



NEUTRALITY IN CONSTITUTIONAL ADJUDICATION IN DISPUTES  
BETWEEN THE POLITICAL BRANCHES: A COMPARATIVE ANALYSIS OF  
THE ROLE OF THE CONSTITUTIONAL COURTS OF THE KYRGYZ  
REPUBLIC, RUSSIAN FEDERATION AND THE FEDERAL REPUBLIC OF  
GERMANY

By

Imaralieva Uulkan

**LL.M. SHORT THESIS**  
**COURSE:** German Constitutional Law  
**PROFESSOR:** Alexander Blankenagel  
Central European University  
1051 Budapest, Nador utca 9.  
Hungary

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## **ABSTRACT**

The thesis is a comparative analysis of the extent of neutrality in adjudication that constitutional courts of Germany, Russia and the Kyrgyz Republic maintain when they solve disputes between the executive and legislative branches by focusing on legal and political restraints that directly affect the neutral adjudication and the actual performance of the courts in such disputes. The research demonstrates that although the legal framework in the three jurisdictions places courts on approximately the same level, in terms of degree of neutrality the courts differ significantly, with the Kyrgyz Constitutional Court holding the least of degree among the three courts for its somewhat dubious reasonings and obvious indulgences towards the President, because of its comparatively greater exposure to politics. Therefore, recommendations on the improvement of the Kyrgyz constitutional justice system will be provided as well.

## INTRODUCTION

"When the legislative and executive power are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may rise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner" warned Montesquieu in the *Spirit of Law*. This famous statement of the great thinker is not obsolete; on the contrary it is of current importance in contemporary constitutionalism. It has been well-accepted that there should be "institutional restraints on substantive matters to prevent lapses into an authoritarian or even totalitarian system cloaked with populist trappings."<sup>1</sup> So separation of powers and checks and balances today are one of the fundamental principles of contemporary constitutionalism/statehood.<sup>2</sup> Thus, a guardian of these principles becomes a vital necessity. In this regard, Hans Kelsen, the founder of the European model of constitutional review, suggested one way of such oversight by arguing that "the integrity of the legal system... would only be assured if the superior status of the constitutional law... could be guaranteed by a "jurisdiction", or a "court-like" body."<sup>3</sup>

The purpose of the thesis is to analyze the extent of neutrality in adjudication that constitutional courts of Germany, Russia and the Kyrgyz Republic maintain when they

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<sup>1</sup> Murphy, Walter, *Constitutions, Constitutionalism, and Democracy*, in *Constitutionalism and Democracy: Transitions in the Contemporary World*, eds. Greenberg D., Katz S., Oliviero M., and Wheatler S., 1993, in Jackson,

Vicki and Mark Tushnet, *Comparative Constitutional Law*, New York: New Yourk Foundation Press, 1999, p. 195

<sup>2</sup> Sajo, András, *Limiting Government: An Introduction to Constitutionalism*, Budapest: Central European University

Press, 1999, p. 13; Stone, Alec, *Governing with Judges: Constitutional Politics in Europe*, New York: Oxford

University Press, 2000, p. 60

<sup>3</sup> Stone, Alec, *Governing with Judges: Constitutional Politics in Europe*, New York: Oxford University Press, 2000, p. 34

solve disputes between the executive and legislative branches by focusing on legal and political restraints that directly affect the neutral adjudication and the actual performance of the courts in such disputes. It will be demonstrated that although the legal framework in the three jurisdictions places courts on approximately the same level, in terms of degree of neutrality the courts differ significantly, with the Kyrgyz Constitutional Court holding the least of degree among the three courts for its somewhat dubious reasonings and obvious indulgences towards the President. Therefore, recommendations on the improvement of the Kyrgyz constitutional justice system will be provided as well.

The study of the role of constitutional courts neutral adjudication in disputes between political branches is significant in a theoretical and a practical way. First of all, it reflects on the necessity to address the particular role of constitutional courts. In this respect it must be noted that the previous researches addressed different aspects of constitutional courts: Federal Constitutional Court has been most studied by both legal scholars and political scientists in its capacity as a "positive legislator"<sup>4</sup>; attention to the Russian Constitutional Court addressed to a certain degree the topic of the thesis<sup>5</sup> in the discussions of the overall role of the court and political development of Russia, as well as issues of creating an independent judiciary<sup>6</sup>. In the case of the Constitutional Court of the Kyrgyz Republic no research has been produced that would specifically address the issue

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<sup>4</sup> Currie, David, *The Constitution of the Federal Republic of Germany*, Chicago: University of Chicago Press, 1994,

p. 19; Stone, Alec, *Governing with Judges: Constitutional Politics in Europe*, New York: Oxford University Press, 2000, p. 52;

<sup>5</sup> Blankenagel, Alexander, *The Court Writes its Own Law, Roundtable: Redesigning the Russian Constitutional Court*, 4 *East European Constitutional Review* 3 (Summer-Fall 1994), pp. 74-79; Brzezinski, Mark, *Toward Constitutionalism in Russia: The Russian Constitutional Court*, 42 *International & Comparative Law Quart.* 673-90 (1993); Maggs, Peter, *The Russian Courts and the Russian Constitution*, 8 *Indiana International & Comparative Law Rev.* 99. (1997); Trochev, Alexei, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006*, New York: Cambridge University Press, 2008.

<sup>6</sup> Trochev, Alexei, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006*, New York: Cambridge University Press, 2008.

of objective constitutional adjudication. Thus the theoretical significance of the paper is producing a unique comparative analysis with comprehensive study of the constitutional courts within this particular area. The thesis also has a practical value. The research identifies discrepancies and problematic aspects of *de jure* and *de facto* independence of the courts in resolving disputes between the political branches, their *de facto* power to be a neutral arbiter. It provides concrete proposals on addressing the problems.

The role of the institute of constitutional court in Kyrgyzstan is of crucial importance. As the former Chairperson of the Constitutional Court of the Kyrgyz Republic, Cholpon Baekova, underlined, constitutional justice has become an integral characteristic of democratic reforms in the majority of post-soviet states.<sup>7</sup> Over the past decade, the Kyrgyz Republic experienced a number of constitutional reforms, involving a voluntary abdication of presidential duty<sup>8</sup> as an outcome of the Tulip Revolution of 2005,<sup>9</sup> and rewriting the constitution five times<sup>10</sup> during its seventeen years of independent statehood. With this regard, the place of the Constitutional Court of the Kyrgyz Republic (CCKR) is special. It carries the role of ensuring and maintaining stability of the constitutional order, observance of constitutional rights and freedoms in good faith. Moreover, CCKR, since its establishment in 1993, has been receiving over 10 cases per year<sup>11</sup> dealing with disputes between the political branches. Therefore, the topic of the thesis is of special interest and requires the attention of academic legal research.

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<sup>7</sup> Baekova Cholpon, "On Constitutional Justice in the Kyrgyz Republic" in *Constitutional Justice: Bulletin of the Conference of the Organs for Constitutional Control in Countries of Young Democracy*, (2002) [available at: <http://www.concourt.am/hr/ccl/vestnik/4.14-1.15/baekova.htm> (accessed on: March 15, 2010)]

<sup>8</sup> In the original language it is "dobrovolnoe slojenie polnomochiy"

<sup>9</sup> Huskey, Eugene, *Kyrgyzstan's Tulip Revolution*, 13 *Demokratizatsiya* 4 (Oct. 2005)

<sup>10</sup> The exact years were 1996, 2003, 2006, 2007 January, and 2007 October

<sup>11</sup> Since due to lack of critical literature in the area, precise credible qualitative data has not been found. The number

The choice of Russia and Germany is as well not by chance. Certainly, each state is specific and incomparable in its own way. Yet the following reasons guided the choice of Russian and German jurisdictions. The paper is first of all guided by the availability of similar institutions in the jurisdictions. The Constitutional Court of the Russian Federation (RCC) is not only a similar institution, but, more importantly, it is the court which has a similar creation in history after the fall of the Soviet Union<sup>12</sup>, operates in a strong semi-presidential system as CCKR, and faces similar challenges.<sup>13</sup> In the case of the Federal Constitutional Court of Germany (FCC), it must be noted that although the German and Kyrgyz systems of government are different, have different constitutional settings in these jurisdictions<sup>14</sup>, CCKR has similar powers and functions as FCC. Moreover, the danger for constitutional order are not limited to the presidential system,<sup>15</sup> therefore it is interesting to analyze the German approach in similar disputes. Last, but not least, FCC has almost sixty years experience. It has developed a reputation as a "guardian of German democracy"<sup>16</sup> while ensuring the rule of law and maintaining

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is based on my calculations that were developed by content analysis of CCKR decisions since 1993 which are all

available at the official website of the Constitutional Court of the KR [[www.ks.kg](http://www.ks.kg)]

<sup>12</sup> History of Creation of the Constitutional Court of the Kyrgyz Republic (Istoriya sozdaniaya Konstitucionnogo Suda Kyrgyzskoi Respubliki). Official website of the Constitutional Court of the Kyrgyz Republic [available at: [www.ks.kg](http://www.ks.kg)]; History of the Constitutional Court of the Russian Federation (Istoriya Konstitucionnogo Suda Rossiyskoy Federatsii). Official website of the Constitutional Court of the Russian Federation [available at: [www.ksrf.ru](http://www.ksrf.ru)]; See also Trochev, Alexei, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006*, New York: Cambridge University Press, 2008, p. 61

<sup>13</sup> Trochev, Alexei, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006*, New York: Cambridge University Press, 2008, p. 11

<sup>14</sup> Different constitutional settings meaning different reasons for the creation of the FCC and different historical legacy.

