 54, 58, 59, 93, 98, 99.

10 I. T. Tulteev, *Personal, public and state interests in the field of public management: correlation and legal defense* (In Russian Личные, общественные и государственные интересы в сфере публичного управления: соотношение и правовая защита) (2019) PL 195.

straint and establishes the area of natural rights and freedoms of citizens.[11] At the same time, the scientist does not provide a list of state interests. In addition, the state is not capable of establishing the area of natural rights of citizens; it literally naturally belongs to a man by nature.

Analysis of the judgment of individual scholars in the field of law allows us to develop a preliminary hypothesis that in Uzbekistan:

Firstly, the transition to the Romano-Germanic legal system has not yet been finally completed;

Secondly, the foundation of Uzbekistan's legal system is still based on the socialist legal system, where legal norms protect the interests of the state.[12]

4. Comparative analysis

In our opinion, the norms of the constitutions of certain foreign countries on the issue under discussion are formulated in a more rational way. As a comparison, for example, exactly the same rule is reflected in the German Basic Law in the most rational way. Thus, Article 14 establishes that "Property entails obligations, its use shall also serve the common good." The key concept here is "common good". Article 69 of the Icelandic Constitution has similar content, where it is written, and "There can be no restrictions on freedom of entrepreneurial activity other than for the common good. Such restrictions must be based on the law".[13]

Article 36 of the Swiss Constitution states that "Restrictions on fundamental rights must be justified by the public interest or protection of the fundamental rights of third parties."[14] As evidenced by the most developed and democratic world practice, not a single constitution of the Romano-Germanic or Anglo-Saxon legal system of countries contains a division of interests into the state, public and personal. Since public bodies are created for this and must function in order to promote the implementation of the legitimate interests of each person. Consequently, in turn, based on the interests of the individual, the interests of the majority are formed, which is called the public interest. That is, the public interest is the interest of a reasonable majority of the population, formalized by legal norms. Moreover, this is an axiom that cannot be refuted by anyone.

11 Z. M. Islamov. *Problems of the power: its understanding, purpose, social value* (In Russian Проблема власти: её понимание, назначение, социальная ценность). TSIL [2003].

12 F. P. Khayitboev, M. K. Najimov, *Basic modern legal systems* (In Uzbek Хозирги замон асосий ҳуқуқий тизимлари). TSIL [2008].

13 Constitution of Iceland [1944]. Article 69.

14 Constitution of Switzerland [1999] Article 36.

Prominent German lawyer Rudolf von Jhering theoretically substantiated the meaning of the category "interest". By interests, he understood the demands of life in a broad sense; he recognized the right itself as legally protected interests[15].

Sh. Z. Urazaev also expressed a similar opinion. He writes, "If we consider state power as the political leadership of society, and it is such, then the law is a form of power, a means of manifesting the policy of power in life.

The main purpose of power in modern conditions is the protection of human rights, democracy, and regulation of legal and social relations in the interests of the Human. If power exceeds its purpose, and is exercised over man without expressing his interests, it becomes totalitarian."[16]

Naturally, it should be recognized that in international relations, each state has its own interests, this is objective and these interests, ideally, they should be formed based on the interests of its citizens and it is called national interests but by no means state interests.

We believe that this very fundamental factor influencing the legal system of Uzbekistan is a "stumbling block" in the effective implementation of the noble aspirations, goals, and objectives, begun in building a new Uzbekistan. Society should be guided by the norms of laws that are adopted after a long discussion and have the highest legal force in the legal regulation of public relations, and by-laws should only concretize its individual norms without violating the principles and spirit of the law. Based on the general theory of law, it can be noted that by-laws should regulate only procedural moments for the implementation of certain material norms. Since the executive authorities issue bylaws, the likelihood of pursuing "departmental interests" is high. All introductory parts of issued bylaws should begin with reference to specific articles of laws and codes because the primordial function of the executive branch is to comply with the norms of laws, and not to exercise departmental interests.

5. Descriptive analysis

The problems of forming legal policy or the predominance of someone's interests are noticeable in the formulation of bylaws. Therefore, according to the Law of the Republic of Uzbekistan "On Normative Legal Acts", the Republic of Uzbekistan recognizes the unconditional supremacy of the Constitution and the laws of the Republic of Uzbekistan.

15 Jhering R, *Interest and law*, [1998] P. 57.
16 Sh. Z. Urazaev, *Power and law* (In Russian Власть и закон)."FAN" [1991].

Decrees and resolutions of the President of the Republic of Uzbekistan, resolutions of the Cabinet of Ministers of the Republic of Uzbekistan, orders, and resolutions of ministries, state committees, and departments, decisions of local government bodies are by-laws. The President of the Republic of Uzbekistan based on and in pursuance of the Constitution and laws, adopts normative legal acts in the form of decrees and resolutions.[17]

The Cabinet of Ministers of the Republic of Uzbekistan based on and in pursuance of the Constitution, laws of the Republic of Uzbekistan, resolutions of the chambers of the Oliy Majlis of the Republic of Uzbekistan, decrees, resolutions, and orders of the President of the Republic of Uzbekistan, adopts regulatory legal acts in the form of resolutions. The laws declare the rule of law, that all by-laws are adopted in compliance with the norms of the Constitution and laws, but in practice, in most cases, by-laws are adopted in execution of decrees or resolutions of the President of the Republic of Uzbekistan, and sometimes they directly contradict the norms of laws and the constitution.

So, the introductory part of the Resolution of the Cabinet of Ministers of the Republic of Uzbekistan "On measures to improve the provision of organizations and the population of the Fergana region with electric energy"[18] does not prescribe in the implementation of which article of the Constitution or law this norm was adopted. This norm refers to the Resolution of the President of the Republic of Uzbekistan "On measures to implement the general plan of Fergana, the construction and reconstruction of social and transport-communal infrastructure for the period 2012–2015." the liquidation of *JSC Fargona viloyat energo markazi* is envisaged, but this kind of Presidential Decree is absent on the basis of national legislation.

To give another example, in the Resolution of the President of the Republic of Uzbekistan "On measures to implement the investment project"[19] Construction of a wind farm with a capacity of 500 MW in the Navoi region there is also no reference in the

17 Law Republic of Uzbekistan "On Normative Legal Acts" (In Russian «О нормативно-правовых актах») <https://lex.uz/docs/2105726>.

18 Resolution of the Cabinet of Ministers of the Republic of Uzbekistan "On measures to improve the provision of organizations and the population of the Fergana region with electric energy" (In Russian Постановление Кабинета Министров Республики Узбекистан «О мерах по улучшению обеспечения организаций и населения Ферганской области электрической энергией») <https://lex.uz/ru/docs/2101127>.

19 Resolution of the President of the Republic of Uzbekistan "On measures to implement the investment project 'Construction of a wind power plant with a capacity of 500 MW in the Navoi region' (In Russian Постановлении Президента Республики Узбекистан «О мерах по реализации инвестиционного проекта «Строительство ветряной электростанции мощностью 500 МВт в Навоийской области») <https://lex.uz/docs/5177530>.

implementation of which constitutional or legal provision this resolution was adopted, although there are relevant laws in this area.

The Decree of the President of the Republic of Uzbekistan "On measures to further accelerate the organization of the introduction of water-saving technologies in agriculture"[20] also lacks any reference to the law or the norms of the Constitution.

As a result, in many by-laws (decrees, decrees, orders, and decisions), one can notice that their content and meaning are separated from the spirit of laws and sometimes the constitution. Sometimes, decrees of the Cabinet of Ministers contradict decrees of the President of the Republic of Uzbekistan, which in practice leads to numerous problems and violations of the rights and legitimate interests of individuals and legal entities. In such by-laws, departmental interests clearly prevail, where individuals lobby for their commercial interests through state and economic administration bodies, as well as local government bodies, which fundamentally contradict the true public interest.

6. Causal analysis

As another bright example of probably lacking relations to laws of Presidential decrees is the Decree "On additional support measures for the population, industries of the economy and businesses during the coronavirus pandemic" which established zero rates of customs duties and excise taxes on the import of goods including sugar. As a result, from 15 July 2020 "Horazm-shakar" and "Angren-shakar" plants due to encouraging import goods forcedly had suspended their activities where worked more than 2 thousand employees. Such situations had occurred in neighboring countries. The question arise on the basis of which law or code are these "self-destructive measures" established? Why are there no tax incentives for domestic factories, while importers are completely exempt from taxes? Why do similar problems arise in neighboring countries almost simultaneously? What external factors can affect the domestic sugar market? Shouldn't the authorities protect domestic producers in order to ensure the country's food security? Consequently, whose interests are so dominated by the interests of the people? The preliminary sum is that the economy of the state is still strong in administrative managements, lacks real market principles, as well as does not provides norms in the Constitution: "The state shall express the will of the people and serve their interests". That is why we suggest initiating real constitutional reforms in order to establish legal policy and sensible divisions of powers, where vital issues will be considered in parlia-

20 Resolution of the President of the Republic of Uzbekistan "On measures to further accelerate the organization of the introduction of water-saving technologies in agriculture" (In Russian Постановление Президента Республики Узбекистан «О мерах по дальнейшему ускорению организации внедрения водосберегающих технологий в сельском хозяйстве») <https://lex.uz/ru/docs/5157170>.

ment and therefore providing transparency. Our concrete suggestions will be listed in the below-mentioned texts.

7. Legal-technical analysis

Almost all laws contain in their content a large number of reference and discretionary norms, which both reduce the significance of the norms of laws and increase deviations from the spirit of these laws through by-laws. Thus, one of the socially and economically important laws of the Republic of Uzbekistan adopted in recent years is the Law of the Republic of Uzbekistan "On Administrative Procedures".[21]

This law is distinguished by its more democratic character and relatively balanced interests in comparison with other laws adopted in previous years. For example, Article 19 of this law states, "Administrative acts and administrative actions must comply with the principles of administrative procedures. Failure to comply with the principles of administrative procedures entails the cancellation or revision of administrative acts and administrative actions." One gets the impression that officials in the course of resolving an administrative case should unquestioningly obey the principles of this law. Accordingly, the principles of this law are also quite democratic such as legality; proportionality; reliability; the opportunity to be heard; openness, transparency, and clarity of administrative procedures; priority of the rights of stakeholders; inadmissibility of bureaucratic formalism; meaningful absorption; implementation of administrative proceedings in "one window"; equality; protection of trust; the legality of administrative discretion (discretionary powers) and the principle of research.

At the same time, in the articles that reveal the essence of these principles, the legislator leaves great opportunities for the executive authorities to "maneuver". Thus, Article 6 establishes that "administrative procedures must be carried out in accordance with the Constitution of the Republic of Uzbekistan, this Law and other acts of legislation." The question arises: What is included in "other acts of legislation"? From the general theory of law, we know that the principles of law are fundamental values, ideas, and the core on which laws are held. Based on these principles, the essence of the remaining articles of the laws should be determined. In addition, "other acts of legislation" can be interpreted in different ways and the most undesirable is that it can include many bylaws, where departmental interests may prevail. Moreover, the law should not protect departmental interests! It must protect the interests of people and society. After all, the principle of legality primarily means compliance with the law, and not with other acts of legislation, to which includes bylaws.

21 Law of the Republic of Uzbekistan "On Administrative Procedures" (In Russian Закон Республики Узбекистан «Об административных процедурах») <https://lex.uz/docs/3492203>.

