Constitutional Review in Transition: Central Asian Constitutional Courts in Comparative Perspective

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Abstract

This dissertation presents the analysis of Central Asian constitutional courts with comparative perspectives from South Korea and Taiwan. The dissertation claims that the constitution is a holistic project, and the research on constitutional courts should also involve a holistic approach. Constitutional courts, especially in new democracies, do not operate in a vacuum and in order to better understand and have a comprehensive picture of their work, constitutional courts must be placed in a broader legal, political, geopolitical, historical and economic context. The central premise of the dissertation is that these broader factors and contexts in line with constitutional design and architecture have a direct impact on the success or failure of constitutional review in new democracies. With these premises in mind, and employing a comparative legal approach in combination with contextual political, historical, geopolitical analysis, the current thesis presents a study constitutional courts of Kyrgyzstan and Kazakhstan with comparative perspectives from Uzbekistan, Tajikistan, South Korea, and Taiwan. The primary research questions of the dissertation are: *first, what constitutional and extra-constitutional frameworks and factors caused the failure of constitutional review in Central Asia? Second, how to strengthen the potential of these courts towards success? Third, what is the added value of the comparative study of Central Asian and East Asian constitutional courts to the existing global discourse on judicial review?*

Introduction

At the end of the twentieth century, along with the precipitous collapse of communist regimes across Eastern/Central Europe and Former Soviet Union, the broad transformational trend toward democratization included dutiful processes of constitution-making and, as part of these, the establishment of constitutional courts (CCs). This transformational trend produced constitutional courts across new democracies, and the 1990s became known as the period of "*great constitutional borrowings*." [1] This third wave of democratization [2] increased an unprecedented interest in the study CCs throughout the world. Numerous theories[3] and models on the origin and operation of judicial review emerged, to mention few: rights-based hypothesis,[4] internationalization, modernization, [5] and globalization, [6] hegemonic-preservation theory, [7]

[1] Dennis. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 Int'l J. Const. L. 181–95 (2003). Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 Int'l J. Const. L. 244–68 (2003). Lee Epstein, Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 Int'l J. Const. L. 196–223 (2003). Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 Int'l J. Const. L. 224–43 (2003). Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 Int'l J. Const. L. 269–95 (2003). Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models*, 1 Int'l J. Const. L. 296–324 (2003). Vlad Perju, *Constitutional transplants, borrowing and migrations*, in Michel Rosenfeld, Andras Sajo, Oxford Handbook of comparative constitutional law, 1304-1327 (Oxford University Press, 2012). Vicki C. Jackson, *Comparative constitutional law: methodologies*, in Michel Rosenfeld, Andras Sajo, Oxford Handbook of comparative constitutional law, 54-74 (Oxford University Press, 2012). Sujit Choudhry, The Migration of Constitutional Ideas, (Cambridge University Press, 2006).

[2] Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century, (Norman: University of Oklahoma Press, 1991).

[3] Victor Ferreres Comella, Constitutional Courts and Democratic Values: A European Perspective, (Yale University Press, 2009). Michel Troper, *The logic of justification of judicial review*, 1.1. International Journal of Constitutional Law, 99-121, (2003). Mauro Cappelletti et W. Cohen, Comparative Constitutional Law. Cases and Materials, (Indianopolis, the Bobbs Merril Company, 1979).

[4] Martin Shapiro, *The success of judicial review*, in Sally J. Kenney, William M. Reisinger and John C. Reitz. Constitutional Dialogues in Comparative perspectives, 204(Macmillan Press LTD, Great Britain, 1999). Martin Shapiro, Courts a Comparative and Political Analysis, (University of Chicago Press, 1981).

[5] Andrew Harding, Penelope Nicholson, New Courts in Asia (Routledge, 2010)

[6] Günther Frankenberg, *Constitutional Tranfer: The IKEA Theory Revisited*, 8 INT'L J. CONST. L. (2010).

[7] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2009).

insurance theory.[8] The traditional study based on normative/institutional analysis of judicial review shifted towards more theoretical and comparative analysis.[9] The geographical landscape of the study of constitutional courts was also extended to include Latin America, Central and Eastern Europe, Africa and Asia.

Furthermore, there is currently some literature suggesting the existence of distinctive characteristics of constitutionalism in the Global South and argues that established theories in the Global North might not work in the Global South, due to its distinctive political context, legal culture and tradition.[10] Other scholars, particularly Ran Hirschl argues that the claim for distinctive constitutionalism in the Global South lacks clarity and is mostly limited to the argument on underrepresentation in the scholarship. Moreover, he thinks that content-wise there are no clearly articulated arguments, theories, discussions that are peculiar to the Global South and that have been left out from the existing global discourse on judicial review.[11]

David Landau on the other hand argues that in the context of the Global South the degree and level of challenges faced by the judiciary such as "*democratic distrust, political inattention to constitutionalism and political dysfunction"*[12] is much higher and more pervasive that in the Global North. Ultimately, Landau argues that "*constitutionalism of the global south will not be*

[8] Tom Ginsburg and Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30.3 Journal of Law, Economics, and Organization, 587-622 (2014).
[9] Michel Rosenfeld and András Sajó, The Oxford Handbook of Comparative Constitutional Law (OUP Oxford, 2012). Tom Ginsburg and Rosalind Dixon, Comparative Constitutional Law (Edward Elgar Publishing, 2011). Mark Tushnet, Thomas Fleiner, and Cheryl Saunders, Routledge Handbook of Constitutional Law (Routledge, 2013). Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law (OUP Oxford, 2014).
[9] Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013).
[10] Daniel B. Maldonado, *Introduction Toward a Constitutionalism of the Global South*, in D. B. Moldonado (eds). Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Columbia (Cambridge University Press, 2013).
[11] Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law, 206-220 (Oxford University Press, 2014).
[12] David Landau, *Institutional Failure and Intertemporal Theories of Judicial Role in the Global South*, in David Bilchitz, David Landau (eds), The Evolution of Separation of Powers, 56 (Edward Elgar Publishing Limited, 2018).

the development of an isolated set of theories applicable only to abnormal situations, but a richer account of how judges can and should behave in different kinds of political contexts".[13] This project shares Landau`s approach on this issue and aims to show similar traits in the context of Central Asia. Namely, the dissertation will reveal that CCs of this region do have an added value to the existing global discourse on judicial review, if these courts are studied and discussed beyond the context of classic post-communist transitional project.

Central Asia has always been kept under the shadow of the (Former) Soviet Union and studied by comparative constitutional law scholars as part of the post-communist project.[14] Almost no separate research has been done on constitutional review in Central Asia.[15] This work aims to demonstrate that Central Asia, even though is still highly influenced by the legacy of Soviet Union, is more than just a post-communist project: looking and researching CCs of Central Asia only from the prism and blinders of post-communist approach might lead to misleading research outcomes. The internal dynamics within Central Asia, namely the existing clan politics,[16] regionalism,[17] nationalism,[18]the rise of political Islam,[19] pervasive clientelism[20]

[13] David Landau, *Institutional Failure and Intertemporal Theories of Judicial Role in the Global South*, in David Bilchitz, David Landau (eds), The Evolution of Separation of Powers, 56 (Edward Elgar Publishing Limited, 2018).
[14] Rett R. Ludowikowski, Constitution-making in the Region of Former Soviet Dominance (Duke University Press, 1996).
[15] In 2017 under the Hart`s Constitutional Systems of the World Series a book on Central Asia was published, however it was not a separate study on constitutional courts, rather general overview of constitutional systems of Central Asia. See Scott Newton, The Constitutional Systems of the Independent Central Asian States (Oxford and Portland: Hart Publishing, 2017).
[16] Kathleen Collins, Clan Politics and Regime Transition in Central Asia 210-215 (Cambridge University Press, 2006). Collins, Kathleen, Clans, *Pacts, and Politics in Central Asia*, 13/3 *Journal of Democracy* (2002).
[17] Sally Cummings, Power and Change in Central Asia, Politics in Asia, (Routledge, 2002). John Anderson, Kyrgyzstan: Central Asia's Island of Democracy*? (* London: Routledge, 1999). Murzakulova Asel, Schoeberlein John, *The Invention of Legitimacy: Struggles in Kyrgyzstan to Craft an Effective Nation-State Ideology*, 61/7 Europe-Asia Studies *(2009)*. Huskey Eugene, Iskakova, Gulnara, *Narrowing the Sites and Moving the Targets*, 58/3 Problems of Post-Communism, 58/3 (2011).
[18] Dagikhudo Dagiev, Regime transition in Central Asia: stateness, nationalism and political change in Tajikistan and Uzbekistan, (Routledge, Taylor & Francis Group, 2013)
[19] Emmanuel Karagiannis, *The New Political Islam in Central Asia: From Radicalism to the Ballot Box*?, 19.1 Brown Journal of World Affairs, 72-76 (2012).

and corruption,[21] combined with external geopolitical factors[22] as "authoritarian regionalism"[23], political economy and the influence of Russia and China [24] makes this region unique. Accordingly, constitutional structures and developments in Central Asia require a broader contextual analysis. If researched in their broader contextual study, scholarship on these courts has a high potential of contributing to the existing global discourse on judicial review.

The main premise of the dissertation is that constitutional review in new democracies shall not be separated from broader historical, political, economic and geopolitical dynamics. These courts do not work and function in a vacuum and all abovementioned factors along with constitutional design and institutional architecture directly influence the success or failure of constitutional review in newly emerging democracies. To substantiate this argument, this thesis studies Central Asian CCs in comparison with CCs of Taiwan and South Korea. Existing scholarship suggests that vibrant and successful constitutional developments in these states, especially the context of CCs, are due to the emerging model of *East Asian Constitutionalism* that is grounded in shared features such as socio-political and economic context, "instrumental approach to state building", [25] "textual continuity with incremental changes" [26] and

[20] Scott Radnitz, Weapons of the Wealthy: Predatory Regimes and Elite-led Protests in Central Asia (Cornell University Press, 2012). Pomfret Richard, The Central Asian Economies in the 21st Century, 180 (Princeton University Press, 2019).

[21] Alexander Cooley, John Heathershaw, Dictators Without Borders Power and Money in Central Asia (Yale University Press 2017). For more information on the nexus between corruption and terrorism in Central Asia see Mariya Omelicheva, Lawrence Markowitz, Webs of Corruption: Trafficking and Terrorism in Central Asia (Columbia University Press, 2019).

[22] Konstantin Syroezhkin, *Central Asia Between the Gravitational Poles of Russia and China*, in Boris Rumer (ed), Central Asia a Gathering Storm?, 169 (Armonk, N.Y. : M.E. Sharpe, 2002)

[23] Anastassia Obydenkova, Alexander Libman, Athoritarian Regionalism in the World of International Organizations: Global Perspective and the Eurasian Enigma (Oxford University Press, 2019).

[24] Mariya Y. Omelicheva, Democracy in Central Asia: Competing Perspectives and Alternative Strategies, (Lexington: University Press of Kentucky 2015). Alexander Cooley, *Ordering Eurasia: The Rise and Decline of Liberal Internationalism in the Post-Communist Space*, 28.3 Security Studies,588-613 (2019).

[25] Jiunn-Rong Yeh, Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59.3 The American Journal of Comparative Law, 816-822 (2011). Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3.2 National Taiwan University Law Review, 115, (2008).

"reactive/cautious judicial review".[27] Despite the historical and cultural differences of these regions, the thesis will demonstrate that in the context of CCs and their past, current and potential roles in the transition to democracy, Central Asian courts can learn a lot from the experience of Taiwan and South Korea and in-depth parallel research of constitutional review in East Asia and Central Asia has a high potential of substantially contributing to the existing global discourse on judicial review.

Thus, employing a comparative legal analysis approach[28] in combination with some elements of contextual qualitative political,[29] political economy,[30] historical,[31] geopolitical analysis[32] current thesis undertakes a study of CCs of Kyrgyzstan and Kazakhstan with comparative perspectives from Uzbekistan, Tajikistan, South Korea, and Taiwan and answers the

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[26] *Id*. 816-822

[27] *Id*. 816-822

[28] Existing comparative law methodology offers various approaches in this field. This dissertation apart from the comparative black letter analysis of constitutions, statutes, laws, acts, and judicial decisions of respective jurisdictions goes beyond it. To be specific, the emphasis is also made on functionalism and conceptualism. Namely, under these methods, scholars argue that laws and rules "be appreciated for what they do, rather than for what they say." See Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 Brooklyn Journal of International Law, 408-412 (2007). Mathias Siems, Comparative law, 31-40 (Cambridge University Press, 2014). For more on comparative methodology in law see: Maurice Adams, Dirk Heirbaut (eds), The Method and Culture of Comparative Law (Hart Publishing, 2014). Maurice Adams, Husa, J., Oderkerk, M. (eds.), Comparative law methodology: Volumes I and II. (Cheltenham: Edward Elgar, 2017). Pier Guiseppe Monateri (ed.) Methods of Comparative Law, 291 (Edward Elgar Publishing, 2012). David Law, *Constitutions*, in Peter Cane, Herbert M. Kritzer, Oxford Handbook of Emperical Legal Research, 376 (Oxford University Press, 2010).

[29] For more on contextual political analysis methodology see Robert E. Goodin, Charles Tilly, The Oxford handbook of Contextual Political Analysis, (Oxford University Press, 2006). Charles Tilly, Robert E. Goodin, *Overview of Contextual Political Analysis it Depends*, in Robert E.Goodin, The Oxford Handbook of Political Science (Oxford University Press, 2011). Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, Overview of Law and Politics the Study of Law and Politics, in Robert E.Goodin, The Oxford Handbook of Political Science (Oxford University Press, 2011).

[30] Barry R. Weingast, Donald A. Wittman, *Overview of Political Economy*, the Reach of Political Economy in Robert E.Goodin, The Oxford Handbook of Political Science (Oxford University Press, 2011). Antonio Nicita, Simona Benedettini, *Towards the Economics of Comparative Law: The Doing Business Debate*, *in* Pier Guiseppe Monateri (ed.) Methods of Comparative Law, 291 (Edward Elgar Publishing, 2012).

[31] For examples of contextual historical analysis of politics see: Ashford, D. E., *Historical context and policy studies*, in D.E. Ashford, History and Context in Comparative Public Policy, 27–38 (Pittsburgh, Pa.: University of Pittsburgh Press, 1992). James Mahoney and Daniel Schensul, *Historical Context and Past Dependence* in Robert E. Goodin, Charles Tilly, The Oxford handbook of Contextual Political Analysis, (Oxford University Press, 2006).

[32] Robert E. Goodin, Charles Tilly, The Oxford handbook of Contextual Political Analysis, (Oxford University Press, 2006).

following key research questions. ***First, what constitutional and extra-constitutional frameworks and factors caused the failure of constitutional review in Central Asia? Second, how to strengthen the potential of these courts towards success? Third, what is the added value of the comparative study of Central Asian and East Asian constitutional courts to the existing global discourse on judicial review?***

In addition to theoretical and methodological background discussed above, it is highly important to add the perspective of transformative constitutionalism. Theunis Roux in his recent book on politico-legal dynamics of juridical review observed that

> "*Judicial Review regimes do develop incrementally, but that incremental development in practice never leads to wholesale regime transformation. For that to occur, there must be an exogenous shock that destabilizes the regime by undermining its economic or political premises. In addition, JR-regime transformation requires the intervention of legal and political actors with an interest in driving the change to a new conception of the law/politics relation*."[33]

His main findings were grounded on a number of case studies that involved states representing both global south and global north and presents a great contribution to the existing comparative constitutional law scholarship on the role of the judiciary in the transformation of societal understanding on political/constitutional and regime transition.[34] To explore Roux`s main proposition,particularly the incrementality of change and transition, this dissertation will coduct a detailed contextual analysis of each selected case by exploring the impact and aftermath of those cases.

[33] Theunis Roux, The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis, 297 (Cambridge: Cambridge University Press, 2018)
[34] Id.

With these aims and objectives in mind the dissertation is divided into five chapters. Chapter 1 is dedicated to the institutional analysis of Central Asian CCs with comparative elements from Taiwan and South Korea. First, it examines the main motivations and reasons behind the establishment of CCs. Second, it aims to define how those factors and reasons shaped the institutional design choices of these courts. The first section of the chapter will briefly describe the process of establishment of CCs in the context of former Soviet Union. Then the chapter will revisit existing theories in comparative constitutional law on the origin of judicial review. The emphasis will be on the insurance theory, that is currently dominating the existing scholarship on theories on origin of judicial review and will show how this theory was tested in the context of Taiwan, South Korea, and Mongolia. Furthermore, the chapter will reveal that in the context of Central Asia, the insurance theory cannot fully and accurately explain the reasons behind the establishment of CCs. The chapter will define the main driving forces and motives behind the establishment of these courts. It shows that behind the adoption of certain institutional design was political economy that has been shaped by politico-historical context, early transitional transitional period and foreign policy choises of Central Asia.

Chapter 2 will review the jurisprudence of Central Asian and East Asian CCs in issues involving mega politics and politically sensitive cases. The following patterns are revealed by overview and contextual analysis of these decisions. When faced with politically sensitive issues, the CC of South Korea tends to adopt a constitution-preservationist approach, namely the decisions are interpreted and reasoned in a way to preserve the legitimacy of the constitution. The Judicial Yuan of Taiwan in cases involving mega politics shows itself to be reactive and on extremely sensitive issues as transitional justice, unlike South Korean Court the Judicial Yuan is more conservative and rather uses a regime-preservationist approach, namely the cases involving

transitional justice seemed to be decided with the purpose of preserving the legitimacy of the KMT. Kyrgyz Constitutional Chamber tends to adopt a deferential approach on issues involving mega politics and politically sensitive issues. Unlike in Kyrgyzstan`s CCs in Tajikistan, Kazakhstan and Uzbekistan due to less competitive power dynamics were not actively involved in mega politics. However, to the extent they got involved, it happened mostly by the will and invitation of the President and were mostly used as a window dressing.

Chapter 3 will analyze cases involving separation of powers, particularly the issues of open political confrontation between branches. Based on the decisions, the CCs will be grouped into following categories. The Mongolian court preferred to act aggressively, thus creating a greater deadlock and tension among branches with the eventual undermining of its legitimacy before political branches, namely the Parliament. On the other hand, the CCs in Taiwan and South Korea adopted a more facilitative approach as a neutral decision-maker. This approach allowed them to successfully cope with the political deadlock at the same time keeping its legitimacy and credibility before other branches of power. Finally, there is a block of Central Asian CCs that fall into the category of "tamed courts" under strong presidential rule. While the outcome of their decisions is always predictable (pro-presidential), it is never possible to predict the reasoning and rationale behind the judgements. However, within this block of “tamed courts” there is the Constitutional Chamber of Kyrgyzstan that after 2010 seemed to be emerging from the shadow of tamed courts. Accordingly, the chapter will identify what prompted this exception and what is unique about constitutional review in Kyrgyzstan in political conflicts.

Chapter 4 will address issues related to the adjudication of fundamental constitutional rights in Central Asia and East Asia. The main purpose of this chapter is to demonstrate that in the context of Central Asia and East Asia external factors and political dynamics play a crucial

role in the adjudication of fundamental rights. *Conscientious objection case* in South Korea demonstrates the shifting and cautious position of the South Korean CC on this issue with gradual strengthening of the civil society and consistent criticism of major international human rights organization as UN. With respect to Taiwan the *same-sex marriage case* will be analyzed in the context of post democratization period and the ability of the Judicial Yuan to adjudicate cases not only involving the issues of transition and facilitation of democracy, but also in the field of important and sensitive fundamental rights protection issue. The analysis of Central Asian constitutional jurisprudence on this issue will reveal that the jurisprudence of these courts are being shaped by external geopolitical factors. Furthermore, there is a shift from monist towards a more dualist approach to international human rights norms, while having a pluralistic approach to norms regulated by Russia led regional organizations as Eurasian Economic Union (EAEU) and Collective Security Treaty Organization (CSTO).

The final Chapter includes a synthesis of all previous chapters, and drawing the analysis of observed shared patterns and anti-patterns of Central Asian and East Asian CCs and placement of those findings into the global discourse judicial review. This chapter addresses one of the primary research questions, namely the added value of the comparative study of Central Asian and East Asian CCs to the current global discourse on judicial review. Under this section the focal points are: first, the contribution of the study of Central Asian CCs to the existing discourse on the place of international materials in constitutional jurisprudence; second, on illiberalism and authoritarian constitutionalism; third, on issues involving the impact of Islamization in constitutionalism.

Chapter 1: The Origin and Institutional Design of Constitutional Review Mechanisms in Central Asia.

This chapter pursues two main objectives. First, it identifies the main factors and reasons behind the establishment of CCs in Central Asia. Second, it defines how those factors and reasons shaped the institutional design of these courts. To do that, the chapter will first briefly explain the formation of CCs in the context of Former Soviet Union. Then it will revisit existing theories in comparative constitutional law on the origin of judicial review. The analysis starts from the insurance theory, that is currently dominating the global discourse on judicial review and will show how this theory was tested in the context of Taiwan, South Korea, and Mongolia. Furthermore, the chapter will reveal that in the context of Central Asia, the insurance theory cannot fully and accurately explain the origin of constitutional review. Instead, the thesis will convey that the main driving force and motive behind the establishment of these courts and behind the adoption of certain institutional design were economic forces in Central Asian states that have been shaped by politico-historical and transitional context of Central Asia.

1. The Emergence of Constitutional Courts in the Context of Former Soviet Union

Scholarship of comparative constitutional law undewent a rapid growth over the past decade.[35] Especially the issues revolving around the constitutional review and the role of courts[36]

[35] Michel Rosenfeld and András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law (OUP Oxford, 2012). Tom Ginsburg and Rosalind Dixon (eds.), Comparative Constitutional Law (Edward Elgar Publishing, 2011). Mark Tushnet, Thomas Fleiner, and Cheryl Saunders, Routledge Handbook of Constitutional Law (Routledge, 2013). Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law (OUP Oxford, 2014). Gunter Frankenberg, Comparative Constitutional Studies. Between Magic and Deceit. (Edward Elgar Publishing, 2018).

in the process of democratization.[37] As it was described by Shapiro "*what once appeared to be American exceptionalism came into play in most European, Continental and in some Asian democratic states*"[38]

The review of the current contemporary scholarship reveals emerging trends in the field of comparative constitutional scholarship that is evolving both thematically and geographically. A substantial boom in the literature is being observed outside of the western world from Latin America[39] to Africa[40] and from Former Soviet Union[41] to Asia.[42] This transformational trend

[36] For instance Hart is a strong proponent of judicial review in facilitating democracy as a proper check on majority power, see Hart J. Ely, Democracy and Distrust: a theory of Judicial review, (Harvard University Pres, 1981). There are other scholars who perceive constitutionalism as empowering the majority, rather then limiting it, see Bruce Ackerman, We the People: Transformations, (Harvard University Press, 1991). Cass Sunstein, Designing Democracy: What Constitutions Do, (Oxford University Press, 2001). Jurgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (MIT Press, 1998).

[37] Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013).

[38] Martin Shapiro, *Courts in Authoritarian Regimes* in Tom Ginsburg and Tamir Moustafa, Rule by Law: The Politics of Courts in Authoritarian Regimes, 326 (Cambridge University Press, 2008).

[39] Julio Rious-Figueroa, Courts in Latin America (Cambridge University Press, 2011). Javier A. Couso, Alexandra Huneeus, Rachel Sieder, Cultures of Legality: Judicialization and Political Activism in Latin America (Cambridge University Press, 2010). Manuel Jose Cepeda Espinosa, David Landau, Colombian Constitutional Law: Leading cases (Oxford University Press, 2017).

[40] Theunis Roux, The Politics of Principle: The First South African Constitutional Court, 1995-2005, (Cambridge University Press, 2013). Douglas Greenberg et al. (eds.), Constitutionalism and Democracy: Transitions in the Contemporary World: (Oxford University Press, USA, 1993). Charles M. Fombad, Constitutional Adjudication in Africa, (Oxford University Press, 2017).

[41] Alexei Trochev, Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006 (Cambridge University Press, 2008). Wojciech Sadurski, Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective (Springer Science & Business Media, 2002). Wojciech Sadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (Springer Science & Business Media, 2005).

[42]Jiunn-rong Yeh, Wen-Chen Chang (eds.) Asian Courts in Context (Cambridge University Press, 2014). Rosalind Dixon and Tim Ginsburg, Comparative Constitutional Law in Asia (Edward Elgar Publishing, 2014). Albert H. Y. Chen, Constitutionalism in Asia in the Early Twenty-First Century (Cambridge University Press, 2014). Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003). Andrew Harding and Penelope Nicholson, New Courts in Asia (Routledge, 2010). Bjorn Dressel, The Judicialization of Politics in Asia, (New York, Routledge, 2012). Rosalind Dixon, Tom Ginsburg (eds.) Comparative Constitutional Law in Asia (Edward Elgar Publishing, 2014). Tom Ginsburg, Albert Chen, Roman Tomasic (eds.) Public Law in East Asia (Routledge, 2013). Simon Butt, The Constitutional Court and Democracy in Indonesia (Leiden: Brill Nijhoff, 2015).

produced constitutional courts[43] , and 1990s became known as the period of "*great constitutional borrowings*".[44]

Existing scholarship suggests that the nature of constitutionalism is shifting and the democracy is no longer understood as "canonical" majority rule/ parliamentary sovereignty, but rather as "minorities possess legal protection in the form of a written constitution, which even a democratically elected assembly cannot change". [45] It still remains unclear what does constitutionalism mean? Are there any criteria or definition against which the global constitutionalism can be tested? Overall there is no strictly defined definition or understanding of constitutionalism. According to Andras Sajo and Renata Uitz "*constitutionalism is often described as a liberal political philosophy that is concerned with limiting government".*[46] Existing scholarly literature on constitutionalism share common traits that constitutionalism is a set of principles, ideals and values revolving around the organizational structure of

[43] Wojciech Sadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, 3 (Springer Science & Business Media, 2005). Radoslav Prochazka, Mission Accomplished on founding constitutional adjudication in Central Europe, 16 (Central European University Press, Budapest New York, 2002). Kim Lane Scheppele, *A Comparative Ciew of the Chief Justices` Role. Guardians of the Constitution: Constitutional Court Presidents and the struggle for the rule of law in post-soviet Europe*, 154 University of Pennsylvania Law Review, 1757 (2006).

[44] D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 Int'l J. Const. L. 181–95 (2003). Lee Epstein, Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 Int'l J. Const. L. 196–223 (2003). Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 Int'l J. Const. L. 224–43 (2003). Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 Int'l J. Const. L. 244–68 (2003). Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 Int'l J. Const. L. 269–95 (2003). Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models*, 1 Int'l J. Const. L. 296–324 (2003). Vlad Perju, *Constitutional transplants, borrowing and migrations*, in Michel Rosenfeld, Andras Sajo, Oxford Handbook of comparative constitutional law, 1304-1327 (Oxford University Press, 2012). Vicki C. Jackson, *Comparative constitutional law: methodologies*, in Michel Rosenfeld, Andras Sajo, Oxford Handbook of comparative constitutional law, 54-74 (Oxford University Press, 2012). Sujit Choudhry, The Migration of Constitutional Ideas, (Cambridge University Press, 2006).

[45] Ran Hirschl, Towards Juristocracy: the origins and consequences of the new constitutionalism, 2 (Harvard University Press, 2004).

[46] Andras Sajo, Renata Uitz, The Constitutions of Freedom: an Introduction to Legal constitutionalism, 19, (Oxford University Press, 2017).

government.[47] Reviewing the works of scholars as Andras Sajo, Giovanni Sartori, Michel Rosenfeld and Louis Henkin one can trace such principles as "*limited nature of government*", "*respect for individual rights*" and "*rule of law*" as core values associated with constitutionalism.[48] One may ask what limited government means. The primary understanding of limited government is grounded on written nature of constitution. As Chief Justice Marshal emphasized in *Marbury vs. Madison*, the entire purpose of writing the US constitution was to limit the government, not to empower it.[49] Furthermore, the existing scholarly literature in deliberative democracy highlights basic role of judicial review as a complementary tool in ensuring the limited nature of government.[50]

Thus, based on the abovementioned, it can be claimed that currently we are living in the age of global constitutionalism[51] grounded on the emphasis on human rights and limited government.[52] The emphasis shifted from the classical understanding on the majority rule

[47] Cass R. Sunstein, *Constitutionalism After the New Deal*, 101.2 Harvard Law Review, 421-23 (1987). Bruce Akerman, *The rise of world Constitutionalism*, 83.4 Virginia Law Review, 788-91, (1997).

[48] Andras Sajo, Limiting government: an introduction to constitutionalism, 9-13 (Central European University Press, 1999). Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56.4 American Political Science Review 853-55(1962). Michel Rosenfeld, Constitutionalism, identity, difference and legitimacy: theoretical perspective, 5-10, (Duke University Press, 1994). Andras Sajo, Renata Uitz, The Constitutions of Freedom: an Introduction to Legal constitutionalism, Chapter 1 (Oxford University Press, 2017). Louis Henkin, Elements of Constitutionalism (New York: Columbia University Press, 1994). Tamas Gyorfi, Against New Constitutionalism, (Edward Elgar Publishing, 2016). Larry Alexander, Constitutionalism: Philosophical Foundations (Cabridge University Press, 1998).

[49] Marbury v. Madison, 5 U.S. 137 (1803) p. 177

[50] Hans Kelsen, Pure Theory of law, German edition by Max Knight Published Gloucester, (Mass. Peter Smith1967) Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 Southern California Law Review, 1307-1351(2001). Nino Carlos Santiago, *The Constitution of Deliberative Democracy*, 187-98 (Yale University Press, 1996). John Hart Ely, Democracy and distrust, 73-90 (1980). Alexander Bickel, The least dangerous branch, 1-29 (Yale University Press, 1986). Aharon Barak, The Judge in a democracy, 1-88(Princeton University Press, 2008).

[51] Beer L, W, *Introduction: Constitutionalism in Asia and the United States*, in L.W. Beer (ed.). Constitutional Systems in Late Twentieth Century Asia, 1-54 (Seattle: University of Washington Press, 1992). Arjomand, S.A, *Law, Political Reconstruction and Constitutional Politics*, 18.1 International Sociology, 7-32 (2003). Klug, H, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, (Cambridge: Cambridge University Press, 2000).

[52] Beer L, W, *Introduction: Constitutionalism in Asia and the United States*, in L.W. Beer (ed.). Constitutional Systems in Late Twentieth Century Asia, 1-54 (Seattle: University of Washington Press, 1992).

towards constitutional restraints[53] of power via written constitutions and the concept of judicial review[54] plays an integral role in the global constitutionalism.[55]

According to scholars the application of basic principles and propositions about constitutionalism into third wave democracies, namely African/Asian and former Soviet Union produced an interesting paradox and the emergence of such notions as constitutions "*without constitutionalism*" [56] and "*sham constitutions*". [57] In the context of FSU, as Mazmanyan highlighted that constitutionalism "*has failed to meet the definition in several ways, but most importantly in that it continuously lacked sensitivity to the most essential aspect – limit on government*."[58]

The collapse of the soviet regime produced novel institutions vested with the power to invalidate legislative statutes almost in all successor states.[59] These courts were different from each other in terms of constitutional design, composition, structure, extent of jurisdiction and standing creteria.[60] However, an overarching element that combined them all was that they

[53] Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56.4 American Political Science Review 853-55(1962).
[54] Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, in Petra Dobner and Martin Loughlin (eds), The Twilight of Constitutionalism, 2-8 (Oxford University Press 2010). Dieter Grimm, Constitutionalism - Past, Present, and Future (Oxford University Press 2016).
[55] Karl Loewenstein, Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in Douglas Greenberg (eds), Constitutionalism and Democracy - Transitions in the Contemporary World 3-8 (Oxford University Press 1993). Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in Michel Rosenfeld (ed.), Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, 38-41 (Duke University Press 1994). Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (Oxford University Press, 2010).
[56] H. W. O. Okoth-Ogendo, Constitutions without Constitutionalism: An African Political Paradox, in Constitutionalism and Democracy: Transitions in the Contemporary World, 65-80 (Douglas Greenberg, S. N. Kartz, B. Oliviero and S. C. Wheatley eds., 1993).
[57] David S. Law, Mila Versteeg, *Sham Constitutions*, 101 California Law Review, 865-911 (2013).
[58] Armen Mazmanyan, *Failing constitutionalism: from political legalism to defective empowerment*, 1.2 Global Constitutionalism, 315, (2012).
[59] Radoslav Prochazka, Mission Accomplished on founding constitutional adjudication in Central Europe, 35 (Central European University Press, Budapest New York, 2002). Herman Schwartz, *The new East European Constitutional Courts*, 13 Michigan Journal of International law, 742 (1992).
[60] Kasiah Lach, Wojciech Sadurski, *Constitutional Courts of Central and Eastern Europe: between adolescence and maturity*, 3.2 Journal of Comparative Law (2008).

followed the centralized model of constitutional review as opposed to diffused one. Why did they choose to follow the examples of France and Germany? Are there any legal/theoretical justifications? Sadurski depicts the active emergence of constitutional courts in FSU as a "*mechanical importation*"[61] of once determined to be successful models of constitutional review in the West, particularly in France and Germany to FSU states. His main proposition was that the process of "*mechanical importation*" was not based on any contextualization or experimentation, instead was a mere "*move towards something safe, to something familiar and a return to normalcy*".[62]

Sadurski referring to Martin Shapiro further illustrated the importation of western constitutional review to post-communist states as a highly complicated and multifaceted transition involving old communist leaders, quasi new power elites, legal elites, judges and lawyers all striving to gain something out of it.[63]

Alexei Trochev writing on Russia also shares this view and emphasizes that the emergence of CCs in FSU was entirely an elite driven process where legal elites persuaded "*post-soviet ruling elite*" to establish constitutional courts according to their own perceptions of constitutional review in Germany and France.[64] Along with Sadurski,[65] Herman Schwartz,[66] Jon

61 Wojciech Sadurski, Rights before courts: a study of constitutional courts in post-communist states of central and eastern Europe, preface (Springer, 2005). Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 Int'l J. Const. L. , 251 (2003).
62 Wojciech Sadurski, Rights before courts: a study of constitutional courts in post-communist states of central and eastern Europe, preface, xii,(Springer, 2005).
63 Wojciech Sadurski, Postcommunist Constitutional Courts in search of political legitimacy, European University Institute working paper, 17 (2001).
64 Alexei Trochev, Judging Russia: Constitutional court in Russian Politics, 1990-2006, 25 (Cambridge University Press, 2008).
65 Wojciech Sadurski, Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective, 17 (Kluwer law international, New York, 2002).
66 Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe, 248 (The University of Chicago Press, 2000).