<sup>15</sup> Favoreu, Louis, "Constitutional Review in Europe," in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, eds. Hepkin L. and Rosenthal A., New York: Columbia University Press, 1992, p. 56

<sup>16</sup> Kommers, Donald, *The Federal Constitutional Court: Guardian of German Democracy*, Annals of the American Academy of Political and Social Science, Law, Society, and Democracy: Comparative Perspectives 603 (Jan., 2006), pp-111-128

constitutional order. Thus, its experience may teach some lessons, especially for a struggling Kyrgyz Constitutional Court.

The thesis paper is a comparative research based on the analysis of qualitative data. It employs content analysis of constitutional provisions of the respective constitutions, relevant legislative acts of the three jurisdictions, and most relevant decisions of the courts. The research is also based on the doctrinal works developed by prominent scholars focusing on the role of constitutional courts in constitutionalism. Due to the substantial lack of scholarly materials on Kyrgyz Constitutional Court both local and foreign scholarship, the research is based on the opinions and reports of international experts, especially that of the Venice Commission.

The object of the present thesis is the study of the extent of the neutrality of the constitutional courts in resolving disputes between the executive and legislative branches, where neutrality means objectivity, without political bias. The researched type of dispute concentrates on cases where one of the political branches was accused of stripping out powers. Although there are different factors influencing neutral arbitration such as corruption of judges which is a significant problem worldwide, the paper will be limited to the factors that are shaped by constitutions, laws and legal principles. For the purposes of this paper only the most relevant cases will be analyzed. Furthermore, the paper does not address constitutional adjudication in constitutional rights cases.

In pursuit of its aim, the thesis will be analyzed in two chapters and a conclusion. The first chapter concentrates on the principles that have significantly influenced the objectivity of courts - separations of powers and judicial independence in constitutional courts. This chapter consists of three sub-chapters. The first sub-chapter presents the



appointment of judges with an emphasis on possibilities of external influence on the judges and limitations for objective adjudication. It will then proceed with the analysis of the composition of courts and the guiding principles by which the courts must operate. This sub-chapter will pay close attention to the qualifications of the judges and availability for dissents and their strength. Then the last sub-chapter will proceed with the analysis of respective constitutional provisions and legal acts that prescribe the powers and functions of the courts. A special focus will be devoted to the extent of powers and their limitations.

Chapter two then seeks to demonstrate the courts actual practice through in-depth examination of three most relevant cases from each jurisdiction in three sub-chapters. The three sub-chapters, aside from describing the facts and the holding of the decisions, will concentrate on the reasoning of the courts as to their task of neutral arbiters. They will also discuss the developments following a particular decision in the jurisdiction. The chapter will also revisit the traditional approach in constitutional law that the biggest danger is posed by the legislature. This chapter on the basis of the decisions to draw and compare positions of the courts by addressing the question whether the courts are political tools in hands of one or the other branches of government.

In conclusion the paper will develop a summary of the arguments. As the paper seeks to reveal lessons for the Kyrgyz Constitutional Court, several recommendations as to neutral arbitration will be provided.

## CHAPTER I. SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE IN CONSTITUTIONAL COURTS

“Without judicial independence, there is no rule of law.”<sup>17</sup> The importance of judicial independence in objective decision-making is crucial. If the law that is legitimately adopted hinders judicial independence, the courts will be prematurely limited in producing objective decisions. So, the strength of legal constraints becomes significant: they may fully-empower the courts and allow them to be objective mediators or create for them a nominal role where they will be much more exposed to external influences on their decision-making, especially in the cases where the courts mediate between the political branches. Thus, in assessing the degree of independence in the constitutional courts, legal factors require special attention, although other factors are equally important.

In constitutional law, such legal factors can be found in the maze of separations of powers and checks and balances, whereby an interference of political actors may lead to the subjection of the courts. Therefore, the first chapter of the thesis will focus on the comparative analysis of legal factors affecting their role of neutral adjudicators in disputes between the political branches: the procedure of appointment of the constitutional court judges, the composition of the courts and guiding principles within and by which the courts should act, and the competences of the courts that create contain both positive and negative aspects.

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<sup>17</sup>Epstein, Lee et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, Annual meeting of the American Political Science Association (2000) [available at: <http://epstein.law.northwestern.edu/research/conferencepapers.2000APSA.pdf> (accessed on: March 20, 2010)]

## 1.1 Appointment of Judges

Appointment procedure is an important element in ensuring judicial independence and directly related to objective adjudication. There are two modes of appointment: nomination and election.<sup>18</sup> "Where nomination procedures are used, the appointing authority simply names a judge or a slate of judges; no countervailing confirmation or veto procedures exist. Where election systems are used, a qualified, or super, majority (a 2/3 or 3/5 vote) within a parliamentary body is necessary for appointment."<sup>19</sup>

In Germany FCC judges are elected. The Basic Law states that the judges of the Federal Constitutional Court are elected half by Bundestag, and half by Bundesrat,<sup>20</sup> and then appointed by the Federal President.<sup>21</sup> The Federal Constitutional Court Act sets the details of the procedure, which demonstrates maintenance of the institutional balance:

Half of the judges of each panel shall be elected by the Bundestag and the other half by the Bundesrat. Of those to be selected from among the judges of the supreme Federal courts of justice one shall be elected by one of the electoral organs and two by the other, and of the remaining judges three shall be elected by one organ and two by the other. (Art. 5 [1] of the Act)

The judges to be elected by the Bundestag shall be elected indirectly. (Art. 6 [1])

The Bundestag shall, by proportional representation, elect a twelve-man electoral committee for the Federal Constitutional Court judges. Each parliamentary group may propose candidates for the committee. The number of candidates elected on each list shall be calculated from the total number of votes cast for each list in accordance with the d'Hondt method. The members shall be elected in the sequence in which their names appear on the list. If a member of the electoral committee retires or is unable to perform his functions, he shall be replaced by the next member on the same list. (Art. 6 [2])

The judges to be elected by the Bundesrat shall be elected with two thirds of the votes of the Bundesrat. (Art. 7)

The Federal President shall appoint the judges elected. (Art. 10)

The Federal Ministry of Justice shall keep another list in which it shall enter all the candidates who are proposed for the post of Judge of the Federal Constitutional Court by a parliamentary group of the Bundestag, the Federal Government or a Land government and who meet the requirements under the law. (Art. 8)

<sup>18</sup> Stone, Alec, *Governing with Judges: Constitutional Politics in Europe*, New York: Oxford University Press, 2000. p.46

<sup>19</sup> Id.

<sup>20</sup> Art. 94 of the Basic Law

<sup>21</sup> Art. 60 [1] Basic Law and Art. 10 of The Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht) of 12 March 1951 (with latest amendments of 16 July 1998)

"Because German politics are multi-party systems, and because no single party has ever possessed a super-majority on its own, the qualified majority requirement effectively necessitates the parties to negotiate with each other in order to achieve consensus on a slate of candidates. In practice, these negotiations determine which party will fill vacancies on the court, with allocations usually roughly proportionate to relative parliamentary strength."<sup>22</sup>

As a result of the above, the appointment of the judges, although substantially controlled by the Parliament, the participation of the executive is also present. Although the role of the Federal President is a nominal one, the possibility of a ministerial back-up list of candidates may act as a counterbalance to the "pure" parliamentary appointment.

In the jurisdiction of the Russian Federation, judges of the Constitutional Court are appointed by the Council of the Federation, the upper house of the parliament, upon the proposal of the president. The details of the procedure which are absent under the Constitution are specified by Art. 9 of the Federal Constitution Law "On the Constitutional Court of the Russian Federation" as follows. First, candidacies can be proposed to the president by the members of either houses of the parliament, legislative organs of the subjects, supreme judicial organs and federal legal offices, all-Russian legal associations, legal scientific and educational institutions. Although the article does not state it precisely, presumably, by the wording of the Art. 128 of the Constitution the president may propose his own candidacies as well. Then, once the list of the candidates are made, the Council of Federation by secret voting in single candidate with a simply majority procedure. Therefore, although the constitutional provision and provision of the law name this procedure "*naznachenie*", which is translated as either "appointment" or "nomination" but not "election", the nature of the procedure falls under the election mode of appointment. Consequently, this suggests that the house of the parliament has a

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<sup>22</sup> Stone, Alec, *Governing with Judges: Constitutional Politics in Europe*, New York: Oxford University Press, 2000, pp. 46-48

countervailing mechanism to ensure independence of the judges. Moreover, a presumably large pool from which the candidacies are drawn as well balance out the possibility of spoiling the court with president-loyal judges.

Similarly to Russia, Kyrgyz system of appointing constitutional court judges follows the election mode. According to Art. 83 [5] 3 of the Constitution the judges of the Constitutional Court are elected by the Parliament upon the proposal of the President. The election procedure is organized by means of secret voting for a single candidate by a simple majority.<sup>23</sup> However, neither the Constitution nor the Law specifies whether other organs may propose candidacies to the president. Nonetheless, the presence of parliamentary influence responds to the principles of judicial independence and separations of powers.

Unlike in Germany, where judges are elected for a non-renewable twelve-year term<sup>24</sup>, in Russia and Kyrgyzstan the term of office is not fixed to a certain period.<sup>25</sup> Until 2009 the judges were elected for a fixed fifteen-year term of office.<sup>26</sup> However, with the recent amendments the justices stay in office until reaching the age limit, which is 70 years.<sup>27</sup> This rule is identical to a provision under the Russian legislation.<sup>28</sup> The Russian

<sup>23</sup> Art. 5 of the Law of the Kyrgyz Republic “On the Constitutional Court of the Kyrgyz Republic” (Zakon Kyrgyzskoi Respubliki “O Konstitucionnom sude Kyrgyzskoi Respubliki”) of December 18, 1993 N 1335-XII

<sup>24</sup> Art. 4 of The Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht) of 12 March 1951 (with latest amendments of 16 July 1998)

<sup>25</sup> Art. 83 of the Constitution of the Kyrgyz Republic, Art. 4 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” (Federalniy konstitucionniy zakon “O Konstitucionnom sude Rossiyskoi Federacii”) of July 21, 1994 N 1-FKZ (with latest amendments of 2 June 2009)

<sup>26</sup> Art. 5 of the Law of the Kyrgyz Republic “On the Constitutional Court of the Kyrgyz Republic” (Zakon Kyrgyzskoi Respubliki “O Konstitucionnom sude Kyrgyzskoi Respubliki”) of December 18, 1993 N 1335-XII, Venice Commission, Gstohl & Paczolay

<sup>27</sup> Art. 5 of the Law of the Kyrgyz Republic “On the Constitutional Court of the Kyrgyz Republic” (Zakon Kyrgyzskoi Respubliki “O Konstitucionnom sude Kyrgyzskoi Respubliki”) of December 18, 1993 N 1335-XII

legislation claims such irremovability is one of the guarantees of judicial independence.<sup>29</sup> Although irremovability of judges may provide them with more independence, it does not automatically deem that an irremovable judge will be objective and free of political pressure.