A very controversial point in this law is also part two of Article 2, which emphasizes "In cases where the acts of legislation establishing special administrative procedures do not regulate certain relations on the implementation of administrative procedures, the norms of this Law are applied." This rule alone significantly reduces the significance of this law. Interpreting this proposal in other words, it can be understood that this law will be used only in cases where legislative acts establishing special administrative procedures have not regulated certain relations. Moreover, if they, i. e. By-laws (decrees, resolutions, orders, regulations, and instructions) are already regulated, then it is not necessary to apply the norms of this law.

Thus, it can be noted that the legislator gives an absolute preference to officials of the executive authorities, which already contradicts the principles of checks and balances.

If we consider that this law was adopted in 2018, where reforms are fully carried out by the new government of Uzbekistan, then we can tentatively formulate an inductive inference that there will not be much change.

In general, one of the many negatively influencing factors in the construction of the rule of law is the poorly developed sanctions part of the current legal norms. Thus, the Law of the Republic of Uzbekistan "On the Mass Media" provides for a formal sanction as "Persons guilty of violating the legislation on the mass media are liable in the prescribed manner." At the same time, the violation of which law or by-law is not specified which entails liability? Where is the established order?

In the following a number of laws, "duty sanctions" are established, which do not promise any responsibility for the subjects of legal relations, especially for officials. The Laws of the Republic of Uzbekistan "On the rehabilitation of agricultural enterprises", "On highways", "On the prevention and treatment of drug addiction" or in the law "On guarantees of the activities of non-governmental non-profit organizations", as well as "On-road safety" set the same "sanctions" – "Persons guilty of violating the legislation on …, are liable in the prescribed manner." This, of a legal and technical nature, in practice, first, leads to the failure of officials to fulfill their functional duties, which sometimes leads to an increase in corruption and the formation of legal nihilism among the population.

One of the most dangerous crimes against the rule of law is corruption. Among them is bribery. So, according to the laws in force, a rather low penalty is provided for bribery. For example, for accepting a bribe, that is, knowingly unlawful acceptance by an official of a state body, an organization with state participation or a self-government body of citizens personally or through an intermediary of material values, or obtaining property benefits for the performance or non-performance in the interests of the bribe-giver of a

certain action, which the official should have or could have committed using his official position, – is punished with a fine from fifty to one hundred basic calculation units or restriction of liberty from two to five years or imprisonment up to five years with deprivation of a certain right.[22]

One of the active deputies of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan, Rasul Kusherbayev, on social networks, notes more than once that in practice, officials of executive authorities more often refer to written instructions "from above", minutes of meetings of certain bodies or by-laws, then how most of these instructions and some by-laws directly contradict the law and their principles.[23]

In any developed and rapidly developing modern country, one of the institutions capable of guaranteeing the building of the rule of law is the legislative power of that country. Because laws are issued by the legislature, the deputies who received their mandate directly from the people issue them. It should be emphasized that the legislative power in the Republic of Uzbekistan – the chambers of the Oliy Majlis of the Republic of Uzbekistan has a rather weak role in the structure of government bodies, which is confirmed by the norms of current laws. Thus, all parliamentarians and members of local representative bodies have an "imperative mandate" which is regulated by the Law of the Republic of Uzbekistan "On the recall of a deputy of a local Kengash of people's deputies, a deputy of the Legislative Chamber and a member of the Senate of the Oliy Majlis of the Republic of Uzbekistan."[24] This law sets out the procedures for depriving the deputy of the status of deputies of the local kengash of people's deputies, a deputy of the Legislative Chamber, and a member of the Senate. This approach is also a confirmation of adherence and welcomes socialist methods of state building, where you can deprive parliamentary immunity of anyone who strays from the "political course".

According to article 1 of this law, the basis for recalling a deputy, a senator is:

> violation by a deputy, a senator of the legislation of the Republic of Uzbekistan, which may entail criminal, civil, administrative, and other liability provided for by law;
>
> committing by a deputy, a senator of actions, misdeeds, grossly violating generally accepted norms of morality, deputy ethics, discrediting the title of the deputy, senator and damaging the prestige of representative bodies of state power;

22 Criminal Code of the Republic of Uzbekistan. [1995] Article 210 <https://lex.uz/docs/111457>.

23 See https://www.facebook.com/100113808057840/videos/240963357522221/.

24 Law of the Republic of Uzbekistan "On the recall of a deputy of the local Kengash of People's Deputies, a deputy of the Legislative Chamber and a member of the Senate of the Oliy Majlis of the Republic of Uzbekistan" (In Russian Закон Республики Узбекистан «Об отзыве депутата местного кенгаша народных депутатов, депутата Законодательной палаты и члена Сената Олий Мажлиса Республики Узбекистан») <https://lex.uz/ru/docs/504006>.

systematic, without good reason, non-fulfillment by a deputy, a senator of his duties stipulated by law, including non-participation in meetings of the relevant Kengashes of People's Deputies, the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan (hereinafter – the Legislative Chamber), the Senate of the Oliy Majlis of the Republic of Uzbekistan (hereinafter – the Senate), the work of their bodies, failure to fulfill their orders.

Failure of the deputy to fulfill his obligations to the political party that nominated him as a candidate for deputy.

Only one part of this rule of law speaks volumes. A deputy, a senator, if they violate the "legislation" of the Republic of Uzbekistan, may entail criminal, civil, administrative, and "other" liability. This is a problem of legal culture and confirmation of still existing socialist perception of the law. We believe that deputies should have a free mandate, parliamentary immunity, and independence, which exists in many modern states.

According to the first part of Article 15 of the Law of the Republic of Uzbekistan "On Parliamentary Control": a deputy of the Legislative Chamber has the right to send a request to officials of state bodies, economic management bodies with a request to provide a substantiated explanation or state their position, as a rule, on issues related to ensuring rights and legal interests of voters of the respective electoral district, and a member of the Senate – on issues related to the interests of the respective regions.[25] If we interpret this norm in other words, then we can see that deputies are only allowed to send an inquiry to the state and economic management bodies of their district. A deputy or a senator is not a position that embodies the interests of the entire people, but only protects the issues of a certain part of it. Disappointment from the impotence of the deputy's request is also noted by academics in the post-Soviet space.

So, M.A. Krasnov writes, "If we analyze the regulation of the deputy's request in Russian legislation from this point of view, we, unfortunately, will have to admit that the potential of the deputy's request as one of the manifestations of the control function is practically reduced to zero."[26] Hypothetically, parliamentary inquiries have been disclosed and continue to be disclosed, to resolve some problems and to reveal certain abuses. At the same time, firstly, this is only a hypothesis. Secondly, we believe it is difficult to remember that because of any request of a deputy, serious abuse in the activities of public administration bodies was revealed, after which "sensational resignations"

25 Law of the Republic of Uzbekistan "On Parliamentary Control" Article 15. (In Russian Закон Республики Узбекистан «О парламентском контроле») <https://lex.uz/docs/2929475>.

26 M.A. Krasnov *Is a parliamentary inquiry capable of being a means of parliamentary control?* (In Russian Способен ли депутатский запрос быть средством парламентского контроля?) // Российское право: состояние, перспективы, комментарии.

would begin. Thirdly, perhaps the request will be "selfish", but objectively useful for the people. However, today no one can say whether this or that request of the deputy contributed to a citizen, a legal entity of Uzbekistan, to exercise a subjective right, to protect interests. We assume that all this is due to the passive role of parliament in the country, in the system of state power.

As stated on the website of the political parties of UzLiDeP, at a meeting of the Nishan regional kengash of UzLiDeP, the results of the party's work for 9 months were summed up and the 21 deputy inquiries sent by the deputies of the regional Kengash of people's deputies to officials of the executive bodies were criticized.[27]

With the arrival of Sh. M. Mirziyoyev, many expected him to strengthen the role of parliament in government administration, activate political parties, and improve the principle of "checks and balances". Some attempts have been made to strengthen parliament by making changes and additions to the country's Basic Law. Thus, clause 5 was added to Article 79 of the Constitution of the Republic of Uzbekistan, which states that the exclusive powers of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan include: consideration and approval, upon the proposal of the Prime Minister of the Republic of Uzbekistan, candidates for members of the Cabinet of Ministers of the Republic of Uzbekistan for their subsequent approval for positions by the President of the Republic of Uzbekistan. At the same time, in the innovation, it can be noted that the deputies still do not have authority to reject candidates for members of the Cabinet of Ministers, since it is imperatively established that it is necessary to "consider and approve". The deputies have no choice but to approve the presented candidacy. In our opinion, all this is a direct confirmation of a serious obstacle in the formation of legal policy in the country.

Here is another example, according to paragraph 13 of Article 78 of the Constitution of the Republic of Uzbekistan, the joint jurisdiction of the Legislative Chamber and the Senate of the Oliy Majlis of the Republic of Uzbekistan includes: approval of decrees of the President of the Republic of Uzbekistan on the formation and abolition of ministries, state committees, and other government bodies.[28] In other words, Parliament undertakes to approve the President's decree "without hesitation". If the Basic Law of the country provided for the word not approval, but "consideration", then it would be safe to note that the parliament might not approve the presidential decree on the formation and abolition of ministries, state committees, and other bodies. So far, there is not

27 Why did 21 deputy inquiries remain unanswered in Nishan? <http://uzlidep.uz/en/news-of-party/7412>.

28 Constitution of the Republic of Uzbekistan. [2019] Article 78.

a single statistic about whether the parliament did not approve a presidential decree. This fact is also an argument for the underdeveloped system of "checks and balances".

Without prejudice to the importance of the institution of the presidency in the Republic of Uzbekistan, it should be noted that after nearly thirty years there is no normative legal act, which would detail the powers, functions, and tasks of the institution of the presidency and its administration. It is known from world practice that the institution of the president is to the executive branch and the presidential administration is the organ of the presidential office. In the presidential administration of an imperative nature, instructions for the executive authorities and society as a whole should come only from the president. Such orders are formalized in the form of decrees and orders of the head of state. At the same time, the trend of recent years demonstrates that in the practice of office work of executive authorities and society, it is often possible to observe the obligatory "instructions" of individual advisers and the head of administration, drawn up based on their meeting. We believe that such a precedent cannot be allowed. In order to escape such unlawful precedents, the President of the Republic of Uzbekistan ought to initiate a draft law "On the legal basis on the activity of the President of Republic of Uzbekistan and his Administration". Naturally, such a draft law has to be discussed in society and would take into account the views of peoples.

Building a state governed by the rule of law, where politics is strictly limited by law, requires a clear prescription in the laws for implementing the principle of "checks and balances". Issues of a particularly important nature in public policy such as the appointment of the Prime Minister, ministers, and other members of the Government, the election of the Presidents of the Supreme Court, the Constitutional Court, other judges, the appointment of the Prosecutor General, the President of the Central Bank, the President of the State Security Service, the Accounts Chamber, and others should be subject to serious discussion in the country's parliament, where the latter should have the opportunity to reject the relevant candidates if necessary.

The theory of separation of powers has long been developed by John Locke and Charles-Louis Montesquieu and has found its practical confirmation in the practice lots of the countries of the world. There is a need to adhere to these scientifically based mechanisms to respect and protect the interests of society and individuals. In a state where legal policy (and not law) "rules", there will be no official or a whole body that will be accountable to a collegial body or the people. Accountability should be enshrined in the rule of law and should be strictly prescribed, which specifies the period, forms, and list of accountable issues, and ensures the openness and transparency of the reporting procedure. Moreover, this is especially the case with responsibility because of reporting.