Elster,[67] Wiktor Osyatinski[68] and Radoslav Procharzka[69] also believed that the legitimacy of these institutions was simply assumed and taken for granted rather than tested.[70] Russian political scientist Andrei Medushevsky claims that until now there was no evident motive and reason established behind and nature of the constitutional borrowing in the Russian Constitution as well as in constitutions of other FSU states. Most of the information on the drafting process was restricted and can be indirectly known from western authors who were involved in the debates.[71]

According to initial texts of majority of constitutions of FSU states, CCs in this region have been created with broad powers entrusted to settle separation of powers, as well as rights related disputes.[72] The mechanisms of constitutional review in FSU predominantly were established in the framework of CCs that was perceived as supreme judicial organ that independently exercised the constitutional review.[73] They followed a centralized or so-called "Austrian" or "European" model for the organization of constitutional review. The only FSU state that did not establish a CC was Turkmenistan.[74] The rulings of CCs among these states

[67] Jon Elster, *Constitutional-making in eastern Europe: rebuilding the boat in the open sea*, 71 Public Administration, 172 (1993).
[68] Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 Int'l J. Const. L. , 251 (2003).
[69] Radoslav Prochazka, Mission Accomplished on founding constitutional adjudication in Central Europe, 35 (Central European University Press, Budapest New York, 2002).
[70] Henry Hale, *Formal Constitutions in Informal Politics: Institutions and Democratization in Post-Soviet Eurasia*, 63.4 World Politics, 584-589 (2011). Armen Mazmanyan, *Constrained, pragmatic pro-democratic apprising constitutional review courts in post-Soviet politics*, Communist and Post-Communist studies, 409(2010).
[71] Andrei Medushevsky, Russian Constitutionalism: Historical and Contemporary Development, 203 (Routledge, 2006).
[72] Sadurski, *Rights Before Courts*, 107.
[73] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 5 May 1993, Article 85 (1); Konstituciya Rossiyskoi Federacii [Constitution of the Russian Federation] 12 December 1993, Article 125; Konstituciya Respubliki Azerbaijan [Constitution of Azerbaijan] 1996, Article 130; Konstituciya Respubliki Kazakhstan [Constitution of Kazakhstan] 1993, Article 72, Konstituciya Respubliki Tadzhikistan [Constitution of Tajikistan] 1994, Article 89; Konstituciya Respubliki Armenia [Constitution of Armenia] 1995, Article 101; Konstituciya Gruzii [Constitution of Georgia] 1995, Article 89; Konstituciya Ukrainy [Constitution of Uktaine] 28 June 1996, Article 148
[74] Scott Newton, The Constitutional Systems of the Independent Central Asian States (Oxford and Portland: Hart Publishing, 2017).

were final and not subject to appeal.[75] The legal force of the CCs decisions could not be overruled via the enactment of the normative legal acts, the norms of which are the same as those that have been declared unconstitutional. [76]

The establishment of CCs and the choice of certain models have been accompanied by different political, social and economic challenges in FSU. For some states as Kyrgyzstan and Kazakhstan it took less than two years after the independence to adopt constitutions, for others as Armenia or Georgia it took longer.[77] However despite these differences many of these courts initially have shared common features in terms of jurisdiction, standing and other requirements. Among primary sources regulating the activities of CCs in FSU besides the constitution were constitutional laws on *Constitutional Courts, Status of Judges, Law on Selection of Judges* and procedural rules regulating the activities of CCs. The above-mentioned legal framework empowered CCs in FSU to exercise both *a priori* (in the context of reviewing the constitutionality of constitutional amendments and international treaties not ratified by respective states) and *ex post factum* review (constitutionality of acts/ laws of parliament) along with the

[75] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 5 May 1993, Article 85 (1); Konstituciya Rossiyskoi Federacii [Constitution of the Russian Federation] 12 December 1993, Article 125; Konstituciya Respubliki Azerbaijan [Constitution of Azerbaijan] 1996, Article 130; Konstituciya Respubliki Kazakhstan [Constitution of Kazakhstan] 1993, Article 72, Konstituciya Respubliki Tadzhikistan [Constitution of Tajikistan] 1994, Article 89; Konstituciya Respubliki Armenia [Constitution of Armenia] 1995, Article 101; Konstituciya Gruzii [Constitution of Georgia] 1995, Article 89; Konstituciya Ukrainy [Constitution of Uktaine] 28 June 1996, Article 148

[76] *Id.*

[77] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 5 May 1993, Article 85 (1); Konstituciya Rossiyskoi Federacii [Constitution of the Russian Federation] 12 December 1993, Article 125; Konstituciya Respubliki Azerbaijan [Constitution of Azerbaijan] 1996, Article 130; Konstituciya Respubliki Kazakhstan [Constitution of Kazakhstan] 1993, Article 72, Konstituciya Respubliki Tadzhikistan [Constitution of Tajikistan] 1994, Article 89; Konstituciya Respubliki Armenia [Constitution of Armenia] 1995, Article 101; Konstituciya Gruzii [Constitution of Georgia] 1995, Article 89; Konstituciya Ukrainy [Constitution of Uktaine] 28 June 1996, Article 148

abstract review. [78] Thus, the choice of constitutional review models in FSU can be characterized as a hybrid of the German and French models of constitutional review.[79]

The majority of scholars share two common views on why FSU states preferred centralized review over decentralized one. First, they claim that drafters lacked confidence in ordinary judges and their abilities to adjudicate on constitutional matters.[80] Second argument is rooted in the nature of governmental structure in FSU states and particularly role of the judiciary in inter-branch disputes and relationships. As Sadurski claims the role of judges in these states was always limited to the mere application of the law, rather than making of the law thus, "*the adoption of the Kelsenian system seemed to disturb this tripartite structure of government to a lesser extent than allowing all of the regular courts to examine laws in terms of their constitutionality in the course of ordinary adjudication*"[81]

[78] Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011, No. 37, Article 4 (1). Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 5 May 1993, Article 85 (1); Konstituciya Rossiyskoi Federacii [Constitution of the Russian Federation] 12 December 1993, Article 125; Konstituciya Respubliki Azerbaijan [Constitution of Azerbaijan] 1996, Article 130; Konstituciya Respubliki Kazakhstan [Constitution of Kazakhstan] 1993, Article 72, Konstituciya Respubliki Tadzhikistan [Constitution of Tajikistan] 1994, Article 89; Konstituciya Respubliki Armenia [Constitution of Armenia] 1995, Article 101; Konstituciya Gruzii [Constitution of Georgia] 1995, Article 89; Konstituciya Ukrainy [Constitution of Uktaine] 28 June 1996, Article 148

[79] Alec Stone Sweet, *Constitutional Courts*, in Michel Rosenfeld, Andras Sajo (eds.), The Oxford Handbook of Comparative Constitutional Law, 823(Oxford University Press, 2012). Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 5 May 1993, Article 85 (1); Konstituciya Rossiyskoi Federacii [Constitution of the Russian Federation] 12 December 1993, Article 125; Konstituciya Respubliki Azerbaijan [Constitution of Azerbaijan] 1996, Article 130; Konstituciya Respubliki Kazakhstan [Constitution of Kazakhstan] 1993, Article 72, Konstituciya Respubliki Tadzhikistan [Constitution of Tajikistan] 1994, Article 89; Konstituciya Respubliki Armenia [Constitution of Armenia] 1995, Article 101; Konstituciya Gruzii [Constitution of Georgia] 1995, Article 89; Konstituciya Ukrainy [Constitution of Uktaine] 28 June 1996, Article 148
Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law. Vicki Jackson, Mak Tushnet, *Comparative Constitutional Law*, 468 (Foundation Press, 2006).

[80] Wojciech Sadurski, Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective, 175 (Kluwer law international, New York, 2002). Armen Mazmanyan, *Failing Constitutionalism: From Political Legalism to Defective Empowerment*, 1.2 Global Constitutionalism, 313-33 (2012). Rett R. Ludwikowski, *Constitution-Making in the Region of Former Soviet Dominance*, 234-35 (Duke University Press, 1996).

[81] Wojciech Sadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, 44, (Springer Science & Business Media, 2005).

It was a brief explanation of the constitution-making landscape in Former Soviet Union. However, as chapter proceeds, it will show that in order to fully comprehend the origin of Central Asian CCs it is important to study them separately in the context of Central Asian history, transitional period and political economy. But before that it is important to revisit existing theories in comparative constitutional law on the origin of judicial review.

2. Revisiting Existing Theories on the Origins of Constitutional Courts

What are the incentives of the drafters to establish the system of constitutional review and to subject itself to this review? A number of theories were developed by comparative constitutionalists to explain the incentives of the drafters in creating and establishing CCs. In the global discourse on judicial review one can notice a shift from normative/institutionalist approach/ analysis of the origin of judicial review to a more theoretical and comparative approach.[82] Different models and theories on origin and operation of judicial review emerged, such as rights based[83] and rule of law hypothesis on the origin or judicial review[84], ideational approach, [85] theories on internationalization [86] and modernization, [87] hegemonic- preservation theory[88], global proliferation of comparative constitutional norms that either forces or fosters

[82] Erin F. Delaney, Rosalind Dixon, *Introduction*, *in* E.Delaney, R. Dixon ed, Comparative Judicial Review, 1-4 (Edward Elgar, 2018). Daly Tom Gerald, The Alchemists (Cambridge University Press, 2017). Samuel Issacharoff, Fragile Democracies: Contested Power in the Era of Constitutional Courts (Cambridge University Press, 2015). Pasquale Pasquino, Francesca Billi (eds.) The Political Origins of Constitutional Courts: Italy, Germany, France, Poland, Canada, United Kingdom, (Rome, Fondazione Adriano Olivetti, 2009).
[83] Martin Shapiro, *The success of judicial review*, in Sally J. Kenney, William M. Reisinger and John C. Reitz. Constitutional Dialogues in Comparative perspectives, 204(Macmillan Press LTD, Great Britain, 1999).
[84] *Id.*
[85] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Claredon Press, 1989).
[86] Cheryl Saunders, *International Involvement in Constitution Making*, U of Melbourne Legal Studies Research Paper. Available at SSRN: https://ssrn.com/abstract=3414698 (July 4,2019).
[87] Andrew Harding, Penelope Nicholson, New Courts in Asia (Routledge, 2010)
[88] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2009).

states to establish CCs either by coercion, competition or learning[89], others have ascribed it to such factor as politicians trying to shift responsibility from political branches to the judiciary[90]. Finally, there is Tom Ginsburg`s insurance theory which ties the establishment of CCs to the electoral market or to the competitiveness of political parties.[91] The Insurance theory is currently dominating the global discourse on the origin of judicial review and has been tested in number of third wave democracies.

2.1. The Insurance Theory Revisited

The approach of Martin Shapiro, also known as the political account for constitutional review can be considered as one of the pioneers in comparative constitutional law scholarship that paved the way and inspired the development of other theories in this field, particularly the insurance theory. Therefore, before revisiting Ginsburg`s insurance theory it is worth briefly reviewing Shapiro`s approach to the origin of judicial review.

First, Shapiro claims that effective judicial review can be constructed only in those states which have a past history of rule of law commitment. He describes the origin of constitutional courts based on three primary propositions. First, the federalism proposition, where he argued that for federal states as the USA it was crucial to create a third party for resolving disputes between states and the federal government.[92] This hypothesis was later confirmed by the

[89] Tom Ginsburg and Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30.3 Journal of Law, Economics, and Organization, 587-622 (2014). Benedikt Goderis, Mila Versteeg, The Transnational Origins of Constitutions: Evidence from a New Global Data Set on Constitutional Rights, CentER Discussion Paper (2013).
[90] Carlo Guarnieri and Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy (Oxford University Press, Incorporated, 2002).
[91] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003).
[92] Martin Shapiro, *The success of judicial review*, in Sally J. Kenney, William M. Reisinger and John C. Reitz Constitutional Dialogues in Comparative perspectives, 204 (Macmillan Press LTD, Great Britain, 1999).

experience of Germany, which according to the author contributed to it by its long-standing tradition of *Rechtsstaat* [93].

The next proposition of Shapiro is grounded on the notion of diffusion or separation of powers between branches. He argues that the Constitutional Council under the Fifth Republic was created to secure the transition to the system of separation of powers.[94] In Shapiro`s view, the main objective of creating the Constitutional Council was keeping the Parliament in check.[95] This proposition was also confirmed by Otto Pfersmann who claimed that: "*It was not introduced to protect rights and liberties. instead, it was conceived of a strictly preventive check on legislation, to prevent parliament from overstepping its limited competencies*."[96]

The final proposition of Shapiro is grounded on something called "*rights-based approach*". Under this approach, he believes that the majority of states, including Spain, Italy, and Israel adopted the constitutional review mechanisms for protection and enforcement of constitutional rights.[97]

Ginsburg generally describes Shapiro`s hypothesis and account for the emergence of constitutional review as the "*ideational account of judicial review*".[98] He claims that in the ideational approach, the constitutional review becomes a dependent variable while rights being the independent variable. According to Ginsburg, Shapiro`s approach makes judges become

[93] *Id 179.*
[94] *Id. 197*
[95] Sophie Boyron, The Constitution of France: contextual analysis, 150 (Oxford, Hart, 2013). Alec Stone, The Birth of Judicial Politics in France: the Constitutional Council in comparative perspective, 220 (Oxford University Press, New York, 1992). Bell, John, French Constitutional law, 120 (Oxford University Press, 1992). Rogoff Martin A, French Constitutional law: cases and materials, 156(Carolina Academic Press, 2011). Knapp, Andrew, Wright Vincent, The Government and Politics of France, 320 (Rutledge, London 2001).
[96] Otto Pfersmann, *Concrete Review as Indirect Constitutional Complaint in French Constitutional law: a Comparative Perspective*, 5 European Constitutional Law Review, 224, (2010).
[97] Martin Shapiro, *The success of judicial review*, in Sally J. Kenney, William M. Reisinger and John C. Reitz Constitutional Dialogues in Comparative perspectives, 204 (Macmillan Press LTD, Great Britain, 1999).
[98] Tom Ginsburg, *The Global Spread of Constitutional Review*, in Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, The Oxford Handbook of Law and Politics 88 (Oxford University Press, 2010).

guardians of the public interest. In other words, "*if courts succeed, they generate greater demands for constraining government, leading them to become inevitably, deeply involved in policy-making*."[99] Thus, Ginsburg claims that a rights-based argument is not sufficient to explain the political accounts for the logic of constitutional review. "*The rights hypothesis is a demand-side theory that posits judicial review as an institutional response to societal forces*"[100] This demand –side argument according to Ginsburg is extremely difficult to assess due to its unspecified nature.

Therefore, Ginsburg claims that in order to objectively assess the logic behind the adoption of constitutional review across the regions, it is better to adopt an **institutionalist approach.** According to Ginsburg institutions matter and certain choices of institutional design are not random. Furthermore, he argues that

> "*the emergence of judicial review is built on the fragmentation of power vertically or horizontally. Political fragmentation creates the potential for conflict among different institutions and therefore demand for a third party to resolve disputes. Since this is what courts do, they are a logical place to turn when disputes concern constitutional allocation of policy-making power*."[101]

Ginsburg names this approach the insurance theory. Under this theory at the constitution-drafting phase, there are always uncertainties about the lasting nature of the ruling power. In order to secure their future positions, parties are prone to create judicial review as an insurance/alternative mechanism for their power holding purposes.

[99] *Id*. 89
[100] *Id*. 89
[101] *Id*. 90. Also see the introduction in Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003).

Even though the theory might sound simple, the basic argument has preconditions regarding the nature of the regime and circumstances surrounding the constitution drafting phase. First, when one party controls the drafting process and when there is a high potential of this party staying in power, drafters prefer to choose a weaker court.[102] Second, when the drafting process is controlled by two or more parties on more or less equal position and there is no certainty as to who is going to win - most likely they will establish a strong court. This hypothesis has been tested by Ginsburg in his book judicial review in new democracies in application to East Asian states.[103]

Democratic transitions in East Asia according to Ginsburg have been accompanied by the emergence of powerful constitutional courts.[104] CCs of South Korea, Mongolia and Taiwan were able to be a real constraint on political authority. This is especially interesting taking into consideration the past background of the region, namely the executive without effective judicial control had dominated this region for a long time. As Ginsburg puts it "*there was little precedent for active courts protecting rights or interfering with the state action*".[105] This could be paralleled with past soviet constitutional councils and their passive role as well not being a constraint for government at all.[106]

The majority of East Asian states have been influenced[107] by the Chinese tradition[108] and the judicial and executive functioned were combined in one and there was a strong centralized

[102] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases 22-26 (Cambridge University Press, 2003).
[103] *Id.* 23-25
[104] *Id.* 30-35
[105] Tom Ginsburg, *Constitutional courts in East Asia*, in Rosalind Dixon and Tim Ginsburg, Comparative Constitutional Law in Asia 47 (Edward Elgar Publishing, 2014).
[106] Andrei Medushevsky, Russian Constitutionalism: Historical and Contemporary Development (Routledge, 2006).
[107] Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27.4. Law & Society Inquiry, 763 (2002).

political authority.[109] This background to a certain extent could be equated to FSU States in terms of centralized authority with no legal tradition on rule of law.

Coming with such a centralized authority system background all three states of Taiwan, Mongolia and South Korea started experiencing the process of democratization. However, in the phase of establishment of constitutional review mechanism, all three states were in a different position from the perspectives of political diffusion and fragmentation. Thus, these three scenarios perfectly reflect and resonate with the hypothesis of Ginsburg developed under the insurance theory. Namely, when there is a dominant party in the drafting process of constitution or establishment of constitutional review- such environment tends to create weak constitutional courts. When the power is fragmented and more diffused it tends to create a strong constitutional review.

Ginsburg was able to identify a certain trajectory among these three states depending on the fragmented nature of politics while the establishment of the constitutional review mechanism. The strongest court according to Ginsburg was created in South Korea[110]. This is due to the fact in the process of negotiation there were three parties on roughly equal positions. Such a diffused political environment according to one of the hypotheses leads to the creation of stronger

[108] For more information on constitutionalism in China see Stephanie Balme, Michael W. Dowdle, Building Constitutionalism in China, (PalgraveMacmillan, 2009). Zhang Qianfan, The Constitution of China: A Contextual Analysis (Oxford: Hart Publishing, 2012).

[109] Pyong-Choon Hahm, The Korean Political Tradition and Law: Essays in Korean Law and Legal History (Hollym Corporation, 1987). Dae Kyu Yoon, Tae-Gyu Yun, Law and Political Authority in South Korea (Westview Press, 1990). Paul Heng-chao Ch'en, Chinese Legal Tradition Under the Mongols: The Code of 1291 as Reconstructed (Princeton University Press, 1979). Linda Chao, Ramon H. Myers, The First Chinese Democracy: Political Life in the Republic of China on Taiwan (The Johns Hopkins University Press, 1998). Chaihark Hahm, *Law, culture, and the politics of Confucianism,* 16 Columbia Journal of Asian Law, 253–301, (2003).

[110] Detailed process of constitution making during the transition period is discussed in Chapter 2.

constitutional courts. This is essentially what happened in South Korea. Constitutional court was established with broad powers as well as with broad *locus standi.*[111]

The weakest constitutional review mechanism was established in Taiwan.[112] This again resonates with one of the primacy hypotheses of Ginsburg under the insurance theory.[113] Namely, in Taiwan there was a dominant KMT party at the initial phase of the establishment of the constitutional review mechanism. Thus, instead of the court the dominant party chose to establish a weaker Council of Grant Justices[114] with a limited access to it and with much narrow powers than in South Korea.[115]

Mongolia was in the middle of this spectrum since the political situation was not as fragmented as in Korea and was not dominantly ruled by one party as Taiwan. Namely, the Leninist party was constrained by the opposition to a greater extent than in Taiwan. Thus, it created a stronger court than in Taiwan, yet a weaker one than in Korea.[116] Thus the application of insurance theory in East Asia can be illustrated accordingly:

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[111] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003). p. 215-217. The insurance theory can be confirmed by reading following works as well: John Kie-chiang. On Korean Politics: The Quest for Democratization and Economic Development, 87–107 (Ithaca, NY: Cornell University Press,1999). Chaihark Hahm, *Beyond law vs. politics in constitutional adjudication: Lessons from South Korea*, 10 International Journal of Constitutional Law, 6–34, (2012). Justine Guichard, Regime Transition and the Judicial Politics of Enmity: Democratic Inclusion and Exclusion in South Korean Constitutional Justice (Palgrave Macmillan, 2016). Chaihark Hahm, Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea, (Cambridge University Press, 2015).

[112] Detailed process of constitution-making in Taiwan in discussed in Chapter 2.

[113] Nuno Garuopa, Veronica Grembi, Shirley Ching-ping Lin, Explaining Constitutional Review in New Democracies: The Case of Taiwan, 20.1. Pacific Rim Law and Policy Journal, (2011). Lawrence Shao-Liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 AM.J.COMP.L. 509, 515 (1991). Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracies*, 2 ASIA L.REV. 73-82(2005).

[114] Fa Jyh-pin, *Constitutional Developments in Taiwan: The Role of the Council of Grand Justices*, 40 International and Comparative Law Quarterly, 198 (1991).

[115] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003). p. 130-132. Chien-Chih Lin, *The Birth and Rebirth of the Judicial Review in Taiwan - Its Establishment, Empowerment, and Evolvement*, 7/1 National Taiwan University Law Review, 178-189, (2012).

[116] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003). p. 162-163

South Korea: fragmented	Mongolia: in between	Taiwan: dominant party
• Negotiations were on a roughly equal basis between threee opposing parties • Kelsenian constitutional court was created with broad powers and broad locus standi	• Leninist party was constrained by opposition to a greater degree than in Taiwan • Locus standi was broad. However the Court`s power was much restricted than those in South Korea but broader than in Taiwan	• There was a dominant party (KMT) during the establishment process • The Council of Grand Justices was established with a very limited access and limited power. However gradually the Council widened its power while the KMT`s power declined.

2.2. Insurance Theory in the Context of the Global Discourse on Judicial Review

The current literature on judicial review suggests that the insurance theory "seems to perform better than many alternatives in a range of circumstances."[117]A number of constitutional law scholars tested the insurance theory in different regions and claimed that it was one of the most accurate theories among other available ones that explains the expansion of judicial review

[117] Tom Ginsburg, Mila Versteeg, *Why Do Countries Adopt Constitutional Review*, 30 Journal of Law and Politics, 350-65(2014). Rosalind Dixon and Tom Ginsburg, *Constitutions as Political Insurance: Variants and Limits*, in Comparative Judicial Review, 1-4 (E. Delaney, R. Dixon ed., Edward Elgar, 2018). Rosalind Dixon, Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 International Journal of Constitutional Law, 988-1012 (2017). Brad Epperly, *The Provision of Insurance? Judicial Independence and the Post-Tenure Fate of Leaders*, 1 Journal of Law and Courts, 250-75 (2013). George Tridimas, *Constitutional Judicial Review and Political Insurance*, 29 European Journal of Law and Economics, 90-100 (2009).

across the globe.[118] Hendianto applied it in the context of Indonesia[119], Gatmaytan studied the insurance theory in application to the courts of Philippines[120], Finkel applied it in the context of Mexico, Argentina and Peru[121] and Volcansek in the context of Italy[122].

At the same time, there are number of scholars who have a critical perspective on the insurance theory and claim that it does not provide a compelling and accurate explanation on the origins and expansion of judicial review. Some scholars questioned the application of insurance theory in the setting of non-democratic, authoritarian states.[123] Inclan claims that in the context of Mexico judicial review was more a question of political legitimacy for a regime and the application of the insurance theory in Mexico is not capable of revealing nuances, rather leads to a misleading understanding on the role of judicial review.[124] Finally, Hilbink argues that the insurance theory does not take into account the ideational factor, which is in her opinion is among the key explanatory powers of the judicial review.[125]

When one speaks about reasons behind the establishment of constitutional review, it is important not to oversimplify facts and the context. It is hard to tell for sure the reasons behind

[118] Maria Popova, Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine (Cambridge: Cambridge University Press, 2014). Lee Epstein, Jack Knight, Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*. 35 Law & Society Review, 115-120, (2001).
[119] Stefanus Hendrianto, Law and Politics on Constitutional Courts: Indonesia and the Search for Judicial Heroes, (New York: Routledge, 2018). Simon Butt, Melissa Crouch, Rosalind Dixon, *The First Decade of Indonesia`s Constitutional Court*, 16 Australian Journal of Asian Law, 2-6, (2016)
[120] Dante Gatmaytan, Judicial Review of Constitutional Amendments: The Insurance Theory in Post-Marcos Philippines, 1 Philippine Law and Society Review, 75-85, (2011).
[121] Jodi Finkel, Judicial Reform as Political Insurance: Argentina, Peru and Mexico in the 1990s, (Notre Dame: University of Notre Dame, 2008).
[122] Mary Volcansek, *Bargaining Constitutional Design in Italy: Judicial Review as Political Insurance*, 33 West European Politics, 281-95 (2010).
[123] Kirk Randazzo, Gibler Douglas, Rebecca Reid, *Examining the Development of Judicial Independence*, 69 Political Research Quarterly, 584-91, (2016).
[124] Silvia Inclan, *Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?* 62 Political Research Quarterly, 754-63, (2009).
[125] Lisa Hilbink, Judges Beyond Politics in Dictatorship and Democracy, (Cambridge University Press, 2008).

the establishment of CCs, they depend on various factors such as political background, presence of plurality, past history of rule of law practice, external influence, the timing of the formation, modernization, globalization, civil society and any of these factors or combination of two or three of them could be a triggering mechanism for the establishment of judicial review and for the choice of the institutional model of these courts.

This dissertation shares some of the basic ideas of critics of the insurance theory and argues that in the context of Central Asia, the insurance theory cannot fully and accurately explain the reasons behind the origin of Central Asian CCs. In order to fully comprehend this process, a wider and complex approach shall be applied which will take into consideration nuances that are peculiar to these states and to this region. Accordingly, this work suggests that broader politico-historical reasons behind, transitional constitutionalism and predominantly the political economy were the defining factors of the establishment of these courts. Thus, next section will review the historical context followed by transitional constitution-making period and finally will discuss the formation of these courts in the context of the political economy.

3. Politico-Historical Context as the Shaping Factor of the Subsequent Politico-Legal Landscape of Post-Soviet Central Asia

3.1. Historical Context

Historically in Central Asia there was no classical understanding of nation-states as it is usually perceived in Europe.[126] Predominantly when elites formed in emirates or khanates they never relied on ethnicity, in other words as historians describe Central Asia used to be a union of

[126] For more information on contextual history of Central Asia see Hiro Dilip, Inside Central Asia: A Political and Cultural History of Uzbekistan, Turkmenistan, Kazakhstan, Kyrgyzstan Tajikistan, Turkey and Iran (London, Duckworth Overlook, 2013).

"polyethnic societies".[127] Under the Russian Empire the entire region of Central Asia was united under one colonial administrative unit named Turkestan.[128] When the Bolsheviks took power, driven by the fear of **Pan-Turkism**[129] and **Pan-Islamism,**[130] the Soviet rule decided to divide Turkestan and form different territorial units. This is how the five current states of Central Asia emerged. However, it is noted by historians that territorial boundaries and the "political map"[131] was drawn arbitrarily and artificially[132] without respect for historical, ethnic or cultural roots, with intention to disempower local elites and without "*sufficient knowledge nor consistent conceptual framework for their national policy*."[133] The division was predominantly made to prevent the emergence of one united Turkestan[134] or Pan-Turkism, while suppressing any ideological movements united under the Turkist idea.[135]

Another fear of the Soviet rule was Pan-Islamism. As it was mentioned earlier, these Turkic groups in Central Asia never associated themselves in the classical understanding of nation-state based on ethnicity, however the religious affiliation played a leading role. As

[127] Yuriy Kulchik, Andrey Fadin, Viktor Sergeev, Central Asia After the Empire, 4 (Pluto Press, 1999). Peter Roudik, The History of the Central Asian Republics, (2007).
[128] For more information on historical perpectives on Central Asia see Beatrice F. Manz (ed.) Central Asia in historical perspective (Boulder : Westview Press, 1994).
[129] Pan-Turkism is defined by historians as "idea of political, cultural and ethnic unity of various Turkic peoples who often shared historical, cultural, and linguistic roots in common". Dagikhudo Dagiev, Regime transition in Central Asia: Stateness, Nationalism and Political Change in Tajikistan and Uzbekistan, 19, (Routledge, Taylor & Francis Group, 2013)
[130] Pan-Islamism is an ideology defined by scholars as "socio-political solidarity among all Muslims" John Esposito (ed.), The Oxford Dictionary of Islam, (Oxford University Press, 2003). For more information on Pan-Islamism in Central Asia see Edward Walker, Islam, *Islamism and Political Order in Central Asia*, in Shahram Akbarzade, Islam and Globalization: critical concepts in Islamic Studies, 223-246 (London: Routledge, 2006).
[131] Uurintuya Batsaikhan, Marek Dabrowski, *Central Asia- Twenty Five Years After the Breakup of the USSR*, 3.3 Russian Journal of Economics, 298 (2017).
[132] International Crisis Group, *Border, Disputes and Conflict Potential*, 33 Europe and Central Asia, April 2, 2002.
[133] Amanda Farrant, *Mission Impossible: The Politico-geographic Engineering of Soviet Central Asia`s Republican Boundaries*, 25 Central Asian Survey, 61 (2006).
[134] These movements were named by Soviets Basmachi movement. Bolsheviks killed the main leader of the movement Enver Pasha, while others fled to Afghanistan. Yuriy Kulchik, Andrey Fadin, Viktor Sergeev, Central Asia After the Empire, 5 (Pluto Press, 1999).
[135] Dagikhudo Dagiev, Regime transition in Central Asia: stateness, nationalism and political change in Tajikistan and Uzbekistan, (Routledge, Taylor & Francis Group, 2013)

historians describe "*in the conditions of polyethnicity religious affiliation was the basis of self-identification for local communities*."[136] Therefore, once the Soviet regime was established the practice of Islam in the Central Asian region was tightly controlled. Somewhat ironically, it is claimed by most historians and political scientists that during the Soviet occupation of Afghanistan the Soviet Union intentionally used Muslim population, particularly the citizens from the Tajik Soviet Republic and "*the government-controlled Muslim establishment to penetrate the Arab-Islam world*".[137] It is argued that this strategic move of the Soviet Union facilitated the formation of Islamic movements and particularly the politicization of Islam in Central Asia, especially in Tajikistan which later would become one of the key factors of the Civil War in Tajikistan.[138] Thus, these flaws in decision making of the Soviet Union during the ruling of the Central Asia at the foundation of these states created "*incoherent sense of stateness*"[139] that later had tremendous negative impact once these states gain independence after the collapse of the Soviet Union. Chapter 5 will address the contemporary consequences of these initial developments.

3.2. Transitional Context

Scholars suggest that in order to understand the constitutional landscape, it is important to look beyond the formal texts of the originally adopted constitutions, but also to see how those constitutions were drafted.[140] Namely, the process of constitution-making matters and in the

[136] Yuriy Kulchik, Andrey Fadin, Viktor Sergeev, Central Asia After the Empire, 2-4 (Pluto Press, 1999).
[137] Lena Johnson, Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam, 45-55 (I.B. Tauris& Co Ltd., 2006).
[138] Sergei Gretsky, *Civil War in Tajikistan: Causes, Developments and Prospects for Peace*, in Roald Z. Sagdeev, Susan Eisenhower (eds.) Central Asia Conflict, Resolution, and Change, 217-225 (Maryland, CPSS Press, 1995).
[139] Dagikhudo Dagiev, Regime transition in Central Asia: stateness, nationalism and political change in Tajikistan and Uzbekistan, (Routledge, Taylor & Francis Group, 2013)
[140] Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 Duke Law Journal, 364–86(1995). Justin Blount, Zachary Elkins, Tom Ginsburg, *Does the Process of Constitution-Making Matter?* in Tom Ginsburg,

context of Central Asia it is of utmost importance. The transitional period after the collapse of the Soviet Union did not work out smoothly in Central Asia. Transitional constitutionalism in Central Asia reveals that farther we move from Eastern European and Baltic states[141] the transition from communism to democracy[142] seemed to be more technical[143] and far less driven by national liberation and democratization movements.[144] Transition in Central Asia reflected "*the continued strength of subnational clan identities and patronage networks".*[145]

The literature in history and political science suggests that unlike in Eastern European states the revolution from below never happened in Central Asia[146], in other words transition mostly reflected a top-down approach.[147] Thus, transition was largely left in the hands of regime

Comparative Constitutional Design, 33-56 (Cambridge University Press,2012). Cass R. Sunstein, Designing Democracy: What Constitutions Do (Oxford University Press, 2001).

[141] David Mason, Revolution and Transition in East-Central Europe (2d ed., 1996). George Schopflin, *The End of Communism in Europe*, 66 Int'l Affairs 3 (1990). Steven Levitsky, Lucan A. Way, Competitive Authoritarianism: Hybrid Regimes After the Cold War (2010). David R. Cameron, Mitchell A. Orenstein, *Post-Soviet Authoritarianism: The Influence of Russia in Its "Near Abroad*," 28 Post-Soviet Aff. 1 (2012).

[142] Cass R. Sunstein, *Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe*, 2 Constitutional Political Economy, 375-85(1991).

[143] Ruti Teitel, *Post-Communist Constitutionalism: a Transtitional Perspective*, 26 Columbia Human Rights Law Review, 167 (1994).