Nonetheless, the above suggests that the appointment of constitutional court judges involves participation of both political branches and a degree of institutional balance between them. Moreover, the design of the procedures suggested that the branches shall arrive at a compromise of some degree in order to ultimately appoint the judges. Thus, judicial independence to a certain extent is constitutionally ensured, which in the long run should ensure the objective decision-making of the court.

## 1.2 Composition of the Courts and the Guiding Principles of the Institute of Constitutional Courts

In understanding the system of the constitutional courts arriving at a position, and decision-making, it is important to critically analyze what this system is composed of. Therefore, such matters as composition of the courts and courts guiding principles become crucial. The Federal Constitutional Court is comprised of sixteen judges, six out of which must be federal judges, and all must be qualified to be a federal judge<sup>30</sup>. The judges must be at least forty years old.<sup>31</sup> The judges are restricted to holding the position of FCC judges: no membership in the Parliament, Government, or any other organ, nor

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<sup>28</sup> Art. 12 f the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” (Federalniy konstitucionniy zakon “O Konstitucionnom sude Rossiyskoi Federacii”) of July 21, 1994 N 1-FKZ (with latest amendments of 2 June 2009)

<sup>29</sup> *Id.*, Art. 13 [1]

<sup>30</sup> Art. 94 of Basic Law, Art. 3 [1] and [2] of the Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht) of 12 March 1951 (with latest amendments of 16 July 1998)

<sup>31</sup> *Id.*, Art. 3 [1]

any other professional occupation other than educational, which is also restricted to a lecturer of law at a higher education.<sup>32</sup> In practice, "law professors make up the largest group of appointees, followed by former ordinary judges and lawyers."<sup>33</sup>

A similar framework exists in both Russia and Kyrgyzstan, though with a different quantity of judges. There are nineteen judges in the Russian Constitutional Court.<sup>34</sup> The qualification requirements for the judges are: minimum age limit of forty years old, higher legal education, with a minimal legal professional experience of fifteen years, high qualifications in law, and *impeccable reputation*.<sup>35</sup> Although membership with state organs and occupation with other jobs is not explicitly stated, it is implied that the judges shall be occupied exclusively with their duties as constitutional court judges. Because the judges are elected for a non-fixed term, the diversity of the judges has not much changed taking into consideration that the court was established in 1993. In deed, the first President of the RCC, who, because of his "political" conduct was a subject to many discussions in 1992-93, Valeriy Zor'kin, is today acting as the President of the Court. In general, the RCC has been predominantly occupied with judges who have worked as judges, members of parliament, etc.<sup>36</sup>

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<sup>32</sup> Id., Art. 3 [3] and [4]

<sup>33</sup> Stone, Alec, *Governing with Judges: Constitutional Politics in Europe*, New York: Oxford University Press, 2000.

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<sup>34</sup> Art. 125 of the Constitution of the Russian Federation, Art. 4 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" (Federalniy konstitucionniy zakon "O Konstitucionnom sude Rossiyskoi Federacii") of July 21, 1994 N 1-FKZ (with latest amendments of 2 June 2009)

<sup>35</sup> Id. Art. 8

<sup>36</sup> Composition of the Constitutional Court of the Russian Federation. Official website of the Constitutional Court of the Russian Federation [available at: [www.ksrf.ru](http://www.ksrf.ru)]

The Constitutional Court of the Kyrgyz Republic consists of nine judges<sup>37</sup>. The judges must meet the following requirements: age of between thirty-five and seventy years old, higher legal education, legal professional experience minimum of ten years.<sup>38</sup> The status of CCKR judges is not compatible with: a mandate of deputy, membership in a political party or other public association pursuing political aims, occupation of any other position, entrepreneurial activities, executing works and receiving rewards in other state or public bodies, having any private practice save for creative, scientific and pedagogical activities.<sup>39</sup> Thus, although the qualifications for CCKR judges seem to be less strict than for FCC and RCC judges, the law provides an important restriction on judges -it emphasized on political affiliations of the judges. This is of crucial importance as it stresses the necessity and importance of judicial independence from political biases.

However, the independence of constitutional court judges is found not only in these statements. In fact, it is one of the guiding principles of the constitutional justice in all the three jurisdictions. Art. 4 of the Law of KR “On the Constitutional Proceedings” state that

1. Constitutional Court is independent and subjected only to the Constitution and the laws.
2. Decisions of the Court are based on the Constitution, and express the legal position of the judges, which is free of any kinds of biases.
3. Judges make decisions in the conditions that exclude external influence on their freedom of declaration of will.
4. Any kind of interference with the activities of the Court is prohibited and entails responsibility prescribed by law.<sup>40</sup>

<sup>37</sup> Art. 85 the Constitution of the Kyrgyz Republic, Art. 4 of The Law of the Kyrgyz Republic “On the Constitutional Court of the Kyrgyz Republic” (Zakon Kyrgyzskoi Respubliki “O Konstitucionnom sude Kyrgyzskoi Respubliki”) of December 18, 1993 N 1335-XII

<sup>38</sup> Art. 5 of the Law of the Kyrgyz Republic “On the Constitutional Court of the Kyrgyz Republic” (Zakon Kyrgyzskoi Respubliki “O Konstitucionnom sude Kyrgyzskoi Respubliki”) of December 18, 1993 N 1335-XII

<sup>39</sup> Id., Art. 7

<sup>40</sup> Art. 4 of The Law of the Kyrgyz Republic “On Constitutional Proceedings of the Kyrgyz Republic” (Zakon Kyrgyzskoi Respubliki “O Konstitucionnom sudoproizvodstve Kyrgyzskoi Respubliki”) of July 20, 2009 N 235



Moreover, Art. 83 [3] of the Constitution of the Kyrgyz Republic adds that “no one may demand a report from a judge (not only constitutional court judge) upon a concrete case.”<sup>41</sup> This requirement automatically forbids members of the parliament, members of the government, and the president to interfere with the constitutional proceedings.

RCC as well operates by similar principles. Art. 7 of the Federal Constitutional Law “On the Constitutional Court” prohibits “any kind of limitation of legal, organizational, financial, informational, material and technical, personnel, and other conditions of Court’s activities.”<sup>42</sup>

### 1.3 The Scope of Competences and the Status of the Constitutional Courts

The very purpose of institute of constitutional courts as initially designed is to conduct constitutional review and constitutional supervision. However, today the scope of powers of constitutional courts has been expanded. Federal Constitutional Court is established by the Basic Law<sup>43</sup> and supplemented by law that in detail prescribe competences, court procedure and types of cases.<sup>44</sup> Under this legal framework FCC possesses a rather wide range of competences:

forfeiture of basic rights (Art. 1), constitutionality of political parties (Art. 21 [2]), review of election results (Art. 41 [2]), impeachment of the federal president (Art. 61), Disputes between high state bodies (Art. 93 [1] 1), Abstract judicial review (Art. 93 [1] 2), Federal-state conflicts (Art. 93 [1] 3 and 84 [4]), Concrete judicial review (Art. 100 [1]), Removal of judges (Art. 98), Intrastate constitutional disputes (Art. 99), Public international law action (Art. 100 [2]), State constitutional court references (Art. 100 [3]), Applicability of federal law (Art. 126), other disputes specified by law (Art. 93 [2]), constitutional complaints (Art. 93 [1] 4a and 4b).<sup>45</sup>

<sup>41</sup> Art. 83 [3] of the Constitution of the Kyrgyz Republic

<sup>42</sup> Art. 7 of the The Federal Constitutional Law “On the Constitutional Court of the Russian Federation” (Federalniy konstitucionniy zakon “O Konstitucionnom sude Rossiyskoi Federacii”) of July 21, 1994 N 1-FKZ (with latest amendments of 2 June 2009)

<sup>43</sup> Art. 92 of the Basic Law

<sup>44v</sup> The Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht) of 12 March 1951 (with latest amendments of 16 July 1998)

<sup>45</sup> K ommers, Donald, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham and London: Duke University Press, 2<sup>nd</sup> edition, 1997, p. 10

For the purposes of the thesis a jurisdiction of particular interest are the disputes between "high state bodies", which are referred to as *Organstreit* proceedings. These proceedings involve constitutional disputes between the branches of the Federal Republic of Germany, which are Federal Government, Federal President, Bundestag, and Bundesrat.<sup>46</sup> The proceedings may be initiated by the four above and units of these organs vested with independent rights by their rules of procedure or Basic Law, including individual members of parliament and parliamentary political parties.

It is evident that the jurisdiction of the Court in these proceedings covers practically all the political actors of the state, which places it as "*primus inter pares*" among these federal organs ["high state bodies"] because it has the authority to define their institutional rights and duties when resolving conflicts between them."<sup>47</sup> Consequently, such status provides strength, and, more importantly, accountability, as the Court treats the federal organs equally without *a priori* advantage or disadvantage to either one. In addition, it must be noted that in supervising and maintaining institutional balance in executive-legislative relations the Court is not limited to *Organstreit* proceedings, as abstract judicial review provides an additional lever to ensure separations of powers, especially since Germany is a parliamentary state, as well as impeachment competence, which allows the court to try the President.