As rightly noted by A. V. Malko, neither economic, nor social, nor national, nor any other domestic and foreign policy can be fully and effectively implemented without legal means to ensure them. Ill-conceived and weak legal policy will lead to contradictions in legal acts and with non-specific priorities, which will lead to failures in the implementation of economic, social, national policies. Hence the conclusion: until we put things in order in the legal sphere, there will be no order in another sphere, and vice versa.[29]

8. Conclusion

In connection with the above, we believe that the Republic of Uzbekistan objectively needs to continue constitutional reforms to improve the rational regulation of the main spheres of public life. We consider it acceptable to focus on this process by increasing the active role of the national parliament, reducing departmental rule making, and expanding the fundamental aspects of covering even larger spheres of life in the Basic Law of the country.

In conclusion, it should be noted that it is necessary to increase the practical implementation of the principle of "checks and balances" between the branches of government. It is extremely important to strengthen the control functions of the national parliament over the activities of the executive branch, and the legal regulation of the institution of the presidency. Ignoring and postponing these reforms in the long term may lead to a decrease in public confidence in public authorities, which, accordingly, at least will lead to an outflow of foreign investment from the country. The departure of investors from the country can negatively affect the economic state of the country and contribute to a decrease in the country's image in the world.

In order to prevent such an undesirable, but in case of inactivity, inevitable outcome, we recommend taking the following measures to formulate legal policy:

1. Carry out a large-scale constitutional reform, including the implementation of political powers to distribute between the parliament and the president.

In particular,

– to provide the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan with the right to consider, upon the nomination of the President of the Republic of Uzbekistan, the candidacy of the Prime Minister of the Republic of Uzbekistan, as well as annual hearing and discussion of the reports of the Prime Minister on topical issues of the socio-economic development of the country;

29 А. В. Малько. *Правовая политика: Актуальные проблемы исследования.* // https://cyberleninka.ru/article/n/pravovaya-politika-aktualnye-problemy-issledovaniya.

- to give exclusive powers to the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan to provide the right for consideration, upon the proposal of the Prime Minister of the Republic of Uzbekistan, of candidates for members of the Cabinet of Ministers of the Republic of Uzbekistan for compliance with the recommended position;
- Consideration of the issue of election by the President of the Republic of Uzbekistan to the Constitutional Court of the Republic of Uzbekistan;
- Consideration of the issue of election by the President of the Republic of Uzbekistan to the Supreme Court of the Republic of Uzbekistan;
- consideration of the issue of appointment, upon the proposal of the President of the Republic of Uzbekistan, the chairman of the High Judicial Council of the Republic of Uzbekistan;
- consideration of the approval of the decrees of the President of the Republic of Uzbekistan on the appointment and dismissal of the Prosecutor General of the Republic of Uzbekistan and the chairman of the Accounts Chamber;
- Consideration on approval of decrees of the President of the Republic of Uzbekistan on the appointment and dismissal of the chairperson of the State Security Service of the Republic of Uzbekistan;
- Adoption of laws on certain issues in the field of political, socio-economic life, as well as issues of the domestic and foreign policy of the state.

By adding and changing the key words "adoption", "approval" and "election" in article 78 of the Constitution of the Republic of Uzbekistan to "consideration" will be supply more equal powers between President and Parliament. Eventually, such reforms must be demonstrate it's positive reflections.

We believe it necessary to adopt the law of the Republic of Uzbekistan "On the status of the President and his Administration". It should clearly prescribe the boundaries of authority of the President and members of his Administration. The principles of its activity and the specific mechanisms of its accountability, as well as the legal basis for its participation in the legislative process.

To abolish the socialist spirit of the Law of the Republic of Uzbekistan "On the recall of a deputy of the local Kengash of people's deputies, a deputy of the Legislative Chamber and a member of the Senate of the Oliy Majlis of the Republic of Uzbekistan" dated December 2, 2004 and granting the deputies a "free mandate".

Introduce amendments to Article 67 of the Constitution of the Republic of Uzbekistan regarding the official recognition of the registered mass media as the fourth power in the country. Accordingly, amend the Law of the Republic of Uzbekistan "On the Mass Media".

Introduce into Article 34 of the Constitution of the Republic of Uzbekistan the provision on equal access to all citizens of the Republic of Uzbekistan with the appropriate qualifications and work experience in public service. Admission and promotion in the civil service is carried out according to the principle of meritocracy. The Law of the Republic of Uzbekistan "On Civil Service" regulates civil service issues.

To make changes and additions to Article 89 of the Constitution of the Republic of Uzbekistan that the legal basis for the activities of the President of the Republic of Uzbekistan is regulated by the Constitutional Law of the Republic of Uzbekistan "On the Institute of the Presidency in the Republic of Uzbekistan".

Replace the phrase "state interest" and "public interest" in the articles of the Constitution of the Republic of Uzbekistan with the phrase "common interest".

2. It is recommended to adopt a new version of the Law of the Republic of Uzbekistan "On Parliamentary Control" of April 11, 2016 with a significant strengthening of the control function of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan, where it will be established that the elected deputy has the right to represent the interests of the entire region from which he was elected.

Strengthen the dispositive part of the Law of the Republic of Uzbekistan "On parliamentary control", with specific measures of influence for not timely or incomplete reporting, or ignoring the request of a deputy or parliament.

In particular, up to dismissal from office by submitting a petition of the appropriate content to the President of the Republic of Uzbekistan.

3. To toughen and concretize the sanctioning parts in all laws, which are followed by "on-duty proposals" such as "Persons guilty of violating the legislation on … are liable in the prescribed manner."

4. To toughen penalties for bribery by providing for imprisonment from ten to twenty years. Including the exception of alternative types of punishment such as fine and restriction of freedom.

All these measures, over time, should show their positive results in the formation of legal policy in Uzbekistan, which will contribute to the comprehensive development of the country.

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MIRZATILLO TILLABAEV

Uzbekistan's Progress towards Compliance with International Obligations on Human Rights

1. Introduction

Human rights are universal legal guarantees that provide persons and groups of people with the ability to contest actions and inactions which interfere with basic human liberties, entitlements, and personal dignity.[1] Human rights, as natural rights, are present for every single human being de facto and take their base from the dignity and value of each person's worth. They originate from human values that are blind to cultural, racial, gender or other differences across civilizations. The Universal Declaration of Human Rights serves as the legal basis for codification of human rights along with a range of universal human rights treaties that are adopted by states and other regional and national legal tools. In most countries, besides the aforementioned documents, constitutions also provide for full guarantee of human rights in line with international documents.

Human rights are universal, inalienable, interrelated, interdependent and indivisible.[2]

The nature of the human rights, its independent origin from human activity and historical development, and the codified system ensures that every State and other responsible parties are deterred from breaching these rights or compromising them and allows the local, regional, or global governing bodies and international organizations to take actions against such parties.

COVID-19 has turned the world upside down. Everything has been impacted. How we live and interact with each other, how we work and communicate, how we move around and travel. Every aspect of our lives has been affected[3]. Although the world is in lockdown, governments, epidemiologists, school principals, entrepreneurs and families around the world are already planning the next steps: how to safely reopen schools and businesses, how to commute and travel without transmitting or contracting infec-

1 Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation (United Nations publication, Sales No. E.06.XIV.10), p. 1.

2 Human Rights Indicators. A Guide to Measurement and Implementation HR/PUB/12/5 New York and Geneva, 2012. p. 10.

3 UNICEF (2020), 'How COVID-19 is changing the world. A statistical perspective, Volume I' available from <https://data.unicef.org/resources/how-covid-19-is-changing-the-world-a-statistical-perspective/>.

tion, how to support those most affected by the crisis – the millions who have lost their livelihoods or their loved ones, how to ensure the already serious inequalities do not deteriorate further[4].

"The COVID-19 pandemic is a public health emergency – but it is far more. It is an economic crisis. A social crisis. And a human crisis that is fast becoming a human rights crisis" – noted Secretary-General of the United Nations, António Guterres.[5]

The impact of COVID-19 is still unfolding and being assessed. States' efforts in strengthening national data collection and reliability will be crucial to understand the spread and severity of the impact on communities. The growing trend in the number of recorded deaths and observed cases of COVID-19 across regions shows how urgent it is to establish national and international public health responses anchored strongly in human rights[6]. The COVID-19 pandemic affects many human rights, starting with the rights to health and life. In response to the pandemic, states of emergency and emergency measures have been declared by more than 100 countries. While international law allows emergency measures in response to significant threats, those restricting human rights should be legal, proportionate, necessary, non-discriminatory and temporary. States parties to the International Covenant on Civil and Political Rights should send formal notifications of such emergency measures through the UN Secretary-General. From 9 March to 15 April 2020, this has been done by only 13 countries. State ratification of international human rights treaties contributes to the implementation of human rights standards on the ground. Through ratification, States commit to put in place domestic measures and legislation compatible with their treaty obligations, and allow individuals to report possible human rights violations. On average States have ratified 60 per cent of all international human rights treaties. Despite the high level of commitment, the implementation of human rights commitments is still lagging behind and varies greatly across regions and countries, raising concerns about the level of human rights enjoyment by the people.

The pandemic has demonstrated the structural weaknesses of many health systems across the world, in which more than half of the global population already lack access to adequate essential health care. It has created the greatest disruption to education systems in history. Large-scale school closures have affected nearly 1.6 billion learners in

4 Committee for the Coordination of Statistical Activities (2020), 'How COVID-19 is changing the world: a statistical perspective' available from <https://stat.unido.org/content/publications/how-covid-19-is-changing-the-world%253a-a-statistical-perspective>).

5 Statement by UN Secretary-General António Guterres, 23 April 2020 // https://www.ohchr.org/EN/NewsEvents/Pages/UNSG_HumanRights_COVID19.aspx.

6 Ibid 4.

more than 190 countries worldwide.[7] COVID-19 has also laid bare pre-existing and vast structural inequalities in housing systems all over the world, characterized globally by a growing shortage in affordable housing and by homelessness. According to the International Labour Organization (ILO), between April and June 2020 alone, 495 million full-time jobs were lost, with nearly half of the global workforce placed at risk of losing their livelihoods. Since the start of global COVID-19 epidemic more than 17 % employed young people have become unemployed.[8]

Issues related to promotion and protection of human rights are considered as one of the top priorities of the state policy in Uzbekistan. Today, the country has established its own model of systematic and step-by-step implementation of international human rights standards in national legislation and law enforcement practice. The 2030 Agenda for Sustainable Development shall be implemented in our country in accordance with the UN principle of "Leaving no one behind" to ensure the rights and legal interests of every person. This is the implementation of the National Human Rights Strategy, in the preparation of which the experts from the Office of the High Commissioner for Human Rights have actively participated.[9]

Currently, Uzbekistan has joined more than 80 major international human rights instruments, including 6 major UN treaties and 4 Optional Protocols on the implementation of which, national reports are submitted to the UN Human Rights Council and the UN treaty committees on a regular basis. The law "On International Treaties"[10] provides for international treaties of the Republic of Uzbekistan to be subjected to strict and compulsory implementation by the Republic of Uzbekistan in compliance with norms of the international law.