[144] Claus Offe, *Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe*, 58 Social Research, 866-89 (1991). Michael McFaul, *The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Post communist World*, 54.2 World Politics, 220-39 (2002). Bunce Valerie, *Rethinking Recent Democratization: Lessons from Post communist Experience*, 55.2 World Politics, 168-85 (2003). Russel Bova, *Political Dynamics of a Postcommunist Transition: A Comparative Perspective, 44.1 World Politics*, 114-25 (1991). Mark Beissinger, Nationalist Mobilization and the Collapse of the Soviet Union, 72-75 (Cambridge University Press, 2002).

[145] Sally Cummings, Power and Change in Central Asia, Politics in Asia, (Routledge, 2002). John Anderson, Kyrgyzstan: Central Asia's Island of Democracy*? (* London: Routledge, 1999). Collins, Kathleen, Clans, *Pacts, and Politics in Central Asia*, 13/3 *Journal of Democracy* (2002). Murzakulova Asel, Schoeberlein John, *The Invention of Legitimacy: Struggles in Kyrgyzstan to Craft an Effective Nation-State Ideology*, 61/7 Europe-Asia Studies *(2009)*. Huskey Eugene, Iskakova, Gulnara, *Narrowing the Sites and Moving the Targets*, 58/3 Problems of Post-Communism, 58/3 (2011). For an overview of constitutional framework of Central Asian states see Newton Scott, The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis. (Bloomsbury Publishing 2017).

[146] Dmitriy Furman, Postsovetskiy Politicheskiy Regim Kazakhstan a [Post-Soviet Political Regime in Kazakhstan], 8-18 (Moscow: Ogni, 2004).

[147] Uuriintuya Batsaikhana, MarekDabrowski, Central Asia — Twenty-Five Years After the Breakup of the USSR, 3.3 Russian Journal of Economics, 296-301 (2017).

elites and the clan elites.[148] Constituent assemblies of Central Asian states consisted of sitting Supreme Soviets (deputies of parliament from Soviet Rule)[149] and these assemblies were headed by the sitting Presidents of the Soviet Central Asian Republics (*partiyno-sovetskaya nomenklatura*),[150] namely, the old establishment and soviet political elite orchestrated the transition. In other words, all the reforms were headed and carried out by political forces that were the part and beneficiaries of the old soviet regime.[151] Before moving to the next section, it is important to highlight that the insurance theory looks at local political dynamics in political terms, without taking into account the social, historical and economic origins of the players forming the parties. Accordingly, it cannot fully grasp true dynamics in contexts where old/established elites permeate political forces across the seemingly diverse political spectrum.

[148] Kathleen Collins, Clan Politics and Regime Transition in Central Asia 210-215 (Cambridge University Press, 2006). Gregory Gleason, Central Asia`s New States, (Boulder, Co: Westview Press, 1997). Mark Beissinger, Nationalist Mobilization and the Collapse of the Soviet Union, 72-75 (Cambridge University Press, 2002).

[149] With the exception of Tajikistan. The Civil War that erupted in Tajikistan delayed the constitution-making process for 4-5 years and the final text of the Constitution was adopted as a consensus document between conflicting parties. Konstitucia Respubliki Tajikistan [Constitution of The Republic of Tajikistan] November 6, 1994, adopted by the Referendum.

[150] Zakon Respubliki Uzbekistan o Poryadke vvedenia v deitstvie Konstitucii Respubliki Uzbekistan [Law of the Republic of Uzbekistan on entering into force of the Constitution of the Republic of Uzbekistan], December 8. 1992 No.725 adopted by the Supreme Soviet of the Republic of Uzbekistan. Postanovlenie Verhovnogo Soveta Respubliki Kyrgyzstan o sozdanii rabochei gruppy po podgotovke proekta novoi Konstitucii [Resolution of the Supreme Soviet of the Republic of Kyrgyzstan on establishment of the constitutional assembly to develop a text of the new Constitution], May 15,1991. Konstitucia Kyrgyzskoi Respubliki [Constitution of the Republic of Kyrgyzstan] May 5,1993, adopted by the Supreme Soviet of the Kyrgyz Republic. Postanovlenie Verhovnogo Soveta Respubliki Kazakhstan ob obrazovanii konstitucionnoi kommussii [Resolution of the Supreme Soviet of the Republic of Kazakhstan on establishment of the Constitutional Assembly], December 15, 1990. Postanovlenie Verhovnogo Soveta Respubliki Kazakhstan o naznachenii Nazarbayeva N.A. Predsedatelem Konsticionnoi Kommissii [Resolution of the Supreme Soviet of the Republic of Kazakhstan on appointment of Nazarbayev N.A. as the chairman of the Constitutional Assembly] December 15,1991. Konstitucia Respubliki Kazakhstan [Constitution of the Republic of Kazakhstan] January 28,1993, adopted by the Supreme Soviet of the Republic of Kazakhstan.

[151] R. Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 Columbia Human Rights Law Review, 175-79 (1994). S. Kanter, *Constitution Making in Kazakhstan*, 5 International Legal Perspectives, 64-66 (1993). J. Anderson, *Constitutional Development in Central Asia*, 16.3 Central Asian Survey (1997). Imomov Ashurbay, *Razvitie Konsepsii Konstitucii Suverennoi Respubliki na opyte Tadjikistana* [The Development of the Concept of Constitution of Sovereign Republic based on the Experience of Tajikistan], 11 Sovestskoe Gosudarstvo i Pravo, 18 (1991). S. Newton, *Transplantation and Transition: Legality and Legitimacy in the Kazakhstan i Legislative Process*, in M. Kurkchiyan and D. Galligan, Law and Informal Practices: The Post-Communist Experience, 152-65 (Oxford University Press, 2003).

4. Towards Super-Presidentialism: the Initial Phase of the Wave of Parliamentary Forced-Dissolutions.

Mazmanyan describes the early period of constitution drafting in FSU as "the pattern of constitutional romanticism".[152] Institutional, economic and political reforms were adopted, and courts were established and empowered with unprecedented powers. However, this period of romanticism did not last long and the hope for democratization later turned into a wave of establishment of super-presidentialism across the Former Soviet Union. Thus, in the early period of tranision, Central Asia against all hopes for moving towards democracy one by one opted for authoritarian alternatives, by establishing super-presidential regimes.

Based on the existing literature and contextual analysis of Central Asian[153] states, it can be argued that key features of Central Asian super-presidentialism include the following. First, "elite-dominated" and "highly personalized" rule. [154] Second, the constitutionalization of "planned/pragmatic and contemplated constitutional reforms"[155] where presidents appear before the public as "regents or stewards" of change.[156] Finally, the dissertation will demonstrate in forthcoming chapters that one of the principal features of Central Asian super-presidentialism is the legal entrenchment of the special constitutional status for ex-presidents with extended immunity. Namely, Central Asian presidents tend to create a special constitutional position as

[152] Armen Mazmanyan, Failing Constitutionalism; from political legalism to defective empowerment, *Global Constitutionalism*, 316 (2012).
[153] Zhenis Kembayev, *The Rise of Presidentialism in Post-Soviet Central Asia: The Example of Kazakhstan*, in: R. Grote and T. Röder (eds), Constitutionalism in Islamic Countries: Between Upheavel and Continuity , 431-435(New York: Oxford University Press 2011).
[154] Kathryn Stoner, *Old Games, New Rules? Great Powers in the New Central Asia*, Book Review Roundtable, 16 Asia Policy (2013). John Ishiyama, Ryan Kennedy, *Super-Presidentialism and Political Party Development in Russia, Ukraine, Armenia and Kyrgyzstan*, 53.8 Europe-Asia Studies, 1178 (2011).
[155] Scott Newton, The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis, Chapter 4 (Bloomsbury Publishing 2017).
[156] *Id.*

First President,[157] *Elbasy*,[158] *Founder of Nation*[159] for ex-presidents that permits formal roles in the government even after the resignation from the presidency along with extended ex-presidential immunities.

Furthermore, it is also important to highlight that even though most Central Asian CCs function in the context of authoritarian constitutionalism, where they appear to be mere facades, the analysis of their decisions sheds some light to otherwise closed countries. As it is claimed by Ginsburg elsewhere, courts in authoritarian regimes shall be taken seriously as "*they provide a useful lens through which to examine a variety of political dynamics in an environment that is otherwise distinguished by a lack of transparency*."[160]

At the same time, it is important to note that among all Central Asian states in Kyrgyzstan, despite the power maximization efforts of all presidents, genuine political competition can be observed.[161] In such a political pluralism, Kyrgyzstan experienced several waves of regime transition. Under this political setting the Constitutional Court and later the Constitutional Chamber had more place for maneuver and attempts to foster constitutionalism. Therefore most of their decisions unlike peer CCs of Central Asia constitute relatively genuine and proper constitutional adjudication, not a façade one like in other Central Asian CCs.

Thus the shift towards authoritarianism tremendously affected the works of CCs as well; namely, the courts have experienced major institutional adjustments from formal suspension to

[157] The notion of First President was first introduced by Akayev that was reflected in the law. See Zakon Kyrgyzskoi Respubliki o Garantiah Deyatelnosti Prezidenta Kyrgyzskoi Respubliki [The Law of the Kyrgyz Republic on Guarantees of Activities of the President of the Kyrgyz Republic], July 18, 2003 No. 152.
[158] Konstitucionniy Zakon RK o Pervom Prezidente RK Elbasy [Constitutional Law of the RK on First President of the RK- Elbasy] July 20, 200 No. 83-II.
[159] Zakon Respubliki Tajikistan ob Osnovatele Mira, Nacionalnogo Edinstva- Lidera Nacii [Law of the Republic of Tajikistan on Founder of Peace, National Unity- Leader of Nation] December 25, 2015 No. 12.
[160] Tom Ginsburg, Tamir Moustafa (eds.), *Introduction*, Rule by Law: The Politics of Courts in Authoritarian Regimes, 3 (Cambridge University Press, 2008).
[161] To see specific democracy indices on Kygyrzstan and Central Asia please visit the The Global State of Democracy Indices by IDEA International, https://www.idea.int/gsod-indices/#/indices/world-map

turning into irrelevance. However, before discussing those major institutional adjustments of CCs it is highly important to identify what triggered this wave of authoritarianism in Central Asia.

For a long time, political scientists have been trying to identify the main factors that led these states to an authoritarian path. As it was mentioned earlier, in contrast to other post-communist states where there were evident national liberation movements, Central Asian case was different: "*Central Asia experienced a process of non-rupture in which the old soviet container almost seamlessly metamorphosed into one of a new national state*"[162] Democratic reforms were on the surface and were mostly used by the elites to enhance their ability to capture distributive gains during the transition.[163] All Central Asian regimes paid lip service to elections[164] and ostensibly had "fair and free elections".[165] The literature on the reasons and root causes of authoritarianism in Central Asia can be grouped accordingly. Some scholars argue that the main reason of opting for authoritarianism in Central Asia was the nature of society which was highly patrimonial[166] and hierarchical.[167] Others argue that it was tightly connected with political culture[168], namely rejection of anything new and strong belief that authoritarianism

[162] Sally N. Cummings, Understanding Central Asia: Politics and Contested Transformation, 61, (Routledge 2012).
[163] *Id 63*
[164] Donnacha Ó Beacháin, Rob Kevlihan. *Imagined democracy? Nation-building and elections in Central Asia*, 43.3. Nationalities Papers, 495-504 (2015).
[165] *Id 62*, D. Hiro, Inside Central Asia: A Political and Cultural History of Uzbekistan, Turkmenistan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkey, Iran (London, Duckworth Overlook, 2013). Huskey Eugene, Iskakova Gulnara, *Barriers to Intra-Opposition Cooperation*, 26 Post-Soviet Affairs 26 (2010). Iskakova Gulnara, Vybory i Demokratiya v Kyrgyzstane [Elections and Democracy in Kyrgyzstan] (Bishkek, Kyrgyzstan: Biyiktik. 2003)
[166] David Lewis, *Understanding the Authoritarian State: Neopatrimonialism in Central Asia*, 19 Brown Journal of World Affairs, 115 (2012).
[167] John Anderson, *Elections and Political Development in Central Asia*, Journal of Communist and Transition Politics, 28-58 (1997)
[168] J. Heathershaw and E. Schatz, Paradox of Power: The Logics of state weakness in Eurasia chapter 1, (University of Pittsburg Press 2017). JT Ishiyama, R. Kennedy, *Superpresidentialism and Political Party Development in Russia, Ukraine, Armenia and Kyrgyzstan*, 53 Europe-Asia Studies, 1176 (2001).

better serves Central Asia, it is a cure rather than a curse.[169] Furthermore, there are scholars who argue that the root causes of authoritarianism come from clan politics.[170] Some approached this issue from transitional context and emphasized the importance of political will, "*ability of new elite to forge unity and negotiate with oppositional elites*".[171] Others argued that clan politics was an obstacle.[172] Finally, some scholars claimed that authoritarian presidentialism and the function of neo-patrimonialism was inherited from the Soviet Union.[173] This dissertation shares all the above-mentioned theories on the reasons of authoritarianism in Central Asia. However, it is also important to note that there was a specific political event that initially triggered this wave which later paved the way for Central Asian states to opt for the authoritarian alternatives. This event is related to the wave of forced dissolution of parliaments that started in Russia in the early years of constitutional transition and became a signal and a turning point to Central Asian states as well.

5. The Wave of Forced Dissolution of Parliaments as a Root Cause of Tamed Central Asian Constitutional Courts

Before Russia adopted a new Constitution in 1993, the text of the RSFSR Constitution was in force and major decision-making was carried out via constant amendments to the RSFSR Constitution. [174] For the purposes of constitutional oversight the first Russian CC was

[169] Paul Kubicek, Authoritarianism in Central Asia: Curse or Cure? *Third World Quarterly* (1998)
[170] Kathleen Collins, Clan Politics and Regime Transition in Central Asia 210-215 (Cambridge University Press, 2006)
[171] Sally N. Cummings, Understanding Central Asia: Politics and Contested Transformation, 68 (Routledge 2012)
[172] Kathleen Collins, Clan Politics and Regime Transition in Central Asia 210-215 (Cambridge University Press, 2006)
[173] John Ishiyama, *Neopatrimonialism and the Prospects for Democratization in the Central Asian Republics* in S. Cummings, Power and Change in Central Asia p. 42-58 (2002)
[174] Richard Sakwa, *The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism*, 48 Studies in East European Thought, 115 (1996).

established.[175] It is important to note that since the text of the RSFSR Constitution remained in force, it was not designed to ensure a system of separation of powers therefore it led to major disagreement and political tension between President Yeltsin and the Russian Parliament. Furthermore, the Court was actively entangled into a political struggle for power between president and parliament[176]. Both parties actively used the Court with an attempt to limit the power of the other. Thus, CC issued number of decisions related to inter-branch disputes[177], economic reform disputes[178], federalism issues[179], communist party ban case.[180] Constant amendments to the Constitution along with ambiguous and vague provisions in the text of the Constitution allowed the Court[181] to maneuver and to be actively involved in this inter-branch struggle for power. The Court was not able to stay above the political game and to remain neutral,

[175] Zakon RSFSR O Konstitucionnom Sude [The Law of the Russian Federal Socialist Republic on Constitutional Court], October 30,1991.
[176] Jane Henderson, *The Constitution of the Russian Federation: A Contextual Analysis* (Bloomsbury Publishing, 2011). P. 67
[177] Delo o proverke konstitusionnosti Ukaza Prezidenta RSFSR ot 19 Dekabrya 1991 Goda No. 289 ob Obrazovanii Ministerstva Bezopasnosti I Vnutrennih del RSFSR [Decision of the Russian Constitutional Court on Constitutionality of the Decree of the President of the RSFSR as of December 19, 1991 on the establishment of the Ministry of Security and Internal Affairs] 1993
[178] Delo o proverke konstitucionnosti zakona RSFSR ot 22 noyabrya 1991 goda o vnesenii izmeneniy I dopolneniy v statu 3 o zakona RSFSR o konkuretsii I ogranichenii monopolisticheskoi deyatelnosti na tovarnyh rynkah [Decision of the Russian Constitutional Court on the constitutionality of the law of the RSFSR as of November 22,1991 on introducing amednments to Article 3 of the law of the RSFSR on competition and limitation of monopolistic activities on trademarks] May 20, 1992.
[179] Delo o proverki normativno pravovyh aktov kasaushihsya opredelenia I razgranichenia polnomochiy predstavitelskih I ispolnitelnyh organov vlasti goroda Moskvy [Decision of the Constitutional Court of the Russian Federation on constitutionality of certain normative legal acts related to the work of representative and executive bodies of the city of Moscow] April 2, 1993
[180] Delo o Proverki Konstitucionnosti Ukazov Presidenta Rossiyskoi Federasii ot 23 Avgusta 1991 goda o Priostanovlenii Deyatelnosti Kommunisticheskoi partii RSFSR I ot 6 Noyabrya 1991 goda o Deyatelnosti KPSS I KP RSFSR a takje o Proverke Konstitusionnosti KPSS I KP RSFSR [Decision of the Constitutional Court of the Russian Federation on constitutionality of the decrees of the President of the Russian Federation as of August 23,1991 on suspension of the activities of the Communist Party of the RSFSR as of November 6, 1991 and on activities of the KPSS and KP RSFSR and also on reviewing constitutionality of the KPSS and KP RSFRS] November 30, 1992
[181] Alexander Vereschagin, Judicial Law-Making in Post-Soviet Russia, 50-60 (New York: Routledge, 2007).

most of its decisions mentioned earlier exacerbated the tension between President and Parliament.[182]

The tension escalated even more over the text of the new Constitution. Two parallel alternative drafts were developed, namely the parliamentary draft commissioned by the Oleg Rumyancev, and presidential draft commissioned by President Yeltsin. [183] President Yeltsin was insisting on holding a constitutional referendum, while Parliament opposed it.[184] CC`s Chairman Zorkin was also escalating the tension between parties by constantly appearing on TV, giving interview and sharing his view on constitutional system and that the referendum shall be postponed.[185] Eventually, the Supreme Soviet (Parliament) refused to ratify the presidential draft, claiming that "*accepting the documents that resulted from a presidential initiative was, therefore, tantamount to a surrender*." [186] In response, President Yeltsin issued an edict suspending the work of the legislature and existing RSFSR Constitution.[187] The same day the CC reviewed the constitutionality of the edict and decided that it was unconstitutional.[188] Later, the Supreme Soviet and CC had an emergency meeting and both condemned the actions of president. However the media and the army were controlled by President Yeltsin. The political crisis

[182] Edward Morgan-Jones, Constitutional Bargaining in Russia, 1990-93, 83-99 (New York: Routledge, 2010).
[183] Jane Henderson, The Constitution of the Russian Federation: A Contextual Analysis, 67 (Bloomsbury Publishing, 2011). Carla L. Thorson, Politics, Judicial Review, and the Russian Constitutional Court, 102-105 (Palgrave Maclillan, 2012).
[184] Carla L. Thorson, Politics, Judicial Review, and the Russian Constitutional Court, 102-105 (Palgrave Maclillan, 2012).
[185] Carla L. Thorson, Politics, Judicial Review, and the Russian Constitutional Court, 102-105 (Palgrave Maclillan, 2012).
[186] Ibid. p. 76
[187] Ukaz Presidenta Rossiyskoi Federacii o Poetapnoi Konstitusionnoi Reforme v Rossiskoi Federasii [The Decree of the President of the Russian Federation on Gradual Constitutional Reform of the Russian Federation] September 21, 1993 No.1400.
[188] Zakluchenie Konstitucionnogo Suda Rossiskoi Federacii o Sootvetstvii Konstitucii Rossiskoi Federacii deistviy I resheniy Prezidenta Rossiyskoi Federacii B.N. Eltsina svyazannyh s ego Ukazom o poetapnoi konstitucionnoi reforme ot 21 Sentyabrya 1993 goda No.1400 [Conclusion of the Constitutional Court of the Russian Federation on Constitutionality of the actions and decisions of the President of the RF B.N. Yeltsin with regard his Presidential Edict on Gradual Constitutional Reform of the Russian Federation as of September 21,1993 No.1400], September 21, 1993.

between President and Parliament escalated and finally in October 1993 President Yeltsin used his military authority,[189] blockaded the white house with the tanks and arrested certain members of the Supreme Soviet and announced the suspension of the Parliament and CC.[190] Later, a referendum was called and the new text of the Constitution was adopted in December 1993. This major political event that resulted in the forceful dissolution of Parliament by the President repeated itself in the context of Central Asia as well.

As if following a similar pattern, forced parliamentary dissolutions took place in Kyrgyzstan and Kazakhstan. A close look at these events, reveals a certain link with the dissolution that happened in Russia. These forced parliamentary dissolutions triggered subsequent institutional adjustments and the taming of Central Asian CCs.

Both presidents of Kazakhstan (Nazarbayev) and Kyrgyzstan (Akayev) were elected by the people in 1991 for a term of 5 years in a non-competitive election where there were single candidates. Both Parliaments of Kazakhstan and Kyrgyzstan, also known Supreme Soviets were elected in 1990 based on the Constitutions of Kyrgyz and Kazakh Soviet Republics. Both Parliaments were dominated with deputies from the Communist Party (around 90%) and the rest were independent deputies or representatives of some associations.[191]

Furthermore, both Kyrgyzstan and Kazakhstan adopted a unitary system.[192] They had central governments (President, Parliament, Cabinet, Judiciary and other bodies as Prosecutor`s Office, Central Election Commission, National Bank) and local self-governances (representative

[189] Alexander N. Domrin, The Limits of Russian Democratisation: Emergency powers and states of emergency, (New York: Routledge, 2006).
[190] Ibid. p. 86
[191] Zimanov, S.Z. *Parlament Kazakhstana v trudnye gody provozglasheniya nezavisimosti* [Kazakhstan's parliament in the difficult years of proclaiming independence], (Almaty 2011), Huskey, Eugene and Iskakova, Gulnara 2010. "Barriers to Intra-Opposition Cooperation". Post-Soviet Affairs 26 (July-September).
[192] Konstituciia Respubliki Kazakhstan (1993) [Konst.RK] [Constitution] Article 1, Konstituciia Kyrgyzskoi Respubliki (1993) [Konst.KR] [Constitution] Article 1

body in each region and city elected by local people). Besides local self-governance in each region and a city the Central Government had its own representative of the executive. There was no specific separation of functions in the Constitution between the Central Government and local self-governance. [193] Local self-governance continuing to operate under the old Soviet scheme, claimed the first role in the regional administration. In turn, regional representatives of the central government *de facto* became owners and official representatives of the state on the ground. On this basis, there was a further division and bifurcation in the system of local bodies, which contributed to the formation of local diarchy and could not but hurt power relations and the structure of the state, especially given the strong influence of clan identities and patronage networks in both States.

5.1. Forced Parliamentary Dissolution in Kazakhstan

Following the scenario of Russia, [194] Kazakhstan also experienced the President-Parliament saga in 1994. The power dynamics in Kazakhstan involved an intense tension between President and Parliament that led to forced Parliamentary dissolution.

One of the causes of the dissolution was the struggle between two tendencies, or ideologies (soviets and reformists). That led to significant disagreements on vital social and economic reforms,[195] particularly on the implementation of recommendations of the World Bank and IMF. [196] Essentially, Parliament mostly consisted of deputies coming from *Soviet Nomenklatura* (former communist/ruling party) was against those implementations that involved massive privatization of property which meant the destruction of kolhoz and sovhoz. Parliament

[193] Konstituciia Respubliki Kazakhstan (1993) [Konst.RK] [Constitution] Chapter 5 (Kazakhstan)
[194]Carla L. Thorson, Politics, Judicial Review, and the Russian Constitutional Court, 52-64 (2012)
[195] Olcott, Martha Brill, Kazakhstan: Unfulfilled promise, 101-102 (Washington, DC: Carnegie Endowment for International Peace 2002)
[196] Sally N. Cummings, Understanding Central Asia: Politics and Contested Transformation, 64 (Routledge 2012)

wanted gradual reforms, not the shock therapy.[197] The President and his team also known as reformists, on the other hand, was cheering for those economic reforms. However, the inner motivation of both blocks also should not be taken for granted. The reformists might have seen a high potential of earning money by implementing the recommendations of World Bank and IMF that first and foremost concerned the privatization of state property.

Another reason that led to Parliamentary Dissolution was the existing inconsistencies and numerous ambiguous provisions in the text of the Constitution. First, the Constitution was silent about both dissolution and self-dissolution of the Parliament. Second, the Constitution did not clearly identify the electoral system for the Parliament. This issue had to be regulated by the Electoral Code. The drafting process of the Electoral Code was also one of the root causes of the tension between President and Parliament. The President Nazarbayev was trying to push his draft Electoral Code which contained the provision on "State-list" candidates for the deputies of the Parliament nominated by President. This way he wanted to gain the influence and have a long hand on the Parliament. Parliament was not willing to adopt this draft and this Parliament never managed to adopt the Electoral Code.

The most tense period of the Parliament-Presidential in Kazakhstan (September and October of 1993) was also mirroring the period of the highest aggravation of relations between the President and Parliament of the Russian Federation.[198] On September 29, Parliament of Kazakhstan received a letter from the 10th Extraordinary Congress of People's Deputies of the Russian Federation that was headed "To Parliaments, Presidents and Government Presidents of the Commonwealth of Independent States." The text of the letter was the following:

[197] Zimanov, S.Z. *Parlament Kazakhstana v trudnye gody provozglasheniya nezavisimosti* [Kazakhstan's parliament in the difficult years of proclaiming independence], (Almaty 2011)
[198] Carla L. Thorson, Politics, Judicial Review, and the Russian Constitutional Court, 52-64 (Palgrave Maclillan, 2012).

> *"A country that is friendly to you - the Russian Federation-Russia - is experiencing tragic days. By the will of B. N. Yeltsin, a coup d'etat was carried out in the Russian Federation. The Constitution and laws of the state, on which hopes for the stability of Russian society were based, are trampled. The country is on the brink of civil war. Most of the subjects of the Russian Federation condemned the organizers of the coup. B. N. Yeltsin was removed from the post of President of the country. Vice-President L. V. Rutskoi, who temporarily fulfills the powers of the President of the Russian Federation, was sworn in. Work is underway to form a new government."*[199]

Very few could predict which side would have an advantage in the spheres of power in Russia. There were forces aligned with both sides.[200] The debates within the Parliament reflected that divide. Some deputies shared the idea of fully supporting of the Parliament of Russia and the condemnation of President Yeltsin; there were others who did not wish to intervene and comment any internal affairs of Russia. The final point of the President-Parliament saga in Russia, namely Yeltsin`s victory over the Parliament with tanks and forceful dissolution of Parliament[201] gave confidence to President Nazarbayev as well, and the events involving the Parliamentary dissolution in Kazakhstan developed as follows.

On November 1993, the Parliament suddenly faced the wave of self-dissolution of district councils (organs of local self-governance) throughout Kazakhstan. Initially it started with the decision of the Alatau District Council (local self-governance) on self-dissolution.[202] By December 9th, 1/3 of the district councils across Kazakhstan declared their self-dissolution.[203] Some argued that the massive self-dissolution of district councils was a hidden plan of President

[199] Letter from the 10th Extraordinary Congress of People's Deputies of the Russian Federation headed "To Parliaments, Presidents and Government Presidents of the Commonwealth of Independent States."
[200] Zimanov, S.Z. *Parlament Kazakhstana v trudnye gody provozglasheniya nezavisimosti* [Kazakhstan's parliament in the difficult years of proclaiming independence], (Almaty 2011)
[201] *Supra* note 47
[202] Sheretov, S.G. Noveishaya istoria Kazakhstana (1985-2002) [Recent history of Kazakhstan (1985-2002)], (Almaty: Jurist 2003)
[203] Furman Dmitriy Postsovetskiy Politicheskiy Regim Kazakhstan a [Post Soviet Political Regime of Kazakhstan], (Izdatelstvo Osin 2004)

Nazarbayev to force the self-dissolution of the Parliament.[204] Parliament was internally divived, some deputies supported the idea of self-dissolution, and there were the ones against it. It is also important to highlight that the text of the 1993 Constitution of Kazakhstan was silent about the possibility of Parliamentary self-dissolution. Deputies who were fighting for the maintenance of the Parliament were stressing this fact from the Constitution. However, other deputies started voluntarily giving up their parliamentary mandates.

Meanwhile, President Nazarbayev actively used the press and was reaching out people by giving speeches and interviews. In those speeches, he claimed that Kazakhstan had to build its own way, and was claiming that Parliament was not allowing society to take that path by enacting populistic laws that required much budgetary spending, whereas the executive did their best to balance societal needs with realistic budgetary constraints.[205] He was also invoking the 1993 events in Russia, the Civil War in Tajikistan, presidential-parliamentary backlash – and believed that only strong presidential system would lead this state into stability and economic reforms.[206] On December 13, 1993, the last meeting of the Parliament adopted a resolution on self-dissolution even though the Constitution did not contain any provision on this matter.

Right before the dissolution, Parliament passed the *Law* on December 10, 1993 about delegating and transferring additional powers and competencies to President. According to the Law, until the formation of the next Parliament, the President was given the power to issue orders with the force of laws, in other words in the absence of the Parliament legislative power was transferred to the President.[207] It is important to note that Constitution did not contain a

[204] Zimanov S.Z. Parlament Kazakhstan a v trudnye gody Provozglashenia Nezavisimosti [The Parliament of Kazakhstan in challenging years of the declaration of independence], (Almaty, Alash Baspasy, 2011)
[205] Nazarbayev N. Kazakhstan kiy Put [The Kazakhstani Way], (Karaganda 2006)
[206] *Id*
[207] Zakon Respubliki Kazakhstan o vremennom delegirovanii Prezidentu Respubliki Kazakhstan I glavam mestnyh administraciy dopolnitel`nyh polnomochiy [The Law of the Republic of Kazakhstan on ad hoc delegation of

framework or permission of such a temporary transfer of power. Furthermore, other essential powers of the Parliament (appointment and dismissal of the cabinet members, the judiciary and other government officials as Central Election Commission, approval of the budget, emergency powers and etc.) were also transferred to Nazarbayev.[208] Parliamentary elections took place on March 1994, which means for the period of four months Kazakhstan was under the unilateral Presidential rule.[209]

The 1994 Parliamentary elections were fraught with numerous procedural violations.[210] Most of the times this was due to vague and controversial rules adopted by the Central Election Commission under the supervision of the President. As it was mentioned earlier due to disagreements between Parliament and President the Electoral Code had not been adopted by this time. The procedure of conducting the election as well as the counting process was defined by sub-constitutional norms, namely regulations of the Central Election Commission. Since there was no Parliament during that time, the Central Election Commission was under the exclusive control of the President.[211] International monitoring bodies had also highlighted the violations that took place during the elections. Those violations included the short notice of elections[212], insufficient time for political parties for electoral campaign[213], registration system of political

additional powers to the President of the Republic of Kazakhstan and to Heads of local administrations] Dec. 10, 1993, No.2576-XII

[208] *Id*

[209] U.S. Department of State, *"Kazakhstan," Country Reports on Human Rights Practices for 1993* (Washington, 26 D.C.: U.S. Government Printing Office, February 1994), p. 937.

[210] U.S. Commission on Security and Cooperation in Europe. 1994. The parliamentary elections in Kazakhstan—March 7, 1994, Washington, DC.

[211] Zakon Respubliki Kazakhstan o vremennom delegirovanii Prezidentu Respubliki Kazakhstan I glavam mestnyh administraciy dopolnitel`nyh polnomochiy [The Law of the Republic of Kazakhstan on ad hoc delegation of additional powers to the President of the Republic of Kazakhstan and to Heads of local administrations] Dec. 10, 1993, No.2576-XII Art. 3

[212] Commission on Security and Cooperation in Europe, Report on the March 7, 1994 Parliamentary Election in Kazakhstan (Washington, D.C.: U.S. Government Printing Office, March 1994) p. 5

[213] *Id*

parties was extremely flawed[214], opportunity for one individual to cast a vote for other individuals[215], presence of double list[216], violation of fairness, the system of counting adopted by the Central Election Commission was also confusing[217], particularly the cross out method. This resulted in some districts with more votes recorded than the actual number of voters who showed up.

Nevertheless, the results of the parliamentary elections did not please the President. Parliament turned out to be diverse and multi-party, former opposition deputies were able to secure seats as well.[218] The newly elected Parliament continued blocking a substantial number of initiatives of the executive and opposed the President on economic and social reforms.[219] In the circumstances the President was less likely to be able to force the second self-dissolution of the Parliament. There was a need for another plan, this time the plan involved the Constitutional Court (this part will be discussed in text chapters).

5.2. Forced Parliamentary Dissolution in Kyrgyzstan

Just like Kazakh peer, the Kyrgyz Parliament experienced a "forced" self-dissolution as a result of a political confrontation with President. The root causes and scenario to a certain extent shared some common patterns and yet had its peculiarities as well. The common ground of political crisis was laid on the text of the constitution, and particularly the fight between the president and parliament to gain more power. Both constitutions that started with balanced semi-presidential systems with relatively broad powers of parliament were turned into strong

[214] *Id 6*
[215] *Id*
[216] *Id 7*
[217] *Id 8*
[218] U.S. Department of Justice, Profile Series Kazakhstan Political Conditions in the Post-Soviet Era *(*Washington, September 1994*)* p. 14.
[219] Nazarbayev N. Kazakhstan kiy Put [The Kazakhstani Way], (Karaganda 2006), Olcott, Martha Brill, Kazakhstan: Unfulfilled promise 101-102 (Washington, DC: Carnegie Endowment for International Peace 2002)

presidentialism, and in Kyrgyzstan, due to political instability, these changes will be cyclic and repetitive. Another typical pattern is that in those critical moments CCs played a leading role in the process of dissolution of parliament and in turning the text of the Constitution from semi-presidentialism to presidentialism.