The competences of the Russian Constitutional Court do not yield to the powers of FCC either. Art. 125 of the Constitution of the Russian Federation and Art. 3 of the

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<sup>46</sup> Art. 93 [1] 1 Basic Law, and Art 63 of The Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht) of 12 March 1951 (with latest amendments of 16 July 1998)

<sup>47</sup> Kommers, Donald, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham and London: Duke University Press, 2<sup>nd</sup> edition, 1997, p. 115; See also Currie, David, *The Constitution of the Federal Republic of Germany*, Chicago: University of Chicago Press, 1994, p. 28

Federal Constitutional Law "On the Constitutional Court of the Russian Federation"<sup>48</sup>

enumerates the competences:

1. cases on correspondence to the Constitution of: a) federal laws, normative acts of the President, the Council of the Federation, the State Duma, the Government; b) the constitutions of republics, charters, and the laws and other normative acts of subjects, published on issues pertaining to the jurisdiction of bodies of state power of the Russian Federation and joint jurisdiction of bodies of state power of the Russian Federation and bodies of state power of subjects of the Russian Federation; c) agreements between bodies of state power of the Russian Federation and bodies of state power of subjects of the Russian Federation, agreements between bodies of state power of subjects of the Russian Federation; d) international agreements of the Russian Federation that have not entered into force.
2. disputes over jurisdiction: a) between the federal state bodies; b) between state bodies of the Russian Federation and state bodies of the subjects of the Russian Federation; c) between supreme state bodies of subjects of the Russian Federation.
3. constitutional complaints
4. interpretation of the Constitution
5. judgment (*zaklyuchenie*) on compliance with established procedures when charging the President of the Russian Federation with state treason or other grave crime.
6. legislative initiative on the issues of its competence
7. other competences set by the Constitution, Federate treaty (*Federativniy dogovor*), and federal constitutional laws. (Art. 3 [7] of FCL)

This long list of RCCs jurisdiction provides the Court *de jure*<sup>49</sup> with significant powers in managing executive-legislative relation. In this particular sphere, the court has similar powers as FCC: resolving disputes between the federal bodies, abstract judicial review, and interpretation. At the same time RCC yields to FCC in trying the President as its ruling is limited to procedural matters, but it surpasses FCC in the ability to initiate necessary legislative platform for more effective exercise of its powers. Thus the status of the court does not significantly hinder the objective adjudication.

In comparison to these two courts, the powers of the Constitutional Court of the

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<sup>48</sup> The Federal Constitutional Law "On the Constitutional Court of the Russian Federation" (*Federalniy konstitucionniy zakon "O Konstitucionnom sude Rossiyskoi Federacii"*) of July 21, 1994 N 1-FKZ (with latest amendments of 2 June 2009)

<sup>49</sup> Trochev, Alexei, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006*, New York: Cambridge University Press, 2008.

Kyrgyz Republic slightly differ. According to Art. 85 of the Constitution of the Kyrgyz Republic, the Courts competences are:

1. recognition of laws and other normative acts as unconstitutional if they contradict the Constitution
2. resolves disputes concerning operation, application, an interpretation of the Constitution
3. judgment<sup>50</sup> on constitutionality of presidential elections
4. judgment for impeachment of the president, removal of judges of the Supreme Court
5. judgment on the draft law on amendments and additions to the Constitution
6. constitutional complaints
7. suspension of powers of Constitutional Court judges
8. judgment on the removal of judges of the Supreme Court and Supreme Arbitrazh Court
9. quashing decisions of the self-government bodies, when they contradict the Constitution
10. other competences prescribed by the legislation<sup>51</sup>

This rather short list as compared to the other two jurisdictions may at first glance give an impression that the court is not a big player in maintaining executive-legislative relations. However, practically all of these powers respond to the Court's competences are employed in resolving matters between the political branches because the scope of such competences as constitutionality review, interpretation of the Constitution is quite broad, and can be used as one of the methods of regulating the executive-legislative relations, although the Constitution does not precisely state that the court is to regulate this area. In fact two primary laws<sup>52</sup> regulating the court state only that its task is "to guarantee supremacy of the Constitution on the territory of the Republic, to protect the

<sup>50</sup> All of these "judgments" refer to "zaklyuchenie" type of judgements

<sup>51</sup> Art. 85, Art 13 The Law of the Kyrgyz Republic "On the Constitutional Court of the Kyrgyz Republic" (Zakon Kyrgyzskoi Respubliki "O Konstitucionnom sude Kyrgyzskoi Respubliki") of December 18, 1993 N 1335-XII; Art. 11 of The Law of the Kyrgyz Republic "On Constitutional Proceedings of the Kyrgyz Republic" (Zakon Kyrgyzskoi Respubliki "O Konstitucionnom sudoproizvodstve Kyrgyzskoi Respubliki") of July 20, 2009 N 235

<sup>52</sup> The Law of the Kyrgyz Republic "On the Constitutional Court of the Kyrgyz Republic" (Zakon Kyrgyzskoi Respubliki "O Konstitucionnom sude Kyrgyzskoi Respubliki") of December 18, 1993 N 1335-XII; The Law of the Kyrgyz Republic "On Constitutional Proceedings of the Kyrgyz Republic" (Zakon Kyrgyzskoi Respubliki "O Konstitucionnom sudoproizvodstve Kyrgyzskoi Respubliki") of July 20, 2009 N 235

constitutional order, rights and freedoms of citizens."<sup>53</sup> Thus, uncertainty arises with regard to the status of the courts, especially in the light of the presidential status of "guarantor of the Constitution"<sup>54</sup> by which he is entitled to "adopt measures... to ensure coordinated functioning and interaction of all the bodies of state power."<sup>55</sup> Note that an identical provision exists under the Russian Constitution.<sup>56</sup> But, unlike in Germany and Russia, the Constitution of the Kyrgyz Republic explicitly places the Constitutional Court at the top in the hierarchy of the judiciary.<sup>57</sup>

It follows then that the comparative analysis of the competences of constitutional courts in the three jurisdictions demonstrated that the courts have both strength and weaknesses. In Germany, the court has precise and, at the same time, enumerated powers in executive-legislative relations. It is a *primus inter pares* body. But it does not have an initiative power such as the Russian Constitutional Court, thus it may as a subject to parliamentary acts be exposed to potential challenges. Yet, in weighing the overall powers of FCC and RCC in terms of objectivity, RCC although being vested with similar competences as FCC cannot be deemed to be better off than FCC. Its legislative initiative power has been much criticized for "writing their own laws."<sup>58</sup> Moreover, a "guarantor" title of the President also poses a threat to operating *de facto* independent of politics. The identical "threat" endangers the court in Kyrgyzstan. The court in Kyrgyzstan has broad

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<sup>53</sup> Art. 1 The Law of the Kyrgyz Republic "On Constitutional Proceedings of the Kyrgyz Republic" (Zakon Kyrgyzskoi Respubliki "O Konstitucionnom sudoproizvodstve Kyrgyzskoi Respubliki") of July 20, 2009 N 235

<sup>54</sup> Art. 42 [2] of the Constitution of the Kyrgyz Republic

<sup>55</sup> Art. 42 [3] of the Constitution of the Kyrgyz Republic

<sup>56</sup> Art. 80 of the Constitution of the Russian Federation

<sup>57</sup> Art. 85 [1] Constitutional Court is the supreme organ of the judicial branch in protection of the Constitution

<sup>58</sup> Blankenagel, Alexander, *The Court Writes its Own Law, Roundtable: Redesigning the Russian Constitutional Court*, 4 East European Constitutional Review 3 (Summer-Fall 1994), pp. 74-79 in Trochev, Alexei, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006*, New York: Cambridge University Press, 2008, p. 31

competences and is challenged by its imprecise constitutional status in executive-legislative relations, although this issue can be remedied by the court itself under its interpretation power. Consequently, it appears that despite the courts at first glance being in a sort of a hierarchy in terms of their powers, the overall balancing with the challenges to which they are exposed, it can be concluded that the courts have somewhat equal legal platform for their neutral adjudication.

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In summarizing Chapter I a conclusion can be drawn that the comparative study of the principles of the separations of powers and judicial independence in the three jurisdictions demonstrated a general resemblance. Although there are technical unique aspects of each of the jurisdictions, analogies have been established within each category of the research. In the appointment of judges involvement of both the parliament and the executive is obligatory in the three jurisdictions and necessitates reaching a compromise of some degree, while an institutional balance is maintained. At the same time, the composition of the courts, although with a different number of judges and different term of office in the German case, do not create a substantial difference, as the qualification requirements for the judges and guiding principles of the courts provide for a rather equal foundation. The competences of the courts that concern particularly the disputes between the legislative and executive branches in an overall weighting do not differ much, although the formulation varies from broad interpretative to specifically concrete, detailed powers.

Therefore, one may conclude that the legal framework set by the constitutions of the countries and the respective laws create lawful conditions recognized by both of the political branches conditions where all of the three courts may *de jure* adjudicate to a large degree independently of external influence. Consequently, the Federal Constitutional Court of Germany, the Russian Constitutional Court, and the Constitutional Court of the Kyrgyz Republic should, in practice, be able to hold the position of neutral adjudicators in disputes between the political branches. For this reason, the focus of Chapter II will be the practice of the courts and their degree of objectivity in their decisions.

## CHAPTER II. COURTS IN PRACTICE: CASES AND NEUTRALITY OF THE COURTS

It is not a secret that powers provided on paper may turn different in their actual exercise, nor it is a secret that in practice different challenges may hinder the actual exercise. For this reason, a comprehensive look at the practical application of powers must be given in order to understand the real powers of an institution. Therefore, the purpose of this chapter will be to analyze the practice of the constitutional courts of the three jurisdictions.