The Cabinet of Ministers of the Republic of Uzbekistan takes practical measures for ensuring the implementation of international treaties of the Republic of Uzbekistan and within the framework of its competence determines which state bodies and officials are in charge of implementation of international treaties of the Republic of Uzbekistan.

Measuring and monitoring the situation of human rights is inherent to human rights obligations. Without assessing progress, or regression, in the realization of human rights at the national level, States do not have the information necessary to develop the laws, policies and programmes that will enable them to meet their obligations. This is also in-

7 United Nations, Policy Brief: Education during COVID-19 and beyond, August 2020.

8 UN News, "Impact on workers of COVID-19 is 'catastrophic': ILO", press release, 23 September 2020.

9 Speech by the President of the Republic of Uzbekistan Shavkat Mirziyoyev at the 46th Session of the United Nations Human Rights Council // https://president.uz/en/lists/view/4179.

10 The Law of the Republic of Uzbekistan dated February 06, 2019 "On International Treaties".

timately linked to the notion of evidence-based policies. Moreover, without monitoring the application of laws, policies and programmes, it is not possible for States to make the adjustments necessary to achieve their intended results.[11]

2. Implementation of international treaties on human rights

2.1 Civil rights and freedoms

Ensuring fundamental human rights and freedoms shall remain central in reforming Uzbekistan. Democratic reforms have become irreversible and are aimed at establishing a new Uzbekistan. The initiative of the United Nations „A Call to Action for Human Rights" is a key priority for further enhancing the democratic transformations in Uzbekistan[12].

Priority attention is paid to deepening reforms in the judicial and legal field as a result of which, specific measures have been taken to incorporate international standards in the field of judicial independence and right protection to have fair court proceedings. In particular, strict responsibility has been established for using information as evidence of prosecution, which was obtained by unlawful methods. Article 235 of the Criminal Code (torture) is given in accordance with Article 1 of the UN Convention against Torture[13].

Public commissions have been established in places to learn about candidates' personal and professional qualities for the position of judge. The system of electronic distribution of cases has been incorporated to ensure fairness, openness and transparency of examination of cases in courts alongside with systems of "Electronic Criminal Case" and "Remote Interrogation", which are being incorporated to ensure the reduction of expenditures and bureaucratic red tape.

Overall, innovations included within the framework of legal and judicial reform have expanded guarantees of citizens' access to justice and established conditions for strengthening independence as well as self-sufficiency of courts being an important component of society formation and its democratization.

11 Question of the realization in all countries of economic, social and cultural rights. Report of the Secretary-General // UN Document A/HRC/31/31.

12 Speech by the President of the Republic of Uzbekistan Shavkat Mirziyoyev at the 46th Session of the United Nations Human Rights Council // https://president.uz/en/lists/view/4179.

13 Adopted by the Law of the Republic of Uzbekistan dated April 4, 2018 No. LRU-470 "On Introducing Amendments and Supplements to some Legislative Acts of the Republic of Uzbekistan in Connection with the Adoption of Measures to Strengthen the Guarantees of Citizens' Rights and Freedoms in Judicial Investigation Activities".

Objectives and authorities of state security bodies were completely reviewed in 2018–2019 and an objective evaluation on employees' activities of all levels was given. As a result of efforts on protection of public order and early warning of offenses, a 36 percent reduction in crime was achieved primarily with the participation of the general public in this process.

The Concept of Improving the Criminal and Criminal Procedural Legislation of the Republic of Uzbekistan has been approved according to which, it is planned to remove legal gaps in the Criminal and Criminal Procedural Codes that impede the efficient protection of citizens' rights and freedoms alongside with interests of the society and the state.

Uzbekistan fulfills international obligations and one of the most vivid examples is the work on continuing the implementation of the procedure as Habeas Corpus, which is aimed at strengthening judicial control during the investigation process. Using preventive measures in the form of detention was reduced by 30 % in 2018 and courts dismissed petitions to use a preventive measure in the form of detention in 42 cases[14].

Using a criminal punishment in the form of custody has been repealed in favor of non-custodial punishments and detention terms of individuals that are suspected of committing a crime have been reduced from 72 to 48 hours. In addition, using preventive measures in the form of detention, house arrest, preliminary investigation has been reduced from 1 year up to 7 months and individual criminal responsibility for falsification of evidence has been introduced[15].

With the aim of timely prevention and interception of violence, torture and unlawful conduct against individuals that are held in custody, over 2,800 surveillance cameras have been installed in penitentiary institutions with 1920 of them in penal colonies and 880 surveillance cameras in remand centers[16].

123 surveillance cameras have been installed in all remand centers of the Ministry of Internal Affairs and in rooms for conducting investigation activities. In addition, 42 surveillance cameras with recording devices have been installed in investigators' rooms

14 Ibid.

15 Concluding observations on the fifth periodic report of Uzbekistan (CCPR/C/UZB/5). Adopted by the Committee at its 128th session (2–27 March 2020).

16 List of issues in relation to the 5th periodic report of Uzbekistan: Committee against Torture: addendum. CAT/C/68/1 4 Consideration of reports submitted by States parties under article 19 of the Convention.

and remand centers alongside with 283 surveillance cameras installed in rehabilitation centers.[17]

Thus, the next stage will be connected with transferring courts the right to authorize a search and wiretap individuals that are suspected of committing a crime.

Lawyers' powers in ensuring citizens' rights and freedoms have been expanded. Lawyers are granted the right to take action on pre-trial settlement of disputes, reconciliation of the parties as well as they are granted the right to act as an arbitrator. The role of the Chamber of Lawyers has been increased considerably. Henceforth, draft regulations on issues related to advocacy and legal proceedings must be agreed with the Chamber of Lawyers and the Chairman of the Chamber of Lawyers is given the right to participate in meetings of the Legislative Chamber of the Oliy Majlis to discuss draft laws.

The Probation Service and its territorial divisions have been established at the General Directorate for Execution of Punishments of the Ministry of Internal Affairs of the Republic of Uzbekistan to organize work on execution of punishments not connected with deprivation of liberty and control of the conduct of conditionally convicted and conditionally released individuals.

The Concept of Improving the Penal Enforcement Legislation of the Republic of Uzbekistan in 2019–2021 has been adopted and work on the development of a new version of the Penitentiary Code has been initiated[18].

To ensure the right of free movement for citizens guaranteed by the Constitution and international obligations, difficulties in registration and obtaining exit visas have been eliminated. Comprehensive measures are being implemented aimed at optimizing the procedure for issuing permits to foreign citizens to enter the republic, transforming inbound tourism into one of the important sectors of the national economy as well as widespread promotion of cultural and historical heritage, natural wealth and traditions.

With the aim of implementing international obligations in the field of human rights, the following legislative acts have been adopted:

17 New Uzbekistan and Human Rights. Uzbekistan's progress towards compliance with international obligations on human rights. – Tashkent: National Centre of the Republic of Uzbekistan for Human Rights, 2020. p. 4–10.

18 Resolution of the President of the Republic of Uzbekistan of November 7, 2018 No. RP-4006 "On measures for regular improvement of the criminal enforcement legislation". This document approved the Concept of Improving the Penal Enforcement Legislation of the Republic of Uzbekistan in 2019–2021.

- the law on "Administrative Procedures" dated January 8, 2018;
- "The Civil Procedure Code of the Republic of Uzbekistan" dated January 22, 2018;
- "The Economic Procedural Code of the Republic of Uzbekistan" dated January 24, 2018;
- "The Code of the Republic of Uzbekistan on Administrative Proceedings" dated January 25, 2018;
- the law on "The State Security Service of the Republic of Uzbekistan" dated April 5, 2018;
- the law on "Public Control" dated April 12, 2018;
- the law on "Countering Extremism" dated July 30, 2018;
- Law on "Mediation" dated July 3, 2018;
- the law on "The Election of the Chairman (Aksakal) of Citizens' Assembly" dated October 15, 2018;
- the law on "The Approval of the Consular Regulations of the Republic of Uzbekistan" dated January 17, 2019;
- the law on "International Treaties of the Republic of Uzbekistan" dated February 06, 2019;
- the law on "Protection of Victims, Witnesses and Other Participants in Criminal Proceedings" dated January 14, 2019;
- the law on "Administrative Supervision of a Separate Category of Individuals Released from Penitentiary Institutions" dated April 2, 2019
- the law "On the Protection of Women from Harassment and Violence" dated 02.09.2019;
- the law "On guarantees of equal rights and opportunities for women and men" of 2.09.2019.

2.2 Political rights

With the aim of implementing international electoral standards, the Parliament has approved the Electoral Code of the Republic of Uzbekistan for the first time in 2019, which meets modern requirements and international practice of conducting democrat-

ic elections[19]. Furthermore, conclusions and opinions have been received from international organizations such as the OSCE/ODIHR, the Venice Commission of the Council of Europe, the CIS Executive Committee and others.

The Electoral Code envisages the following major new provisions:

- the institute of quota allocation of deputy seats in the Legislative Chamber for Ecological Movement representatives has been excluded;
- the procedure for nominating candidates to district (city) Kengashes of people's deputies by citizens' self-governing bodies has been repealed;
- the functioning procedure of the Unified Electronic Voter List of the Republic of Uzbekistan is legislatively regulated;
- the procedure for considering appeals of individuals and legal entities on matters of organization, conduct and summarization of election results has been introduced;
- the procedure for immediate posting of a copy of the protocol of vote counting at the polling station has been established;
- the procedure for electing members of the Senate at the legislative level is determined with the repeal of the Regulation on the procedure for electing members of the Senate of the Oliy Majlis previously approved by the Central Election Commission of the Republic of Uzbekistan resolution;
- the restriction on participation in elections of individuals held in prisons for committed crimes, which do not represent a great public danger and less serious crimes has been excluded;
- the end of the procedure for early voting 3 days before the election instead of the current 1 day is envisaged.

In the elections of deputies of the Legislative Chamber of the Oliy Majlis and local Kengashes on December 22, 2019, 5 political parties took part for the first time. More than 20 million voters have voted in elections, of which more than two million young people voted for the first time[20]. And also, according to the Electoral Code, the most important institution of civil society – self-government bodies of citizens had taken part in the elections as both the organizer and the election observers, which in turn ensure

19 Ibid 17, p. 15–16.

20 CEC, "Parliamentary elections on December 22, 2019" available at: <https://elections.uz/en/lists/view/2246>.

openness and publicity of this political and social process. Thus, public control was exercised over the preparation and conduct of the elections, including during the voting and counting process. A similar measure was introduced taking into account the recommendations of international observers who participated in previous elections.

Legislative measures have been adopted to strengthen responsibility of members of the Government, especially members of the Cabinet of Ministers have been approved by the President of the Republic of Uzbekistan on the proposal by the Prime Minister of the Republic of Uzbekistan submitted after receiving the approval provided by the Legislative Chamber. The Parliament is also reviewing the quarterly report of the Cabinet of Ministers on implementation of the state program for the corresponding year resulting from the Message of the President of the Republic of Uzbekistan to the Oliy Majlis.

2.3 Socio-economic rights

One of the prioritized directions of the state policy was increasing citizens' welfare by improving the regulation of economic and social potential of the country as well as increasing support for socially vulnerable categories of the population.