If in Kazakhstan the significant ground of disagreement between president and parliament was mostly related to the implementation of the World Bank and IMF recommendations, social policy, debate over the Electoral Code and most importantly the external influence of Russian experience, the root causes of the political crisis in Kyrgyzstan mostly come from Parliament exercising the controlling functions under the Constitution. During the adoption of the 1993 Constitution, Parliament managed to attain vast parliamentary powers especially in the field of appointment, the direction of foreign policy, and parliamentary control of the execution of laws.[220] As was mentioned earlier Parliament mostly consisted of deputies from the Communist Party. The first parliament which is also commonly named the "legendary parliament" took its powers with great enthusiasm and took particularly seriously their parliamentary control functions.[221] The Parliament was actively establishing parliamentary commissions to investigate corruption and political scandals involving President Akayev and his network. Those political scandals included the Gold Scandal[222], scandals revolving around the privatization of national property by Akayev and his family.[223]

[220] Konstituciia Kyrgyzskoi Respubliki (1993) [Konst.KR] [Constitution] Art 51
[221] Martha Brill Olcott, Central Asia`s New States: Independence, Foreign Policy, and Regional Security 97 (US Institute of Peace Press, Washington D.C. 1996)
[222] *The Soviet Insider, the Gold, and Kyrgyzstan`s Political Innocents*, Financial Times, (Jan.28, 1994), https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=lzfk0212 (last visited March 2, 2019).
[223] Martha Brill Olcott, Central Asia`s New States: Independence, Foreign Policy, and Regional Security 95 (US Institute of Peace Press, Washington D.C. 1996), Johan Engvall, *Kyrgyzstan and the Trials of Independence* 4-5 in Marlene Larvelle, Johan Engvall, Kyrgyzstan beyond Democracy Island and Failing State: social and Political Changes in a Post-Soviet Society (Lexington Books 2015)

As discussed earlier, the victory of the presidential forces in Russia had an impact to the dissolution of Parliament in Kazakhstan.[224] One can speculate that the wave of parliamentary dissolution gave confidence to the Kyrgyz President as well. By the summer of 1994, there was a consolidation of the Presidential apparatus and the government, including part of the deputies in Parliament.[225] Interestingly, the development of the scenario somehow reminds the events of Kazakhstan with few modifications. In September 1994, the Parliament was planning to announce the outcome of a parliamentary inquiry on the "gold case" and privatization of property scandals involving some members of the executive. However, this scheduled session of the Parliament did not take place due to the lack of a quorum.[226] It appeared that on August 1994, 160 deputies signed an appeal to President Akayev, in which they accused the Parliament of political intrigues, hindering reforms and refused to participate in its work.[227] The President backed deputies started boycotting the Parliament and did not show up for Parliamentary sessions. Despite the attempts of other deputies to maintain the work of the Parliament, established crisis led to the "forced self-dissolution" of the Parliament.[228]

[224] Carla L. Thorson, Politics, Judicial Review, and the Russian Constitutional Court, 52-64 (Palgrave Maclillan, 2012), Letter from the 10th Extraordinary Congress of People's Deputies of the Russian Federation headed "To Parliaments, Presidents and Government Presidents of the Commonwealth of Independent States." Zimanov, S.Z. *Parlament Kazakhstana v trudnye gody provozglasheniya nezavisimosti* [Kazakhstan's parliament in the difficult years of proclaiming independence], (Almaty 2011)

[225] Huskey Eugene, *Eurasian semi-presidentialism: the development of Kyrgyzstan`s model of government* in R.Elgie and S. Moestrup 162-179 (Routledge 2007)

[226] *Id*, Johan Engvall, *Kyrgyzstan and the Trials of Independence* 4-5 in Marlene Larvelle & Johan Engvall Kyrgyzstan beyond Democracy Island and Failing State: social and Political Changes in a Post-Soviet Society (Lexington Books 2015)

[227] Murat Ukushev, Ternistiy Put` Parlamentarizma v Kyrgyzstane: dvuhpalatniy Jogorku Kenesh [Thorny Path of Parliamentarism in Kyrgyzstan: bicameral Jogorku Kenesh], pr.kg (2009) http://www.pr.kg/gazeta/number441/781/ (last visited January 27, 2019).

[228] Sally N. Cummings, Understanding Central Asia: Politics and Contested Transformations 60-76 (Routledge 2012)

As one can notice, the dissolution of Russian Parliament by President Yeltsin indeed paved the way for presidents of Central Asia to choose the path of super-presidentialism.[229] The wave of parliamentary dissolutions created an opportunity for Central Asian presidents to tame CCs. The taming was reflected either by suspension of CCs, packing or simply turning these courts into façade courts.[230] Next chapters will discuss in detail the wave of CCs taming process throughout Central Asia.[231]

5.3. Uzbekistan and Tajikistan: Reasons Behind the Avoidance of the Wave of Forced Parliamentary Dissolutions

Unlike Kyrgyzstan and Kazakhstan, Tajikistan and Uzbekistan escaped the process of forced parliamentary dissolutions and there is an explanation for it. In case of Tajikistan, the Civil War in the early 1990s substantially delayed the entire process of constitution-making and establishment of the Constitutional Court.[232] The Constitution was adopted only in 1994 and the Court was established only in 1995. By the time when the Court started to function, Kyrgyz and Kazakh constitutional courts have already experienced the influence of strong presidential rule. It might be speculated that the overall regional tendency towards strong presidentialism and relatively weak competencies of the Tajik CCs might have by default created an already tamed court from the start.

[229] Jane Henderson "The constitution of the Russian Federation: contextual analysis" 2011, Hart Publishing Ltd. P. 123

[230] Armen Mazmanyan, *Constrained, pragmatic pro-democratic apprising constitutional review courts in post-Soviet politics*, Communist and Post-Communist studies, 409(2010). Alexei Trochev, *Fragmentation? Defection? Legitimacy? Explaining Judicial Roles in post-communist colored revolutions*, in Diana Kapiszewski (eds.) Consequential Courts: judicial roles in global perspective, 68 (Cambridge University Press, 2013).

[231] Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe, 248 (The University of Chicago Press, 2000).

[232] Sally N. Cummings, Understanding Central Asia: Politics and Contested Transformation, 64 (Routledge 2012)

The establishment of the Constitutional Court of Uzbekistan did not happen until 1995[233]. If in Tajikistan it was due to the Civil War, in Uzbekistan President Karimov delayed the process of formation. The political persecution against opposition leaders started early in Uzbekistan, Islam Karimov was able to consolidate power around himself.[234] By the time the Court was established, Uzbekistan was already under the strong presidential rule. Competencies of the Uzbek Constitutional Court were substantially lower in comparison to peers in Central Asia. There was no individual complaint mechanism. Most of the powers of the Court concentrated on the disputes concerning the regions and autonomic republics. For the above reasons, this section will concentrate on Kazakhstan and Kyrgyzstan only.

6. Political Economy and Foreign Policy as the Defining Factor of the Emergence of Central Asian Constitutional Courts

The historical past and early days of transition in Central Asia shaped subsequent internal, external, political and economic landscapes of these states that later directly impacted the instructional design of CCs that emerged in this region. It is particularly important to discuss foreign policy and political economy as the dissertation will show that they were key defining factors that influenced the formation and institutional designs of these courts and continue to have a lasting impact.

6.1. Foreign Policy at the Early Transitional Period

Foreign policies adopted by respective Central Asian states largely depended on two factors: first, on the abilities of these states to control their borders in the first years of the independence and second, economic landscape and political economy. While Kazakhstan and

[233] Konstituciia Respubliki Uzbekistan (1992) [Konst.RK] [Constitution]
[234] Sally N. Cummings, Understanding Central Asia: Politics and Contested Transformation, 64 (Routledge 2012)

Uzbekistan managed to build armies and control their own borders it was challenging for Kyrgyzstan and Tajikistan.[235] Thus, from the early independence Kyrgyzstan entered into an agreement with Russia on border cooperation while in Tajikistan due to the civil war there was a heavy presence of Russian military services. It later shaped the foreign policy accordingly. Kazakhstan pursued a multi-vector foreign policy[236] that included a constant balance between traditional and historical ties with Russia and strategic economic partnership with China. In other words, to a certain extent Nazarbayev viewed Kazakhstan as a bridge between Asia and Europe. Kyrgyzstan under the Presidency of Akayev adopted a great silk road foreign policy[237] doctrine that was centered on the concept of mutual dependence and the development of "*mutually advantageous international cooperation*"[238] in the great silk road region. Tajikistan since 2002 declared "an open door" policy that included a "broad and constructive cooperation with all states and entities of international relations"[239] yet while preserving national interests and national sovereignty of Tajikistan.[240] In contrast, Uzbekistan under Karimov opted for the self-reliance doctrine of foreign policy that was heavily based on respect and recognition of national

[235] John Anderson, The International Politics of Central Asia (Manchester University Press, 1997).
[236] Strategia Stanovlenia I Razvitia Kazakhstan a kak suverennogo gosudarvsta [Strategy of the establishment and Development of Kazakhstan as Sovereign State] May 16, 1992, adopted by the President of the Republic of Kazakhstan . Konsepsia Vneshnei Politiki Kazakhstan a [The Concept of the External Policy of Kazakhstan] 1995, adopted by the President of the Republic of Kazakhstan. Sally Cummings, *Eurasian Bridge or Murky Waters between East and West? Ideas, Identity and output in Kazakhstan `s Foreign policy* p. 139-155 in Rick Frawn (ed) Ideology and National Identity in Post-Communist Foreign Policies (London 2004)
[237] Akayev Askar, Diplomatia Shelkovogo Puti: Doktrina Prezidenta Kyrgyzstakoi Respubliki [The Silk Road Diplomacy: The Doctrine of the President of the Kyrgyz Republic], (Bishkek, 1999). Eugene Huskey, *National Identity from Scratch: defining Kyrgyzstan`s role in World Affairs* p. 111-138 in Rick Frawn (ed) Ideology and National Identity in Post-Communist Foreign Policies (London 2004)
[238] *President of Kyrgyzstan: Our foreign policy doctrine is the Great Silk Road*, EIR Volume 26, Number 15, April 9, 1999, available athttps://larouchepub.com/eiw/public/1999/eirv26n15-19990409/eirv26n15-19990409_049president_of_kyrgyzstan_our_fore.pdf
[239] Lena Johnson, Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam, 56 (I.B. Tauris &Co Ltd. 2006).
[240] Lena Johnson, *Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam*, 18.3 Journal of Islamic Studies, 59-61 (2007).

sovereignty.[241] As chapter will show later on these elements of foreign policy are reflected in the institutional design choices of Central Asian CCs.

6.2. Current Foreing Policy/ Geopolitics

It is highly essential to note that if foreign policy choices in the early transitional period affected the institutional design choices of Central Asian CCs, current foreign policy and geopolitics is presently affecting the work and decision-making of these courts. This pattern will be revealed in more details in Chapter 4 and Chapter 5. However, to set the analytical ground and context for further chapters, it is important to briefly discuss the current foreign policy issues in Central Asia and overall regional dynamics that will reveal a strong reason for the comparison of Central Asian and East Asian CCs.

Central Asia`s bond with Russia goes beyond Former Soviet legacy, shared heritage and waves of parliamentary dissolutions discussed earlier. With the establishment of regional organizations, Russia is currently trying to dominate the trade, economic and security policies in the region.[242] One of those institutions is Eurasian Economic Union (EAEU) that currently consists of Russia, Belarus, Kazakhstan, Kyrgyzstan and Armenia and it is expected to include all Central Asian states.[243] The benefits of these union for Central Asian states are highly contested[244], however despite this fact abovementioned states joined the union. Russia targeted Kazakhstan, Kyrgyzstan and Tajikistan by providing stabilization grants and loans, securing

[241] Annette Bohr, Uzbekistan: domestic and regional policy, *Royal Institute of International Affairs*, 1998
[242] Zhenis Kembayev, The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration? *Review of Central and East European Law* 342-367 (2016)
[243] Treaty on the Establishment of the Eurasian Economic Community, (October 10, 2000) 2212 UNTS 309.
[244] Evgeny Vinokurov, *Eurasian Economic Union: Current State and Preliminary Results*, 3.1 Russian Journal of Economics, 54 (2017). Aidos Alimbekov, Eldar Madumarov, Gerald Pech, *Sequencing in Customs Union Formation: Theory and Application to the Eurasian Economic Union*, 32.1 Journal of Economic Integration, 65 (2017). Azimzhan Khitakhuranov, Bulat Mukhamedieyev, Richard Pomfret, Eurasian Economic Union: Present and Future Perspectives, 50.1 Economic Change and Reconstructing, 59 (2017). EDB, *Eurasian Economic Integration 2017*, EDB Centre for Integration Studies, Eurasian Development Bank (2017).

extension of military facilities for these states and providing benefit for labor migrants from Central Asia in Russia, since Kyrgyzstan and Tajikistan`s economies substantially depend on remittances of migrants from Russia.[245]

Even though it presents itself as an Economic Union, it is argued by scholars that from the beginning it was a political project of Russia.[246] Political nature of the organization can be assumed based on its institutional design. Unlike EU the institutional structure of the Eurasian Economic Union is highly centralized and lacks proper checks and balances and the decision-making process is not democratic and open rather mostly made behind closed doors.[247] The main supreme body of the EAEU is the highest Eurasian Economic Council (EEC) (composed of heads of state).[248] The executive body of the EAEU consists of the Eurasian Economic Commission, which in turn composed of a council (vice prime minister) and a board (members are appointed for a term of 4 years by the EEC)[249] and finally, there is a Court of the EAEU.[250] Any decisions of the executive body are taken under strict control of the EEC. Such an institutional design makes small member states highly dependent on the decision-making of the EEC. Even though states can apply to the Court of the EAEU, there is no guarantee that the court will provide an independent decision making, because an attempted judicial activism[251] of the Court resulted with the adoption of the norm in the treaty which expressly stipulated that the

[245] Richard Pomfret, The Central Asian Economies in the 21st Century, 250 (Princeton University Press, 2019).
[246] Alexander Cooley, *Ordering Eurasia: The Rise and Decline of Liberal Internationalism in the Post-Communist Space*, 28.3 Security Studies,588-613 (2019).
[247] Zhenis Kembayev, Regional Integration in Eurasia: The Legal and Political Framework, 41.2 Review of Central and East European Law, 117-53 (2016).
[248] Treaty on the Establishment of the Eurasian Economic Community, (October 10, 2000) 2212 UNTS 309.
[249] *Id*.
[250] Statut Suda Evraziyskogo Ekonomocheskogo Soiuza [The Statute of the Court of the Eurasian Economic Union], May 29, 2014.
[251] Postanovlenie Bolshoi Kollegii Suda Evraziyskogo Ekonomicheskogo Soobshestva po Delu Yuzhnogo Kuzbasa [Regulation of the Grand Chamber of the Eurasian Economic Community Court on Yuzhniy Kuzbas] April 8, 2013.

EAEU Court "*may not create any new rules and may not change and terminate existing rules of the EAEU Law and the Legislation of Members States."*[252]

There are now discussions revolving around the introduction of common currency[253] and if introduced it will have a big implication to internal legal dynamics in Central Asian states since it would mean that potentially Russia will take over both monetary and fiscal policy, thus de facto threatening the economic independence of these states.[254] Finally, there is opinion among some analytics and researchers that Russia is willing to use the EAEU to develop a chain of nuclear power industry, thus eventually dominating this field in the global value chain.[255] Uzbekistan and Kazakhstan have already recently announced about their plans on building of the nuclear power plants.[256]

Furthermore, Central Asian states except for Uzbekistan[257] are members of Russian-led Collective Security Treaty Organization (CSTO),[258] that aims at strengthening peace, collective

[252] Statut Suda Evraziyskogo Ekonomocheskogo Soiuza [The Statute of the Court of the Eurasian Economic Union], May 29, 2014. Paragprah 109. For more information about the activities of the Court see Zhenis Kembayev, *The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration?*, 41 Review of Central and East European Law, 342-367 (2016).

[253] Mostafa Golam, Monowar Mahmood, *Eurasian Economic Union: Evolution, Challenges and Possible Future Directions*, 9.2. *Journal of Eurasian Studies*, 163-72 (2018).

[254] Another important problem that is being discussed now is the issue of passportization. For more information see Anne Peters, Passportisation: Risks for international law and stability, Blog of the European Journal of International Law (May 9,2019) https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-part-one/?fbclid=IwAR16Klp_9ttTdWwtJA7TsE4agVyPt1skk11DoJ-IKCVpIWI4483RAIEA_2A (last visited May 20, 2019).

[255] Elena Ustyuzhanina, *The Eurasian Union and global value chains*, 17.1 European Politics and Society,35-45(2016). Paul Vandenberg, Khan Kikkawa, *Global Value Chains along the New Silk Road*, ADBI Policy Brief (May, 2015).

[256] Zachem Uzbekistanu I Centralnoi Azii Atomnaya Elektrostansia? [Why do Uzbekistan and Central Asia need Nuclear Power Plant?] Central Asian Analytical Network (CAAN) https://caa-network.org/archives/13297?fbclid=IwAR2IN55nVAnUQrwWEdHFJRDT1VWcEJEcWMfpHBBJ5z_CCwYqx4qA2nn8bnw (last visited June 2019).
Aslan Nurzhanov, *Nuclear Power Prospects of Kazakhstan*, Central Asian Bureau for Analytical Reporting, (May 15, 2019).

[257] Uzbekistan refused to prolong the membership in 1994, for further details see Protokol o Prodlenii Dogovora o Kollektivnoi Bezopasnosti [Protocol on prolongation of the treaty on Collective Security], Apr.20, 1994, https://en.odkb-csto.org/documents/documents/protokol_o_prodlenii_dogovora_o_kollektivnoy_bezopasnosti/ (last visited February 19, 2019)

security, territorial integrity and cooperation in the region.[259]Due to war in Syria and Afghanistan one of the key aspects of this organization is fight against terrorism and drug trafficking.[260]

Another leading external influence in the region is China. Although it started active engagement in Central Asia relatively recently in comparison to EU or US[261], existing literature suggests that in a short period of time China is succeeding in attempts to undermine the western democratization efforts in Central Asia[262], namely by substituting western democratic values with ideas of economic stability and prosperity.[263] China is actively offering "*alternative source of donor assistance, investment, and economic cooperation*"[264] without any package of political commitment to democracy and human rights as it is usually done by the EU and US donor assistantship.[265] For instance to compare numbers the European Union assistance to Central Asia for the 2007-2012 period was 750million USD, in 2014-2020 1billion USD. China assistance under the Belt and Road initiate is estimated around 40 billion USD.[266]

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[258] Collective Security Treaty, Collective Security Treaty Organization, May 15,1992, https://en.odkb-csto.org/documents/documents/dogovor_o_kollektivnoy_bezopasnosti/ (last visited March 2, 2019)

[259] Charter of the Collective Security Treaty Organization, Collective Security Treaty Organization, Oct. 7, 2002, https://en.odkb-csto.org/documents/documents/ustav_organizatsii_dogovora_o_kollektivnoy_bezopasnosti_/ (last visited March 2,2019)

[260] Spisok podpisannyh dokumentov na sessii soveta Kollektivnoi Bezopasnosti ODKB 23 dekabrya 2014 goda Moskva [List of signed documents on the session of the Council of Collective Security of CSTO as of December 23, 2014 Moscow], Dec. 23,2014, https://en.odkb-csto.org/documents/documents/spisok_podpisannykh_dokumentov_na_sessii_soveta_kollektivnoy_bezopasnosti_odkb_23_dekabrya_2014_goda/ (last visited March 2, 2019)

[261] Wilder Alejandro *Sanchez, Central Asia in 2018: What's the Future of the C5+1?,* Geopolitical Monitor (July 11,2018) https://www.geopoliticalmonitor.com/central-asia-in-2018-whats-the-future-of-the-c51/ (last visited January 2019).

[262] Vera Axyonova, Fabrienne Bossuyt, *Mapping the substance of the EU's civil society support in Central Asia: From neo-liberal to state-led civil society*, 49.3 Communist and Post-Communist Studies, 207-17 (2016.

[263]Mariya Y. Omelicheva, Democracy in Central Asia: competing perspectives and alternative strategies, (Lexington: University Press of Kentucky 2015)

V. Axyonova, F.Bossuyt, Mapping the substance of the EU's civil society support in Central Asia : from neo-liberal to state-led civil society, *Communist and Post-Communist Studies*, (2017)

[264] A. Sharshenova, G. Crawford, Undermining Western democracy promotion in Central Asia: China's countervailing influences, powers and impact, *Central Asian Survey*, 467, (2017).

[265] A. Sharshenova, G. Crawford, Undermining Western democracy promotion in Central Asia: China's countervailing influences, powers and impact, *Central Asian Survey*, pp. 453-472 (2017)

[266] Wade Shepard, *Why the China-Europe "Silk-Road" Rail Network Is Growing Fast*, Forbes, 251 (January 28, 2016).

Furthermore, China increased its investment and economic presence in the region by signing various economic cooperation agreements both on governmental and private level and currently actively integrating Central Asia to the *one belt one road* initiative.[267] Besides that, China have been offering loans with small interest rates[268] this all led to the point that currently Tajikistan and Kyrgyzstan`s foreign debt to China amounts to almost half of the entire amount of external debt.[269] As it was highlighted by the Times of Central Asia "*Tajikistan's external debt exceeded $2.3 billion in 2017 and the debt to China was more than half of this amount, $1.2 billion. China's share in Kyrgyzstan's foreign debt has grown from 2% to 44%*."[270] On the other hand, it should be noted that the external debt before China might push the Governments of Kyrgyzstan and Tajikistan to look back to the West again for money[271], thus creating an incentive to strengthen the democracy landscape in these states. Furthermore, Central Asia is also part of the Shanghai Cooperation Organization which involves Russia and China as one of the founding members and lately China have increased its active involvement within the organization.[272]

[267] World Bank, *Belt and Road Economics: Opportunities and Risks of Transport Corridors,* Advance Edition. (World Bank, Washington, DC. 2019).
[268] *Rivals for Authority in Tajikistan`s Gorno-Badakhshan*, briefing No. 87 Europe and Central Asia, International Crisis Group (March 14, 2018) https://www.crisisgroup.org/europe-central-asia/central-asia/tajikistan/b87-rivals-authority-tajikistans-gorno-badakhshan (last visited April 23, 2019).
[269] Catherine Putz, *Kyrgyzstan Hunt for Power Plant Corruption Continues*, the Diplomat, (June 28, 2018). Andrew Higgins, *A Power Plant Fiasco Highlights China's Growing Clout in Central Asia,* The New York Times, (July 6, 2019). Thomas Grove, *A Spy Case Exposes China's Power Play in Central Asia,* The Wall Street Journal, (July 10, 2019).
[270] *Kyrgyzstan searching for ways to get out of debts*, The Times of Central Asia (May 6, 2018) https://www.timesca.com/index.php/news/26-opinion-head/19706-kyrgyzstan-searching-for-ways-to-get-out-of-debts (last visited March 5, 2019).
[271] Wilder Alejandro *Sanchez, Central Asia in 2018: What's the Future of the C5+1?,* Geopolitical Monitor (July 11,2018) https://www.geopoliticalmonitor.com/central-asia-in-2018-whats-the-future-of-the-c51/ (last visited January 2019). Catherine Putz, Azimjan Askarov Headed for a second retrial in Kyrgyzstan, The Diplomat (July 19,2019) https://thediplomat.com/category/crossroads-asia (last visited July 20,2019).
[272] Declaration on the Establishment of the Shanghai Cooperation Organization, June 15, 2001.

In July 2019 China released a New White Paper on National Defense and there are three important issues to be mentioned for the purposes of this dissertation. First, China condemned the "Taiwan independence" policy led by Democratic Progressive Party in Taiwan and their account to foreign help, particularly US and dubbed it as "*stubborn separatism and refusal to recognize the 1992 Consensus*".[273] It is particularly important taking into consideration that in January 2020 Taiwan will hold presidential elections. As a candidate from the KMT party was nominated a "populist Mayor" who is supposedly inclined towards mainland China and experts claim that this elections might involve active influence from Chinese Communist Party.[274] Second, White Paper explicitly stated that "*China will never allow the secession of any part of its territory by anyone*"[275] and continued that China "*makes no promise to renounce the use of force and reserve the option for taking all necessary measures*".[276] Third, the White Paper emphasized the unprecedented high-level military and strategic partnership between Russia-China relationship.[277] Finally, the defense policy stressed the significance of Shanghai Cooperation Organization and expressed further strategic cooperation with Central Asia on issues related to security and maintenance of stability in the region.[278]

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[273] The State Council Information Office of the People's Republic of China, *China's National Defense in the New Era*, (Foreign Languages Press Co. Ltd., Beijing, China, 2019. Ankit Panda, *China's 2015 Defense White Paper: Don't Forget Taiwan*, The Dilpomat, (May 27, 2015) https://thediplomat.com/2015/05/chinas-2015-defense-white-paper-dont-forget-taiwan/ (last visited April, 2019). Document: China's Military Strategy, (May 26, 2015) https://news.usni.org/2015/05/26/document-chinas-military-strategy (last visited May 2019). Ankit Panda, *China to Release New White Paper on National Defense: What to Expect*, The Diplomat, (July 23, 2019) https://thediplomat.com/2019/07/china-to-release-new-white-paper-on-national-defense-what-to-expect/?fbclid=IwAR3yvDeVdEZf7XDiwfIuWGWz4xNldLb86H_GkuUs-bDGmnrZiBKfnJrFsqs (last visited July 23, 2019).

[274] Chris Horton, *Populist Mayor is picked to Run against Taiwan`s President*, The New York Times, (July 15, 2019). https://www.nytimes.com/2019/07/15/world/asia/taiwan-han-kuo-yu-president-china.html (last visited July 20, 2019).

[275] The State Council Information Office of the People's Republic of China, *China's National Defense in the New Era*, (Foreign Languages Press Co. Ltd., Beijing, China, 2019.

[276] *Id.*

[277] The State Council Information Office of the People's Republic of China, *China's National Defense in the New Era*, (Foreign Languages Press Co. Ltd., Beijing, China, 2019.

[278] *Id.*

Another important issue in the context of China-Central Asia relationship is the issue of the suppression of the Muslim population in Xinjiang (China) which consists of mostly ethnic Yugurs and ethnic Kyrgyz and Kazakh.[279] Despite demands addressed to government by the citizens in Kyrgyzstan and Kazakhstan to raise concern about this issue, presidents of Central Asia constantly are emphasizing that it is an internal affair of China.[280] Moreover, Central Asia did not join in signing a collective letter by 22 states in the HRC condemning Chinese re-education camps in Xinjiang.[281] However, Tajikistan joined a support letter of Chinese re-education camp which was signed by almost 40 states (predominantly Muslim).[282]

6.3. Political economy

In the context of Central Asia political economy was the defining factor on the origin of constitutional courts and the choice of their models. Central Asian states under the Soviet Union was part of the planned Soviet State economy.[283] Being a landlocked region, it did not have an interaction with the rest of the world and Central Asia predominantly played the role of the supplier in the Soviet Economy of raw materials, cotton, mineral and energy resources.[284]

[279] Human Rights in China, *China: Minority Exclusion, Marginalization and Rising Tensions*, Minority Rights Group International (2007). Linda Benson, The Ili Rebellion: The Moslem Challenge to Chinese Authority in Xinjiang, 1944-1949 (London: M. E. Sharpe, 1990).

[280] Jeenbekov: Vopros ob etnicheskih menshinstvah v Kitae – vnutrenee delo KNR [Jeenbekov: The question of ethnic minorities in China is the internal affair of China], Radio Azattyk (June 13,2019). https://rus.azattyk.org/a/29996739.html (last visited July 2019).

[281] UN: Unprecedented Joint Call for China to End Xinjiang Abuses, Human Rights Watch (July 10, 2019) https://www.hrw.org/news/2019/07/10/un-unprecedented-joint-call-china-end-xinjiang-abuses (last visited July 15,2019).

[282] Spotlight: Ambassadors from 37 countries issue joint letter to support China on its human rights achievements, Xinhuanet, (July 13, 2019) http://www.xinhuanet.com/english/2019-07/13/c_138222183.htm (last visited July 16, 2019).

[283] Ericson Richard, *The Classical Soviet-Type Economy: Nature of the System and Implications for Reform*, 5 Journal of Economic Perspectives, 11-20(1991). Describes in detail the nature of the soviet economy,
Gleason Gregory, The New Central Asian States, (Westview Press: Boulder,Co, 1997). Gleason Gregory, Markets and Politics in Central Asia (Routledge: London, 2003). Pomfret Richard, The Economies of Central Asia (Princeton University Press, 1995). Pomfret Richard, The Central Asian Economies in the 21st Century (Princeton University Press, 2019).

[284] Pomfret Richard, The Central Asian Economies in the 21st Century, 4 (Princeton University Press, 2019).

Among these cotton was the predominant one and most historian and political scientists describe the Soviet economic policy towards Central Asia as "*white gold cotton dictatorship*."[285] Thus Central Asia was substantially financed by Moscow for producing cotton, however the Soviets at the same time used "*repressive command methods to enforce the monoculture status of cotton*"[286] that later led to dramatic ecological problems involving water balance system in Central Asia and the disappearance of the Aral Sea.[287]

Once the Soviet Union collapsed these states along with building a nation-state had to develop economic systems and policies themselves. As the chapter proceeds further, it will reveal that there is a genuine link between the emergence of judicial review/ institutional design of Central Asian CCs and the choice of economic systems and approaches to political economy that each of these states pursued.

In international political economy scholars identify four alternative perspectives that states can pursue, namely, Marxist, liberal-pluralist, realist and domestic politics approach.[288] In the context of Post-Soviet Central Asia scholars claim that these states pursued the combination of the realist and the domestic politics approach.

It is claimed that before WWI empires mostly used the Marxist approach since it presumed the expansion and exploitation of colonial resources and the economic system of the Soviet Union was predominantly based on the Marxist approach.[289] The Liberal-pluralist

[285] Yuriy Kulchik, Andrey Fadin, Viktor Sergeev, Central Asia After the Empire, 3, (Pluto Press, 1999).
[286] *Id.* 10. Also see International Crisis Group, *The Curse of Cotton: Central Asia`s Destructive Monoculture*, 93 Europe and Central Asia (2005).
[287] Rama Sampath Kumar, *Aral Sea: Environmental Tragedy in Central Asia*, 37 Economic and Political Weekly, 3797 (2002).
[288] Martin Spechler, Dina Spechler, *The International Political Economy of Central Asian Statehood*, in Emilian Kavalski, Stable Outside, Fragile Inside? Post-Soviet Statehood in Central Asia, 72-73 (Ashgate Pub. 2010). Gilpin Robert, The Political Economy of IR, 12-13 (Princeton University Press, 1987). Krasner S.D., IPE
[289] Martin Spechler, Dina Spechler, *The International Political Economy of Central Asian Statehood*, in Emilian Kavalski, Stable Outside, Fragile Inside? Post-Soviet Statehood in Central Asia, 72-73 (Ashgate Pub. 2010).

approach to international political economy can be observed in US-Europe relations and North Atlantic region that predominantly centers on financial stability and on liberal free market ideas.[290] Realist approach suggests that "*hegemonic power can ease the achievement of collective goods or trade*."[291] As chapter proceeds, it will show that in the early period of transition in Central Asia, the attraction of foreign investment and desire to be part of the international trade relations pushed some states like Kyrgyzstan and Kazakhstan on creating the infrastructure of the rule of law and constitutional democracy in place.

If in a region there is no such hegemonic power, then states usually opt for short-term bilateral agreements rather than long-term, strategic and broad commitments, in other words their economic strategy reflects the reality that surround them. In the early 1990s when Central Asia newly emerged as independent states there was no such hegemonic power: Russia was busy with its own internal domestic, political and economic reforms and among Central Asian states there was no evident leader that could be that Hegemon, therefore it is claimed that Central Asian states opted for a realist international political economy[292], in other words adopted economic policies that were sporadic and not comprehensive mostly balancing between Russia, China and other potential partners.

Finally, domestic politics approach suggests that international trade enhances the powers of domestic regimes in case if there are available natural resources, in other words something called "natural resources trap".[293] Therefore some Central Asian states due to availability of natural resources chose to retain command economy and the access to international trade enabled

[290] *Id.* 73-74
[291] *Id.* 73-74
[292] *Id.* 73-74
[293] Rogowski R., Commerce and Coalitions (Princeton University Press, 1989).

these regimes to consolidate their power and to strengthen their regimes.[294] Thus, keeping in mind these approaches to international political economy, economic choices and perspectives of these states can be placed into to the spectrum ranging from most liberal to least liberal.