This chapter will be comprised of three sub-chapters, each concentrating on three most relevant cases of the jurisdiction of the Federal Constitutional Court of Germany, the Russian Constitutional Court, and the Constitutional Court of the Kyrgyz Republic accordingly. A comparative analysis will be provided throughout the sub-chapters.

### 2.1 Decisions of the Federal Constitutional Court of Germany

The degree of neutrality of the Federal Constitutional Court may be analyzed through two groups of cases. The first group concentrates on the position of the court, which sets restrictive framework for the political branches, whereas the second the group discusses less restrictive position, which gives a potential for abuses.

The first group relies on the *Deployment of German soldiers in Turkey Case*.<sup>59</sup> The significance of this case is the court's firm position to require the government to obtain the Bundestag's approval for issues concerning defense. The deployment of German soldiers in aerial surveillance measures for the protection of Turkey pursuant to the NATO was a part of the NATO-Iraq military tensions. The issue before the court lied in the nature and legal consequences of the deployment as it did not fall under either of

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<sup>59</sup> Deployment of German soldiers in Turkey Case (2008) BVerfG, 2 BvE 1/03 of May 5, 2008



the provisions that require mandatory parliamentary approval, namely, the declaration of war nor the establishment of the state of defense.<sup>60</sup> The court, by examining the nature and the purpose of NATO, concluded that “new forms of deployment of the Bundeswehr in changed strategic circumstances, such as are expressed in NATO's new Strategic Concept of 24 April 1999, are essential for the democratic state.”<sup>61</sup> It acknowledged that in the contemporary international relations declarations of war are not made, thus, “*de facto* use of military force was to be treated as equivalent to officially engaging in war.”<sup>62</sup> Furthermore, because the decision to deploy German soldiers “related to an essential foreign-policy problem of the organization of the international order” the approval of the German *Bundestag* was a requirement.<sup>63</sup> A decision that is as fateful and essential as the display of military power by use of or threatening with armed force may not be entrusted to the executive alone.<sup>64</sup> Therefore, in this decision the court followed a strict interpretation of circumstances setting aside that the NATO operations and the deployments associated with it were of political decision guided by foreign policy.

Under the second group two cases shall be discussed, namely the *Dissolution I*<sup>65</sup> and *Dissolution II*.<sup>66</sup> In the *Dissolution I* the Federal Chancellor Kohl

contrived to lose vote of confidence held on December 17, 1982. Only then he requested the federal president, as planned, to dissolve the Bundestag so that the new elections could take place in March, a full year and a half before the regularly scheduled election. On January 7, 1983 the federal president dissolved the Bundestag, on the chancellor's request... Certain members of the Bundestag argued that the dissolution order infringed their electoral mandate... The chancellor and the president were accused of manipulating the Constitution for political purposes. The Second Senate [of the Federal Constitutional

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<sup>60</sup> Id., para. 28

<sup>61</sup> Id.

<sup>62</sup> Deployment of German soldiers in Turkey Case (2008) BVerfG, 2 BvE 1/03 of May 5, 2008, para. 36

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> Parliamentary Dissolution Case (1984) 62 BVerfGE I

<sup>66</sup> Parliamentary Dissolution Case (2005) BVerfG, 2 BvE 4/05 of Aug. 25, 2005

Court] upheld the dissolution order, contending, essentially, that the president had reasonably exercised his discretion in light of the complex political circumstances surrounding the chancellor's call for a confidence vote and his subsequent request for an order of dissolution.<sup>67</sup>

The federal president that dissolved the Bundestag in 1983, Karl Carstens recognized that most German constitutional scholars questioned the constitutionality of the dissolution order.<sup>68</sup> Although the decision was an "unusual political delicacy,"<sup>69</sup> the court seemed to avoid conducting its own evaluation of the very circumstances for the dissolution. It rather shifted this responsibility: the court may "find a constitutional violation here only when the standards expressly laid down in the Basic Law [under Art. 68] have been violated;"<sup>70</sup> where by the "standards" it referred to "judging, evaluating, and making political decision"<sup>71</sup> by the chancellor when calls for a vote of confidence, the Bundestag when it makes the vote, and the president when he is requested to dissolve the Bundestag.<sup>72</sup> But at the same time, the court

distinguished between the "formal" and "material" conditions for dissolving the Parliament under Art. 68. The formal requirements are four, involving, respectively, the chancellor's call for a vote of confidence, the Bundestag's "no" vote", the chancellor's request to the president, and the president's acceptance of the request.<sup>73</sup>

The material condition, added by the court and proclaimed to be the unwritten principle under Art. 68, requires "a situation of instability" that would in fact undermine the ability of the ruling coalition to govern effectively:<sup>74</sup> "[he] can no longer expect to advance his political program in a meaningful way and at the same time secure the continuing support

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<sup>67</sup> Kommers, Donald, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham and London: Duke University Press, 2<sup>nd</sup> edition, 1997, p. 118

<sup>68</sup> Id., p. 122

<sup>69</sup> Id.

<sup>70</sup> Parliamentary Dissolution Case (1984) 62 BVerfGE I, para. 9

<sup>71</sup> Id.

<sup>72</sup> Kommers, Donald, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham and London: Duke University Press, 2<sup>nd</sup> edition, 1997, p. 121

<sup>73</sup> Kommers, Donald, *The Federal Constitutional Court: Guardian of German Democracy*, Annals of the American Academy of Political and Social Science, 603 Law, Society, and Democracy: Comparative Perspectives (Jan., 2006), pp-111-128, p. 124

<sup>74</sup> Id.

of the parliamentary majority. <sup>75</sup> Thus, a limitation to the right of dissolution was established, which is the "support of a parliamentary majority." But, as Kommers commented, the court "was unwilling to hold the chancellor constitutionally barred from calling for a vote of confidence simply and only because he has support of a parliamentary majority."<sup>76</sup> Therefore, a constitutionally confirmed interpretation of the discretionary powers of the executive and the legislative branches under Art 68 created a sphere that was not precisely within FCC's review, with a potential for abusive usage.

So the predictions were realized, when in 2005 FCC was faced with *Dissolution Case II*.<sup>77</sup> The facts of the case were almost identical to that of the first case.<sup>78</sup> However, the Chancellor Schröder was "taking a calculated political risk...and betting on the strategy's constitutionality,"<sup>79</sup> as he hoped that "fresh elections would produce a new governing mandate he desperately wanted and needed."<sup>80</sup> Fulfilling all of the four formal conditions, dissolution of the Bundestag was announced by the President. The burden of proof of the material condition's presence rested on the chancellor.<sup>81</sup> Therefore, the court analyzed the reasons of the chancellor and found that they were as compelling as the reasons of Chancellor Kohl in 1983.<sup>82</sup> Although, the dissenting opinion of the Justice

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<sup>75</sup> Parliamentary Dissolution Case (1984) 62 BVerfGE I, para. 6

<sup>76</sup> Kommers, Donald, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham and London: Duke University Press, 2<sup>nd</sup> edition, 1997, p. 121

<sup>77</sup> Parliamentary Dissolution Case (2005) BVerfG, 2 BvE 4/05 of Aug. 25, 2005

<sup>78</sup> Kommers, Donald, *The Federal Constitutional Court: Guardian of German Democracy*, Annals of the American Academy of Political and Social Science, 603 Law, Society, and Democracy: Comparative Perspectives (Jan., 2006), pp-111-128, p. 123

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> Parliamentary Dissolution Case (1984) 62 BVerfGE I, para. 6

<sup>82</sup> Kommers, Donald, *The Federal Constitutional Court: Guardian of German Democracy*, Annals of the American Academy of Political and Social Science, 603 Law, Society, and Democracy: Comparative Perspectives (Jan., 2006), pp-111-128, p. 125

Jentsch questioned even the 'loss of vote' by the chancellor as before he usually succeeded in gaining the confidence of the Bundestag.<sup>83</sup>

In both of the *Dissolution* cases, "the court felt that this was a largely a political question requiring a measurable degree of deference to the three political organs. The deference was anything, but total, however."<sup>84</sup>

The invention of a dissolution-oriented vote of confidence in the above discussed decision can be interpreted as the acceptance of a political maneuver whose sole winner is the Chancellor, who has gained power to extort obedience from the governing parties in Parliament. He or she can threaten to dissolve the body instead of having to strive for the approval of controversial legislation. Yet, the decision does not so much weaken democracy as such. Rather it represents a shift from a representative democracy towards a plebiscitarian democracy.<sup>85</sup>

The decisions of the Federal Constitutional Court suggest that the court has a firm position of maintaining balance between the two branches. In the *Dissolution cases* the Court although was deferential to the executive, it could not go beyond of what it ruled because it would involve itself into political decision-making. However, in situations where there is an obvious violation, the court holds the position of strict observance of the rules. Therefore, a general conclusion on the basis of these three examples can be drawn that in Germany the court possesses a significant degree of objectivity in resolving disputes between the executive and legislative branches.

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<sup>83</sup> Parliamentary Dissolution Case (2005 BVerfG, 2 BvE 4/05 of Aug. 25, 2005, para. 218)

<sup>84</sup> Kommers, Donald, *The Federal Constitutional Court: Guardian of German Democracy*, Annals of the American Academy of Political and Social Science, 603 Law, Society, and Democracy: Comparative Perspectives (Jan., 2006), pp-111-128, p. 125

<sup>85</sup> Apel, Simon et al., *The Decision of the German Federal Constitutional Court of 25 August 2005 Regarding the Dissolution of the National Parliament*, 6 German Law Journal 9 (2005)

## 2.2 Decision of the Constitutional Court of the Russian Federation

Similarly to the German jurisdiction, adjudication of the Russian Constitutional Court under the below cases reflects two types of the court's positions: a) failed neutrality, when the court interprets the constitution in a way which is most favorable to the executive branch, in the Russian case, the President; and b) partial neutrality – when the court objectively limits the power of the political branches.