With the aim of implementing the UN Agenda by 2030, the Government adopted National Goals and Targets of Sustainable Development for the period by 2030[21], which has approved 16 national goals and 125 targets. The Roadmap has been adopted on implementation of National Goals and Targets and the Coordination Council has been established as well.

With the aim of establishing favorable conditions for entrepreneurs and business structures and a system for protecting their rights, more than 1,200 legislative acts have been adopted including 156 laws, 138 Presidential decrees and resolutions alongside with 280 resolutions of the Cabinet of Ministers. In addition, the principle of the priority of entrepreneurs' rights in their relations with state, law enforcement and regulatory bodies have been incorporated as well[22].

With the aim of accelerating economic development and increasing the investment attractiveness, the Concept of improving tax policies has been adopted. Instead of the existing maximum income tax rate of 22.5 percent, the personal income tax rate of 12

21 Resolution of the Cabinet of Ministers of the Republic of Uzbekistan dated October 20, 2018 No. 841 "On Measures to Implement National Goals and Targets of Sustainable Development for the period by 2030".

22 Voluntary National Review of the Republic of Uzbekistan on progress towards the Sustainable Development Goals April 2020. Available at: <https://sustainabledevelopment.un.org/content/documents/26381VNR_2020_Uzbekistan_Report_Russian.pdf>.

percent has been introduced and 8 percent insurance deductibles have been repealed. The high unified social payment rate has been reduced from 25 percent to 12 percent. Mandatory deductibles in the amount of 3.2 percent to the Non-budgetary pension fund, targeted road and educational funds have been repealed[23].

The human right to have competent housing has a key role in using economic, social and cultural rights. The adoption of special programs "Obod Qishloq" ("Prosperous village"), "Obod Mahalla" ("Prosperous neighborhood") is aimed at gradual improvement of the population's living conditions and achieving positive changes in their lifestyle and living standards in order to give these villages (mahallas) a modern look as well as form new job positions[24].

As part of the program, construction and improvement works are intended in 312,549 houses where more than 1.6 million people live.

Considerable work is being implemented on improving regional and district centers, renewing the architectural appearance of central streets. Meanwhile, fair complaints and appeals provided by residents show that there are problems connected with creating and improving housing and living conditions of the population.

Thus, as a result of irresponsibility of local khokimiyats (municipal governmental body), the housing stock has not been repaired for years, which led to deterioration of the roofing of houses and their external appearance has ceased to meet set requirements. In addition, frequent accidents in power grids and transformer units of residential areas lead to numerous power outages and a shortage of cylinders with liquefied gas is observed as well. One of the following urgent problems is low quality work implementation on repair and maintenance of roads in areas as well as poor condition of networks and water supply facilities alongside with non-compliance of the sewage with sanitary requirements.

Meanwhile, during the period of large-scale construction and reconstruction of the housing stock, fair complaints from owners of houses, apartments and other real estate entail actions of local authorities and developers regarding violation of the law during demolition of houses with no notification and open discussion.

The Program on further development of specialized medical care for the population over the period of 2017–2021 has been approved[25]. There is a Program of Measures on

23 Decree of the President of the Republic of Uzbekistan dated June 29, 2018 No. DP-5468 "On the concept of improving the tax policy of the Republic of Uzbekistan".

24 President.uz, "Measures elaborated to reduce poverty through entrepreneurship promotion and vocational training" available at: <https://president.uz/en/lists/view/3408>.

25 Decree of the President of the Republic of Uzbekistan dated June 20, 2017 No. DP-3071 "On measures for further development of specialized medical care for the population over the period of 2017–2021".

stimulating the development of private health care including its exemption from the payment of all types of taxes and mandatory contributions to state trust funds by January 1, 2022. As a consequence of raising the level of qualified medical care and comprehensive reforms, the average life expectancy in the country increased from 67 years in 1990 and to 74 years in 2018. Child mortality has decreased by 3 times.

A new Law on the Rights of Persons with Disabilities has recently come into force, in the near future the Parliament of Uzbekistan shall ratify the UN Convention on the Rights of Persons with Disabilities.

The country has implemented systematic work to strengthen the population's reproductive health and the law on "Reproductive Health" has been adopted, the basic principles of which are aimed at determining the availability and quality of medical services, ensuring their guaranteed amount, protecting individuals from interference in private life and preserving family secrets, humanity as well as respect towards a human alongside with gender equality[26].

The law on "Restriction of Smoking Hookahs and Electronic Cigarettes in Public Places", which aims at protecting citizens' health from a harmful impact of smoking hookahs and electronic cigarettes because of social or other negative consequences connected with it. In addition, the law aims at establishing organizational and legal conditions for formation and approval of a healthy lifestyle in society.

The World Health Organization has acknowledged the elimination of measles and rubella in Uzbekistan and the country is a "malaria-free" territory[27].

Targeted work is being implemented in the country to further develop the health care system to oppose the spread of HIV/AIDS alongside with protecting the population's health as well as protecting it from tuberculosis infection.

The number of people living with AIDS in the republic is equal to 37,861. 4,025 cases of HIV infection were registered in 2018. A reduction in the rate of HIV infection among children has been observed in Uzbekistan in recent years. The number of children under the age of 18 among newly registered HIV cases is equal to 13.4 %. The country pays special attention to prevention of HIV transmission from mother to child to contribute to the birth of a healthy child.

The Concept on the Development of Mental Health Care Service of the Population of the Republic of Uzbekistan for 2019–2025 is being implemented. One of its main

26 Ibid 17, p. 21.

27 Uzdaily, 'Uzbekistan recognized as a malaria-free country' available at: <https://www.uzdaily.uz/en/post/48993>.

directions is elimination of discrimination and stigmatization of people based on the presence of mental disorders[28].

One of the most urgent issues remains the implementation of the right to have pension. In particular, starting from January 1, 2019, the maximum amount of pension payments will be increased from 8 to 10 times based on the minimum wage and working pensioners will be paid pension in full amount.

2.4 Labor rights

Effective measures are being taken to implement annually approved programs to provide employment, improve employment mechanisms for vacant and quota-based job positions and develop efficient forms of self-employment in Uzbekistan. A number of legal acts have been adopted aimed at stimulating business activity and entrepreneurial initiative of the population, providing employment to socially vulnerable segments of the population, increasing the availability, quality and efficiency of public services to ensure employment of the population.

"The E-workbook" system has been introduced, NGOs have been granted the right to provide services in the field of citizens' employment in the country and abroad on a license basis and the Public Works Foundation under the Ministry of Employment has been established.

With the aim of developing and implementing the state order to ensure the population's permanent employment and establishment of new job positions, a procedure for allocating subsidies and grants at the expense of the State Fund for the Promotion of Employment Subsidies and Grants is being implemented.

Work on preparing the draft of a new Labor Code that meets modern requirements and the ILO recommendations has been initiated. With the aim of implementing recommendations of international organizations, the ban on hiring citizens who do not have a temporary or permanent residence permit or citizens who have not registered at the place of stay has been repealed. Meanwhile, the employer's responsibility for hiring citizens who live without a temporary or permanent residence permit or without having a registration at the place of stay has been repealed as well.

The law on "Private Employment Agencies" has been adopted, which is aimed at legal regulation of activities of non-governmental organizations that provide recruitment services as well as assist job seekers in obtaining employment alongside with other ser-

28 Ibid 17, p 22.

vices in the labor market. The Foundation to support and protect citizens' rights and interests that are engaged in labor activities abroad has been established.

Nevertheless, regions still maintain a high level of tension in the labor market. In addition, issues of establishing permanent job positions, providing employment for young people, women and members of low-income families, especially in rural areas alongside with aligning the process of external labor migration remain unresolved.

The attitude to issues of labor migration has radically changed in the country. Meanwhile, legislation does not have concepts of legal and regulatory principles to regulate external and internal labor migration, i. e. unified migration legislation aimed at regulating migration processes on the basis of unified principles and rules alongside with implementation of a unified migration policy.

The Republic of Uzbekistan has managed to advance considerably in protecting the rights of adults and children from forced forms of labor. Uzbekistan's implementation of its international commitments within the framework of the International Labor Organization conventions including their submitted recommendations based on the results of monitoring the cotton harvest campaign alongside with the Country Program on Decent Labour in Uzbekistan for 2017–2020 have contributed to positive evaluations provided by international partners.

The Resolution of the Cabinet of Ministers on "Additional Measures to Eliminate Forced Labor in the Republic of Uzbekistan" by a separate paragraph, noted prevention of all types of citizens' forced involvement, in particular, employees in the field of education, health alongside with either budget or other organizations as well as pupils and students of educational institutions from being involved in forced labor[29].

On September 20, 2018, the US Department of Labor published the 17th edition of its annual findings on the worst form of child labor (TDA report). The report notes that Uzbekistan, for the first time, has made moderate progress as a result of a significant reduction made by the Government of Uzbekistan on the mobilization of forced child labor to pick cotton. The US Department of Labor has excluded Uzbek cotton from the "List of Goods Produced by Child Labor or Forced Labor[30]."

Large-scale work in the field of combating human trafficking is being implemented in the country and comprehensive measures have been taken to prevent crimes in this

29 Resolution of the Cabinet of Ministers of the Republic of Uzbekistan dated May 10, 2018 No. 349 "Additional Measures to Eliminate Forced Labor in the Republic of Uzbekistan".

30 U. S Embassy in Uzbekistan, 'U. S. Department of Labor Publishes New Reports on Child Labor; Notes Uzbekistan's Moderate Advancement' available at: <https://uz.usembassy.gov/u-s-department-of-labor-publishes-new-reports-on-child-labor-notes-uzbekistans-moderate-advancement/>.

area, which have made it possible to achieve positive results in ensuring the rights and freedoms of victims of human trafficking as well as achieving a significant improvement of the criminogenic situation in the country.

In the Annual Report on the Situation of Human Trafficking in 2017, the US State Department raised the level of Uzbekistan from the third category to the second-category countries[31].

Meanwhile, work forms and methods of state bodies involved in prevention of offenses in the field of human trafficking do not fully meet modern requirements increasing the need to fundamentally improve the institutional and legal frameworks of support in the area of combating human trafficking.

In accordance with the Decree of the President of the Republic of Uzbekistan dated July 30, 2019 No. UP-5775 "On Additional Measures to Further Improve the System for Combating Trafficking in Persons and Forced Labor," the National Commission on Countering Trafficking in Persons and Forced Labor was established and its composition was approved. Furthermore, the institution of the National Rapporteur on combating trafficking in persons and forced labor was established. The duties of the Chairperson of the national commission and the national rapporteur are carried out by the Chairperson of the Senate of the Oliy Majlis.

Insufficient initiative of the authorized bodies and lack of proper interdepartmental cooperation as well as inconsistency of the implemented measures require radical improvement of the activities in the field of crime prevention and combat against human trafficking. Currently, work is underway to prepare a draft new version of the Law "On Combating Trafficking in Human Beings" and a draft law on introducing relevant amendments and additions to the Criminal Code taking into account international standards and the experience of foreign countries.

2.5 Women's rights

Legislative, organizational and other measures are being implemented in the country to strengthen guarantees for providing reliable protection of women's rights and enhance their social and political and activity. In order to prevent gender discrimination of women, the Commission on the Protection of Gender Equality of Women was established.