Kyrgyzstan adopted one of the most liberal economic systems. It can be explained by the fact that unlike its neighbors it lacked resources and materials that Kyrgyzstan was in a position of extracting and exporting itself. Therefore, there was a need for attracting international investments and to do that Kyrgyzstan had to liberalize its economy and legal system. Thus, based on the recommendations of the World Bank and the IMF, Kyrgyzstan adopted one of the most liberal reforms in the economic sector. Those reforms were reflected in the reorganization and liquidation of enterprises, also known as PESAK[295], in the agricultural economy also known as APEAK[296], and finally the reorganization of the financial market, also known as FINSAK[297]. This liberal approach to the economic system also impacted to the development of politico-legal landscape of Kyrgyzstan which was one of the most liberal in Central Asia. Furthermore, it also

[294] Martin Spechler, Dina Spechler, *The International Political Economy of Central Asian Statehood*, in Emilian Kavalski, Stable Outside, Fragile Inside? Post-Soviet Statehood in Central Asia, 72-73 (Ashgate Pub. 2010).
[295] Postanovlenie Pravitelstva Kyrgyzskoi Respubliki o merah po demonopolizacii ekonomiki i podderjski predprenimatelstva v Respublike Kyrgyzstan [Resolution of the Government of the Kyrgyz Republic on On measures to demonopolize the economy and support entrepreneurship in the Republic of Kyrgyzstan], August 25,1992, No. 421.
[296] Ukaz Prezidenta Respubliki Kyrgyzstan ob osobennostyah razgosudarstvlenia i privatizacii sovhozov I drugih gosudarstvennyh, kommunalnyh, selskohozyastvennyh predpriyatiy v Respubliki Kyrgyzstan [Decree of the President of the Kyrgyz Republic on the peculiarities of the privatization of state farms and other state (communal) agricultural enterprises in the Republic of Kyrgyzstan], January 13, 1992, No. УП-10.
[297] Ukaz Prezidenta Kyrgyzskoi Respubliki o razrabotke ekonomicheskoi strategii razvitia Kyrgyzskoi Respubliki na period do 2005 goda I indakativnogo socialno-ekonomicheskogo plana na 1996-1996 gody [Decree of the President of the Kyrgyz Republic on the development of an economic development strategy of the Kyrgyz Republic up to 2005 and an indicative social and economic plan for 1996-1998] December 29,1995. Postanovlenie Pravitel`stva Kyrgyzskoi Respubliki ob agenstve po reorganizacii bankov i rekonstruksii dolgov pri Ministertste Finansov Kyrgyzskoi Respubliki [Regulation of the Government of the Kyrgyz Republic about the Agency for the Reorganization of Banks and Restructuring debt with the Ministry of Finance of the Kyrgyz Republic], February 19, 2002, No. 87.

impacted to the establishment of one of the most empowered CCs with expansive institutional design and competencies.[298]

The second state that also opted for a liberal economic system was Kazakhstan. In contrast to Kyrgyzstan, Kazakhstan was rich in such resources as oil and gas, however after the collapse of the Soviet Union Kazakhstan lacked the capacity of extracting these natural resources on its own. Therefore, it also had to liberalize its economic and legal policies to attract investors. In the same vein as in Kyrgyzstan, Kazakhstan established a CC with substantially broad and wide powers and competencies. However, gradually with the increase of oil prices Kazakhstan enjoyed "energy driven booms"[299] and privatization of state assets transformed Kazakhstan into "autocratic economy,[300] dominated by oligarchs"[301] and paved the way for the consolidation of power under Nazarbayev. This change of the political landscape, consolidation of power later led to a tremendous adjustment of the Constitutional Court via constitutional amendment (1995) into a much weaker Constitutional Council followed by the French model.[302] Thus, the choice of institutional design of CC in Kazakhstan was also predominantly driven by economic considerations.

[298] More detailed analysis of design will be discussed in next section.
[299] Pomfret Richard, The Central Asian Economies in the 21st Century, 4 (Princeton University Press, 2019).
[300] Lutz Kleveman, The New Great Game: Blood and Oil in Central Asia, chapter on Kazakhstan 74 (New York, Grove Press, 2004).
[301] Pomfret Richard, The Economies of Central Asia (Princeton University Press, 1995). Pomfret Richard, The Central Asian Economies in the 21st Century. 70-75 (Princeton University Press, 2019). Karla Hoff, Joseph Stiglitz, *After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies*, 94(3) American Economic Review, 754-60(2004). Kerven Carol, Sarah Robinson, Roy Behnke, Kanysh Kushenov, E.J. Milner-Gulland, *A Pastoral Frontier: From Chaos to Capitalism and the Re-Colonization of the Kazakh Rangeland*, 127 Journal of Arid Environments, 110-18 (2016)
[302] Special commission of experts was formed to prepare a draft of the amendment. The Commission included foreign experts such as Roland Dumas (then a member of the French Constitutional Council). For more information see Zhenis Kembayev, *The Rise of Presidentialism in Post-Soviet Central Asia: The Example of Kazakhstan*, in: R. Grote and T. Röder (eds), Constitutionalism in Islamic Countries: Between Upheavel and Continuity , 437 (New York: Oxford University Press 2011). A. Kotov, Konstitucionnaya Reforma- Nachalo Politicheskoi Modernizacii Obshestva [Constitutional Reform- Beginning of the Political Modernization of Society], 8 Mysl, 2 (2006).

Uzbekistan was the one to initially develop the least liberal economic system and opted to retain the state command economy. Unlike Kazakhstan and Kyrgyzstan, during the Soviet regime Uzbekistan was the supplier of the cotton. Since cotton unlike oil or gas was an easily extractable and exportable product. Thus, it did not require attraction of investors, therefore Uzbekistan decided to keep the state command economy.[303] Thus, there was no economic interest for Uzbekistan to liberalize its economic and politico-legal system. Accordingly, among all Central Asian states Uzbekistan established the least powerful and empowered CC.

Tajikistan was in the middle of this spectrum and the main reason behind it was the Civil War (1992-1997) that erupted once it emerged as an independent state. The Civil War delayed the entire process of constitution-making, economic policies and the establishment of CC.[304] Once the Civil War was over with the help of the international actors the constitution was adopted that also established CC. Since the economic landscape of Tajikistan was devastated after the war it needed to liberalize its economy and attract investors. Yet the wave of political events across Central Asia and FSU that paved the way towards more authoritarian presidentialism also had an impact on the institutional design of Tajik CC. Accordingly, Tajikistan established a Court with comparatively less powers than in Kazakhstan and Kyrgyzstan but relatively more powers in comparison to Uzbekistan.

[303] Bakhodyr Muradov, Alisher Ilkhamov, *Uzbekistan's Cotton Sector: Financial Flows and Distribution of Resources*, Open Society Eurasia Program Working Paper (October 2014). White Gold, The True Cost of Cotton: Uzbekistan Cotton and the Crushing of a Nation, *Environmental Justice Foundation* (2005).

[304] Isaac Scarborough, Economic Causes of Strife in Tajikistan, Voices on Central Asia (March 20, 2018) https://voicesoncentralasia.org/economic-causes-of-strife-in-tajikistan/ (last visited January 2019). Bahtrier Sobiri, *S Shiroko Zakrytymi Glazami: Dolgoe Eho Grazhdanskoi Voiny v Tajikistane* [With eyes wide shut down: Long Echo of the Civil War in Tajikistan], Open Democracy (June 22, 2017) https://www.opendemocracy.net/ru/exo-grazhdanskoi-voiny-tadzhikistan/ (last visited March, 2019).

7. Institutional Design of Central Asian Constitutional Review Mechanisms

To provide a comprehensive picture of the institutional design of Central Asian CCs tables were prepared that also include the design choices of South Korean and Taiwanese Constitutional Courts. [305]

Composition of the Court				
	Number of Justices	Organizational Structure	Appointment	Dismissal
Kyrgyzstan Constitutional Chamber[306]	11 Judges[307] 40-70 years of age, has a higher legal education, a minimum of 15-year professional legal experience[308]	Chairperson (elected among Judges), deputy chairperson and 9 justices Judge reporters designated for each case by the Chairperson. [309] Apparatus of the	Appointed by Parliament upon submission of the President on the basis of proposal of the Council of Judges.[310] Appointed for a term of 7 years for the first time, then if renewed have tenure until they reach the mandatory retirement age[311].	A judge may be dismissed from his/her post by the by the majority of not less than two thirds of votes of the total number of the deputies of Parliament upon submission of the President on the

[305] Gretchen Helmke and Julio Rios-Figueroa, Courts in Latin America (Cambridge University Press,2011). A. Seibert-Fohr (eds.), Judicial independence in transition–strengthening the rule of law in the OSCE region, Max Plank Institute's series on comparative and International law. 307-40 (Heidelberg: Springer, 2012). Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003). Mark Ramseyer, *The Puzzling Independence of Courts: A Comparative Approach*, The Journal of Legal Studies, 721 (1994). Bell, J., Judiciaries within Europe (Cambridge: Cambridge University Press, 2006).
Linda Camp Keith, *Judicial Independence and Human Rights Protection around the World*, 85 Judicature. 193-97 (2000). Garoupa, N., T. Ginsburg, *Guarding the guardians: Judicial councils and judicial independence*, 57 The American Journal of Comparative Law, 103-120 (2009).

[306] *De facto* and *de jure* - by the letter of both the Constitution and the Constitutional Law on the Constitutional Chamber - CC is an autonomous court that does not report to the Supreme Court in any way. Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011, No. 37, Articles 2, 3, 11.

[307] Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011, No. 37, Article 5.

[308] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 27 June 2010, Article 97 (2); Konstitucionnuj zakon Kyrgyzskoj Respubliki o statuse sudej Kyrgyzskoj Respubliki [Constitutional Law on the Status of Judges in the Kyrgyz Republic] July 9, 2008, No. 141, Article 15 (1).

[309] Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011, No. 37, Article 5.

[310] Konstitucionnuj zakon Kyrgyzskoj Respubliki o statuse sudej Kyrgyzskoj Respubliki [Constitutional Law on the Status of Judges in the Kyrgyz Republic] July 9, 2008, No. 141, Article 15.

[311] Konstitucionnuj zakon Kyrgyzskoj Respubliki o statuse sudej Kyrgyzskoj Respubliki [Constitutional Law on the Status of Judges in the Kyrgyz Republic] July 9, 2008, No. 141, Article 15.
According to the Venice Commission, "setting probationary periods can undermine the independence of judges, as they may feel under pressure to decide cases in a certain manner" European Commission for Democracy through

		Court		basis of proposal of the Council of Judges.[312]
Kazakhstan Constitutional Council	7 Members + *ex officio* members all ex-Presidents[313] Minimum 30 years of age, has a higher legal education, a minimum of 5-year professional legal experience.[314]	Chairperson (appointed by President), 6 members, reporter member designated for each case by the Chairperson.[315] Apparatus of the Council	Chairperson and **two** members of the Council are appointed by **President**, **two** members by the **upper house** of Parliament and **two** by the **lower house** of parliament for the term of 6 years.[316]	Chairperson may be dismissed by President and other members of the Council by the respective bodies that appointed them on the grounds listed in Article 15 of the law.[317]
Tajikistan Constitutional Court	7 Judges. 30-65 years of age, lawyer, a minimum of 10-year professional legal experience[318]	Chairperson (elected among Judges), deputy chairperson and 5 Judges, Judge reporters designated for each case by the Chairperson [319]	Appointed by Parliament upon submission of the President.[320] Appointed for a term of 10 years.[321]	A judge may be dismissed from his/her post by the decision of Parliament upon submission of the President on the grounds listed in the law.[322]

Law (Venice Commission), Opinion on the Draft Amendments to the Constitutional Law on the Status Of Judges Of Kyrgyzstan, Opinion no. 480/2008, CDL-AD(2008)039, p.4 [available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)039-e (last accessed on September 24, 2014)].

[312] Konstitucionnuj zakon Kyrgyzskoj Respubliki o statuse sudej Kyrgyzskoj Respubliki [Constitutional Law on the Status of Judges in the Kyrgyz Republic] July 9, 2008, No. 141, Article 25 (2). Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 27 June 2010, Article 97 (1).
A CC judge may be subject to early dismissal in the following cases: "on the judge's own application; health grounds (attested by a medical commission); appointment to another court or position; a guilty criminal verdict; a court judgment to apply compulsory medical measures; a disciplinary infringement incompatible with the calling of a judge, confirmed by decisions of the Council of Judges; activity incompatible with the office of a judge; political party membership, promotion of any political party; registration as a candidate for Presidency, registration as member of a political party that is participating in Parliamentary elections, or registration as a candidate for a local self-governance body representative elections." Konstitucionnuj zakon Kyrgyzskoj Respubliki o statuse sudej Kyrgyzskoj Respubliki [Constitutional Law on the Status of Judges in the Kyrgyz Republic] July 9, 2008, No. 141, Article 26 (2).

[313] Konstitucionnuj zakon Respubliki Kazakhstan o Konstitucionnom Sovete Respubliki Kazakhstan [Constitutional Law on the Republic of Kazakhstan on Constitutional Council] December 29, 1995, No. 2737, Articles 2.

[314] *Id*. Article 4.

[315] *Id*. Article 10, 26.

[316] *Id*. Article 3, 5.

[317] *Id*. Article 15. A member of the Council may be subject to early dismissal in following cases: on the member`s own application; a guilty criminal verdict; a court judgment to apply compulsory medical measures; a disciplinary infringement incompatible with the calling of a judge and violation of the oath. Konstitucionnuj zakon Respubliki Kazakhstan o Konstitucionnom Sovete Respubliki Kazakhstan [Constitutional Law on the Republic of Kazakhstan on Constitutional Council] December 29, 1995, No. 2737, Articles 15.

[318] Konstitucionnuj zakon Respubliki Tajikistan o Konstitucionnom Sude Respubliki Tajikistan [Constitutional Law on the Republic of Tajikistan on Constitutional Court] November 3, 1995, No. 84, Articles 7,8.

[319] *Id*. Article 8.

		Apparatus of the Court		
Uzbekistan Constitutional Court	7 Judges[323] 35-70 years of age, specialists in the field of law and politics.[324]	Chairperson (elected among Judges), deputy chairperson and 5 Judges, Judge reporters designated for each case by the Chairperson [325] Apparatus of the Court	Appointed by Parliament upon submission of the President on the basis of proposal of the Supreme Judicial Council. Appointed for a term of 5 years and the same Judge cannot serve for more than 2 terms[326]	A judge may be dismissed from his/her post by the decision of Parliament on grounds listed in the Law[327]
South Korea Constitutional Court	9 Justices 40-70 years of age, has a higher legal education, a minimum of 15-year professional legal experience.[328]	President of the CC (appointed by President), Council of Justices, Justices, Rapporteur Judges. [329] Administration	"Justices are appointed by the President. In such case, from among the Justices, three shall be elected by the National Assembly, and three shall be nominated by the Chief Justice of the Supreme Court for the term of renewable 6 years."[330]	Justices may be dismissed based on the impeachment motion passed by the National Assembly.[331]
Taiwan Judicial Yuan	15 Justices[332]	President (Chief Justice), Vice President, Justices,	The 15 justices, including a president and a vice president of the	No judge shall be removed from office unless he has been

[320] *Id*. Article 8.
[321] *Id*. Article 9.
[322] *Id*. Article 14. A CC Judge may be subject to early dismissal in following cases: on the member`s own application; a guilty criminal verdict; a court judgment to apply compulsory medical measures; a disciplinary infringement incompatible with the calling of a judge and violation of the oath, loss of citizenship
[323] Konstitucionnuj zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Constitutional Law on the Republic of Uzbekistan on Constitutional Court] May 27, 2017, No. ЗРУ-431, Articles 5.
[324] *Id*. Article 16.
[325] *Id*. Article 5.
[326] Konstitucionnuj zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Constitutional Law on the Republic of Uzbekistan on Constitutional Court] May 27, 2017, No. ЗРУ-431, Articles 5.
[327] Konstitucionnuj zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Constitutional Law on the Republic of Uzbekistan on Constitutional Court] May 27, 2017, No. ЗРУ-431, Articles 23. A CC judge may be subject to early dismissal in the following cases: "on the judge's own application; health grounds (attested by a medical commission); a guilty criminal verdict; a court judgment to apply compulsory medical measures; loss of citizenship and violation of the oath.
[328] Constitutional Court Act, December 30, 2014, Act No. 12897, art.5,7,8 (S. Kor.), *translated* in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.)
[329] *Id*. Article 12,16
[330] Constitutional Court Act, December 30, 2014, Act No. 12897, art.6,7 (S. Kor.), *translated* in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.)
[331] *Id*. 8. Daehanminkuk Hunbeob [Hunbeob][Constitution] art.65 (S.Kor.).
[332] The Additional Articles of the Constitution of the Republic of China (Taiwan) art. 5, https://www.judicial.gov.tw/FYDownload/en/p07_2.asp?lawno=98 (last visited May 16, 2019)

		Rapporteur Judges administration.[333]	Judicial Yuan are nominated and, with the consent of the Legislative Yuan, appointed by the president of the Republic for the term of 8 years.[334]	guilty of a criminal offense or subjected to disciplinary measure, or declared to be under interdiction[335]

Jurisdiction of the Court	
Kyrgyzstan Constitutional Chamber (since 2010)[336]	1. Review constitutionality of normative legal acts (individual complaints included) 2. Review constitutionality of international treaties before ratification 3. Review constitutionality of constitutional amendments[337]
Kazakhstan Constitutional Council (since 1995)[338]	1. Review election and referendum 2. Review constitutionality of acts of parliament before promulgation.[339] Since 2017 after promulgation by the request of President[340] 3. Review constitutionality of international treaties before ratification 4. Official interpretation of the constitution.
Tajikistan Constitutional Court	1. Review constitutionality of normative legal acts 2. Review constitutionality of international treaties before ratification 3. Review constitutionality of constitutional amendments 4. Competence disputes between respective state officials 5. Individual complaint since 2008[341]
Uzbekistan Constitutional Court	1. Review constitutionality of normative legal acts 2. Review constitutionality of international treaties before ratification 3. Review constitutionality of Karakalpakstan autonomous Republic

[333] *Id*. Article 5.3.
[334] *Id*. Article 5.2.
[335] Minguo Xiandfa, Constitution of the Republic of China (1947), (Taiwan).
[336] In comparison with previous Constitutional Court that was suspended in 2010, the powers of Constitutional Chamber are much limited. For instance, previous constitutional court in addition to competencies that current CC posses used to be: review application of laws, interpret constitution, impeachment of president and judges, review the results of the elections. For more information see: Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnom Sude [Constitutional Law on the Constitutional Court of the Kyrgyz Republic] December 18, 1993, No. 1335-XII 37, Article 13.
[337] Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011, No. 37, Article 4.
[338] Before 1995, when Kazakhstan had Constitutional Court, the power of the Court was substantially larger, and it included individual complaints and the review of actions of state officials including the decisions of ordinary courts. For more information see Konstitucionnuj zakon Respubliki Kazakhstan o Konstitucionnom Sude Respubliki Kazakhstan [Constitutional Law on the Republic of Kazakhstan on Constitutional Court] June 5, 1992, Articles 10.
[339] Konstitucionnuj zakon Respubliki Kazakhstan o Konstitucionnom Sovete Respubliki Kazakhstan [Constitutional Law on the Republic of Kazakhstan on Constitutional Council] December 29, 1995, No. 2737, Articles 72.
[340] Konstitucionnuj zakon Respubliki Kazakhstan o Konstitucionnom Sovete Respubliki Kazakhstan [Constitutional Law on the Republic of Kazakhstan on Constitutional Council] December 29, 1995, No. 2737, Articles 17.
[341] Konstitucionnuj zakon Respubliki Tajikistan o Konstitucionnom Sude Respubliki Tajikistan [Constitutional Law on the Republic of Tajikistan on Constitutional Court] November 3, 1995, No. 84, Articles 34.

	Constitution and laws 4. Official interpretation of the Constitution 5. Review concrete cases upon referral of Supreme Court (since 2017) 6. Other competencies defined by law[342]
South Korea Constitutional Court	1. Constitutionality of statutes via judicial referral of ordinary courts 2. Impeachment 3. Dissolution of political parties 4. Competence disputes between governmental agencies 5. Constitutional complaint[343] (exercise or non-exercise of government power, excluding judgement of ordinary court)[344]
Taiwan Judicial Yuan	8. Power to interpret the Constitution and unify legal interpretations[345] 9. Individual complaints (since 1958, then confirmed in 1993)[346] 10. Competence dispute between respective official bodies (since 1993)[347] 11. Impeachment of President and VP (since 2005)[348] 12. Dissolution of political parties (since 1992)[349] 13. Review decisions of lower+ Supreme Court (will enter into force in 2022)[350]

This section aimed to reveal that in the context of Central Asia the politico-historical landscape and political economy were the main factors that shaped the origin of CCs, these

[342] Konstitucionnuj zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Constitutional Law on the Republic of Uzbekistan on Constitutional Court] May 27, 2017, No. ЗРУ-431, Articles 4.

[343] Constitutional Court Act, December 30, 2014, Act No. 12897, art.2 (S. Kor.), *translated* in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.). Daehanminkuk Hunbeob [Hunbeob][Constitution] art.111 (S.Kor.).

[344] Constitutional Court Act, December 30, 2014, Act No. 12897, art.68 (S. Kor.), *translated* in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.).

[345] Minguo Xiandfa, Constitution of the Republic of China (1947), Article. 78 (Taiwan).

[346] Constitutional Interpretation Procedure Act, February 3, 1993, art.5 (Taiwan). https://www.judicial.gov.tw/FYDownload/en/p07_2.asp?lawno=73 (lasted visited May 7,2019). Before the adoption of this act the individual complaint, mechanism was regulated by the 1958 Council of Grand Justices Act.

[347] *Id*. Art. 5

[348] The Additional Articles of the Constitution of the Republic of China (Taiwan) art. 2, https://www.judicial.gov.tw/FYDownload/en/p07_2.asp?lawno=98 (last visited May 16, 2019)

[349] Id. Art. 5(5)

[350] It is important to note that as a result of the comprehensive Judicial Reform in 2018 new Constitutional Litigation Act was adopted by the NA that substituted Constitutional Interpretation Act of 1993. The new Bill will enter into force in 2022, until that time within the period of 2018-2022 Judicial Yuan is not accepting cases. Under new revisions the Judicial Yuan will be empowered to review the decisions ordinary courts including the Supreme Court. It was modeled after the German Federal Constitutional Court (*Verfassungsbeschwerde*). For more information see Tzu-Yi Lin, Ming-Sung Kuo, Hui-Wen-Chen, *Seventy Years On: The Taiwan Constitutional Court And Judicial Activism In A Changing Constitutional Landscape*, 48 Hong Kong Law Journal, 1022-1025 (2018).

factors also continued influencing further major institutional adjustments that these courts have carried out.

For instance, once investors were attracted to Kazakhstan and some enterprises were privatized, an economic boom resulting from increased oil prices allowed Nazarbayev to consolidate power and to build an autocratic economic system that no longer needed a strong CC. Thus in 1995 Kazakh Constitutional Court was replaced with much weaker Constitutional Council[351], the competencies of which was substantially decreased. Kyrgyzstan, on the other hand sustained the initial institutional design of the CC for a long time because it needed continued investments and international support. However, after the 2010 Tulip Revolution the Constitutional Court was replaced with the Constitutional Chamber.[352] While Tajikistan and Uzbekistan initially created relatively less powerful courts, recently they seemed to be expanding jurisdictions of these courts, which was also dictated by political economic interests.[353] It is also important to note that as a result of the comprehensive 2018 Judicial Reform in Taiwan, a new *Constitutional Litigation Act* was adopted by the National Assembly that substituted *Constitutional Interpretation Act* of 1993. The new Bill will enter into force in 2022, until that time within the period of 2018-2022 Judicial Yuan is not accepting cases. Under new revisions the Judicial Yuan will be empowered to review the decisions of ordinary courts including the Supreme Court. It was modeled after the German Federal Constitutional Court (*Verfassungsbeschwerde*).[354]

[351] In more details this process will be discussed in next chapters
[352] Details will be discussed in Chapter 2 and Chapter 3
[353] Details will be discussed in next chapters.
[354] For more information see Tzu-Yi Lin, Ming-Sung Kuo, Hui-Wen-Chen, *Seventy Years On: The Taiwan Constitutional Court And Judicial Activism In A Changing Constitutional Landscape*, 48 Hong Kong Law Journal, 1022-1025 (2018).

In order to wrap up the institutional design and competencies of CCs a summary table was prepared for illustrative purposes.

Country	Judicial referral by ordinary courts	Individual complaint	Self-initiation of const. disputes	Review internat treaties	Abstract review	Impeach.	Disputes re Elections	Diss. of Pol. parties	Concrete Review	Competence dispute
Kazakhstan	Yes	No	No	Yes	Yes[355]	Yes	Yes	No	No	No
Kyrgyzstan (after 2010)	Yes	Yes	No	Yes	Yes	No[356]	No[357]	No	Yes	No
Tajikistan	Yes	Yes (after 2008)[358]	No	Yes	Yes	No	Yes (before 2014)[359]	No	Yes	Yes
Uzbekistan	Yes (after 2017)[360]	No	Yes	Yes	Yes	No	No	No	Yes (after 2017)	No
South Korea	Yes	Yes	No	No	No	Yes	No	Yes	Yes	Yes
Taiwan	Yes (since 1995)[361]	Yes (since 1958)	No	No	Yes	Yes (after 2005)	No	Yes (after 1992)	Yes (after 1995)	Yes (after 1993)

[355] Before 2017 amendments the Council could only exercise it *ex ante*, after 2017 constitutional amendments, the Council can exercise it *ex post* as well but only with upon the request of the President
[356] Before 2010 Constitutional Court had a power of reviewing the impeachment cases
[357] Before 2010 Constitutional Court had a power of reviewing the election cases
[358] Amendments were introduced to the law via ЗРТ 20.03.08 №368 Konstitucionnuj zakon Respubliki Tajikistan o Konstitucionnom Sude Respubliki Tajikistan [Constitutional Law on the Republic of Tajikistan on Constitutional Court] November 3, 1995, No. 84, Articles 14.
[359] New law on Constitutional Court was adopted see Konstitucionnuj zakon Respubliki Tajikistan o Konstitucionnom Sude Respubliki Tajikistan [Constitutional Law on the Republic of Tajikistan on Constitutional Court] November 3, 2014, No. 84, Articles 34.
[360] In 2017 amendments to Constitution and Constitutional Court Acts were introduced to include the judicial referral of ordinary courts. Konstitucionnuj zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Constitutional Law on the Republic of Uzbekistan on Constitutional Court] May 27, 2017, No. ЗРУ-431, Articles 4.
[361] JY Interpretation No.371, January 20,1995 (Constitutional Court, Taiwan)

8. Conclusion

This chapter pursued two main objectives. First, it aimed to identify the main factors and reasons behind the establishment of CCs in Central Asia. Second, to define how those factors and reasons shaped the institutional design of these courts. In order to meet these objectives, the chapter first explored the formation of CCs in the context of the Former Soviet Union. Then it revisited existing theories in comparative constitutional law on the origin of judicial review.

Furthermore, the chapter revealed that in the context of Central Asia, the insurance theory could not fully and accurately explain the origin of constitutional review. Instead, the thesis conveyed that the primary driven force and motive behind the establishment of these courts and behind the adoption of a certain institutional design was politico-economic interests of Central Asian states that have been shaped by the politico-historical and transitional context of Central Asia. In order to highlight principal points from this chapter, the following findings can be reiterated. First, the historical context revealed that the Soviet Union policy grounded on fear of Pan-Turkism and Pan-Islamism towards Central Asian created "*incoherent sense of stateness*"[362] that later had a tremendous negative impact once these states gain independence after the collapse of the Soviet Union. Second, the exploration of the transitional context revealed that the early transition in Central Asia was largely left in the hands of regime elites, the clan elites, old establishment and soviet political elite.

Third, the dissolution of Russian Parliament by President Yeltsin paved the way for presidents of Central Asia to choose the path of super-presidentialism. Current chapter demonstrated, as one of the principal features of Central Asian super-presidentialism can be

[362] Dagikhudo Dagiev, Regime transition in Central Asia: stateness, nationalism and political change in Tajikistan and Uzbekistan, (Routledge, Taylor & Francis Group, 2013)

highlighted the legal entrenchment of the special constitutional status for ex-presidents with extended immunity.

Finally, foreign policy choices in the early transitional period affected the institutional design choices of Central Asian CCs. Current foreign policy and geopolitics, namely the influence of Russia and China are presently seemed to be affecting the work and decision-making of Central Asian CCs.

Chapter 2 Dynamics of Constitutional Review of Mega Politics and Politically Sensitive Issues: Comparative Parallel of Central Asia and East Asia.

This chapter will review the jurisprudence of Central Asian and East Asian CCs in cases involving mega politics and politically sensitive issues. For the purposes of this chapter mega politics is understood as "*matters of outright and utmost political significance that often define and divide the whole polities*."[363] It is essential to highlight that these are not merely cases about ordinary mega-politics, rather they all have a transitional justice, regime transition, and regime legitimacy dimension. The central proposition of this chapter is that in the exceptional context of transitional justice, regime legitimacy, and transition, the protection of the legitimacy of the constitution becomes crucial as never before. This particular proposition justifies the selection of cases. The Chapter is divided into two parts: mega politics properly and pseudo mega politics. The first part will discuss cases that involved genuine political and constitutional conflicts with transitional justice and regime transition dimension. Kyrgyz Constitutional Chamber`s [364] decision on the constitutionality of decrees of the interim government will be analyzed in the context of regime legitimacy. Judicial Yuan`s decisions will be analyzed in the context of regime continuity in Taiwan. Finally, cases involving the criminal responsibility and immunity of former presidents will be analyzed in the context of Kyrgyzstan and South Korea.

The second half of the chapter will explore cases involving Kazakh, Tajik, and Uzbek CCs, where presidents used constitutional litigation as window dressing to maximize and

[363] Ran Hirschl, *The Judicialization of MegaPolitics and the Rise of Political Courts*, 11 Annual Review of Political Science, 93 (2008).
[364] Unlike in Kyrgyzstan other Central Asian CCs of Kazakhstan, Tajikistan and Uzbekistan were not actively involved in mega politics and have not yet faced the issues related to the regime change

legitimize their power. Therefore, it is entitled pseudo mega politics. A precondition of these types of cases is a particular type of constitutional/ competitive politics, to be specific the lack of such competitive politics in these states per se. Kyrgyzstan is not included among these states, since as it was mentioned in chapter 1 among all Central Asian states, despite the power maximization efforts of all presidents, genuine political competition could be observed in Kyrgyzstan. In such a political pluralism and political setting, most of Constitutional Court`s and later the Chamber`s decisions, unlike peer CCs of Central Asia constitute relatively genuine and proper constitutional adjudication, not a façade one like in other Central Asian CCs.

1. Part I Mega Politics Properly: Genuine Constitutional Conflicts

1.1. Regime Legitimacy: Kyrgyz Constitutional Chamber and Decrees of the Interim Government

After the 2010 Kyrgyz Revolution, also known as the April 2010 events, the *Interim Government* was established that ruled Kyrgyzstan by so called "decrees". These decrees regulated the establishment of interim government, suspension of major governmental bodies as parliament, constitutional court and nationalization of certain property.[365] Formally in the legal system of Kyrgyzstan there is no legitimate legal act as decree. The main law that regulates types of legal acts in Kyrgyzstan *is the law on normative legal act* and it identifies types of binding legal acts and their order in the system of hierarchy[366]. According to Article 6 of the *Law on Normative Legal Acts* Kyrgyzstan recognizes only the following acts as official and legitimate:

[365] Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 7 aprelya 2010 goda No. 1 o Vremennom Pravitel`stve KR 8 [The Decree of the Interim Government on the establishment of Interim Government of the KR] April 7, 2010, No. 7

[366] Zakon Kyrgyzskoi Respubliki o Normativno Pravovyh Aktah Kyrgyzskoi Respubliki [The Law of the KR on Normative Legal Acts of the Kyrgyz Republic] July 20, 2009 No. 241

constitution, constitutional law, codes, laws, presidential decrees, regulations of parliament, regulations of government, local self-government and other state authorities.[367] The adoption of aach of these acts must follow strict procedural and substantive rules of legality. However, despite this requirement, the Interim Government via decrees dissolved parliament[368], dismissed the executive[369], suspended the work of the constitutional court[370], and President have been forcefully removed from his office.[371] The *Interim Government* undertook the functions of these branches of power and identified decrees as a governing legal act even though these decrees were not in accordance with the law on normative legal acts.

During the ruling of the *Interim Government* a number of decrees have been adopted. Those decrees could be grouped into three categories. First, the decrees related to fundamental orders, second the decrees regulating the daily routine and politics and the last group concerned the nationalization of certain business objects that belonged to former president, his family and network. Overall there were 41 property objects nationalized by the decrees of interim government.[372]

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[367] Zakon Kyrgyzskoi Respubliki o Normativno Pravovyh Aktah Kyrgyzskoi Respubliki [The Law of the KR on Normative Legal Acts of the Kyrgyz Republic] July 20, 2009 No. 241

[368] Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 7 aprelya 2010 goda No. 1 o Vremennom Pravitel`stve KR 8 [The Decree of the Interim Government on the establishment of Interim Government of the KR] April 7, 2010

[369] *Id*

[370] *Id*

[371] Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 26 aprelya 2010 goda No. 30 o lishenii K.Bakieva statusa neprikosnovennosti. [The Decree of the Interim Government on lifting the immunity of K.Bakiev] April 26, 2010

[372] Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 3 iunya 2010 goda No.146 o Nacionalizacii zemel`nogo uchastka I nezhilogo pomeshenia, raspolojennyh po adresu: gorod Dzhalal-Abad, ul.Kurmanbeka,8 [The Decree of the Interim Government on Nationalization of the Land Plot and non-residential premises located in Dzhalal-Abad city Kurmanbeka street 8] June 3, 2010, No. 146

Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 3 iunya 2010 goda No.60 o Nacionalizacii obshestva s ogranichennoi otvetstvennost`u Tashkomyr [The Decree of the Interim Government on Nationalization of the Limited Liability Company Tashkomyr] June 3, 2010 No. 60

Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 12 avgusta 2010 goda o Nacionalizacii 13.21 procenta akciy otkrytogo akcionernogo obshestva Kantskiy Cementniy Zavod [The Decree of the Interim Government on nationalization of the 13.21% of the shares of open joint stock company Kant Cement Factory] August 12,2010 No.