The first group is highlighted by the famous *Prime Ministerial Appointment case*.<sup>86</sup> In this case the issue was raised by the State Duma members on the interpretation of the Art. 111 of the ConstRF on the appointment of the Prime Minister. According to this article, the Head of the Government is appointed by the President with the consent of the State Duma.<sup>87</sup> The procedure of this article states that the State Duma considers the nominated candidacy during a week after the submission of the nomination;<sup>88</sup> and if the Duma rejects three times the candidatures (*kandidatury*), then the President appoints the Head of the Government, dissolves the State Duma, and calls for the new election.<sup>89</sup> The situation in the Russian politics was that the President “sacked the then-Prime Minister and proposed a new candidate to the Duma. Yeltsin’s supporters in the Duma were in the minority, and the candidate was rejected. Yeltsin twice repeated the nomination, threatening the Duma ...that he would act pursuant to Art. 111 of the Constitution. The repeated nomination was seen as a test of the extent of presidential

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<sup>86</sup> Decision of the Constitutional Court of the Russian Federation No. 28-P “On the Interpretation of the provision of Article 111 [4] of the Constitution of the Russian Federation” (Postanovlenie Konstitucionnogo Suda RF “Po delu o tolkovanii polozeniy chasti 4 statii 111 Konstitucii Rossiyskoi Federacii”) of December 11, 1998

<sup>87</sup> The Constitution of the Russian Federation (Konstitutsiya Rossiyskoi Federacii), promulgated on 25 December, 1993 (as amended up to 30 December, 2008), Article 111 [1]

<sup>88</sup> Id., Article 111 [3]

<sup>89</sup> Id., Article 111 [4]

powers.”<sup>90</sup> Thus the questions before the court were: “whether the President may nominate the same candidate again after rejection by the State Duma, and what legal consequences are following the third rejection by the State Duma of the same nominee.”<sup>91</sup> The court held that the President may nominate the same candidate two or three times, and where legal consequences of the third rejection of the candidate, regardless of whether there were different candidates or the same person nominated twice or thrice, the Duma shall be dissolved.<sup>92</sup>

In this decision, RCC as FCC in the *Dissolution cases* avoided the presence of political side of the issue, where the political actor, in the Russian case, the president took a strategic move. So the president was confirmed a mechanism of control over the parliament, which in its substance is contrary to checks and balances principles. In the reasoning the court despite its acknowledgment that the wording of Art. 111 can be interpreted either way,<sup>93</sup> ruled in favor of the President. He, in his capacity of the “guarantor” under Art. 80, sets the foreign and domestic policies and should “ensure cooperation and coordinated functioning of the state bodies,”<sup>94</sup> so that there will be less “unreasonable delays with forming the Government and consequent blockings activities of the Government.”<sup>95</sup> Such reasoning in itself has a significant weakness: the rejection by the Duma implies that the candidate in some way does not qualify for some reason or

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<sup>90</sup> Dorsen, Norman et al., *Comparative Constitutionalism: Cases and Materials*, St. Paul: Thomson West, 2003, p. 265

<sup>91</sup> Decision of the Constitutional Court of the Russian Federation No. 28-P “On the Interpretation of the provision of Article 111 [4] of the Constitution of the Russian Federation” (Postanovlenie Konstitucionnogo Suda RF “Po delu o tolkovanii polozeniy chasti 4 stati 111 Konstitucii Rossiyskoi Federacii”) of December 11, 1998, para. 1

<sup>92</sup> Id.

<sup>93</sup> Id. Para. 2

<sup>94</sup> Art. 80 ConstRF

<sup>95</sup> Decision of the Constitutional Court of the Russian Federation No. 28-P “On the Interpretation of the provision of Article 111 [4] of the Constitution of the Russian Federation” (Postanovlenie Konstitucionnogo Suda RF “Po delu o tolkovanii polozeniy chasti 4 stati 111 Konstitucii Rossiyskoi Federacii”) of December 11, 1998, para. 2

other, thus, logically presuming, the Duma expresses the need for a different nominee. Consequently, it is quite illogical to assume that the same candidate becomes qualified at the second or third time of nomination.

Justice Vitruk in his dissent pointed out, “the general rule precludes the President from ignoring the expressed position of the State Duma.”<sup>96</sup> Thus, the procedure becomes a strategic move for the president, sheer purpose of which is to either force to cooperate with the Presidential appointee or “to punish the Duma for not cooperating by dissolving it;”<sup>97</sup> and the latter sounds more suitable as the first purpose may lead to a period of cohabitation, much undesirable for the president. Thus, agreeing with Justice Luchin, in the hands of an undemocratic president, the ruling of the court provides a legitimate ground to get rid of the Duma, whenever necessary.

Another non-objective position of the court is observed in the *Law “On Cultural Valuables” case*<sup>98</sup> and the recent *Increase in Presidential Term of Office case*.<sup>99</sup> In the

<sup>96</sup> Decision of the Constitutional Court of the Russian Federation No. 28-P “On the Interpretation of the provision of Article 111 [4] of the Constitution of the Russian Federation” (Postanovlenie Konstitucionnogo Suda RF “Po delu o tolkovanii polozeniy chasti 4 stati 111 Konstitucii Rossiyskoi Federacii”) of December 11, 1998, Separate opinion of the Justice N.V. Vitruk (Osoboe mnenie sud’ii Konstitucionnogo suda N.V. Vitruka); See also Vitruk, Nikolai, *The Constitutional Justice in Russia (1991-2001 years): Essays of Theory and Practice (Konstitucionnoe pravosudie v Rossii (1991-2001 gody): ocherki teorii i praktiki)*, Moscow: Gorodets-izdat, 2001, p. 168

<sup>97</sup> Decision of the Constitutional Court of the Russian Federation No. 28-P “On the Interpretation of the provision of Article 111 [4] of the Constitution of the Russian Federation” (Postanovlenie Konstitucionnogo Suda RF “Po delu o tolkovanii polozeniy chasti 4 stati 111 Konstitucii Rossiyskoi Federacii”) of December 11, 1998, Separate opinion of the Justice V. O. Luchin (Osoboe mnenie sud’ii Konstitucionnogo suda V.O. Luchina)

<sup>98</sup> Decision of the Constitutional Court of the Russian Federation No. 11-P “On the Issue of Settling the Dispute between the Council of Federation and the President of the Russian Federation on the Obligation of the President of the Russian Federation to Sign the Adopted Federal Law “On Cultural Valuable Transferred into the USSR as the Result of the Second World War and Remaining in the Russian Federation” (Postanovlenie Konstitucionnogo Suda RF “Po delu o razreshenii spora mezhdu Sovetom Federacii i Prezidentom Rossiyskoy Federacii ob obyazannosti Prezidenta Rossiyskoi Federacii podpisat prinyatiy Federalniy zakon “O kulturnyh tchenostyah, peremeshennyh v Soyuz SSR v rezultate Vtoroy mirovoy voyny I nahodyashihsy na territorii Rossiyskoy Federacii”) of April 6, 1998

first case, the court was faced with two issues: 1) delimitation of the competences of the State Duma and the President; and the President's obligation to sign the adopted Federal Law "On Cultural Valuables Transferred into the USSR as the Result of the Second World War and Remaining in the Russian Federation."<sup>100</sup> The circumstances were such that during the reconsideration of the law, that was returned by the president, some of the Duma members delegated their votes to other member, and, thus, voted in absentia, while members of the Federation Council had voted in writing by means of a circulated document.<sup>101</sup> The president challenging this procedure claimed that despite that his veto was overridden he is not obliged to sign and promulgate the law as under Art. 107 of the ConstRF.<sup>102</sup> However, the court held that the president shall sign and promulgate the law if it was approved by the two chambers of the parliament for the second time. In this decision the court avoided analyzing the voting procedure itself, which questions the legitimacy of adopting the law at the first place. "Strict procedural rules are strict procedural rules: it goes to their very essence that their strictness cannot be abolished by

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<sup>99</sup> Judgment of the Constitutional Court of the Russian Federation No. 348-O-O "On the Rejection of the Admission of the Complaint of the citizen Jevchenko Yuriy Yurievich on the Issues of Amending the Constitution of the Russian Federation, on terms of office of the President of the Russian Federation and other issues" (Opredelenie Konstitucionnogo Suda RF "Ob otkaze v prinyatii k rassmotreniyu jaloby grazhdanina Jevcheno Yuriya Yurievicha po voprosam o vnesenii izmeneniy v Konstitutsiyu Rossiyskoy Federatsii, o srokah polnomochiy Prezidenta Rossiyskoy Federatsii i drugim voprosam") of May 29, 2007

<sup>100</sup> Decision of the Constitutional Court of the Russian Federation No. 11-P "On the Issue of Settling the Dispute between the Council of Federation and the President of the Russian Federation on the Obligation of the President of the Russian Federation to Sign the Adopted Federal Law "On Cultural Valuable Transferred into the USSR as the Result of the Second World War and Remaining in the Russian Federation" (Postanovlenie Konstitucionnogo Suda RF "Po delu o razreshenii spora mezhdu Sovetom Federatsii i Prezidentom Rossiyskoy Federatsii ob obyazannosti Prezidenta Rossiyskoi Federatsii podpisat prinyatiy Federalniy zakon "O kulturnykh tchenostyah, peremeshennykh v Soyuz SSR v rezultate Vtoroy mirovoy voyny I nahodyashihsya na territorii Rossiyskoy Federatsii") of April 6, 1998

<sup>101</sup> Id., para 2

<sup>102</sup> Id.



a silent consensus of the majority not to observe them.”<sup>103</sup> Consequently, the court analyzed only one side of the issue, which is an indicator of its objectivity.

In the *Increase in Presidential Term of Office* case the Court was requested by a citizen to review whether President Medvedev’s reform law was constitutional as it changed the term of office of the president from four years to six years, and for the parliament from four years to five years. The decision of the court took a different form as compared to the previous cases. It took the form of rejection. The court refused to review the issue requested by justifying that it is not within the competence of the court.