On September 2, 2019, the President signed the laws "On the Protection of Women from Harassment and Violence" and "On Guarantees of Equal Rights and Opportuni-

31 U.S Embassy in Uzbekistan, '2017 Trafficking in Persons Report: Uzbekistan' available at: <https://uz.usembassy.gov/our-relationship/official-reports/2017-trafficking-persons-report-uzbekistan/>.

ties for Women and Men". The purpose of these laws is to protect women from all forms of oppression and violence in life, at work, in the field of education and the regulation of social relations in the field of guaranteeing equal rights and opportunities for men and women in all spheres of society, including politics, economics, law, ideology and culture, education and science. A mechanism for protecting women's rights has been created.

In 2019–2020, on behalf of the President of Uzbekistan, more than 300 citizens of Uzbekistan, mainly women and children, were returned to their homeland from the zone of armed conflicts in the Middle East. This humanitarian operation was carried out in accordance with international documents in the field of human rights, including the principles of international humanitarian law.

The Concept on Strengthening the Family Institution is being implemented in accordance with which, 195 centers for women's social adaptation (crisis centers) have been established[32].

Meanwhile, the state of affairs in this area indicates the existence of a number of system problems and shortcomings that impede the establishment of efficient mechanisms to provide women with legal advice and fully support as well as protect women's rights alongside with organizing targeted support for women who are in need of help and those who are in difficult social situations.

With the aim of implementing recommendations by treaty committees of the UN and ILO to strengthen the guarantees of protection of women's labor rights, increase the access level to justice, the following measures have been taken:

- repealing bans on women's employment in certain industries or professions;
- a recommendation list of industries or professions that may adversely affect women's health has been approved;
- if at least three months of parental leave are used by the father, one parent is granted additional parental leave for one month with payment of benefits in the manner indicated by Article 234 of the Labor Code of the Republic of Uzbekistan;
- one of the parents raising a child under the age of two years is given the right to set a break time that is used during the day with the use of breaks for having rest and meals and feeding the child, which are provided during work time in consultation with the employer;

32 Ibid 17, p 30.

– it is prohibited to terminate an employment contract at employer's initiative that has been signed for an indefinite period of time in connection with attaining the retirement age by women or emergence of the right to have an old-age pension in compliance with the legislation upon reaching the age of 60 by women and it is prohibited to terminate a fixed-term employment contract;

– in cases of equality violation of men and women in courts, the payment of legal services provided to women by lawyers is covered at the expense of the state at women's request.

2.6 Rights of the Child

The country is carrying out large-scale work to support motherhood and childhood, create conditions for the spiritual and physical development of children, and ensure compliance with the requirements of the UN Convention on the Rights of the Child.

Today in Uzbekistan there are 13,164 preschool educational institutions, of which 5,882 (45 %) are state-owned and 6,471 (49 %) are public-private partnerships. Of the total number of children aged 3 to 7 years (2.7 million), 1,332.672 (51,7 %) are enrolled in preschool education[33].

The monitoring shows that there are still a number of systemic problems and shortcomings hindering the development of the preschool education system, including an insufficient number of preschool educational institutions to ensure full coverage of children, inadequate material and technical condition of these institutions, low level of technical equipment and methodological support of existing institutions for children with special needs.

There are 9,691 secondary schools in the country, in which 5.8 million people are enrolled. The public education system operate 86 special schools and 21 boarding school for children with disabilities in physical or mental development, where 20,610 children are trained. Also, 13,437 children with disabilities in physical or mental development and needing long-term treatment receive education at home. The education of children in need of special conditions of upbringing and education is carried out in two specialized educational institutions. 2 557 orphans and children without parental care are brought up in 19 "Mehribonlik" (Mercy orphanages) homes and 3 children's camps.

At the same time, the need for a radical improvement of the institutional and legal foundations of ensuring the protection of the rights and legitimate interests of children and upbringing of a harmoniously developed generation is growing. Additional measures

33 Ibid, p 32.

are also required to widely introduce family and other alternative forms of child placement, especially taking them into a family upbringing (patronage), as well as creating favorable conditions for preparing children for independent living.

In the year of the 30th anniversary of the adoption of the UN Convention on the Rights of the Child, President of Uzbekistan adopted a resolution "On additional measures to further strengthen the guarantees of the rights of the child" on April 22, 2019, which aims at ensuring the best interests of children, who constitute 40 % (12.2 million) of the population of Uzbekistan[34].

In order to implement the provisions of the Convention on the Rights of the Child, to ensure real guarantees of the rights of children as provided in the Constitution and laws of the Republic of Uzbekistan adopted the legal and institutional measures to further strengthen the protection of children's rights, in particular[35]:

- children without parental care until they reach the age of eighteen years, shall be given the right to reserve residential premises in the purpose built municipal and communal housing funds in which they lived for the entire period of stay in "Mehribonlik" (Mercy orphanages) homes or place of residence with the consent of the guardianship and custody authority with a custodian or trustee;
- children without parental care are provided with full range of social services regardless of their place of registration and citizenship;
- children without parental care are guaranteed full consideration of their direct appeals to state bodies, and they can not be left without consideration of such appeals due to the child's lack of full legal capacity;
- in the absence of an agreement between parents on the payment of alimony to persons under the age of eighteen years, or failure to pay alimony voluntarily, as well as in the case when neither parent applied to the court with a claim for alimony, children who have reached the age of 14, have the right to independently file claims for the recovery of alimony for maintenance from his mother or mother, and in cases of separation – simultaneously with each parent, in the amount established by law;
- when applying to the courts for the protection of children, the plaintiffs are exempt from paying state duty and other payments.

34 Resolution of the President of the Republic of Uzbekistan dated April 22, 2019 No. DP-4296 "On Additional Measures to Further Strengthen the Guarantees of the Rights of the Child".

35 Ibid.

In line with the recommendations of the UN treaty bodies, the minimum age of marriage for both men and women is fixed at eighteen years[36].

It is not allowed to expel a foreign citizen and a stateless person under the age of eighteen years from the Republic of Uzbekistan if one of his parents or a guardian or custodian has the right to reside lawfully in the territory of the Republic of Uzbekistan.

In order to implement the provisions of international standards of children's rights, the following measures are envisaged:

- development of the draft law "On the social protection of orphans and children without parental care", which provides the social and legal status of orphans and children left without parental care, as well as the form of their upbringing and ensures the rights of orphans and children without parental care to receive legal assistance and judicial protection;
- establishment a reservation procedure for children left without parental care until they reach the age of eighteen years of dwelling in the municipal and communal housing fund in which they lived, the entire period of stay in the homes of "Mehribonlik" (Mercy orphanages) or stay with the consent of the guardianship authority to a guardian or trustee;
- implementation of effective public control mechanisms aimed at preventing abuse and ensuring the rule of law in children's homes, "Muruvvat" (Kindness orphanages) boarding schools for children with disabilities, children's tuberculosis sanatoriums, "Mehribonlik" (Mercy orphanages) homes, children's campuses and preschool educational institutions;
- development of proposals for amendments and additions to the Law of the Republic of Uzbekistan "On guarantees of the Rights of the Child", providing for types of harassment and violence against a child, as well as measures to prevent them, and additional guarantees for the protection of children who are participants in criminal proceedings during the pre-trial and trial proceedings;
- introduction of amendments and additions to the Criminal Code on toughening the norms of responsibility for recruiting a person under eighteen years old as a mercenary, as well as his training, financing or material the provision and use in an armed conflict or hostilities;

36 Uzdaily, "The marriageable age for men and women in Uzbekistan set at 18 years" available at: <http://www.uzdaily.com/en/post/49362>.

– development of the National Action Program for the protection of the rights of children and the creation of favorable conditions for them, as well as a Concept for the implementation of the juvenile justice system.

Within the framework of the program of activities approved by the resolution of the Cabinet of Ministers of the Republic of Uzbekistan, dated 17 July 2019, events dedicated to the celebration of the 30th anniversary of the adoption of the UN Convention on the Rights of the Child were held[37].

3. The National observance mechanisms and protection of human rights

In accordance with the recommendations of international bodies, over the past two years, concrete measures have been taken to improve the legal status and strengthen the personnel and material and financial support of the activities of national human rights institutions, in particular:

– National Centre of the Republic of Uzbekistan for Human Rights;

– Commissioner of the Oliy Majlis of the Republic of Uzbekistan for Human Rights (Ombudsman);

– Commissioner under the President of the Republic of Uzbekistan to Protect Rights and Legitimate Interests of Entrepreneurs.

On the International Human Rights Day and the 70th anniversary of the adoption of the Universal Declaration of Human Rights, the President of Uzbekistan adopted a resolution on improving the activities of the National Centre for Human Rights. This was in response to the appeal of the UN High Commissioner for Human Rights to strengthen national reporting and follow-up mechanisms.

The National Centre for Human Rights is entitled to monitor the penitentiary institutions, as well as training of government officials and representatives of civil society institutions on human rights issues. A procedure is introduced in accordance with which draft laws on the observance and restriction of citizens' rights and freedoms are subject to mandatory coordination with the Centre.

The Centre has prepared the following projects in order to accomplish its international commitments:

37 Resolution of the Cabinet of Ministers of the Republic of Uzbekistan dated July 17, 2019 No. 597 "On the approval of the program of events dedicated to the celebration of the 30th Anniversary of the adoption of the United Nations Convention on the Rights of the Child".

- the draft law on "Ratification of the UN Convention on the Rights of Persons with Disabilities";
- the draft law on "The Rights of Persons with Disabilities"
- the draft law on "The establishment of the institution of the Ombudsman for the Rights of Children and Youth under the President of the Republic of Uzbekistan";
- the draft law on "Free legal aid" (Legal Clinics);
- Presidential Decree on "The program of events dedicated to the 70th anniversary of the Universal Declaration of Human Rights";
- Presidential Resolution on "The improvement of the activities of the National Center of the Republic of Uzbekistan for Human Rights";
- Presidential Decree on "The additional measures to further strengthen the guarantees of the rights of the child".

Legislative measures were taken to strengthen the legal status of the Parliamentary Ombudsman, the staff was doubled and a new organizational structure of its Secretariat was approved. The mechanisms of protection of the rights of convicts and persons in custody are enshrined in law by strengthening the role of the Ombudsman and non-state non-profit organizations in preventing torture and other cruel, inhuman or degrading treatment or punishment.

The structure of the Parliamentary Ombudsman established the position of the Commissioner for Children's Rights.

The powers and staffing of the Commissioner under the President of the Republic of Uzbekistan to protect the rights and legitimate interests of business entities have been expanded, in particular, Commissioner has the functions of coordinating and controlling inspections of businesses.

A rule was introduced in the Code of the Republic of Uzbekistan on administrative responsibility providing for liability for obstructing the activities of the parliamentary Ombudsman and the Business Ombudsman.

3.1 Civil society institutions in promoting human rights

More than 9,200 non-governmental organizations function at present day and play an important role in protecting the rights and legitimate interests of individuals and legal entities, democratic values, achieving social, cultural and educational goals.

Over the past period in the country comprehensive and consistent work has been undertaken on the development and strengthening of independent civil institutions, providing guarantees for their free activities, close cooperation of state bodies with citizens and ensuring the implementation of open, transparent and publicity operations, the establishment of effective public control over the activity of state bodies.

In particular, the activities of the Virtual Reception and the People's Reception of the President of the Republic of Uzbekistan, the Reception of the Prime Minister, were organized to review the appeals of entrepreneurs.