1.1.1. The Case Concerning the Decrees of the Interim Government (2010)

Background of the case

Once the Constitutional Chamber was formed the applicants applied to the Chamber challenging the constitutionality of decrees.[373] Their main argument was that according to Article 12 of the Constitution, nationalization of private property can be made strictly in accordance with the law and with the compensation of the value of such property. Furthermore, appropriation of property can be made only upon the decision of the court. The applicants claimed that during the nationalization of their property due process of law rules were not

121 Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20 maya 2010 goda No. 48 o Nacionalizacii zemel`nogo uchastka I obektov obshestva s ogranichennoi otvetstvennost`u Pansionat Vityaz [The Decree of the Interim Government on nationalization of the land plot and the objects of the limited liability company Vityaz Resort] May 20,2010 No. 48 Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 19 iulya 2010 goda No. 99 o nacionalizacii obektov ozdorovitelno-turisticheskogo kompleksa Avrora Grin [The Decree of the Interim Government on nationalization of the objects of touristic complex Aurora Green] July 19,2010 No. 99
Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 43 o nacionalizacii zemelnogo uchastka I letinogo zhilogo kompleksa Avrora Plus [The Decree of the Interim Government on nationalization of land plot Aurora Plus] 20.05.2010 No. 43. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 44 o nacionalizacii 49% aksiy ZAO Alfa Telekom [The Decree of the Interim Government on nationalization of 49% shares of closed joint stock company Alfa Telekom] 20.05.2010 No. 44. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 45 o nacionalizacii zemelnogo uchastka OsOO Tera Nova [The Decree of the Interim Government on nationalization of land plot of the LLC Tera Nova] 20.05.2010 No. 45. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 47 o nacionalizacii zemelnogo uchastka OsOO Sanvei [The Decree of the Interim Government on nationalization of land plot of the LLC Sanvei] 20.05.2010 No. 47. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 48 o nacionalizacii zemelnogo uchastka pansionat Vityaz [The Decree of the Interim Government on nationalization of land plot of the Vityaz Resort] 20.05.2010 No. 48. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 49 o nacionalizacii administrativnogo zdania, nahodyashegosya po adresu Bishkek bulvar Erkindik 39A [The Decree of the Interim Government on nationalization of administrative building located in Bishkek boulevard Erkindik 39A] 20.05.2010 No. 49

[373] Owners of the expropriated properties have particularly challenged the constitutionality of following decrees: Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 3 iunya 2010 goda No.60 o Nacionalizacii obshestva s ogranichennoi otvetstvennost`u Tashkomyr [The Decree of the Interim Government on Nationalization of the Limited Liability Company Tashkomyr] June 3, 2010 No. 60. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 12 avgusta 2010 goda o Nacionalizacii 13.21 procenta akciy otkrytogo akcionernogo obshestva Kantskiy Cementniy Zavod [The Decree of the Interim Government on nationalization of the 13.21% of the shares of open joint stock company Kant Cement Factory] August 12,2010 No. 121 Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20 maya 2010 goda No. 48 o Nacionalizacii zemel`nogo uchastka I obektov obshestva s ogranichennoi otvetstvennost`u Pansionat Vityaz [The Decree of the Interim Government on nationalization of the land plot and the objects of the limited liability company Vityaz Resort] May 20,2010 No. 48 Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 19 iulya 2010 goda No. 99 o nacionalizacii obektov ozdorovitelno-turisticheskogo kompleksa Avrora Grin [The Decree of the Interim Government on nationalization of the objects of touristic complex Aurora Green] July 19,2010 No. 99

followed, there was no judicial decision and neither regulated by the law, since decrees could not be considered as the normative legal acts in strict sense.[374]

This particular case was a challenge for the Chamber, because the acceptance of the case would confirm the rule of exception and reject rule of law. On the other hand, the rejection of the complaint by the Chamber would question the legitimacy these decrees as well as entire constitutional system of Kyrgyzstan, starting with the basic law and ending with the legitimacy and legality of all institutions. This decision would have opened a pandora`s box for other potential cases involving decrees not only limited to nationalization of property but also to other fundamental decrees on the establishment of the Interim Government, on constitutional reforms and etc. However, on the other hand, rejecting the legal force of these decrees could have potentially reinforced the rule of law and reject the rule of exception. The Chamber was able to resolve this dilemma and after five months it announced the final decision.

It is important to note that procedurally the Chamber can adopt only two types of judicial acts: ruling at the level of admissibility and decision on merits. When the Chamber accepts the case and writes a decision on merits it can only say whether the challenged law is constitutional or not.[375] However, in this case the Chamber adopted a doctrine akin to US doctrine of political question in *Baker v. Carr*[376], namely published its decision, the rationale behind it and yet defer the final decision-making to political branches. Therefore, this case was somewhat unique in the history of constitutionalism in Kyrgyzstan and overall in Central Asia. At the same time, it is

[374] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverki konstitucionnosti dekretov Vremennogo Pravitelstva KR o nacionalizasii ot 11 iulya 2014 goda [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on case involving the constitutionality of decrees of Interim Government of the Kyrgyz Republic on nationalization] July 11, 2014

[375] Konstitucionniy zakon Kyrgyzskoi Respubliki o Konstitucionnoi Palate Verhovnogo Suda Kyrgyzskoi Respubliki ot 13 iunya 2011 goda No. 37 [Constitutional law of the Kyrgyz Republic on Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011 No. 37, art. 46

[376] Baker v. Carr, 369 U.S. 186 (1962)

important to highlight the Kyrgyz CC`s approach to what is a political question seems to be different from the *Baker`s* approach. Because the application of *Baker`s* approach, in this case, would revolve around the absence of constitutional standards on whether such decrees were necessary to solve a crisis. However, at the same time, the question of whether the constitution leaves room for such exceptional legal measures is a constitutional question, not a political. Therefore, before analyzing the Kyrgyz CC`s decision, it essential to clarify this point.

Analysis of the decision

The starting point of the decision was to identify the root causes of the decrees. The chamber emphasized that power transition to *Interim Government* was a result of the socio-political crisis due to the events prior to April 2010. Resembling examples of power transition in Chamber`s observation was not unique to Kyrgyzstan and can be noticed in other different states as well.[377] The decision continued that socio-political crisis is an objective process that reflects the political realities in the society.[378] When this crisis reaches the highest point it usually leads to political disorganization and to the total loss of control of power by official state bodies. Most of the times to avoid further confrontation most decisions during this period of crisis are based upon on the consensus of key subjects of political process. Usually those subjects are temporarily invested with political power on decision-making and that power is targeted for two main objectives. First, to stabilize socio-political situation. Second, to overcome the crisis and

[377] This part of the decision is a good added case for the ex-nihilo type of constitution-making. For more information see Claude Klein, András Sajó, *Constitution-Making: Process and Substance*, in Michel Rosenfeld, András Sajó (ed.) The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012).

[378] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverki konstitucionnosti dekretov Vremennogo Pravitelstva KR o nacionalizasii ot 11 iulya 2014 goda [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on case involving the constitutionality of decrees of Interim Government of the Kyrgyz Republic on nationalization] July 11, 2014

maintain order and security. For this particular purpose the *Interim Government* was created post April 2010 events.[379]

The Chamber further noted that in the context of interim governments it is important to distinguish between legality and legitimacy. In the socio-political context formally, the *Interim Government* is deemed not legal in strict sense because institutional basis of the government does not fulfill all formal elements of law. However, the *Interim Government* is legitimate because legitimacy is about trust of the people and during the turbulent time the *Interim Government* was entrusted with certain powers by the people. Thus, the *Interim Government* of the transitional period as a legitimate subject of political power, undertook the responsibility to conduct constitutional reforms and to form the new constitutional and political order.[380] Chamber continued that to pursue this goal and objective it was necessary for the *Interim Government* to undertake certain measures and at the extraordinary moment it was possible only via the regulation of decrees, even if formally these decrees did not fulfill the procedural requirements of law[381].

After analyzing the socio-political context during which the *Interim Government* existed, the Chamber moved to the analysis of the necessity and reason behind expropriation of properties. In Chamber`s view nationalization of objects was driven by the necessity of restoration of social justice.[382] Formally it was impossible to fulfill requirements of legality due to de-legitimization of Parliament during that time. De facto absence of formal legislative branch as Parliament precluded the possibility of fulfilling the formal rules of the legality.[383]

[379] *Id* at. 13
[380] *Id* at. 15
[381] *Id* at. 16
[382] *Id* at. 18
[383] *Id* at. 18

The Chamber concluded that the decision on adoption of these decrees was of political nature required by the exigency of the circumstances. Furthermore, the Chamber emphasized that under the Constitution of KR constitutional review is intended solely to decide questions of law not politics. The Constitutional Chamber emphasized that this requirement of division between law and politics requires the Chamber from refraining of evaluating factual circumstances of issues related to competence of other political branches. This restriction according to the Chamber is derived from the constitutional principle of separation of power and serves as an essential guarantee of protecting the judiciary from the penetration of elements ideology and political preferences.[384]

Consequently, the Chamber refused from evaluating the constitutionality of decrees adopted by the *Interim Government* and deferred it to other branches, particularly to the executive. The Chamber concluded that for the purpose of detailed examination of the issues covered by the disputed decrees and ensuring interested parties` right to access to justice, the Government of the KR shall take appropriate measures, namely develop a mechanism for resolving dispute within the existing legal framework.[385]

Aftermath

The decision was one of the first rulings adopted by the Chamber after its establishment. With the help of the political question doctrine the court was able to avoid the actual decision-making and yet formally adopt the judicial act with full reasoning justifying the conclusion of the chamber. Furthermore, the Chamber was able to bring decrees back to the legal realm by requesting the government to establish the mechanism for settlement of the dispute. The decision of the Chamber was implemented only after 5 years, on December 2018 the Government of the

[384] *Id* at. 20
[385] *Id* at. 21

Kyrgyz Republic adopted the regulation on the establishment of the commission to review the cases related to nationalized properties via the decrees of the interim government.[386]

The question was highly sensitive for the entire legal system of the Kyrgyz Republic, by adopting a deferential approach the Chamber was able to facilitate transition of the power smoothly by avoiding other potential cases involving decrees of the *Interim Government* that would have emerged had the court found the decrees unconstitutional. However, the legal community of Kyrgyzstan did not perceive the case positively, there was misunderstanding on the notion of political question doctrine and some experts found the decision to be fundamentally wrong since it was grounded on political accounts rather than legal.[387]

The legitimacy and legality of the actions of *Interim Government* and decrees constitute a very sensitive question up to date: based on these decrees former president Bakiev and his family members were investigated by the General Prosecutor and found guilty by the court in absentia with sanctions up to life imprisonment.[388] Among the convicted people for corruption and embezzlement charges was the leading lawyer of the Bakiev`s family, Eliseev[389] who is currently

[386] Postanovlenie Pravitelstva Kyrgyzskoi Respubliki ob utverzhdenii polojenia o poryadke rassmotrenia obrasheniy bychshih sobstvennikov imushestva, nacionalizirovannogo v sootvetsvii s dekretemai vremennogo pravitel`stva Kyrgyzskoi Respubliki v 2010 godu, o vosstanovlenii imushestvennyh prav ot 25 Dekabrya 2018 goda No. 619 [Resolution of Government of the Kyrgyz Republic on adoption of the regulation on complaint procedure for restoration of property rights of former property holders whose assets were nationalized by the decrees of the Interim Government in 2010] December 25, 2018 No. 619

[387] Pravovaya Klinika Adilet, Kratkiy Pravovoi Analiz reshenia Konstitucionnoi palaty Verhovnogo Suda Kyrgyzskoi Respubliki ot 11 iulya 2014 goda po delu o proverke konstitucionnosti Dekretov Vremennogo Pravitel`stva KR [Legal Analysis of the decision of the Constitutional Chamber of the KR as of July 11, 2014 on reviewing the constitutionality of decrees of Provisional Government], (Bishkek: Legal Clinic Adilet, 2014).

[388] Prigovor Pervomaiskogo Rayonnogo Suda goroda Bishkek v otnoshenii M. Bakieva I drugih ot 7 maya 2016 goda [Sentencing decision of the Pervomaiskiy District Court of Bishkek in relation to M.Bakiev and others] May 7,2016

Prigovor Voennogo Suda Bishkekskogo garnizona po sobytiam 7 aprelya 2010 goda ot 21 iulya 2014 goda [Sentencing decision of the Military Court of Bishkek Garnizon on the events of April 7th, 2010] July 21, 2014

Postanovlenie Verhovnogo Suda Kyrgyzskoi Respubliki po sobytiam 7 aprelya 2010 goda ot 29 iulya 2016 goda [Resolution of the Supreme Court of the Kyrgyz Republic on the events of 7th April 2010] July 29, 2016

[389] Prigovor Pervomaiskogo Rayonnogo Suda goroda Bishkek v otnoshenii M. Bakieva I drugih ot 7 maya 2016 goda [Sentencing decision of the Pervomaiskiy District Court of Bishkek in relation to M.Bakiev and others] May 7,2016

under the asylum status in Latvia. He had been continuously blaming the *Interim Government* for violating his due process rights and for illegally nationalizing his assets and property and accordingly he applied against the actions of the *Interim Government* to the UN human rights committee and the case is pending.[390] In the list of the requested state officials to be accountable for the violation of his rights he indicated members of the interim government, general prosecutor and all judges of the Constitutional Chamber for not invalidating the decrees.

1.2. Regime Continuity and the Judicial Yuan of Taiwan

In Taiwan the Judicial Yuan dealt with a number of politically sensitive questions, particularly on issues involving the constitutional amendments and transitional justice. The issue of constitutional amendment up until now is considered to a sensitive questions due to the historical context of this document and the relationship of Taiwan with China. When faced with politically sensitive questions the Court seemed to be adopting a reactive approach on most of the issues, namely it was deeply dependent on political context and public demands. However, with respect to transitional justice the Court unlike in South Korea demonstrated itself to be more conservative.[391] It is also worth noting that besides these decisions there was a pattern of gradual extension constitutional review power in Taiwan through constitutional amendments and statutory and judge made as well.[392]

[390] Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2163/2012, CCPR, 28 July 2017

[391] Jou Juo Chu, *Global Constitutionalism and Judicial Activism in Taiwan*, 38.4 Journal of Contemporary Asia, 520-530 (2008).

[392] For instance, on May 27, 1992 at the second amendment to the Constitution justices of the Judicial Yuan were empowered to adjudicate on the dissolution of political parties. Within the July 1997 Amendments following changes were introduced: "The budget of the Judicial Yuan shall be independent, no longer requiring the approval of the Executive Yuan" Besides constitutional amendments powers and jurisdiction of the Judicial Yuan was expanded via ordinary law and interpretations of the court. Standing requirements before the Judicial Yuan were loosened by the Constitutional Interpretation Procedure Act (1993) congressional minorities became able to challenge the constitutionality of laws by petitioning the Court. Standing requirements were loosened to include judges of different level (judicial referral) Interpretation 371 (1995). Power to invalidate constitutional amendments

The current ROC (Republic of China) Constitution of Taiwan has undergone a number of constitutional amendments[393] and the process of constitution-making in Taiwan is dubbed by scholars as incremental.[394] There are specific reasons for keeping the ROC Constitution and changing it incrementally instead of adopting a completely new text. The ROC Constitution is still a symbol and hope for the reunion of Taiwan and China. The KMT (Nationalist Party of China) in 1928 reunified China and the mainland China was known as Republic of China (ROC) while Taiwan was under the rule of Japan. After the WWII Taiwan was reunited with the ROC and on December 15, 1945 the National Assembly adopted the first Constitution of the ROC. However, in 1949 as a result of the civil war, the Communist Party gained control over the territory of the mainland China and announced the establishment of the People`s Republic of China. ROC maintained control over the island of Taiwan and retained hope for the fall of the Communist regime in mainland China and regaining the ROC control over it.[395] To achieve this goal and National Assembly of ROC introduced temporary provisions to the ROC Constitution on April 1948 and announced the Martial Law throughout Taiwan. The temporary Provisions enhanced the presidential powers particularly the emergency powers.

In 1954 the Judicial Yuan (Constitutional Court of Taiwan, later *used* as Judicial Yuan) in *Interpretation No. 31* was asked if members of Legislative and Control Yuans be allowed to remain in their offices without reelection? According to Article 62 of the ROC Constitution the

(Interpretation 499). Power to adjudicate vertical SOP (Local Government Act). Finally, the Referendum Act, enacted in 2003, also prescribed that referendum disputes regarding the vertical separation of powers should be settled in accordance with the Court's constitutional decisions. Owing to these revisions, the Court has more opportunities to step into the political arena.

[393] Jiunn-Rong Yeh, *Constitutional Reform and Democratization in Taiwan, 1945-2000,* in Peter C.Y.Chow (ed.) Taiwan`s Modernization in Global Perspective, 47 (Praeger Publishers, 2002).

[394] For more information on amendments see Wen-Chen Chang, *Chapter 7 Comparative Discourse in Constitution Making: An Analysis on Constitutional Framers as Dialectic Agent*, in Lo, Chang-fa, Li, Nigel, Lin, Tsai-yu (eds.) Legal Thoughts between the East and the West in the Multilevel Legal Order, (Springer, 2016).

[395] For more on this issue see Linda Chao, Ramon Myers, The First Chinese Democracy:Political Life in the Republic of China on Taiwan (The Johns Hopkins University Press, 1998).

term of the Legislative Yuan was 3 years and 6 years for the Control Yuan. Since the ROC constitution was not amended yet and there was a strong symbolic belief in the reunification for ROC, thus it was important to hold elections both in mainland China and Taiwan. The Judicial Yuan allowed sitting members of Legislative Yuan, Control Yuan and National Assembly respectively to remain in their offices. The Judicial Yuan justified it by the existence of "*severe calamity*"[396] that Taiwan was undergoing. In late 1980s and beginning of 1990s it was evident for the public as well as for the KMT that things have changed radically and National Assembly on April 1991, decided to revoke the Temporary Provisions and end the martial law.[397]

Due to the temporary provisions and the *Interpretation No. 31* of the Judicial Yuan, the members of the National Assembly and Legislative Yuan were not re-elected for more than 40 years. As indicated by scholars to end the "*indefinite extended-term Congress and seeking comprehensive re-election had always been an important goal of Taiwan's democratic reform camp."*[398] Thus, by early 1990s public anxiety and desire to end this "indefinite extended-term Congress" led to massive demonstrations dubbed "Wild Lily Student Movement" that demanded constitutional reforms to end "indefinite-extended term" of the National Assembly.[399]

1.2.1. Interpretation No. 261 (1990)

Background of the case

Accordingly, the changed circumstances, namely end of the Martial Law in Taiwan led the Legislative Yuan to file a complaint to the Judicial Yuan and doubting the application of

[396] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 31 (1954).
[397] Harvey J. Feldman, (ed.), Constitutional Reform and the Future of the Republic of China, 3-30 (New York: M.E. Sharpe, 1991).
[398] Jau-Yuan Hwang, Fort Fu-Te Liao, Wen-Chen Chang, *Development of Constitutional Law and Human Rights in Taiwan Facing the New Century*, 24 IDE Asian Law Series, 90-96 (2003).
[399] Chien-Chih Lin, *The Judicialization of Politics in Taiwan*, 3 Asian Journal of Law and Society, 311 (2016).

Judicial Yuan `s Interpretation No.31. Applicants requested the constitutional interpretation and raised the following question: "*Should the first-term national representatives be allowed to exercise their powers indefinitely without periodical reelection*?"[400] Meanwhile the KMT internally had been experiencing a generational clash: younger generation wanted the members of the First National Assembly to retire, on the other hand they were not willing to do it voluntarily. Furthermore, as scholars suggested "*the justices apparently heard the earnest demands for democratic reforms from Taiwan's society*"[401]

Analysis of the decision

The Judicial Yuan first and foremost started its reasoning by referring to the terms of office of members of the Legislative and Control Yuans in the Constitution. It said that these terms are expressly written in the Constitution and due to "severe calamities" that the nation of Taiwan experienced it was practically impossible to hold elections after the expiration of their terms. Extension of the terms without elections by Interpretation 31 was necessary at given circumstances to preserve and maintain constitutional system. However, the Judicial Yuan said that Interpretation 31 never intended to "*permit indefinite exercise of powers by national representatives nor prohibit the government from holding next-term elections*".[402] Thus, the Judicial Yuan concluded that given the changed circumstances and to cope "*with present situation*" the first-term national representatives that have not been re-elected shall cease terminate their powers by December 31, 1991.[403] Finally, the Judicial Yuan ordered the Government to develop a plan and regulations in accordance with the Constitution and

[400] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 261 (1990).

[401] Chien-Chih Lin, *The Birth and Rebirth of the Judicial Review in Taiwan - Its Establishment, Empowerment, and Evolvement*, 7.1 National Taiwan University Law Review, 190-96 (2012).

[402] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 261 (1990).

[403] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 261 (1990).

Interpretation of the Judicial Yuan on holding the next elections for the national representatives in timely manner.

Aftermath

This Interpretation of the Judicial Yuan ended the "indefinite extended-term Congress."[404] Followed by the interpretation, the first constitutional amendment was introduced to the ROC Constitution by the National Assembly on April 1991 that regulated important issues such as the basis of elections, number of representatives, electoral methods and term of office.[405] Most importantly upon the Interpretation of the Judicial Yuan, national elections were stipulated to be held in Taiwan not in the mainland China.[406] Some scholars argued that the Judicial Yuan in its *Interpretation No. 261* transformed the constitutional identity of Taiwan and had to give analysis and answers to one of the most sensitive socio-political questions for the nation of Taiwan.[407]

One could ask what made the Judicial Yuan to change opinion of the same question from *Interpretation No. 31*. Scholars argued that the Judicial Yuan in issues regarding politically sensitive questions have adopted most of the times reactive approach, in other words if there was an evident or "*potential political consensus the Court would clearly state what the political majority expected in constitutional terms*."[408] Even though this outcome of the court was a complete opposite to its previous decision in *Interpretation No. 31* overall political context and the scholarly opinion suggest that "*a national consensus to undergo the democratization and to*

[404] Jau-Yuan Hwang, Fort Fu-Te Liao, Wen-Chen Chang, *Development of Constitutional Law and Human Rights in Taiwan Facing the New Century*, 24 IDE Asian Law Series, 90-96 (2003).
[405] See additional Articles of the Constitution of the Republic of China adopted by the second extraordinary session of the First National Assembly on April 22, 1991, and promulgated by the president on May 1, 1991
[406] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 261 (1990).
[407] Chien-Chih Lin, *The Judicialization of Politics in Taiwan*, 3 Asian Journal of Law and Society, 307 (2016).
[408] Wen-Chen Chang, Li-ann Thio, Kevin YL Tan, Jiunn-rong Yeh, Constitutionalism in Asia: Cases and Materials, (Hart Publishing, 2014).

suspend the old parliament had already been reached in the National Affairs Conference amidst unprecedented street protests and student demonstrations in March 1990, three months before the Court's decision."[409] Some scholars viewed this decision as judicialization of politics and activist approach of the Judicial Yuan.[410] However, looking closely at the *Interpretation No. 261* one cannot but notice that the Judicial Yuan was simply reinstating the provisions in the Constitution and interpreting them explicitly that it could not do in 1954.

1.2.2. Interpretation No. 272 (1991)

Background of the case

Despite the fact that *Interpretation No. 261* set the tone for the willingness of the Judicial Yuan to actively foster the further democratization of Taiwan, in certain issues the Judicial Yuan remained conservative. Namely in issues involving transitional justice unlike its peer in South Korea the Judicial Yuan took the position of preserving the legitimacy of the regime.

Shortly after the martial law ended in Taiwan the *National Security Act during the Period of National Mobilization of Suppression of the Communist Rebellion* (1978) was enacted.[411] Article 9 of the Act stipulated the following: "*those who are not in active military service may not appeal the final court decisions with respect to criminal cases adjudicated in the military tribunals during the period of the Martial Law to the competent court subsequent to the abolishment of the Martial Law*".[412] Three individuals, previous convicts by the military courts challenged the constitutionality of the Act and requested the Judicial Yuan for interpretation.

[409] Wen-Chen Chang, Li-ann Thio, Kevin YL Tan, Jiunn-rong Yeh, Constitutionalism in Asia: Cases and Materials, (Hart Publishing, 2014).
[410] Chien-Chih Lin, *The Judicialization of Politics in Taiwan*, 3 Asian Journal of Law and Society, 307 (2016).
[411] For more information on democratic transformation in Taiwan see Jiunn Rong Yeh, *Democracy-driven Transformation to Regulatory State: The Case of Taiwan*, 3.2. National Taiwan University Law Review, 33 (2008).
[412] National Security Act during the Period of National Mobilization of Suppression of the Communist Rebellion, 1978, art.9 (Taiwan).

Analysis of the decision

The Judicial Yuan found the Act constitutional and justified its decision by the existence of necessary and exceptional circumstances under the martial law system. The Judicial Yuan started analyzing the constitutional provision that the Act was assumed to be contradicting, namely Article 9. This Article expressly stated that "*except for those who are in active military service, no person shall be subject to trial by a military tribunal*." However according to the Judicial Yuan due to the martial law most of the cases that could not be adjudicated by civil courts "were uniformly adjudicated by a military tribunal"[413], and there were exceptions recognized by the martial law and temporary provisions of the Constitution. Furthermore the Judicial Yuan concluded that even if the martial law was lifted, the reason behind not allowing the appeal before civil courts was "*due to the long-term enforcement of the Martial Law, the difficulty in gathering and investigating evidence after such a long period of time has elapsed and circumstances changed, and the need for maintaining the stability of judgements and social order*"[414]

Aftermath

This conservative ruling of the Judicial Yuan on transitional justice as argued by scholars had set the tone for further cases revolving around this issue. Specifically, when faced with similar cases, the Judicial Yuan almost always "constrained by *Interpretation No. 272*, simply recognized and enlarged the scope of monetary compensation in later decisions without reaching a more liberal conclusion."[415] Root causes of this conservative approach could be grounded on political context and power dynamics, particularly within the KMT. When the Judicial Yuan

[413] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 272 (1991).
[414] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 261 (1990).
[415] Chien Chin Lin, Autocracy, Democracy, and Juristocracy: The Wax and Wane of Judicial Review in the Four Asian Tigers, 48 Georgetown Journal of International Law, 1138 (2017).

adopted the Interpretation 261, the KMT internally was divided between younger and older members. However, on issues of transitional justice the KMT had a shared view on it, namely "*the KMT government had been reluctant to face this issue, since it was the ruling party that committed these crimes; the DPP government had been unable to tackle this issue because it was paralyzed by political stalemate*."[416] After a while, the Judicial Yuan was again involved in the mega politics.

1.2.3. Interpretation No. 499 (2000)

Background of the case

On September 1999 the National Assembly introduced the fifth constitutional amendment that contained a controversial provision to extend the terms for Legislative Yuan and National Assembly till June 2002, although next elections were supposed to be held on December 2001.[417] It had been long argued especially after the fall of the martial law and further democratization of Taiwan`s constitutional system, that the National Assembly`s monopoly on amending the constitution shall be revised. In March 2000 presidential elections took place and for the first time in Taiwan's history the candidate from DPP was elected as president.[418] Several members of the Legislative Yuan filed a constitutional complaint against the recent amendments adopted by the National Assembly.

Applicants argued that there were number of procedural flaws during process of adoption of the amendments. Namely, anonymous ballots were used by members of the NA and the same provisions of the introduced amendments were voted twice.

[416] Chien-Chih Lin, *The Judicialization of Politics in Taiwan*, 3 Asian Journal of Law and Society, 307 (2016).
[417] Gang Lin, *Taiwan's Constitutional Reform: Domestic Inspiration and External Constraints,* 125 ASIA PROGRAM SPECIAL REPORT, (2004).
[418] James Robinson, Deborah Brown, *Taiwan`s 2000 Presidential Election*, 44.4 Orbis, 599 (2000).

Applicants also highlighted substantive flaws in the introduced amendments. First, they claimed that the self-extension of the term for members of the NA and Legislative Yuan was not acceptable by the Constitution. Second, the substitute of the elections of NA members with appointment by political parties according to applicants was in contradiction with Article 25 of the Constitution that expressly states that NA exercises its power on behalf of citizens. On March 2000 the Judicial Yuan in Interpretation No. 499 announced that fifth amendments to Constitution as of 1999 should be considered void and the Constitution amended as of 1997 would remain in force.

Analysis of the decision

Before analyzing the substantive part of the decision, it is important to highlight the arguments brought by the NA representatives. The NA members claimed that this case was not justiciable before the Court for two reasons. First, challenged provisions were already amended to the constitution and became the integral part of the text and "*there can be no contradiction among constitutional provisions*".[419] Second, the jurisdiction of the Judicial Yuan is listed in Article 4 of the *Constitutional Interpretation Procedure Act*[420] that reflect the powers of the Judicial Yuan written in the constitution as well. They claimed that since the constitutional text was silent about Judicial Yuan `s power on annulling the constitutional amendment, the Judicial Yuan was not empowered invalidate constitutional amendments.

When responding to this argument it seemed that the Judicial Yuan was inspired by the US Supreme Court`s decision *Marbury v. Madison*. The Judicial Yuan started with the text of the

[419] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000).

[420] Article 4 stipulates the following: "*The matters for which the Justices shall interpret the Constitution are as follows: Matters concerning doubts and ambiguities in the application of the Constitution; Matters concerning the constitutionality of statutes or regulations; Matters concerning the constitutionality of laws governing the self-government of provinces and counties, and regulations promulgated by. The matters for above-mentioned interpretation shall be limited to those specifically enumerated by the Constitution*." http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).

Constitution, namely Article 78 which stipulated that the "*Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders*".[421] Besides Article 78 the Judicial Yuan emphasized that the constitution also contained expressed provisions which state the following. Article 171 empowers the Judicial Yuan to issue interpretations when there is a doubt or conflict between rules, regulations and national law. Article 171 expressly states that "*Laws that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation shall be rendered by the Judicial Yuan*".[422] Finally, the Judicial Yuan specifically highlighted Article 173[423] and its drafting history to conclude that Judicial Yuan was empowered to review constitutional amendments well. First, the Court stated that Article 173 was part of the chapter 14 titled "Implementation and Amendment to the Constitution". The Court said that cross referencing the Judicial Yuan in Articles 171 and 173 was evident that the Judicial Yuan was not only empowered to generally interpret constitution and meaning of laws "*but it is also to entail the power of Justices of the Judicial Yuan to cover any issues and doubts on the implementation and amendment of the Constitution*".[424] The Judicial Yuan also analyzed its precedents and finally reached the conclusion that this case was justiciable.

Furthermore, on the merits the Judicial Yuan found procedural as well as substantive violations with respect to introduced amendments. On procedural flaws the Judicial Yuan

[421] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000). Available in English at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).

[422] Zhonghua Minguo Xianfa art. 52 [Constitution of the Republic of China, ROC] (1947) art. 171 (Taiwan). Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000). Available in English at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).

[423] Article 173 stipulated the following: "The Constitution shall be interpreted by the Judicial Yuan." Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000). Available in English at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).

[424] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000). Available in English at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).

expressly stated that any constitutional amendment procedure has to strictly follow the "*due process to ensure that the will of the public is indeed fully taken into consideration*".[425] In this case Judicial Yuan stated that the use of anonymous ballots and double voting on the same provisions violated principles of openness and transparency[426] that constitute key element of the due process. These procedural flaws in the opinion of the Judicial Yuan were in violation of Article 133 of the Constitution and "*has violated the fundamental rule to render any constitutional amendment effective*".[427]

The Court also made an important remark on autonomy and internal regulation of NA. Members of the NA argued that that there are certain internal rules that cannot be within the purview of the judicial review and the process of amendment is one of them. The Judicial Yuan on the other hand replied that "*not all parliamentary proceedings that are clearly and grossly flawed may take the pretext of being internal, self-regulatory matters and evade their legal consequences*".[428]

Finally, on substantive grounds the Judicial Yuan made following important statements. First, Justices agreed that constitutional amendments once amended have the same status as other constitutional provisions. However, the Judicial Yuan further continued that not all amendments automatically have to be deemed constitutional. Amendments cannot alter and change "*fundamental nature of governing norms and orders, and the foundation of the Constitution`s*

[425] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000). Available in English at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).
[426] These principles are stipulated in Article 38 paragraph 2 of the regulations of the National Assembly Proceedings
[427] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000). Available in English at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).
[428] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000). Available in English at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).

very existence".[429] According to the Judicial Yuan such principles as democratic republic, sovereignty of people, fundamental rights and freedoms, checks and balances constitute the "*most critical and fundamental tenets of the Constitution as a whole*".[430] Thus, any amendment aimed at altering these tenets shall be considered void. The self-extension of the terms by the members of the NA and abolition of the elections of NA members according to the Judicial Yuan is nothing but the violation of fundamental tenets of the Constitution, namely democratic republic and sovereignty of people. Thus, the Judicial Yuan announced that fifth amendments to Constitution as of 1999 should be considered void and the text of the 1997 Constitution would remain in force.

In many aspects this decision can be viewed as extraordinary and one can notice the self-extension of the judicial review power in Taiwan by introducing the power to invalidate unconstitutional constitutional amendments. Thus, this Interpretation to a certain extent can be considered as the Taiwan`s *Marbury v. Madison*.

Aftermath

The decision of the Judicial Yuan as noted by scholars "*was highly praised and welcomed by the general public*".[431]On April 2000, one month after the decision of the Judicial Yuan the National Assembly passed the 6th amendment to the Constitution which stipulated that the Legislative Yuan was expected to propose amendments to the Constitution for the vote before the NA. The power to recall and impeachment of the president or the vice president was transferred to the Legislative Yuan from NA. Finally, the appointment power of the members of

[429] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000). Available in English at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).
[430] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000). Available in English at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=499 (last visited May 9,2019).
[431] Jiunn-Rong Yeh, Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59.3 The American Journal of Comparative Law, 830,(2011).

Judicial Yuan, Examination Yuan and Control Yuan was also transferred to the Legislative Yuan. Thus, as some scholars argued "*the active intervention of Judicial Yuan in the process of constitutional reform accordingly accelerated the end of the National Assembly*."[432] Later, in 2004 by another round of constitutional amendments the National Assembly would be completely abolished and their powers on amending the Constitution would be transferred to citizens of Taiwan.

1.3. Cases involving the Criminal Responsibility of Former Presidents: South Korean Constitutional Court

In the early 1990s after the end of military authoritarianism the Korean Constitutional Court (KCC) faced number of politically sensitive cases, especially revolving around the transitional justice.[433] These cases are of special importance if one wants to evaluate the role of Constitutional Courts in the democratization process. It is also important to highlight the importance of contextualizing those decisions in the broader socio-political context.