On the one hand, the court is legitimate in rejecting the complaint as it is true that neither the Constitution nor the relevant laws expressly prescribe such competences. However, the legal consequences of rejecting suggest that the court in principle does not see a constitutional violation in such reforms. Thus, on the other hand, such court’s position in deed serves as an acceptance of the reforms. Although the Constitution does not preclude either the executive or the parliament from introducing amendments to the Constitution, the reforms shall remain within the basis and principles of the constitutional order such as democratic statehood (Art. 1 [1]), where the bearer of sovereignty and the only source of power in the state is the multinational population (Art. 3 [1]). In the light of these basis coupled with its purpose of “protecting the fundamentals of constitutional order” (Art 3 of the FKZ), the Russian Constitutional Court could have made a more in-depth analysis of the reform with a special focus on the impact of the reforms.

The above suggests that the position of the Russian Constitutional Court in disputes between the president and the parliament is rather dubious comparing to German

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<sup>103</sup> Blankenagel, Alexander, *Eyes Wide Shut: Displaced Cultural Objects in Russian Law and Adjudication*, 8 East European Constitutional Review 4 (Fall 1999)

court. It tries, on the one hand, maintain its function as an arbiter by interpreting legal framework in a manner compatible with the Constitution and the constitutional order. However, on the other hand, the court cannot avoid being influenced by the politics of the country. That is why, its decisions tend not to object and limit the most influential of the two branches. Consequently, a degree of objectivity in RCC's adjudication is present, but it is in a lesser extent than in Germany.

### 2.3 Decisions of the Constitutional Court of the Kyrgyz Republic

In comparison to German and Russian constitutional court decisions, the decision of the Constitutional Court of the Kyrgyz Republic indicates far less objective position of the court. Similarly to the Russian jurisdiction, under CCKR's jurisprudence the below cases can be analyzed through the prism of two groups: a) failed neutrality and b) partial neutrality. And one must note that the partial neutrality cases of CCKR refer to a far lesser extent of neutrality comparing to both FCC and RCC decisions.

A rather deferring position of the court was demonstrated in the *Third Presidential Term case*.<sup>104</sup> The question before the court was addressed by the members of parliament upon the possibility of the President Akayev's participation in 2000 presidential elections, since he has been in 1991 and 1995.<sup>105</sup> The main disagreement in this issue was that another group of MPs, who were supporters of the president, were arguing that "the elections of 1991, that were held on the basis of the Constitution of the

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<sup>104</sup> Decision of the Constitutional Court of the Kyrgyz Republic "On Settling the Dispute Concerning the Application of Article 43 [2] of the Constitution of the Kyrgyz Republic on the Possibilities of Participation of the President of the Kyrgyz Republic Askar Akayev in the Regular Elections of the President of the Kyrgyz Republic" (Reshenie Konstitucionnogo Suda Kyrgyzskoi Respubliki "O razreshenii spora, svyazannogo s primeneniem punktka 2 statii 43 Konstitucii Kyrgyzskoi Respubliki o vozmozhnostyay uchastiya Prezidenta Kyrgyzskoi Respubliki Askara Akayeva na ocherednyh vyborah Prezidenta Kyrgyzskoi Respubliki") of July 13, 1998

<sup>105</sup> Id.

Kyrgyz Soviet Socialist Republic of April 20, 1978, and the referendum of 1994, concerning the competences of the president, were not applicable to the issue of Akayev's election as president for the period stipulated by Art. 43 [2] of the Constitution of the Kyrgyz Republic.”<sup>106</sup> Art. 43 [2] of the Constitution states that “one and the same person may not be elected President for more than two terms consecutively.” Thus, the court focused in analyzing the precise date of calculation of President Akayev's first term.

Under the Constitution of the Kyrgyz Soviet Socialist Republic of April 20, 1978 the Supreme Soviet of the Kyrgyz SSR by the Law of the Kyrgyz SSR of October 24, 1990<sup>107</sup> established the post of the first President of the Kyrgyz SSR that would be elected by the Supreme Soviet by means of secret ballot for five years, and provided that one and the same person shall not be elected for more than two terms consecutively.<sup>108</sup> Later, on October 27 the same year the Supreme Soviet of the Kyrgyz SSR elected Askar Akayev as the President of the Kyrgyz SSR.<sup>109</sup>

Consequently, having adopted the “Declaration of the State Independence of the Republic Kyrgyzstan” by the Resolution No. 577-XII of August 31, 1991 the Supreme Soviet of the Republic of Kyrgyzstan, scheduled elections of the President of the independent Republic of Kyrgyzstan for October 12, 1991; and by the Resolution No. 569-XII proposed the candidacy of Askar Akayev.<sup>110</sup>

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<sup>106</sup> Id.

<sup>107</sup> the Law of the Kyrgyz SSR of October 24, 1990 (in the case)

<sup>108</sup> Art 114-1 [1] of the law of the Kyrgyz SSR in The case

<sup>109</sup> Resolution No. 230-XII of October 27 1991 of the Supreme Soviet of the Kyrgyz SSR.

<sup>110</sup> Decision of the Constitutional Court of the Kyrgyz Republic “On Settling the Dispute Concerning the Application of Article 43 [2] of the Constitution of the Kyrgyz Republic on the Possibilities of Participation of the President of the Kyrgyz Republic Askar Akayev in the Regular Elections of the President of the Kyrgyz Republic” (Reshenie Konstitucionnogo Suda Kyrgyzskoi Respubliki “O razreshenii spora, svyazannogo s primeneniem punktka 2 statii 43 Konstitucii Kyrgyzskoi Respubliki o vozmojnostyaj uchastiya Prezidenta Kyrgyzskoi Respubliki Askara Akayeva na ocherednyh vyborah Prezidenta Kyrgyzskoi Respubliki”) of July 13, 1998

On October 15, 1991 the Central Election Commission on Election of the President of the Republic of Kyrgyzstan announced that Akayev was elected in the national one-man-for-one-seat (*bezalternativnie*) elections.<sup>111</sup>

Further, on May 5, 1993 the Constitution of the Kyrgyz Republic was adopted on the Twelfth Session of the Supreme Soviet of the Republic of Kyrgyzstan. As a result of this and considering that the powers of the first President of the Republic of Kyrgyzstan were established by Constitution of the Kyrgyz SSR of 1978, on January 30, 1994 a referendum was held. The referendum of February 4, 1994 was held on the question of “whether the people of Kyrgyzstan confirm that the President of the Kyrgyz Republic, popularly elected on October 12, 1991 for five years, is the President of the Kyrgyz Republic under the Constitution of the Kyrgyz Republic; and that he will exercise his powers for the whole period of election as prescribed by the Constitution of the Kyrgyz Republic.”

The Resolution No. 175 of the Central Commission of Referendum “On the Results of the Referendum of the Kyrgyz Republic of January 30, 1994” confirmed in affirmative the question of the referendum.<sup>112</sup>

The holding of the court was in favor of the president: President Akayev has a right to be elected in the regular elections scheduled for the year of 2000.<sup>113</sup> It emphasized on the different posts that Akayev held under the contested enabling legal documents: the national popular elections of 1991 were

an objective, compelled procedure intended to ensure legitimacy of the president of the independent state and his powers established by the Constitution of the Kyrgyz SSR of 1978 with the amendments and additions introduced by the Law of the Kyrgyz SSR on October 24, 1990 “On the Establishment of the Post of the President of the Kyrgyz SSR

<sup>111</sup> Resolution No. 108 of October 15, 1991 of the Central Election Commission on Election of the President of the Republic of Kyrgyzstan

<sup>112</sup> Decision of the Constitutional Court of the Kyrgyz Republic “On Settling the Dispute Concerning the Application of Article 43 [2] of the Constitution of the Kyrgyz Republic on the Possibilities of Participation of the President of the Kyrgyz Republic Askar Akayev in the Regular Elections of the President of the Kyrgyz Republic” (Reshenie Konstitucionnogo Suda Kyrgyzskoi Respubliki “O razreshenii spora, svyazannogo s primeneniem punktka 2 statii 43 Konstitucii Kyrgyzskoi Respubliki o vozmojnostyaj uchastiya Prezidenta Kyrgyzskoi Respubliki Askara Akayeva na ocherednyh vyborah Prezidenta Kyrgyzskoi Respubliki”) of July 13, 1998

<sup>113</sup> Id.

and Introduction of Amendments and Additions to the Constitution of the Kyrgyz SSR.”<sup>114</sup>

Whereas the referendum was a remedy for “the necessity of further legitimization of the new competences” of the President of the Kyrgyz Republic because “the Constitution of the Kyrgyz Republic introduced new principles of state organization and state power, accordingly changed the volume and structure of the competences of the President.”<sup>115</sup>

Therefore, the reasoning of the court took a more formal rather than substantive approach as did the Russian Constitutional Court in the *Law “On Cultural Valuables” case*. The court did not attempt to analyze the substantial differences between the competences of Akayev under the old legal framework and the new one as against general state governing functions and powers. Such analysis, if conducted, would most likely demonstrate substantial similarities. Furthermore, the court had a formal view to the referendum as well. It did not consider that the public opinion accepted Akayev as an adequate President under the Constitution of 1993 conferring powers and functions provided by the Constitution of 1993. Thus, the referendum should have been awarded a greater meaning than a mere “legitimization.” Consequently, this reasoning of CCKR raises questions of the true intent of the decision – another tool to “legitimize” Akayev’s rulings?