The Public Council under the President of the Republic of Uzbekistan has been established in order to fundamentally increase the role and importance of civil society institutions in the comprehensive and advanced development of the country, to strengthen their interaction with state authorities and administration. The breastplate "For contribution to the development of civil society" was established; "Houses of NGOs" are being created locally.

The Law on "Public Control" was adopted, regulating relations in the field of organization and implementation of public control over the activities of state bodies and institutions.

It is envisaged that all drafts of regulatory legal acts affecting the rights and legal interests of non-governmental non-profit organizations are necessarily coordinated with the National Association of NGOs of Uzbekistan. Measures were taken to create a public council at each state body, including law enforcement agencies, the Council of Ministers of the Republic of Karakalpakstan, regional khokimiyats (municipal governmental body) and the city of Tashkent.

In accordance with the Decree of the President of the Republic of Uzbekistan dated October 4, 2019 "On additional measures to increase the effectiveness of public control over ongoing reforms in the socio-economic sphere, as well as the activity of citizens in the implementation of democratic transformations in the country," measures have been identified for introducing widespread international practice effective forms of public control, detailed regulation of mechanisms for implementing forms of public control, their effective application in practice, issues in state agencies and organizations of the Public Council, its role and effective participation in the improvement of the state of affairs in their respective industries[38].

38 Decree of the President of the Republic of Uzbekistan dated October 4, 2019 No. DP-4473 "On additional measures to increase the effectiveness of public control over ongoing reforms in the socio-economic sphere, as well as the activity of citizens in the implementation of democratic transformations in the country".

Also, a draft Code on non-governmental non-profit organizations is being developed. At the same time, the monitoring of legislation in this area indicates the presence of a number of systemic problems and shortcomings that impede the active participation of civil society institutions in exercising public control, enhancing the political culture and legal consciousness of citizens. Particularly:

- no systematic analysis of the needs of NGOs is carried out, effective platforms for exchanging opinions on the most important issues of further state and social development have not been created;
- despite the creation of an adequate legislative framework, social partnership has failed to become an effective mechanism of interaction between government agencies and NGOs aimed at addressing a wide range of citizens social problems, real progress of their initiatives and modern ideas, especially the youth;
- the norms of the legislation governing the registration procedures for NGOs, the procedure for their activities, provide for excessive bureaucratic requirements and obstacles, are outdated and do not meet modern requirements.

The reference standards should be audited in the current legislation governing the activities of non-governmental non-profit organizations and other civil society institutions, including the identification and termination of "empty" exiles.

It seems expedient to develop and adopt the Concept of the development of legislation on NGOs for the period 2020–2025, in which to determine the basis of state legal policy regarding NGOs, the priority areas of lawmaking on NGOs, to develop criteria and stages for the transfer of certain functions of the state system of state and public monitoring and control over the implementation of laws on NGOs.

In order to eliminate the various obstacles in the process of registration of NGOs it is recommended to transfer the function of registration of NGOs Agency of public services and carried out in accordance with the order of registration of business entities.

3.2 Human rights education

Priority directions of state policy on the development of a human rights culture expressed in specific forms of state activities, including the activities of the system of education at all levels and types (universities, schools, colleges and high schools, mass media, training systems), national human rights institutions.

The UN Declaration on Human Rights Education and Training and the World Program for Human Rights Education[39] provide for the cooperation of all interested parties at the local, national, regional and international levels to promote and spread the human rights education.

Forming a human rights culture in society is one of the important conditions for ensuring the observance and protection of the rights of citizens, and strengthening the rule of law. In recent years, significant work has been carried out in the country to fundamentally reform the national legal system, form a legal culture in society and train qualified legal personnel.

The National Center for Human Rights, together with the committee of the Legislative Chamber of the Oliy Majlis (Parliament), has conducted a study on the teaching of human rights in educational institutions and departmental training centers for retraining and advanced training of personnel. The results of the study showed the presence of serious problems in the organization of the educational process on human rights, the lack of students the necessary knowledge and skills on these issues.

Despite the significant work being done in the country in the formation of human rights culture, there are still a number of unresolved issues or those issues that receive insufficient attention. In their midst[40]:

- lack of systematic work to improve the legal culture in the field of legal education and training (one-sided development, with an emphasis on law and some other public bodies, excluding the role of the family, mahallas (local self-administrative bodies) and other civil society institutions);
- exclusion from school teaching such subjects as "The Alphabet of the Constitution", "Journey into the world of the Constitution";
- exclusion from the curriculum of higher educational institutions of the education programme on "Human Rights";
- the lack of a unified approach to work to improve the legal immunity of youth, to foster respect for the laws and the need to comply with them.

More than 20 UN Member States have developed and adopted national action plans or strategies for human rights education, indicating that states are strengthening their attention to human rights education.

39 Adopted by the General Assembly, Resolution 66/137, A/RES/66/137, 19 December 2011.

40 Approved by the joint resolution of the Council of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan and the Council of the Senate of the Oliy Majlis of the Republic of Uzbekistan dated July 15, 2019 No. 2600-III/PK-563-III.

A parliamentary decree approved the National Program of Action for implementing the provisions of the United Nations Declaration on Human Rights Education and Training, the measures set by the Roadmap of the program are being implemented.

In accordance with the Resolution of the Cabinet of Ministers of August 12, 2019, Training courses for personnel in the field of observance and protection of human rights were organized at the National Center for Human Rights of the Republic of Uzbekistan. The purpose of these courses is to organize training for representatives of state bodies and civil society institutions on the basics of preparing national human rights reports of the Republic of Uzbekistan to the UN charter and treaty bodies, preparing alternative reports, and responding to requests from international and regional human rights institutions[41].

3.3 International cooperation on human rights

Uzbekistan is entering a new level in its development as a subject of international law and has initiated international agreements, an active participant in international rule making.

During the 73rd session of the UN General Assembly, at the initiative of Uzbekistan, an important document was adopted – the Resolution "Enlightenment and Religious Tolerance", which was the practical implementation of the initiative of the President of the Republic of Uzbekistan Sh. Mirziyoyev[42]. The Resolution stresses the importance of promoting education, peace, human rights, tolerance and friendship, as well as recognition of the importance of integration, mutual respect, human rights, tolerance and mutual understanding in order to strengthen security and peace in the world[43].

As part of the celebration of anniversaries in November 2018, the Asian Forum on Human Rights was held in Samarkand, which was organized for the first time in 70 years of the creation of the UN on the Asian continent.

41 Resolution of the Cabinet of Ministers of the Republic of Uzbekistan dated August 12, 2019 No. 663 "On the organization of training courses at the National Centre of the Republic of Uzbekistan for Human Rights in the field of observance and protection of human rights".

42 The Permanent Mission of the Republic of Uzbekistan to the United Nations (2018), "The initiative of the President of Uzbekistan is unanimously supported by the international community" available at <https://www.un.int/uzbekistan/news/initiative-president-uzbekistan-unanimously-supported-international-community#:~:text=The%20document%20is%20intended%20to,and%20prevention%20of%20their%20discrimination%E2%80%9D.&text=During%20the%20plenary%20session%20of,and%20religious%20tolerance%E2%80%9D%20was%20adopted>.

43 United Nations General Assembly Resolution 73/128 on "Enlightenment and Religious Tolerance" (12 December 2018).

During the Forum, the Samarkand Declaration on Human Rights was adopted, which was approved as a document of the 73rd session of the UN General Assembly. The Parliament of Uzbekistan approved the "Roadmap" for the implementation of the "Samarkand spirit" of human rights, where it is emphasized once again that there are no civilizations and states where the ideas of freedom, equality, and protection of human rights would not be of primary importance[44].

During the 72nd session of the General Assembly, Uzbekistan initiated the development of the UN International Convention on the Rights of Youth, a draft of which was sent for discussion to all interested parties.

In 2018, Uzbekistan became a full member of the International Organization for Migration.

There is close cooperation with the charter and treaty bodies of the United Nations, as well as with the Office of the High Commissioner for Human Rights.

In September 2019, the UN Special Rapporteur on Independence of Judges and Lawyers Mr. Diego García-Sayán visited Uzbekistan[45]. The UN Special Rapporteur was received by the President of the Republic of Uzbekistan Sh. M. Mirziyoyev, visited 3 regions of the country, held more than 40 meetings with the heads of the chamber of the Oliy Majlis, the judiciary, ministries and departments. The special Rapporteur also met with judges, lawyers and representatives of civil society institutions.

Following the recommendations of the Human Rights Council under the UPR, a draft National Action Plan ("roadmap") was prepared, which will be approved by Parliament in accordance with the recommendations of the Inter-Parliamentary Union.

Within the framework of the International Covenant on Civil and Political Rights, the Human Rights Committee in respect of Uzbekistan registered 125 complaints. Therefrom:

– declared unacceptable 4 (unfounded complaint, incomplete internal mechanisms for the protection of rights);

44 National Centre of the Republic of Uzbekistan for Human Rights (2020), 'New Uzbekistan and Human Rights. Uzbekistan's progress towards compliance with international obligations on human rights'. 63 p.

45 OHCHR, "Uzbekistan: UN rights expert in first visit to assess independence of justice system" available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25015&LangID=E#:~:text=GENEVA%20(18%20September%202019)%20%E2%80%93,exercise%20of%20the%20legal%20profession>.

– consideration was terminated on 46 (at the request of the applicant or the lack of a timely response from his side);

– pending 30 complaints;

– a decision was made in favor of the applicant for 42 and the state – 3.

Currently, an unprecedented deepening of regional cooperation in Central Asia is being carried out in all areas. That is why in November 2018, the first meeting of the national human rights institutions of the countries of Central Asia was held in Tashkent to strengthen cooperation on human rights.

Uzbekistan's cooperation with the Independent Permanent Human Rights Commission (IPHRC) of the Organization of Islamic Cooperation (OIC) has intensified. In particular, Uzbekistan actively participated in the preparation of the OIC Declaration on Human Rights, proposing to include provisions on education in the field of human rights and youth rights in the declaration text.

On October 7–8, 2019, Tashkent hosted the 6th annual seminar of the IPHRC on the *'Importance of promoting and protecting the rights of youth for building peaceful democratic societies and sustainable development'*. As a result of the seminar, the Tashkent Declaration on the Rights of Youth in the States Parties to the Organization of Islamic Cooperation was adopted[46].

Over the past period, the following international legal instruments on human rights have been ratified:

– International Labor Organization Convention No. 144 "Tripartite Consultations to Promote the Implementation of International Labour Standards" (Geneva, June 21, 1976);

– International Labour Organization Convention No. 81 on labour inspection in industry and trade (Geneva, 11 July 1947);

– International Labour Organization Convention No. 129 on labour inspection in agriculture (Geneva, 25 June 1969);

– Protocol to the International Labour Organization Convention No. 29 concerning forced or compulsory labour of 1930 (Geneva, 11 June 2014);

– World Intellectual Property Organization Copyright Treaty (Geneva, December 20, 1996);

46 Asianforum.uz, available at <https://asianforum.uz/en/menu/tashkent-declaration>.

- World Intellectual Property Organization Performances and Phonograms Treaty (Geneva, December 20, 1996);
- International Organization for Migration Constitution (Brussels, October 19, 1953);
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, October 29, 1971);
- Paris Agreement on Climate Change (Paris, December 12, 2015);
- Charter of the Islamic Educational, Scientific and Cultural Organization (Baku, November 26, 2015).
- Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau, 7 October 2002);
- Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005).