With the adoption of the 6th Republic South Korean Constitution (1987) and theelection of President Kim Young Sam (1992) the impunity and punishment of former authoritarian regime became one of the heatedly debated topics not only in Korean politics but in KCC as well.[434]

To understand the background of these cases it is important to go back to the period of ruling of President Park Chung Hee who ruled South Korea between 1963-1979 (through the 3rd

[432] Jau-Yuan Hwang, Fort Fu-Te Liao, Wen-Chen Chang, *Development of Constitutional Law and Human Rights in Taiwan Facing the New Century*, 24 IDE Asian Law Series, 90-96 (2003).
[433] Justine Guichard, *The Role of the Constitutional Court of Korea in the Transition from Authoritarian to Democratic Rule*, In The Spirit of Korean Law. 3 Brill| Nijhoff (2016).
[434] Cho Kuk, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 Pacific Rim Law & Policy Journal, 579-83, (2007). Cotton J. *From Authoritarianism to Democracy in South Korea*, 37 Political Studies, 246-55 (1989). Han S., The Failure of Democracy in South Korea (University of California Press, 1974).

and 4th republics). President Park established a military authoritarianism and became in essence a "dictator for life".[435] He adopted a Yushin Constitution which contained following key features.[436] First, it allowed him to serve as a President for a term of 6 years for an indefinite number of times. Second, the President was not elected directly by people, rather by electoral college in the face of National Conference for Unification (NCU). Third, the President had a power of nominating 1/3 members of the National Assembly.[437]

The year of 1979 was marked as the end of the Park`s regime, when Kim Jae Kyu who then was the head of the Korean Central Intelligence Agency assassinated president Park.[438] After these events, Choi Kyu Ha became an acting president.[439] The Chief of the Defense Security Command of South Korea (key governmental organization within the military responsible for internal and external security), General Chun Doo-Hwan was appointed by acting President Choi as the chief investigator of the assassination of former President Park.[440] However, Chun using his powers as the lead investigator and chief of the Defense Security command engineered a coup on December 12,1979 along with a group of other officers including General Roh Taw-Woo (who later will became the President of South Korea).[441] General Chun and the

[435] Guichard Justine, Regime Transition and the Judicial Politics of Enmity: Democratic Inclusion and Exclusion in South Korean Constitutional Justice 3-4 (New York: Palgrave Macmillan US Palgrave Macmillan 2016).
[436] Marie Seong-Hak Kim, *Constitutional Jurisprudence and the Rule of Law: Revisiting the Courts in Yusin Korea (1972–1980)*, 5.2 Hague Journal on the Rule of Law 5, 179-200 (2013).
[437] Robert E. Bedeski, The Transformation of South Korea: reform and reconstruction in the sixth republic under Roh Tae Woo 1987-1992, 26 (Routledge 1994), Park got dictatorial powers with Yushin Constitution in 1972, *The Korea Times*, http://www.koreatimes.co.kr/www/news/nation/2010/10/116_75537.html (last visited February 2019).
[438] There are still controversies surrounding the assassination of Park, particularly the motives of Kim Jae Kyu. Some scholars argue that it might be part of the planned coup, others believe that it was an impulsive act of Kim caused by confrontation during the dinner.
[439] Robert E. Bedeski, The Transformation of South Korea: reform and reconstruction in the sixth republic under Roh Tae Woo 1987-1992, 26 (Routledge 1994)
[440] *Id*
[441] William A. Hayes, *Do Springs of Democracy lead to Falls of Justice? State–Civil Contests for Political Accountability in South Korea*, 4.2 Journal of Human Rights, 257-262(2005).

military formally seized the power, consolidated the military rule and declared Martial Law.[442] These actions led to massive student and labor union demonstrations against the Chun and military control in Korea with the demands of lifting the Martial law, these events were dubbed as Seoul Spring of 1980.[443] Chun`s military rule reacted to massive demonstrations by extending the Martial Law to the entire territory of South Korea.

The introduction of Martial law in entire territory of the South Korea and overall military rule by General Chun led to the Gwangju uprising[444] in Jeolla province in May 18, 1980.[445] The Gwangju event was interpreted and presented to the US government by the Chun rule as an alleged suspicion of the presence of North Korean agitators. Later it would be confirmed that it was a misinformation used by the Chun regime to receive the US authorization and approval to use force against the protestors.[446] Citizens of Gwangju faced a brutal response by government troops and after 10 days of the uprising more than 200 citizens were killed".[447] As few scholars suggest it is still a highly debated topic[448] of what exactly happened in Gwangju and it was characterized variously as "*uprising, massacre, a riot, a people's democratization movement, a*

[442] Marie Seong-Hak Kim, *Travails of Judges: Courts and Constitutional Authoritarianism in South Korea*, 63.4 The American Journal of Comparative Law , 639-41 (2015).
[443] Cho Kuk, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 Pacific Rim Law & Policy Journal, 579-83, (2007).
[444] In Sup Han, *Kwangju and beyond: Coping with past State Atrocities in South Korea*, 27.3 Human Rights Quarterly, 998-1010 (2005).
[445] Byun J., Lewis L. (eds), The 1980 Kwangju Uprising after 20 years: The Unhealed Wounds of the Victims, (Seoul: Dahae Publishers, 2000). Clark D., The Kwangju Uprising: Shadows over the Regime in South Korea, (Boulder: Westview Press, 1988).
[446] South Korean government panel announces findings on 1980 pro-democracy uprising, BBC Monitoring Asia Pacific – Political Supplied by BBC Worldwide Monitoring, July 24, 2007, available in LexisNexis Academic.
[447] Kyung Moon Hwang, A History of Korea: an episodic narrative, 228 (Pargrave, 2nd ed. 2017)
[448] *Chun Doo-hwan regime lied to justify military suppression of protesters*, Hankyoreh (August 21, 2018) http://english.hani.co.kr/arti/english_edition/e_national/858586.html (last visited November 2018).

communist-led insurrection, an abortive revolution, a national liberation struggle, an exercise of state terror, a North Korean provocation".[449]

In August 16, 1980 the acting president Choi resigned[450] and shortly after, on August 27, 1980 National Unification Conference nominated General Chun and elected him as the next President of the South Korea. Following the elections President Chun introduced amendments to the Constitution, ended the martial law and abolished all political parties.[451] Subsequently, President Chun established his own Democratic Justice Party. By mid-1985 the democratization movements spearheaded in Korea, most of their demands included constitutional amendment for direct election of the president. It later poured into the June 1987 Democracy Movement and the adoption of the 6th Republic Constitution of South Korea.[452] Despite the June 1987 democratic movement and demands against the military rule, the majority of the South Koreans voted for Roh Tae Woo, candidate from the ruling party who was an active member of the authoritarian rule during the 5th Republic.[453]

In January 1990, Kim Young-Sam one of the leaders of the Parliamentary opposition, decided to merge his faction with the ruling Democratic Justice Party of Roh Tae-Woo and the other right-wing New Democratic Republican Party thus creating the Democratic Liberal Party.[454] This sudden merger of the opposition party with the ruling one was perceived by the public negatively. Scholars argued the merger seemed to be "*widely believed that an informal*

[449] West James M., *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 Pacific Rim Law & Policy Journal, 87 (1997).
[450] Robert E. Bedeski, The Transformation of South Korea: reform and reconstruction in the sixth republic under Roh Tae Woo 1987-1992, 26 (Routledge 1994)
[451] William Shaw, Human Rigths in Korea: Historical and Policy Perspectives, (Harvard University Press, 1991).
[452] Chung C., Mesomobilization and the June Uprising: Strategic and Cultural Integration in Pro-democracy Movements in South Korea.(East Asian Social Movements, 2011).
[453] Adrian Buzo, The Making of Modern Korea,151 (Routledge, 2nd ed. 2007)
[454] Guichard Justine, Regime Transition and the Judicial Politics of Enmity : Democratic Inclusion and Exclusion in South Korean Constitutional Justice, (New York : Palgrave Macmillan US Palgrave Macmillan 2016).

commitment to spare Chun and Roh from prosecution was a quid pro quo conceded by Kim Young-Sam in order to obtain the nomination and financial backing of the DLP coalition in the December 1992 presidential election"[455] In the 1992 Presidential elections, Kim Young-Sam was elected as the next President of the 6th Republic of South Korea. When Kim assumed the office, public debates emerged about the prosecution of former Presidents Chun and Roh and other members of the military for their criminal acts in December 1979 (military coup) and May 1980 Gwangju massacre. However, newly elected president Kim was cautious about it and his agenda was mostly about leaving these events to be judged by history while he was mostly pushing the reconciliation policy.[456]

1.3.1. December 12 Incident Non-institution of Prosecution Case (1995)

Background of the Case

In July 1993 thirty-two military officers and victims of the December 12, 1979 coup, including Chung Seung-Hwa, Chang Tae-Wan filed complaints to the Seoul District Prosecutor`s Office accusing former Presidents Chun and Roh along with other members of the junta of treason, insurrection and military mutiny. The Prosecutor`s Office refused to institute the prosecution. First, with respect to treason and insurrection the Prosecutor`s Office stated that in December 1979, the military junta took control of the military only and it was not extended to other institutions as President or Prime Minister, thus it could not be viewed as a treason or disruption of constitutional order. Second, with respect to mutiny, the Prosecutor`s Office did not find sufficient grounds and facts to support these charges and given the fact that long time has

[455] West James M., *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 Pacific Rim Law & Policy Journal, 87 (1997).
[456] JamesWest M., *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 Pacific Rim Law & Policy Journal, 87 (1997).

passed since then it would be practically impossible to find those facts. The applicants applied to Constitutional Court against the decision of the Prosecutor`s office of not instituting the criminal procedure.

Analysis of the Decision

According to Article 84 of the Constitution the "*President shall not be prosecuted during the term except on crimes of treason internal or external*"[457] and it means that statute of limitation for the crime of treason was not suspended for President since the Constitution allowed the prosecution of the President for treason. Thus, with respect to the charge of treason on December events the KCC concluded that statute of limitation expired on December 1994.[458] However, the KCC continued that Article 84 of the Constitution did not allow prosecution of President for mutiny, therefore the statute of limitations for munity was suspended and had not expired yet during the constitutional adjudication, thus the complaint on Prosecutor`s office decision on non-prosecution of Chun Doo Hwan for mutiny was justiciable before the court.

The KCC reached the conclusion that on crimes (mutiny) over which the statute of limitations had not expired the accused can be prosecuted. However, the KCC refused to overturn the prosecution`s decision of not instituting the prosecution. In KCC`s view the Prosecutor`s Office did not act arbitrarily, and its decision was within the boundaries and scope of the prosecution`s discretion and it was justified.[459]

To reach this conclusion the KCC was not interpreting specific provisions of the Constitution on powers of the Prosecutor`s office and what constitutes arbitrariness and going

[457] Daehanminkuk Hunbeob [Hunbeob][Constitution] art.84 (S.Kor.).
[458] Constitutional Court [Const.Ct.], 1995 Hun-Ma246, January 20, 1995, (KCCR,15) (S.Kor.).
[459] *Id*.

beyond the scope of the prosecutorial discretion. Rather it chose to engage in legal philosophy and history. Basically, the court stated the following:

> "*it cannot be denied that the suspects have led the country in pivotal roles as presidents or assembly persons in the past ten or so years. Whether to a small or large extent, whether to our liking or not, the order established during that time became an integral part of our history and formed the foundation of the present political, economic and social order. Balancing between the two-countervailing set of facts does not produce an objectively clear precedence for either and we cannot find the prosecutions decision arbitrary*"[460]

Furthermore, the Court stressed the fact that both former Presidents Chun and Roh have already left their offices and moreover Roh was elected by the Korean people themselves. Finally, according to KCC the "Fifth Republic Corruption Hearing" instituted by the National Assembly have already engaged and dealt with the crimes committed by Roh and Chun, thus the decision of the Prosecutor on non-institution of the prosecution was justified.[461]

Aftermath

Even though the first part of the decision on the possibility of prosecution of former Presidents for mutiny in the December events was welcomed, the second half of the decision on reviewing the actions of the Prosecutor`s office was widely criticized. Some argued that both Prosecutor`s office and the KCC undermined the rule of law in favor of advancing the President Kim Young Sam`s policy on reconciliation.[462] Critics perceived the decision as the reflection of lack of autonomy of such institutions as KCC and the Prosecutor`s office and have widely questioned the judicial independence and recieved the decision of the court as advancement of

[460] Constitutional Court [Const.Ct.], 1995 Hun-Ma246, January 20, 1995, (KCCR,15) (S.Kor.). available in English at https://www.ccourt.go.kr/cckhome/images/kor/30th/constitutional_court_30years_history_en.pdf (last visited May 7.2019).
[461] *Id.*
[462] James West M., *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 Pacific Rim Law & Policy Journal, 87 (1997).

impunity.[463] The general public was not willing to leave these events to be judged by history; they were willing and demanding legal restoration of justice. This shared public opinion was also reflected during the elections of the local government in June 1995 where the Democratic Liberal Party have gained poor support.[464]

1.3.2. May 18 Incident Non-institution of Prosecution decision case (1995)

Background of the case

After the decision of the Court on the December events, a number of victims of the violent suppression in Gwangju (May 18 Incident) filed criminal complaints against former presidents Chun, Roh and 24 other former members of the junta against their actions on May 18, accusing them with treason, murder and mutiny. However, on July 1995 the Seoul District Public Prosecutors office refused to prosecute the accused claiming that "*the accused succeeded in the coup and formed a new constitutional order, thus successful coup cannot be subject to judicial review*".[465] Victims filed a constitutional complaint against the actions of the Prosecutor claiming that it was an arbitrary exercise of power.

Meanwhile, before the Court announced its decision, a number of important events took place that have directly influenced the outcome of the decision. First, on October 1995, one of the members of the opposition party in the National Assembly announced his allegations against Roh Tae-Woo`s slush fund in the amount of millions of dollars that he had created while serving

[463] Guichard Justine, Regime Transition and the Judicial Politics of Enmity : Democratic Inclusion and Exclusion in South Korean Constitutional Justice, (New York : Palgrave Macmillan US Palgrave Macmillan 2016).
[464] *South Korean President's Party Suffers in Regional Election*, The New York Times, June 29, 1995.
[465] Wen-Chen Chan, Li-ann Thio, Jiunn-rong Yeh, Constitutionalism in Asia Cases and Materials, 241 (Hart Publishing, 2014)

as President and continued hiding it after he left the office.[466] These allegations were supported by Mr. Lee Hyuan-Woo, the bodyguard of Roh, later it was confirmed by the prosecutors who were able to find a slush fund in the amount of 60 million USD in one of the banks.[467] The existence of other slush funds gradually kept being revealed by prosecutors and eventually this number was estimated to be around 250 million USD and the Prosecutor`s Office declared about its intention to conduct full investigation.

This corruption scandal prompted immediate reaction of the public and the debates started revolving around the connection of the sitting President Kim to these slush funds and possibility of his electoral campaign to be financed through those slush funds. In November 16,1995 the Public Prosecutor`s Office arrested former President Roh on charges of forming slush funds.[468] Meanwhile daily politics in South Korea was preoccupied with the proposed special law on extending the statute of limitations for the crime committed on May 18, 1980. On November 24 a week before the announcement of the decision of the KCC and soon after the arrest of Roh, President Kim Young-Sam decided to make an official public statement where he announced his new policy shift from reconciliation to restoration of justice.[469] This dramatic move from letting history judge to prosecution and restoration was perceived by the public as his attempt to distance himself from the slush fund corruption scandal involving former presidents. In his public statement President Kim also announced his plan of enacting a Special Law.[470]

[466] Nicholas D. Kristof, *Scandal Shows Deep Roots in Korean Politics,* The New York Times, (November 12, 1995) https://www.nytimes.com/1995/11/12/world/scandal-shows-deep-roots-in-korean-politics.html (last visited March 8, 2019).
[467] *Id.*
[468] Nicholas D. Kristoff, Ex-President of South Korea is Arrested and Apologizes in a Huge Bribery Scandal, The New York Times(November 17,1995) https://www.nytimes.com/1995/11/17/world/ex-president-of-south-korea-is-arrested-and-apologizes-in-a-hugebribery-scandal.html (last visited February 9, 2019).
[469] Sanghyun Yoon, *South Korea's Kim Young Sam Government: Political Agendas*,36.5 Asian Survey, 514-16 (1996).
[470] *Id.* 516

Some critics, particularly the opposition members as Kim Dae-Jung found the President`s announcement to be hypocritical and as strategic tool of turning the public attention from corruption scandal to the transitional justice. Furthermore, critics have also argued that it was a preemptive action of the President to surpass the decision of the court that allegedly President was already aware of.[471] The KCC was expected to issue its ruling in a week. Later events confirmed the concerns of the opposition. On November 27, the draft of the decision of the Court was leaked to the public which stated *"that a successful coup is subject to criminal prosecution"* [472] and that prosecutor`s office acted arbitrarily by refusing to institute the investigation.[473] Also, the KCC calculated the period of limitation to run on August 16, 1980 not May and expire on August 15, 1995. This was an unprecedented leak and a big challenge to KCC`s reputation. The applicants were concerned that the decision of the court might influence the proposed special law and they decided to withdraw their complaint, thus the Court faced a procedural issue that it had to deal with. On December 15, 1995 the KCC issued its ruling.[474]

Analysis of the decision

Withdrawal of the complaint by applicants generated a procedural debate among the judges of the KCC, namely the KCC was split 5v.4 as to whether rendering the case moot or not. Eventually the KCC referred to Article 40 of the *Constitutional Court Act* that provided that the civil litigation laws and regulations shall apply *mutatis mutandis* to the procedure of adjudication

[471] West James M., *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 Pacific Rim Law & Policy Journal, 87 (1997).
[472] For more information see https://www.ccourt.go.kr/cckhome/images/kor/30th/constitutional_court_30years_history_en.pdf (last visited May 7.2019).
[473] Alexei Trochev, Rachel Ellett, *Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance*, 2.1 Journal of Law and Courts, 75 (2014).
[474] Cho Kuk, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 Pacific Rim Law & Policy Journal, 582-83, (2007).

of the Constitutional Court.[475] Thus, the withdrawal of the complaint prompted the KCC to close the case following the rules stipulated in the *Constitutional Court Act.* Namely the majority of five justices out of nine declared the case closed due to the withdrawal of the applicants.[476] However, a minority of four Justices opined that the KCC still can proceed to a final decision even if the applicants had withdrawn their complaints. Eventually, the KCC published its final decision by a vote of 5-4 announcing the case moot due to the withdrawal of the complaint by applicants thus without reviewing the merits.[477] However, the decision was published with the dissenting opinion of 4 justices. The original majority decision that was leaked to the public stated that the successful coup is subject to prosecution[478] and that the Prosecutor`s action of not instituting the investigation against the perpetrators of the May 1980 incident was arbitrary and amounted to an abuse of the discretionary powers of the prosecution. Ostensibly, the KCC was trying to deliberately show its position and explain why it would have reached this ruling had the complaint not been withdrawn by the applicants.

Essentially the minority opinion stated that Prosecutor`s Office was mistaken in its judgment about the consequences of the coup, namely no new constitutional order was established. Particularly the KCC stated the following: "*treasonous acts of the former Presidents were neither justified by the circumstances nor were ratified by free expression of the people*."[479] In other words, the KCC clearly implied that questioning of the legitimacy of the government established by coup does not generate the need for denial of the legal consequences of acts of

[475] Constitutional Court [Const.Ct.], 1995 Hun-Ma221, December 15, 1995, (KCCR,697) (S.Kor.). https://www.ccourt.go.kr/cckhome/images/kor/30th/constitutional_court_30years_history_en.pdf (last visited May 7.2019).
[476] Constitutional Court [Const.Ct.], 1995 Hun-Ma221, December 15, 1995, (KCCR,697) (S.Kor.).
[477] *Id.*
[478] *Id.*
[479] Constitutional Court [Const.Ct.], 1995 Hun-Ma221, December 15, 1995, (KCCR,697) (S.Kor.). https://www.ccourt.go.kr/cckhome/images/kor/30th/constitutional_court_30years_history_en.pdf (last visited May 7.2019).

such government. Finally, the KCC concluded that "*the prosecutor`s non-institution of prosecution decision for reason of immunity of a successful coup engenders misunderstanding of the ideals of the Constitution and the criminal jurisprudence of treason*".[480]

Aftermath

This particular minority decision was perceived well by the public and the withdrawal of the application allowed the KCC to avoid the issues concerning the statute of limitation. As it was mentioned earlier, President Kim promised the enactment of the Special Law on these events that could suspend the statute of limitations for these crimes in question. Eventually the *Special Act on the May Democratization Movement* was adopted on December 12, 1995[481] that *suspended the statute of limitations* for perpetrators of the December and May events of 1980s.[482] After the adoption of the Act, the Seoul District Public Prosecutor`s office opened the criminal investigation against perpetrators involved in those events,[483] particularly in the December 12 mutiny and in the May 18 treason charges.[484] After the institution of investigation, the group of accused argued that the *Special Act* was retroactive law prohibited by Article 13 of the Constitution thus applied to the KCC.[485]

1.3.3. The Special Act on the May Democratization Movement Case (1996)

Background of the Case

[480] Constitutional Court [Const.Ct.], 1995 Hun-Ma221, December 15, 1995, (KCCR,697) (S.Kor.). https://www.ccourt.go.kr/cckhome/images/kor/30th/constitutional_court_30years_history_en.pdf (last visited May 7.2019).
[481] For more information see https://www.ccourt.go.kr/cckhome/images/kor/30th/constitutional_court_30years_history_en.pdf (last visited May 7.2019).
[482] Special Act Concerning the 18 May Democratization Movement, December 21, 1995, Act No. 5029, (S.Kor.), translated in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.).
[483] *Id.*
[484] West James M., *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 Pacific Rim Law & Policy Journal, 87 (1997).
[485] *Id.*

The Special Act, particularly Article 2 stipulated the following:

> "*Crimes disrupting constitutional order under Article 2 of the Act on Special Cases concerning the Prescription for Public Prosecution, etc. against Crimes Disrupting Constitutional Order committed on or around December 12, 1979 and May 18, 1980 shall be deemed suspended during the period from the date each of the relevant crimes terminated until February 24, 1993*"[486]

The *Criminal Procedural Act* of Korea regulates general due process rules including the statute of limitations. It sets out different limitation periods depending on types of crimes. For the crimes punishable with life imprisonment the maximum limitation period is 15 years. Other gradation of periods ranges starting from 10 years and less. However, if the accused is charged with several serious offences then the maximum period of 15 years is applicable.

Analysis of the decision

It is important to highlight that the Court did not immerse itself into identifying the period of limitation and calculation of this period. The logic of the Court was based on one specific guarantee written in Article 13 of the Constitution, namely prohibition of *ex post facto* law. Therefore, the main legal question and standard of reviewing the Act that was developed by the Court was: whether the *Special Act* was deducing grounds for suspension of the statute of limitation from preexisting law (the Court named it declaratory statute) or the Special Act created new grounds for suspension that did not emerge from preexisting law (the Court named it a formative statute). If the case is the later one, then such a provision constitutes the retroactive law in nature.[487]

Later the KCC stated that since the statute of limitation derives its origin from statutes and not from the Constitution, the ultimate interpretation and identification of the period of

[486] Special Act Concerning the 18 May Democratization Movement, December 21, 1995, Act No. 5029, (S.Kor.), translated in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.). Article 2
[487] Constitutional Court [Const.Ct.], 1996 Hun-Ka2, February 16, 1996, (KCCR,51) (S.Kor.).

limitation shall be placed on ordinary judges. In other words, the KCC argued that "*the Constitutional Court is not in a position to rule on the application of individual statutory limitations because they are subject to the individual court for a specific case*."[488] Accordingly, the constitutional justices deferred the case to ordinary courts for the identification of the period of limitation. The KCC concluded that the constitutionality of the Special Act would ultimately depend on the interpretation of the statute by the ordinary judges.

All 9 justices agreed that if ordinary judges conclude that the statute of limitations had not expired at the time of the enactment of the Special Act, then this *Special Act* is constitutional. However, in circumstance of the expiration of statute of limitations at the time of the enactment the Court`s decision was split, 5 justices argued that such law will be deemed unconstitutional and 4 justices opined that even if the statute of limitation expired they still would have found the law constitutional. According to Article 23.2 of the Constitutional Court Act the minimum of 6 votes out 9 is required to render the statute unconstitutional. Since the required 6 votes were not achieved, the *Special Act* was found constitutional.[489]

Aftermath

On August 26, 1996 the Seoul District Court found sixteen accused including former Presidents Chun and Roh guilty for crimes committed during December and May events. Chun was sentenced to death penalty and Roh to 22 years of imprisonment. Later the sentences were reduced to life imprisonment for Chun and 17 years to Roh. On December 1997 when newly

[488] Constitutional Court [Const.Ct.], 1996 Hun-Ka2, February 16, 1996, (KCCR,51) (S.Kor.).
[489] For further detailed analysis of the decision see Yi-Li Lee, *The Korean Constitutional Court and Kwangju Massacre: Note on the Special Act concerning the May Democratization Movement Case*, 4 NTU L. Rev. 227 (2009).

elected President Kim Dae Jung (former opposition during Chun`s regime) assumed the office he decided to pardon former Presidents, thus Chun and Roh were released.[490]

1.4. Cases Involving the immunity of Former Presidents: Kyrgyz Constitutional Chamber

Preconditions of the ex-presidential immunity case

Ex-presidential immunity case is one of the mega politics cases in Kyrgyzstan that directly involved the issues of regime transition. As it was discussed in Chapter 1, one of the key features of Central Asian super-presidentialism is the legal entrenchment of special constitutional status for ex-presidents that permits formal roles in government even after resignation from the presidency along with extended immunity. Even though it is hard to provide the evidence, but it can be argued that Akayev`s initiative on the special constitutional status and legally entrenched position for ex-presidents (first president) was an inspiration for other Central Asian presidents, particularly for Kazakhstan and Tajikistan to introduce the constitutional status of *Elbasy*[491] and *Founder of Nation*.[492]

Before discussing the decision of the Chamber on ex-presidential immunity case, it is important to revisit the historical background of Article 53 of the Kyrgyz Constitution that regulates the status of ex-president. In the original text of the 1993 Constitution, Article 53 was absolutely silent about the status of ex-president and the immunity of the ex-president.[493] In

[490] Andrew Pollack, *New Korean Leader Agrees to Pardon of 2 Ex-Dictators*, The New York Times, (December 21, 1997) https://www.nytimes.com/1997/12/21/world/new-korean-leader-agrees-to-pardon-of-2-ex-dictators.html (last visited January 27, 2019).

[491] Konstitucionniy Zakon RK o Pervom Prezidente RK Elbasy [Constitutional Law of the RK on First President of the RK- Elbasy] July 20, 200 No. 83-II.

[492] Zakon Respubliki Tajikistan ob Osnovatele Mira, Nacionalnogo Edinstva- Lidera Nacii [Law of the Republic of Tajikistan on Founder of Peace, National Unity- Leader of Nation] December 25, 2015 No. 12.

[493] Konstitucia Kyrgyzskoi Respubliki ot redakcii 1993 goda [Constitution of the Kyrgyz Republic], May 5, 1993, No. 1185-XII, adopted by the Supreme Soviet of the Kyrgyz Republic, Article 53.

February 2003, Akayev initiated a constitutional referendum that was successfully approved and based on the referendum, amendments to Article 53 were introduced.[494] The amendments stipulated that all former presidents, except for those who were removed from the office, had the title of ex-president of the Kyrgyz Republic.[495] The ex-president was given absolute immunity. He could not be held criminally and administratively liable for actions or omission committed during the presidential term, and the immunity was also protected the ex-president from being detained, arrested, subjected to search and seizure and interrogation.[496]

Following the constitutional referendum, in July 2003 Parliament adopted the *Law on Guarantees of Activities of the President*. Article 12 of the *Law* word by word duplicated the constitutional norm on the immunity of the ex-president regulated by Article 53 of the Constitution.[497] The law also contained a separate chapter on the status of the *First President* of the Kyrgyz Republic (Akayev). It particularly highlighted the historical mission carried out by the *First President* to recreate Kyrgyz statehood and introduced the honorary title and established special legally entrenched status of the *First President* of the Kyrgyz Republic with the right to absolute immunity.[498]

Akayev was never able to take advantage of privileges provided by the 2003 law. After the 2005 Tulip Revolution, the absolute nature of the immunity of the ex-President became an insurmountable obstacle to bring Akayev to criminal liability. The calls and efforts of the Prosecutor General Beknazarov in 2005 to prosecute Akayev did not find an adequate political

[494] Zakon Kyrgyzskoi Respubliki o Novoi Redaksii Konstitucii Kyrgyzskoi Respubliki prinyatoi Referendumom on 2 fevralya 2003 goda [The Law of the Kyrgyz Republic on New Text of the Constitution of the Kyrgyz Republic adopted by the Referendum as of February 2,2003], February 18, 2003 No. 40.
[495] *Id.* Article 53.
[496] *Id.* Article 53.
[497] Zakon Kyrgyzskoi Respubliki o Garantiah Deyatelnosti Prezidenta Kyrgyzskoi Respubliki [The Law of the Kyrgyz Republic on Guarantees of Activities of the President of the Kyrgyz Republic], July 18, 2003 No. 152.
[498] *Id.* Article 21, 22.

support.[499] Parliament limited itself to removing the rules on the *First President* from the law[500], but did not dare to deprive Akayev of ex-President status. Bakiev, who came to power on a revolutionary wave, was not interested in creating a precedent so dangerous for ex-presidents. However, subsequent to 2006[501] and 2007[502] constitutional amendments, the constitutional norms on the immunity of the ex-President were revised. According to revised amendments, ex-presidents retained their honorary status of ex-president, but the provision on immunity of ex-president was excluded from the text of the Article 53 of the Constitution.[503] However, the *Law on Guarantees of Activities of the President* of 2003 remained unchanged, that is, at the legislative level, ex-presidents retained absolute immunity for actions/omissions committed during the presidential term.[504]

After 2010 Revolution, by decrees of the Interim Government, despite legislative guarantees under the *Law on Guarantees of Activities of the President* of 2003, former presidents Akayev[505] and Bakiev[506] were deprived of ex-presidential status and immunity. In 2016, Bakiev

[499] Aida Kasymalieva, *Kyrgyzskie Sledovateli Pytautsya Doprosit Akayeva* [Kyrgyz Law Enforcement Services are trying to interrogate Akayev], Institute for War and Peace Reporting, November 20, 2005, https://iwpr.net/ru/global voices/ (last visited September 8, 2019).
[500] Zakon Kyrgyzskoi Respubliki o Vnesenii Izmeneniy v Zakon Kyrgyzskoi Respubliki o Garantiah Deyatelnosti Presidenta Kyrgyzskoi Respubliki [The Law of the KR on Introducing changes to the Law on Guarantees of activities of the President of the Kyrgyz Republic] April 9, 2005 No. 59.
[501] Zakon Kyrgyzskoi Respubliki o Novoi Redaksii Konstitucii Kyrgyzskoi Respubliki [The Law of the Kyrgyz Republic on New Text of the Constitution of the Kyrgyz Republic] November 9, 2006, No. 180, Article 53.
[502] Zakon Kyrgyzskoi Respubliki o Novoi Redaksii Konstitucii Kyrgyzskoi Respubliki [The Law of the Kyrgyz Republic on New Text of the Constitution of the Kyrgyz Republic] October 23, 2007, No. 157, Article 53.
[503] *Id.* Article 53.
[504] Zakon Kyrgyzskoi Respubliki o Garantiah Deyatelnosti Prezidenta Kyrgyzskoi Respubliki [The Law of the Kyrgyz Republic on Guarantees of Activities of the President of the Kyrgyz Republic], July 18, 2003 No. 152. Article 12.
[505] Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki o Lishenii A.Akayeva statusa Neprikosnovennosti [The Decree of Interim Government of the Kyrgyz Republic on Depriving of A. Akayev of the status of Ex-President] August 12, 2010, No. 120.
[506] Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki o Lishenii K. Bakieva statusa Neprikosnovennosti [The Decree of Interim Government of the Kyrgyz Republic on Depriving of K. Bakiev of the status of Ex-President] April 26, 2010, No. 30.

was sentenced in absentia by the court to 30 years in prison.[507] The criminal case against Akayev was suspended until the fugitive president return to Kyrgyzstan.[508]

When the *Interim Government* ceased to exist, and the 2010 Constitution entered into force, the Government of the KR initiated amendments to the 2003 Law. The proposed amendment suggested limiting the absolute immunity of the ex-president by including the phrase "except for the case of his removal from office" to Article 12 of the 2003 Law.[509] However, for unknown reasons, legislative initiative had not advanced beyond the stage of public discussion and Government recalled the proposed bill.[510] The question of the immunity of the ex-President was reaised again in 2018 and reached the Constitutional Chamber.

1.4.1. The Case about the Immunity of the Ex-President (2018)

Background

[507] Prigovor Verhovnogo Suda KR v otnoshenii K.Bakieva ot 29 iulya 2016 goda [Sentencing decision of the Supreme Court of the KR in relation to K.Bakiev] July 29,2016.

[508] Recently Akayev expressed his desire about returining to Kyrgyzstan. In response to it the prosecutor`s office issued an official press release stating that upon his arrival he will be interrogated for alleged pending cases on corruption. See Generalnaya Prokuratura Kyrgzskoi Respubliki, Ofisialnoe Poyasnenie po ugolovnym delam imeushim otnoshenia k chlenam sem`yi eks-presidenta KR, Askara Akaeva [Offcial Statement on Criminal Cases involving family members of the ex-president of the KR, Askar Akayev] General Prosecutor`s Office of the KR, August 23, 2019 https://www.prokuror.kg/news-ru/4018-v-svyazi-s-poyavleniem-razlichnykh-kommentariev-v-sredstvakh-massovoj-informatsii-po-ugolovnym-delam-imeyushchim-otnoshenie-k-chlenam-semi-eks-prezidenta-kyrgyzskoj-respubliki-askara-akaeva-ego-rodstvennikam-i-blizkim-litsam-generalnaya-prokuratura-schitaet-neobkhodimym-dat-nizhesleduyushchie-poyasneniya.html
(last visited September 10, 2019).

[509] Postanovlenie Pravitel`stva KR o Proekte Zakona KR o Vnesenii Izmeneniy I Dopolneniy v Zakon KR o Garantiah Deyatelnosti Presidenta KR [Regulation of the Government of the KR on Draft Law on Introducing Amendments to the Law of the KR on Guarantees of Activities of the President of the KR] August 12, 2011, No. 441.