Another dubious position of CCKR was observed as recently as January 2010. In the *Constitutional Amendments of 2010 Case*<sup>116</sup> the court reviewed the provisions of the

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<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Judgment of the Constitutional Court of the Kyrgyz Republic “On the Draft Law “On Amending the Constitution of the Kyrgyz Republic” Submitted by the President of the Kyrgyz Republic to Jogorku Kenesh of the Kyrgyz Republic (Zaklyuchenie Konstitucionnogo Suda Kyrgyzskoi Respubliki “Po proektu Zakona Kyrgyzskoi Respubliki “O vnesenii izmeneniy v Konstitutsiyu Kyrgyzskoi Respubliki,” vnesennogo Presidentom Kyrgyzskoy Respubliki na rassmotrenie Jogorku Kenesha

amendments proposed by the President as a part of his reforms of public administration.<sup>117</sup> The reforms pursued goals of eliminating doubling positions, optimizing and more capacious establishing of the norms of the Constitution.<sup>118</sup> The highlighting aspects of the amendments contained extension of the presidential competences under Art. 46 of the ConstKR:

“to organize Presidential conference (*Presidentskoe soveshanie*) and other conference organs; and to approve (*utverjdat*) regulations on them;  
to form, abolish and reorganize coordinating organs; approve regulations on them;  
to form, abolish and reorganize the directly subordinate to him State Service on State Organs Protection;  
to realize general management of state organs competent in issues of defense, security, foreign affairs, internal affair; appoints and dismisses their administrators and deputy administrators; on the proposal of the Prime Minister approves regulation on the organs competent in the issues of defense and internal affairs.”<sup>119</sup>

Art. 52 of the Constitution, that describes the procedure for the situation where the president is unable to carry out his duties, was as well subject to amendments. It was proposed to change the person acting as president from the Speaker of Jogorku Kenesh (parliament) to a “person determined by the Presidential conference.”<sup>120</sup> Thus, this person would substitute both the Speaker’s and the Prime Minister’s role.<sup>121</sup>

The court held that none of the presidential competence related amendments did not violate the Constitution because the president shall have such competences in order to carry out his four functions.<sup>122</sup> It emphasized that the president must have “an opportunity

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Kyrgyzskoy Respubliki”) of January 21, 2010

<sup>117</sup> Id.

<sup>118</sup> Abdiev, representative of the president in the contestations before the CCKR

<sup>119</sup> Draft Law of the Kyrgyz Republic “On Amending the Constitution of the Kyrgyz Republic” of December 14, 2009, Article 1 [1]

<sup>120</sup> Id., Art 1. [2]

<sup>121</sup> Under Art. 52 of the Constitution Prime Minister should take the position of acting president, in case it is impossible to carry it out by the Speaker.

<sup>122</sup> Judgment of the Constitutional Court of the Kyrgyz Republic “On the Draft Law “On Amending the Constitution of the Kyrgyz Republic” Submitted by the President of the Kyrgyz Republic to Jogorku Kenesh of the Kyrgyz Republic (Zaklyuchenie Konstitucionnogo Suda Kyrgyzskoi Respubliki “Po proektu Zakona Kyrgyzskoi Respubliki “O vnesenii izmeneniy v Konstitutsiyu Kyrgyzskoi

for taking independent decisions and actions; [...] a right to act in and react to unforeseen vital situations.”<sup>123</sup> Thus, the court opened a ground to have concrete expansive competences for the purposes of fulfilling the four functions.

At the same time, the court rejected the concept of electing a person for acting president by a conference type of a body, because by their status such bodies make decisions of only recommendatory character<sup>124</sup>. However, strangely enough, the court did not reject the possibility of determining the person acting as president via “a collegiate body (but not in the form of a conference body) that is convened in the shortest time for this only purpose [of appointing a person acting as president], in the composition of which participation of the head of the executive and the head of the legislative branches is must mandatory.”<sup>125</sup> Thus, the court makes a reference to the necessity of political balance between the branches, awarding itself at least a small degree of objectivity on the contrast of such deference to the president, as it could not ignore such a blatant violation of the constitutional order.

A slightly larger degree of objectivity is observed in the *Political Party Activities of the President case*<sup>126</sup> that addressed the question “whether the president must for the

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Respubliki,”vnesennogo Presidentom Kyrgyzskoy Respubliki na rassmotrenie Jogorku Kenesha Kyrgyzskoy Respubliki”) of January 21, 2010

**The four functions are set by Art. 42 [2 and 3] the President:**

- 1) is the symbol of unity of the people and state power, guarantor of the Constitution, freedoms and rights of human beings and citizens;
- 2) determines the guidelines for the domestic and foreign policies of the state;
- 3) takes measures for the protection of sovereignty and territorial integrity of the Kyrgyz Republic;
- 4) ensures unity and continuity of the state power, coordinated functioning and interaction of the state organs, and their responsibility before the people.

<sup>123</sup> Id.

<sup>124</sup> Id.

<sup>125</sup> Id.

<sup>126</sup> Decision of the Constitutional Court of the Kyrgyz Republic “On the Official Interpretation of Article 45 [3] of the Constitution of the Kyrgyz Republic (Reshenie Konstitucionnogo Suda Kyrgyzskoi Respubliki “Ob ofitcialnom tolkovanii punkta 3 statii 45 Konstitucii Kyrgyzskoy Respubliki) of July 16, 2009

period of fulfillment of his powers suspend his activities in political parties and organizations before new presidential elections pursuant to Art. 42 [3] of the Constitution.”<sup>127</sup> The court interpreted this constitutional provision in a very restrictive way, by defining “activities in political parties and organizations” to include “aggregate of organized actions of the members [of the political party or organization], who are bound to the realization of common interests and goals.”<sup>128</sup> Thus, the argument of the members of the political party “Ak Jol”, that claimed that president’s petition to suspend his activities in the party on October 15, 2007 (before the presidential elections) was a sufficient measure to comply with Art. 42 [3], has been dismissed. The court also emphasized the role of the president and unconstitutionality of consequences of continuing party/organization activities. Therefore, CCKR has been able to create more visible limitations of the presidential power with respect to party affiliation. However, the decision, *de facto*, did not prevent the party to be much supported by the president and vice versa that was significantly reflected in the legislative process.<sup>129</sup>

Consequently, on the basis of the three cases one may suggest that comparing to Russian Constitutional Court and Federal Constitutional Court of Germany CCKR has more problems in neutrally resolving disputes between the executive and the political branches. In practical exercise of its power, it appeared to be much more exposed to politics, and thus, became influenced by it, which is why its reasoning in the decisions seemed to be strained to comply with the Constitution and constitutional principles. In the

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<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Gstol, Harry and Paczolay Peter, *Opinion on the Draft Laws Amending and Supplementing (1) The Law on Constitutional Proceedings and (2) The Law on the Constitutional Court of Kyrgyzstan*, Venice Commission (Oct., 2008)



strong semi-presidential system of Kyrgyzstan, it is not effective in limiting the growing executive, thus, it fails to secure its position as an objective arbiter between the political branches.

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In this chapter the practices of the constitutional courts in disputes between the executive and legislative branches have been demonstrated. All of the three jurisdictions demonstrated the growing strength of the executive branch. Thus, the traditional fear of parliamentary dictatorship may be reconsidered in both parliamentary and semi-presidential systems. With this respect, the three courts appeared to have three different *de facto* approaches. In Germany, the Federal Constitutional Court had a firm position of observing institutional as well as political balance between the two branches. At the same time, it showed that it would stay as far as possible from the political aspects of the disputes, by which it awarded itself a greater degree of objectivity.

In Russia and Kyrgyzstan the courts were less fortunate to be objective. Russian Constitutional Court appeared to attempt to be more objective; however, the overall strength of the executive branch has an influence over its decision. The Constitutional Court of the Kyrgyz Republic, in contrast, demonstrated somewhat obvious loyalty to the executive, which was lightly covered up by its strained reasoning. As a result, CCKR appeared to be a “legitimization” tool for the presidential actions.

Therefore, a conclusion can be drawn that the degree of objectivity of the constitutional courts in resolving disputes between the political branches varies. Since the legal framework for the courts was set on a rather equal level as argued in Chapter I, this

chapter suggests that it is not quite enough to have legal ground in order to produce solid objective decisions, especially when the disputes are tightly intertwined with politics.

## CONCLUSION

The issue of the role of constitutional courts in promoting and maintaining democracy is one of the main focuses of contemporary constitutional law. The specific role of the constitutional courts of Germany, Russian Federation, and the Kyrgyz Republic in disputes between the executive and legislative branches became very crucial because, as the research demonstrated, the ruling of the courts can be manipulated as to legitimize the actions of the executive branch. Therefore, the research contributed to a greater understanding of the role of the constitutional adjudication in the view of increasing strength and role of both the legislative and the executive branches.

By thorough and systemic analysis of the legal framework set for the constitutional courts and their actual exercise of powers and functions within this framework the research objective has been achieved. The varying degree of neutrality of the courts of the three jurisdictions in disputes between the political branches has been demonstrated.

The content analysis of the constitutional provisions and the relevant legislation has established that the constitutional courts in the three jurisdictions are empowered overall rather equally in order to be able to objectively rule in cases. But despite the existence of such similarities, the decisions of the courts appeared to be different in terms of objective decision-making. Discrepancies between theory and practice have been observed especially in the jurisdictions of the Russian Constitutional Court and the Constitutional Court of the Kyrgyz Republic, where the influence of politics made its consequent impact leading to dubious decisions subject to debates and criticisms.

Thus, the above suggests that the strength of political factors as powerful as the legal factor. They may de facto limit the powers of the constitutional courts in spite the fact that de jure they courts are strong as they are *primus inter pares* protecting the Constitution, and thus, standing a step higher then the other two branches. Therefore, political factors should be provided somewhat greater attention in legal studies.

Consequently, with the view to the Constitutional Court of the Kyrgyz Republic the following recommendations can be proposed. On the one hand, the competences of the court must be concretized. Although the court possesses broad interpretative powers that allows the court to review a wide scope cases, more concrete competences, especially specific procedures, may decrease chances to be pressured by the political branches. On the other hand, some investigative powers may also be provided. This would provide the court with a broader view, rather than being limited to the information provided by the parties. Last, but not least, some special trainings of the judges may also assist objective decision-making.

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