Over the past period, cooperation between Uzbekistan and international non-governmental human rights organizations has intensified. The delegations of "Human Rights Watch", "Amnesty International", "Cotton Campaign", the Norwegian Helsinki Committee, the International Commission of Jurists, the International Partnership for Human Rights, and others visited Uzbekistan[47].

4. Conclusions and Recommendations

In recent years, Uzbekistan has taken considerable measures to ensure compliance with the international human rights commitments, created legislative, educational and institutional frameworks for the observance and protection of citizens' rights and freedoms. Furthermore, it established a system for monitoring compliance with human constitutional rights and freedoms, implemented gradual steps to develop cooperation with international and regional mechanisms for the protection of human rights, as well as international non-governmental human rights organizations.

Simultaneously, a research of the actual state of affairs indicates the presence of systemic problems in the implementation of international human rights treaties that negatively impact on the effective implementation of international standards, ensuring reliable protection of the rights and freedoms of citizens, which impedes the efficient imple-

47 Ibid 17.

mentation of democratic reforms and the sustainable development of the national model protection of human rights, in particular:

- lack of coordination and collaboration between public authorities for the realization of international obligations on human rights, the discrepancy institutional framework and principles of activity of the state bodies to current requirements do not allow for qualitative fulfillment of these obligations;
- inadequate knowledge and skills leading to implement significantly the recommendations of international and regional human rights mechanisms;
- statistical reporting system in state bodies does not meet international requirements for the collection of data on qualitative and quantitative indicators, which negatively affects the assessment of national reports of Uzbekistan by international and regional human rights protection mechanisms;
- the system of participation of NGOs and other civil society institutions in the mechanism for the preparation of national reports and follow-up actions, including the preparation of "alternative" reports, is not developed enough;
- the system of training and raising the level of skills of state bodies on issues of international obligations of the Republic of Uzbekistan on human rights has not been established; the subject of "Human Rights" has been excluded from educational programme;
- an exact mechanism of execution of decisions of the treaty committees on individual communications is not developed, practice of courts of the provisions of international human rights treaties has not been established;
- issues of the legal status of foreigners are not settled at the legislative level, there is no mechanism for the judicial order of expulsion of foreign citizens for violation of the law, as well as after the execution or serving of the punishment imposed by the court for the crime committed in the Republic of Uzbekistan.

In the modern globalized world, issues of international security and peace, the protection of human rights are governed by international legal norms, the observance of which is the basis of the existing world legal order. During the 72nd session of the General Assembly, Uzbekistan initiated the development of the UN International Convention on the Rights of Youth, the draft of which was sent for discussion to all interested parties. Today, there are 1.8 billion young men and women among the world's population, which is a record number of young people in the history of mankind. This demographic situation offers unprecedented opportunities for socio-economic progress. At the same time, the potential of many young people is undermined by violations of their fundamental rights.

On October 13, 2020, for the first time in the history of national statehood, Uzbekistan was elected to the membership of the UN Human Rights Council for a period of three years (2021–2023). In response to the UN call to reduce the number of stateless persons, this year 50 thousand compatriots have been granted Uzbek citizenship. The procedure for granting citizenship directly to stateless persons permanently residing in our country for 15 years is being introduced. The situation related to religious freedom has improved dramatically. Interethnic harmony and religious tolerance are being strengthened. Large-scale reforms aimed at ensuring genuine independence and independence of the courts and the rule of law are being consistently implemented. The uncompromising fight against corruption has risen to a new level. The National Action Program is being implemented to implement the provisions of the UN Declaration on Human Rights Education and Training.

On June 22, 2020, for the first time in the history of the country, the National Strategy of the Republic of Uzbekistan on Human Rights was approved. To implement the National Strategy of the Republic of Uzbekistan on Human Rights, the "Road Map" was approved, which provides 78 measures in five areas. The badge "For the Defense of Human Rights" was established, which is awarded annually on International Human Rights Day for achievements in the protection of human rights and the promotion of a culture of human rights. The Parliamentary Commission on Compliance with Uzbekistan's International Human Rights Obligations has begun its work. In 2019, in order to fully implement the requirements of the Convention on the Rights of the Child, to ensure real guarantees of children's rights provided for in the Constitution and laws of the Republic of Uzbekistan, the position of the Commissioner for the Rights of the Child was established. Today, the functions of monitoring penitentiary institutions are vested with the Parliamentary Ombudsman, the Business Ombudsman and the National Center for Human Rights.

In this regard, it is necessary to consider the adoption of a law "On the National Preventive Mechanism for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", which should define the issues of creating a system for the prevention of torture and other cruel, inhuman or degrading treatment or punishment in places of deprivation and restriction of liberty in relation to the persons contained therein, providing for the procedure for the organization and operation of the national preventive mechanism (NPM), the rights and obligations of the NPM participants, the procedure for conducting visits, preparation and publication of NPM reports.

The UN Human Rights Council and treaty committees recommend that the courts of the Republic of Uzbekistan, when passing court decisions, refer to the norms of international law on human rights and freedoms. However, Uzbekistan has not developed a

specific mechanism for applying the norms of international law in judicial practice, although a rule has been established that the application of the norms of international law by the court is refracted through the prism of the legal system of the state. In this regard, it is proposed to supplement the norms of the Criminal Procedure Code, the Civil Procedure Code, the Code of Administrative Procedure with additions to the grounds for the resumption of proceedings in view of newly discovered circumstances "the decision of the statutory bodies and treaty committees on human rights of the United Nations the jurisdiction of the Republic of Uzbekistan".

In order to provide an effective mechanism for eliminating possible conflicts when the courts implement the principle of primacy of international legal norms over national ones, it seems appropriate to develop and adopt a resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan "On the practice of applying by courts the principles and norms of international law, as well as international treaties of the Republic of Uzbekistan."

In a global pandemic, solidarity and cooperation between countries and international organizations is especially relevant. At the same time, it is also necessary to intensify cooperation in the field of economy, trade, transport and other areas in the post-pandemic period in order to eliminate the negative effects of this disease. Human rights play a key role in shaping the approach to tackling the pandemic, both in the context of responding to the current public health emergency and in having a broader impact on people's lives and economies. In various regions of the world, contradictions and confrontations are growing, bloody conflicts, threats such as international terrorism, extremism, drug trafficking, are again making themselves felt such evil as fascism, nationalism, chauvinism.

Many countries do not pay sufficient attention to ensuring socio-economic rights, in particular, this was especially noticeable in the implementation of the UN Millennium Development Goals. Moreover, this was clearly demonstrated by the coronavirus pandemic. This issue is aggravated by the worsening economic situation in the world, problems of access to food and drinking water, and an increase in the debt burden. A chronic inconsistency in promises and practical actions on the part of states significantly hinders the pace of progress towards achieving the UN Sustainable Development Goals.

Uzbekistan has made set a goal of contributing at the international level to the promotion of women's rights, the rights of children, the rights of persons with disabilities and the human rights aspects of migration, health and education, and share best practices, experiences and achievements in these areas. In conclusion, it should be noted that in doing so, special attention should be paid to the development of national laws, policies and strategies, taking into account the main problems, such as those highlighted by the

author. Action must be grounded in the principles of social justice and equity, which are at the heart of the global mission of the United Nations.

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Matthias Knauff und
Chien-Liang Lee (Hrsg.)

Digitale Transformation im Spiegel des öffentlichen Rechts

Die Digitalisierung spielt weltweit eine zentrale Rolle. Weithin vergleichbare Problemstellungen schlagen sich in teils ähnlichen, teils unterschiedlichen Entwicklungsständen und Lösungszugriffen des Rechts nieder. Von E-Government und E-Justice über den Einsatz und die Regulierung von Algorithmen und Künstlicher Intelligenz sowie Fragen der Netznutzung und digitaler Güter bis hin zu speziellen Fragen des Vergabe- und Lebensmittelrechts – die Themen in dem Bereich sind zahlreich und divers.

Die Beiträge des 4. deutsch-taiwanesischen vergleichenden Symposiums zum öffentlichen Recht zeigen ein breites Panorama des im Prozess der Digitalisierung befindlichen öffentlichen Rechts in beiden Ländern auf.

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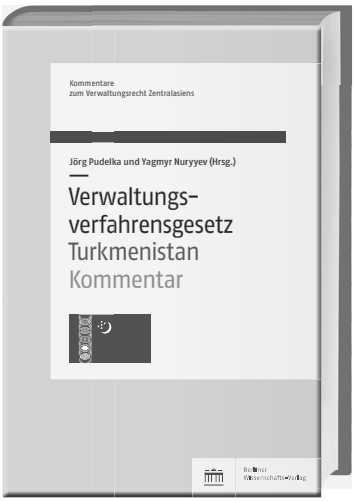

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Verwaltungsverfahrensgesetz Turkmenistan

Kommentar

Turkmenistan verfügt erst seit wenigen Jahren über ein Verwaltungsverfahrensrecht, das sehr stark an das Vorbild des deutschen VwVfG angelehnt ist. Lediglich einzelne Rechtsinstitute, die im deutschen Recht eine starke Ausdifferenzierung erfahren haben, wie etwa die Vorschriften zur Aufhebung von Verwaltungsakten, wurden vereinfacht. Das vorliegende Werk stellt die erste Kommentierung dieses erst nach und nach in die Praxis der turkmenischen Verwaltungsbehörden eingehenden Gesetzes dar. Der auch in russischer Sprache erschienene Kommentar ist mangels vorliegender gerichtlicher Entscheidungen und praktisch nicht vorhandener Fachliteratur zwar nicht mit deutschen Kommentaren vergleichbar. Es handelt sich jedoch um einen ersten Schritt auf dem Weg zur Erhöhung der verwaltungsrechtlichen Kompetenz turkmenischer Rechtsanwender und damit letztlich um einen Beitrag zur Entwicklung der Rechtsstaatlichkeit in Turkmenistan.

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Verwaltungsverfahrensgesetz Kirgisistan

Kommentar

Die kirgisische Republik verfügt erst seit wenigen Jahren über ein Verwaltungsverfahrensrecht, ähnlich dem deutschen VwVfG. Das vorliegende Werk stellt die erste Kommentierung dieses in der Praxis immer noch mit erheblichen Schwierigkeiten angewandten Gesetzes dar. Der auch in russischer Sprache erschienene Kommentar ist mangels vorliegender gerichtlicher Entscheidungen und nur vereinzelt vorhandener Fachliteratur zwar nicht mit deutschen Kommentaren vergleichbar, es handelt sich jedoch um einen ersten Schritt auf dem Weg zur Erhöhung der verwaltungsrechtlichen Kompetenz kirgisischer Rechtsanwender – und damit letztlich um einen Beitrag zur Entwicklung der Rechtsstaatlichkeit in Kirgisistan.

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Constitutional development in Eurasia is very dynamic. In that region, we find a growing acceptance of the universal values of democratic constitutionalism, a rising consciousness of the importance of local and regional traditions, and a tendency to reduce democratic structures and the rule of law. Some states are turning more and more into autocratic regimes, whereas others are in the process of opening their political system. This volume analyses these contradictory tendencies in Russia and in Ukraine, in the ex-Soviet republics in Caucasia and Central Asia, and in neighbouring countries. Special attention is given to how constitutional law works in practice.

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