[510] Postanovlenie Pravitel`stva KR ob Otzyve Proekta Zakona KR o Vnesenii Izmeneniy I Dopolneniy v Zakon KR o Garantiah Deyatelnosti Presidenta KR [Regulation of the Government of the KR on recalling the Draft Law on Introducing Amendments to the Law of the KR on Guarantees of Activities of the President of the KR] June 16, 2014, No. 330.

After interim President Roza Otunbaeva, Atambayev was elected as the next president of the Kyrgyz Republic.[511] He was also a member of the *Interim Government* and founder of one of the oldest political parties SDPK (social democratic party).[512] Under the post 2010 Constitution the presidential term was limited to one time 6 years term.[513] During Atambayev`s presidency Kyrgyzstan against the critique of the majority acceded to Eurasian Economic Union[514], introduced amendments to the Constitution via referendum[515], experienced number of political and corruption scandals that involved political prosecution of leading opposition leaders as Tekebaev.[516] Furthermore, while the case was pending Atambayev exercised continuous pressure on the Constitutional Chamber[517] with an attempt to get the desired decision, one of them was the introduced amendments to the constitution. Under the pressure of President and majority coalition led by SDPK in Parliament Chamber issued an affirmative conclusion on constitutional amendments that involved strengthening of the Governmental Committee on National Security (legacy of the soviet KGB) which is under the exclusive control and discretion of the President and strengthening of the Prime minister. Experts argued that President was preparing a constitutional scheme enabling him to continue ruling the state via the young technocrat Prime

[511] Postanovlenie Sentralnoi Izbiratelnoi Komissii Kyrgyzskoi Respubliki ob opredelenii rezoltatov vyborov Prezidenta Kyrgyzskoi Respubliki ot 30 oktyabrya 2011 goda [Resolution of the Central Election Commission of the Kyrgyz Republic on results of the Presidential Elections of the Kyrgyz Republic] October 30, 2011

[512] For more information see official webpage of the political party: http://www.sdpk.kg/

[513] Konstitucia Kyrgyzskoi Respubliki prinyataya referendumom 27 iunya 2010 goda [Constitution of the Kyrgyz Republic adopted by referendum] June 27, 2010 art. 61

[514] Zakon Kyrgyzskoi Respubliki o ratifikacii mezhdunarodniy dogovorov po prisoedineiu Kyrgyzskoi Respubliki k Dogovoru o Evraziyskom Ekonomicheskom Souze ot 29 maya 2014 goda No. 111 [Law of the Kyrgyz Republic on ratification of international treaties on accession of the Kyrgyz Republic to the agreement on Eurasian Economic Union] May 29, 2014

[515] Zakon Kyrgyzskoi Respubliki o naznachenii referenduma po proektu po proektu zakona Kyrgyzskoi Respubliki ot 2 noyabrya 2016 goda [Law of the Kyrgyz Republic on calling the referendum on introduced amendments to the Constitution of the KR] November 2, 2016

Postanovlenie Sentralnoi Izbiratelnoi Komissii Kyrgyzskoi Respubliki o resultatah referenduma KR ot 11 dekabrya 2016 goda [Resolution of the Central Election Commission of the Kyrgyz Republic on results of the referendum of the Kyrgyz Republic on constitutional amendments] 11 December 2016

[516] Kyrgyz Opposition Leader Tekebaev Handed Eight-Year Prison Sentence, RFE/RL (Aug.16,2017).

[517] More details about his presidency and his relationship with the Constitutional Chamber will be discussed in the next chapter.

Minister Sapar Isakov (the former chief of staff of president Atambayev) and a new successor façade president Jeenbekov.[518] The choice of Jeenbekov was also a strategic move, because his family and clan come from the south while Atambayev is from the north. The north/south division and regionalism remains one of the leading challenges in internal politics of Kyrgyzstan. Historians claim that the roots of this regionalism come from colonialism policy of Soviet Regime where this idea was artificially created in order to make Kyrgyzstan to be easily ruled by Kremlin.[519]

During the Presidential elections in 2017 Atambayev has been actively agitating for Jeenbekov and using all available administrative resources and his influence of SDPK political party, despite the fact that law requires him to remain neutral.[520] Several times during his speech Atambayev was stressing that Jeenbekov would continue his political and strategic policies.[521] Jeenbekov became the next President of Kyrgyzstan and against the expectations of Atambayev, newly elected president departed from planned agenda and started his own independent path and firstly dismissed from the key governmental office's members of Atambayev`s team.[522] Thus, the split between Jeenbekov and Atambyaev started that later have grown into a clash of ex and incumbent presidents. After the dismissal of important state officials, Jeenbekov announced that his priority policy will be the fight against corruption. Dozens of state officials were arrested for

[518] Margarita Meldon, Kyrgyzstan's Constitutional Referendum: Steering populism toward securing vested interests?, The Constitutionnet, (October 28,2016) http://constitutionnet.org/news/kyrgyzstans-constitutional-referendum-steering-populism-toward-securing-vested-interests (last visited December 20, 2018).
[519] Eleri Bititkchi, Begimai Abisheva, Politicheskoe Aktivirovanie Regionalnoi Identichnosti Sever-Ug u Kyrgyzov [Political Activization of Regionalism Identity of North-South in Kyrgyzstan], Akipress, (January 24,2014) http://kghistory.akipress.org/unews/un_post:1967?fbclid=IwAR3oruGIxmBFxAi4tGdoiJmb5HaEg2dab796WquojFUk3bFh2XERqOu9Jbs (last visited May 6, 2019).
[520] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic], art. 63, 27 June 2010.
[521] Bakyt Asanov, Preudprezhnedie Prezidenta Pered Vyborami [The Warning of the President Before the Election] Radio Azattyk (October 17, 2017), https://rus.azattyk.org/a/28783773.html (last visited May 16, 2019).
[522] Grigor Atanesyan, Kak Possorilis Atambayev I Jeenbekovym: prichiny krizisa v Kyrgyzstane [How the conflict between Atambayev and Jeenbekov started: the root causes of the crisis in Kyrgyzstan], BBCRussia, (August 8, 2019) https://www.bbc.com/russian/features-49285839 (last visited August 12, 2019).

alleged corruption crimes and most of them were from the close circle of Atambayev, such as Prime Minister Isakov and Mayor of Bishkek Alymbekov.[523] Atambayev have openly stated that these trials in fact are politically motivated and camouflaged as fight against corruption. While the tension between ex and sitting president grew, Nurbek Toktakunov a well-known human rights lawyer and activist applied to the Constitutional Chamber challenging the constitutionality of Article 12 of the *law on guarantees of president*, particularly the norm which provided absolute immunity for the ex-president.

Thus, Constitutional Chamber was entangled into this power struggle between Atambayev and Jeenbekov when it was asked to evaluate the constitutionality of the law regulating the immunity of ex-president. Early in October 2018, the Chamber adopted a decision finding it unconstitutional and requesting Parliament to develop legal framework on how the immunity of ex-president can be lifted.[524]

Toktakunov challenged the constitutionality of Article 12 of the 2003 *Law on Guarantees of activities of the President*.[525] The provision stated the following: "*The former president of the Kyrgyz Republic has immunity. He cannot be held criminally and administratively liable for acts or omissions committed by him during the period in which the powers of the President of the Kyrgyz Republic are exercised, as well as detained, arrested, searched or interrogated*."[526] Applicant claimed that according to Article 16 of the Constitution all citizens are equal before the law that presumes the guarantee of equal application of law to everyone irrespective of

[523] Kyrgyzstan: Former PM arrested in corruption probe, The Eurasianet, (June 5, 2018) https://eurasianet.org/kyrgyzstan-former-pm-arrested-in-corruption-probe (last visited March 17, 2019).
[524] Reshenie Konstitucionnoi Palaty po delu o proverke constitucionnosti stati 12 Zakona o Garantiah Prezidenta KR [Decision of Constitutional Chamber on reviewing the constitutionality of Article 12 of the law on Guarantees of the Presidents] October 3, 2018.
[525] Zakon Kyrgyzskoi Respubliki o Garantiah deyatel`nosti Prezidenta Kyrgyzskoi Respubliki [Law of the KR on the Guarantees of the Work of the President of the Kyrgyz Republic] July 18, 2003 No. 152
[526] Zakon Kyrgyzskoi Respubliki o Garantiah deyatel`nosti Prezidenta Kyrgyzskoi Respubliki [Law of the KR on the Guarantees of the Work of the President of the Kyrgyz Republic] July 18, 2003 No. 152

subject's position. Furthermore, the applicant continued that syntactic structure of the second sentence of part 1 of Article 12 of the said Law, expressed by the words "as well as detained, arrested, searched, interrogated or body searched"[527] gives reason to believe that ex-president has immunity even in the case of criminal acts committed after the end of his presidential powers. The applicant concluded that the challenged norm provided the ex-president with an indulgence from criminal prosecution for acts committed during execution presidential powers, and after their termination. According to N. Toktakunov, various legal immunities for government officials are focused on the effective functioning of systems of checks and balances and should imply more complex procedure for bringing them to justice. Whereas legal guarantees established by the contested Article, not only violate the principle of equality all before the law and the court, which is the most important principle democratic state, but also the principle of inevitability of punishment.

Analysis of the decision

The decision first identified general principle of equality and accepted limitations of this principle and further deduced it to the issue of ex-presidential immunity.[528]

Equality

The Chamber confirmed that the principle of equality is one of the fundamental principles that shall be guaranteed to all citizens which includes the equality before the law in terms of accountability. At the same time, the Chamber emphasized that Constitution allows some deviation from the principle of equality for public interest. This according to Chamber can

[527] Zakon Kyrgyzskoi Respubliki o Garantiah deyatel`nosti Prezidenta Kyrgyzskoi Respubliki [Law of the KR on the Guarantees of the Work of the President of the Kyrgyz Republic] July 18, 2003 No. 152

[528] Reshenie Konstitucionnoi Palaty po delu o proverke constitucionnosti stati 12 Zakona o Garantiah Prezidenta KR [Decision of Constitutional Chamber on reviewing the constitutionality of Article 12 of the law on Guarantees of the Presidents] October 3, 2018.

be inferred from the broader meaning and content of the Constitution. Departure from the principle of equality is possible for the purposes of granting a legal immunity to state officials, possessing constitutional legal status and performing significant state functions. The purpose of legal immunity is to provide its holders a guarantee from unreasonable encroachments on their independence. The Chamber stated that legal immunity must be considered as an exception to the principle of equality before the law established to enhance the legal protection of a limited number of people, which will allow them to effectively and properly perform significant state functions. However, legal immunity does not in any way imply its holder of absolute immunity from legal liability for offenses committed.[529]

Nature of Presidential Powers

After analyzing the principle of equality in general terms, the Chamber discussed the nature of presidential powers and the logic and justification behind presidential immunity. Special status of president in the constitution was addressed, namely according to the constitution President is the head of state,[530] the highest official symbolizing unity of people and state power[531], having a special position in the system government authority.

According to the Chamber, by virtue of the wide range of powers and duties assigned to the head of state, full and effective implementation is possible only if adequate guarantees of independence and legal means of protection is provided. Therefore, Article 67 of the Constitution of the Kyrgyz Republic grants the head State legal immunity with established special procedure of bringing the President to justice. In accordance with the Constitution of the Kyrgyz Republic, all former Presidents, except those who have been removed from office, have

[529] *Id.*
[530] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic], art. 60, 27 June 2010.
[531] *Id.*

the title of ex-president and it is established by Article 69 of the Constitution. The Chamber stated that by establishing a status of ex-president at constitutional level, Constitution recognizes the public importance of duties of the President and the need to preserve individual legal safeguards provided for the current head of state even after the resignation.[532]

Thus, in Chamber`s view the immunity of the ex-president is a logical continuation and integral part of the constitutional provision on legal guarantees of the current head of state. Therefore, granting legal immunity to a person who has stopped powers of the President established by Article 12 of the challenged law acts as a legal instrument to ensure effective functioning of the institution of the presidency and is not contrary to the Constitution Kyrgyz Republic. Thus, the norm in the challenged law about guarantee of immunity for ex-president was found constitutional. At the same time, the Chamber highlighted two fundamental gaps in the law. First, the law did not contain a provision about procedure for lifting the immunity of ex-resident to bring him into liability in the presence of serious crimes, committed by him during the execution of presidential powers. This according to the Chamber makes the immunity of the ex-president absolute in nature and could be turned into personal privilege. Second, the ambiguity and inaccuracy of the wording of the norm regarding the extension of legal immunity to acts committed by a person already in the status of an ex-president, in Chamber`s view generates uncertainty and can lead to law enforcement problems. Finally, the Chamber highlighted that the immunity of the ex-president must have specific legal framework, and the procedure on lifting the immunity, should be not much less than the procedure on lifting the immunity of incumbent President, otherwise Article 67 of the Constitution (immunity of the head

[532] Reshenie Konstitucionnoi Palaty po delu o proverke constitucionnosti stati 12 Zakona o Garantiah Prezidenta KR [Decision of Constitutional Chamber on reviewing the constitutionality of Article 12 of the law on Guarantees of the Presidents] October 3, 2018.

of state) will lose its original purpose, consisting in performing a public, constitutionally significant task of ensuring the activities of the President of the Kyrgyz Republic.

Thus, the Chamber concluded that in order to eliminate possible ambiguous understanding of the contested norm, there is a need for Parliament to introduce relevant amendments on procedure for lifting the immunity of ex-president to the law *On guarantees of the activities of the President of the Kyrgyz Republic*. Thus Article 12 of the challenged law was found contradictory to Article 16 of the Constitution of the Kyrgyz Republic, to the extent that this provision does not provide for the procedure of bringing to justice the ex-president for acts committed by him during the term of office of the President Kyrgyz Republic.

Analysis

The approach adopted by the Chamber in this case resembled the doctrine of "conditional unconstitutionality" actively used by Constitutional Court of the South Korea.[533] Given the fact that predominant legal community and state officials were educated by the conservative "soviet style" approach to law that is usually grounded on strict formalism and legalism, the decision of the Chamber was misunderstood. Some claimed that the decision was indeterminate or half-faced.[534] Furthermore, it was argued that such a decision looked not only as an arbitrary interpretation of the Constitution, but also as a dangerous precedent for amending and supplementing the Constitution through a court decision.[535]

The same attitude could be observed in the Parliament when deputies were discussing proposed amendments to the law. During the first parliamentary session on proposed

[533] Case Statistics of the Constitutional Court of Korea, South Korean Constitutional Court, http://english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do (last visited May 2019).
[534] Kanymgul Elkeeva, Polovinchatoe Reshenie Konstitucionnoi Palaty Kyrgyzstana [Half-faced decision of the Constitutional Chamber of the Kyrgyz Republic] Radio Azattyk, (October 19, 2018) https://rus.azattyk.org/a/kyrgyzstan-constitution-law-president/29551986.html (February 2019).
[535] *Id.*

amendments, certain deputies openly criticized Constitutional Chamber for abusing its power and not limiting their decision to constitutionality or unconstitutionality.[536] Deputies claimed that Chamber in no circumstances can demand or dictate parliament on specificities of the law. Due to these criticisms the Chamber issued a press release on urging other branches to behave within the constitutional framework.[537] Despite this fact during the second hearing in Parliament deputies continued criticizing and accusing the Chamber on abuse of power. The Chamber issued another press release repeating and urging deputies to behave within the constitutional framework and abstaining from giving a legal evaluation of judicial decisions which is deemed as an interference to judicial independence.[538]

1.4.2. Aftermath and Another Pending Mega Politics Case before the Chamber

Meanwhile, Atambayev officially announced his political party "SDPK" as an opposition and expressed his intention to participate in next 2020 Parliamentary Elections. He accused Jeenbekov`s regime for promoting clan politics and oligarchization and for omission of investigating serious allegations against former head of the customs service also known as one of the wealthiest state officials in Kyrgyzstan called "Raim Million".[539] It created another wave of

[536] Kyrgyz Lawmakers Approve Bill To Strip Ex-Presidents' Immunity, RadioFreeLiberty, (December 14, 2018) https://www.rferl.org/a/kyrgyz-lawmakers-approve-bill-to-strip-ex-presidents-immunity/29656084.html (last visited January 8, 2019).

[537] Press Preliz po Zayavleniam otdelnyh Deputatov Jogroku Kenesh otnositelno deyatelnosti Konstitucionnoi Palaty [Press Release concerning the statements of certain deputies of Jogorku Kenesh regarding the work of the Constitutional Chamber] Constitutional Chamber of the KR (December 18, 2018) http://constpalata.kg/ru/news/press-reliz-po-zayavleniyam-otdel-ny-h-deputatov-zhogorku-kenesha-otnositel-no-deyatel-nosti-konstitutsionnoj-palaty/ (last visited December 20, 2018).

[538] Press Preliz po Zayavleniam otdelnyh Deputatov Jogroku Kenesh otnositelno deyatelnosti Konstitucionnoi Palaty [Press Release concerning the statements of certain deputies of Jogorku Kenesh regarding the work of the Constitutional Chamber] Constitutional Chamber of the KR (December 18, 2018) http://constpalata.kg/ru/news/press-reliz-po-zayavleniyam-otdel-ny-h-deputatov-zhogorku-kenesha-otnositel-no-deyatel-nosti-konstitutsionnoj-palaty/ (last visited December 20, 2018).

[539] Ex-President Officialdom Obyavil chto Pereshel v oppozisiu k Deistvuishemu Prezidentu [Ex-President Officially announced that his Party became an Opposition to the Current Government], The Currentime, (March 18, 2019).

uncertainties, since currently SDPK faction is among the majority coalition in Parliament, however there is an evident split within the faction among deputies who support Atambayev and Jeenbekov.

In April 2019, a number of SDPK party members organized a special session titled "SDPK without Atambayev". As a result of the session, they have announced Abdrahmanov as the new leader of the SDPK Party.[540] However, official representatives of the party urged the public to ignore it and that Atambayev remains a legal and the only leader of the SDPR party and a week later SDPK had another session where they have re-elected Atambayev and political council of the Party. A few weeks later, in the database of the Ministry of Justice the leader of the SDPK has been renamed from Atambayev to Atbrahmanov.[541] SDPK party evaluated it as an illegal takeover and organized a rally in front of the Ministry of Justice demanding explanations and resignation of the Minister for abusing of his power. Currently, Atambayev and Abdrahmanov are facing mutual legal suits over leadership of the SDPK. The tension between ex-president and sitting president continues.

Once Atambayev announced his political party as an opposition, the Office of the Prosecutor announced reopening of the investigation on two cases: illegal release of the notorious "crime lord" Batukaev in 2013 and plane crush of the business cargo on Dacha Suu village which caused the death local people.[542] In both of these cases it is speculated the

[540] Lider Partii Dvijenia SDPK bez Atambayeva obyavil o nachale processa obnovlenia Partii [The Leader of the Movement SDPK without Atambayev announced about the beginning of the renewal of the Party] RadioAzattyk (April 3. 2019).
[541] Atambayev ischez iz rukovodstva v Baze Dannyh Minusta [Atambayev`s name disappeared from the leadership of the SDPK Party in the data of the Mininstry of Justice] Kloop, (April 18. 2019) https://kloop.kg/blog/2019/04/18/minyust-ukazal-rukovoditelem-sdpk-sagynbeka-abdrahmanova-v-partii-eto-nazvali-davleniem-vlastej-na-vedomstvo/ (last visited in May 7, 2019).
[542] Prokuratura Kyrgyzstana vozobnovilo delo bejavshego iz SIZO v Chechnu vora v Zakone [The Prosecutor`s Office of Kyrgyzstan resumed the case of the crime lord that escaped from Prison to Chechnya], Fergana News, (April 17, 2019).

involvement of ex-President Atambayev. Since May 2019 the office of the prosecutor has arrested the former General Prosecutor, former vise Prime Minister, former ministry of health and have been actively offering the suspects the deal with the investigation in return for the cooperation.[543] It is important to emphasize that the new norm of the cooperation with investigation was included to the criminal procedural code that entered into force on January 2019.[544]

Meanwhile, Parliament introduced amendments to the *Law on Guarantees of Activities of the President* that enabled lifting of the ex-president immunity in case of the presence of corpus delicti for committing serious crimes, by serious crimes under the Criminal Code of the KR is understood any crimes that has the sanction of imprisonment for more than 10 years.[545] However, if one reads the law carefully, it is obvious from the text that these amendments were particularly targeted against Atambayev since it contained such provision as "*if ex-president continues his/her involvement in politics then all immunities and guarantees will be waived*".[546] These amendments generated another debate among experts and politicians as to its retroactive application against Atambayev. Deputies continued criticizing the Chamber for its decision and

[543] Delo Batukaeva: Hronologia Zaderjania podozrevaemyh v nezakonnom osvobojdenii krimavtoriteta [The Case of Batukaev: The Chronology of Arrests of Suspects involved in the illegal release of the Crime Lord], Kloop, (June 5, 2019) https://kloop.kg/blog/2019/06/05/delo-batukaeva-hronologiya-zaderzhaniya-podozrevaemyh-v-nezakonnom-osvobozhdenii-krimavtoriteta/ (last visited July 5,2019).

[544] Ugolovno-processualniy Kodeks Kyrgyzskoi Respubliki [Criminal Procedural Code of the Republic of Kyrgyzstan] February 2, 2017, No. 20, Chapter 58.

[545] Eugene Huskey, *Kyrgyzstan Weakens Legal and Social Guarantees for Ex-Presidents amid Continuing Confrontation Between the Current and Former President*, Presidential Power (May 20, 2019) http://presidential-power.com/?p=9590&fbclid=IwAR1EdpBhf9_VSg2YYVz3YR_atehhQ91AmsVUAU8htCUTElWtoIwnYsLNtyw (last visited June 2019).

[546] Zakon Kyrgyzskoi Respubliki o vnesenii izmeniy v zakon KR o garantiah deyatelnosti Prezidenta Kyrgyzskoi Respubliki [The Law of the Kyrgyz Republic on introducing amendments to the law on guarantess of the President of the KR] May 15, 2019 No. 61.

for creating these uncertainties.[547] Chamber this time decided to go beyond the press release and invited journalists for a press conference.[548]

Ex-president Atambayev in early June 2019 applied to Constitutional Chamber challenging proposed amendments, namely retroactive application of the law to lift immunity of ex-president and the ban for ex-president to be involved in political life of Kyrgyzstan. Thus, the Chamber once again is facing a politically charged and sensitive case. Certain deputies are persistently continuing a pressure upon the Chamber, especially on Chairman Mamyrov. Two deputies Masaliev and Zulushev triggered a disciplinary procedure against the Chairman of the Constitutional Chamber, claiming his alleged abuse of power by adopting the decision in a form of order to Parliament to adopt the law. Despite the fact that the Chamber is a collegial body, and decision-making is made collectively, deputies are persistently targeting the chairman. Furthermore, deputies frequently appear in the media with such statements as Chamber is abusing the constitution and that there is a need to suspend it. Observing the tension between the Parliament and Chamber, one cannot but think that deputies are intentionally exercising pressure upon Chamber to influence its decision in the case involving Atambayev and to get the decision desired for Jeenbekov.[549]

In June 13, 2019 special deputy commission of Parliament was formed to start the process of lifting the immunity of Atambayev for his alleged involvement in major corruption schemes, illegal release of notorious crime lord Batukaev and usurpation of power while his

[547] Bayt Asanov, Neprikosnovennost eks-prezidenta. Chem reshenie suda vizmutilo Jogorku Kenesh [Immunity of Ex-President. How the Chamber outraged Jogorku Kenesh], Radio Azattyk (December 18, 2018) https://rus.azattyk.org/a/kyrgyzstan-ex-president-parliament/29664302.html (last visited January 2019).

[548] V Konstitucionnoi Palate sostayalas vstrecha s Jurnalistami [Constitutional Chamber held a meeting with Journalists] Constitutional Chamber of the KR (February 22, 2019) http://constpalata.kg/ru/news/russkij-v-konstitutsionnoj-palate-sostoyalas-vstrecha-s-zhurnalistami/ (last visited February 25, 2019).

[549] Saniia Toktogazieva, Deputaty v. Konstitucionnaya Palata: Chto govorit Urist [Deputies v. Constitutional Chamber: what lawyer has to say?] AkiPress (May 29, 2019) https://kg.akipress.org/news:1549077 (last visited June 2019).

presidency.[550] The corpus delicti of these allegations were confirmed by the General Prosecutor. In June 27, 2019 by the vote of 2/3 of deputies Atambayev`s status of ex-president and as well as his immunity was waived.[551]

After his immunity was waived Atambayev filed another complaint to Constitutional Chamber challenging the constitutionality of the *Resolution* of Parliament. He claimed that the entire process of the waiver of immunity was with gross procedural and substantive violations of law. Despite this fact, police officers summoned Atambayev for questioning, however he was ignoring the subpoena orders of the Law Enforcement bodies[552], claiming that entire process of lifting his immunity was unlawful. His supporters created so called "*narodniy shtab"* in Atambayev`s residence in Koi-Tash claiming that any use of force by the government will meet subsequent consequences.[553]

In late July 2019, Atambayev flew to Russia via Russian military base in Kyrgyzstan to have a meeting with Vladimir Putin and supposedly to get his support on this situation.[554] However, after the meeting Putin publically announced that Kyrgyzstan should unite around the sitting president and said that Russia is committed to continue working with Jeenbekov, yet urged Kyrgyz government to push all efforts for the maintenance of peace and stability.[555] After

[550] Sozdana Specialnaya Komissia dlya dachi zakluchenia po voprosu vydvejenia obvinenia protiv eks-prezidenta KR A. Atambayeva dlya lishenia ego statusa eks-presidenta. [A special commission has been created to give an opinion on the issue of bringing charges against the ex-president of the Kyrgyz Republic A. Atambayev to deprive him of his status] press release Jogorku Kenesh, (June 13, 2019).
[551] Postanovlenie Jogorku Kenesh o lishenii statusa eks-prezidenta Kyrgyzskoi Respubliki A.Atambyaeva [Resolution of the Jogorku Kenesh of the KR on lifting the status of eks-president of the KR A. Atambayev] June 26, 2019.
[552] Catherine Putz, Defiant Atambayev Refuses Second Subpoena, The Diplomat, (July 11, 2019).
[553] Catherine Putz, Atambayev Loses Immunity, Supporters Gather to Resist, The Diplomat (June 27, 2019).
[554] Nurjamal Djanibekova, Kyrgyzstan: Embattled ex-president flies to Russia, Eurasianet (July 24, 2019) https://eurasianet.org/kyrgyzstan-embattled-ex-president-flies-to-russia (last visited July 30, 2019).
[555] Bruce Pannier, *Kyrgyzstan's Embattled Ex-President Scores, With An Assist From Putin*, RadioFreeLiberty, (July 25,2019).

the visit, law enforcement bodies continued sending him subpoena orders, however Atambayev was refusing to obey them until the final decision of the Constitutional Chamber.

In August 7, 2019 the special forces[556] of Kyrgyzstan entered into the residence of Atambayev to take him under the force drive.[557] However, the raid and operation was unsuccessful and turned into a chaos causing the death of one servicemen and more then 40 injured and wounded people.[558] The political tension was escalating and the supporters of Atambayev held 5 soldiers of the special forces hostage and were persisting that the actions of the government were unlawful and that they are willing to wait until the final decision of the Constitutional Chamber. The next day Parliament gathered for an emergency session to discuss the situation and gave the green light for the second raid. As a result, another group of forces were sent to the residence of ex-president and after negotiations Atambayev was taken into custody.[559]

Taking into consideration the rhetoric of deputies about the Chamber, pressure on the Chairman[560] and existing political dynamics, the Chamber is facing serious challenges while adopting the final decision. It is expected that the ruling about admissibility of the second complaint (resolution of parliament on lifting the ex-presidential immunity) will be adopted late September and if accepted, the Chamber has to adopt a final decision within 5 months.

[556] The forces were the representatives of the Government Committee on National Security, howerver under the law it should have been the representatives of the Ministry of Interior. It was another gross violation of procedural rules.

[557] Danil Usmanov, *Kyrgyzstan: Operation to capture Atambayev descends into chaos*, The Eurasianet, (August 7, 2019) https://eurasianet.org/kyrgyzstan-operation-to-capture-atambayev-descends-into-chaos (last visited August 7,2019).

[558] Elite Forces Try, and Fail, to Arrest a Former President of Kyrgyzstan, The New York Times, (August 8, 2019) https://www.nytimes.com/2019/08/07/world/asia/former-president-kyrgyzstan-arrest.html (last visited August 8,2019).

[559] Kyrgyzstan detains Atambayev after deadly skirmish, Aljazeera, (August 9, 2019) https://www.aljazeera.com/news/2019/08/kyrgyzstan-detains-atambayev-deadly-skirmish-190809041505695.html (last visited August 10, 2019).

[560] Glava Konstitucionnoi Palaty Poluchil Preduprejdenie ot Dissiplinarnoi Kommissii [The Chairman of the Constitutional Chamber received warning from the disciplinary commission], Vesti.kg (May 24,2019).

Acceptance of the complaint will create a historical precedent in the jurisprudence of the Chamber. Because it would mean the extension of the constitutional review over the procedural law making process of the Parliament.[561] However, the acceptance of the complaint might exercebate the tension between Chamber and deputies of the Parliament even more.

2. Part II Pseudo Mega Politics: Façade Constitutional Litigation as Window Dressing

2.1. Constitutional Council of Kazakhstan: Instrumentalization by President to Prepare the Transition of Power

Transition of power from the first and until recently the only President of Kazakhstan to another person was always a sensitive question, especially for the last couple of years. President Nazarbayev have firmly protected and engraved his status *El Basy* "Leader of Nation" into the Constitution and have been actively suppressing any opposition or alternative view on this issue. Despite this fact, in March 2019 unexpectedly, although for some experts expectedly Nazarbayev resigned and most waited and discussed moment of transition turned into reality. Constitutional Council of Kazakhstan has been a key forum, player and participant in this orchestrated procedure of transition. It is highly important to note that Nazarbayev throughout his presidency have actively instrumentalized the law, particularly the Constitution to pursue his own political agenda. It was expressed in the enlargement of presidential legislative power, use of the Constitutional Court to trigger the Parliamentary dissolution and so on[562]. It can be specifically

[561] There is currently an existing scholarship that actively argues for the judicial review of the legislative process. For more see: Navot Suzie, *Judicial Review of the Legislative Process*, 39.2 Israel Law Review, (2006). Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91.6 Boston University Law Review, (2011).

[562] Konstituciia Respubliki Kazakhstan (1993) [Konst.RK] [Constitution] – first constitution of the independent Kazakhstan was adopted by the Supreme Soviet of the RK (Parliament). After the dissolution of the parliament Nazarbayev initiated the referendum and the text of the new constitution was adopted in 1995.

observed after 1998 when his grand plan succeeded on dissolving the Parliament, and packing it with his supporters and substituting the constitutional court with constitutional council.[563] The period of 1998-2017 can be characterized as the period of constant changes and amendments to the Constitution and other fundamental laws as Election Laws and laws on powers of President.[564] By 2017 the Constitution of Kazakhstan reflected the extreme consolidation of power by president. Among the most striking elements of consolidation can be highlighted in two important legal inventions of Nazarbayev.

First, the introduction of the special status for the First President of Kazakhstan "*El Basy*" that can be translated as "Leader of Nation".[565] Second, the First President, Leader of Nation was no longer bound by constitutional term limits for the president (no more than 2 times).[566] As it was mentioned earlier, even though it is hard to provide the evidence, but it can be argued that Akayev`s initiative on the special constitutional status and legally entrenched position for ex-presidents (first president) was an inspiration for other Central Asian presidents, particularly for Kazakhstan.

Furthermore, the active involvement of Constitutional Council (Council) in interpreting the requested laws and amendments by Nazarbayev since 2017 demonstrates the

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Konstituciia Respubliki Kazakhstan (1995) [Konst.RK] [Constitution] – was adopted by the Republican Referendum in August 30, 1995. For the evidence of instrumentalization of law by Nazarbayev can be observed in following laws:
Zakon Respubliki Kazakhstan o vremennom delegirovanii Prezidentu Respubliki Kazakhstan I glavam mestnyh administraciy dopolnitel`nyh polnomochiy [The Law of the Republic of Kazakhstan on ad hoc delegation of additional powers to the President of the Republic of Kazakhstan and to Heads of local administrations] Dec. 10, 1993, No.2576-XII, Ukaz Prezidenta RK ob Obrazovanii Assamblei Narodov Kazakhstan a [The Order of the President of RK on Establishment of the Assembly of Peoples of Kazakhstan] March 1, 1995

[563] Pre 1998 Constitutional Court was discussed in detailed in chapter 3.

[564] Nurumov, Dmitry (et al.), *Constitutional Development of Independent Kazakhstan,* in Elgie, Robert, Moestrup, Sophia (Eds.), Semi-Presidentialism in the Caucasus and Central Asia, 143-172 (Palgrave Macmillan UK, 2016).

[565] Konstitucionniy Zakon RK o Pervom Prezidente Respubliki Kazakhstan - Lidere Nacii [Constitutional Law of the RK on First President of the Republic of Kazakhstan- Leader of Nation] July 20, 200 No. 83-II

[566] Zakon Respubliki Kazakhstan o vnesenii izmeniy I dopolneniy v Konstituciu Respubliki Kazakhstan [The Law of the Republic of Kazakhstan on introducing amendments to the Constitution of the Republic of Kazakhstan] May 21, 2007, No. 254-3.

instrumentalization of Council as a part of his transition plan. This section will reflect those tools used by Nazarbayev along with the Constitutional Council`s role in it. In March 19, 2019 Nazarbayev after 30 years in power announced about his resignation from the office of the President[567]. For most of the population this announcement was an unexpected shock, some admired his wisdom and willingness to voluntary transit the power. However, if one looks at past 2-3 years it is possible to conclude that it was not a decision made out of blue, rather a well-orchestrated and well-prepared grand plan which involved changes to the constitution in 2017 and to other important laws on Security Council and finally in February 2019 Nazarbayev`s request for an official interpretation of the constitution from the Council. This section of the chapter will analyze all these decisions of the Council.

In 2017 with the initiative of President[568] number of changes were introduced to the Constitution. The amendments were speculated to be aimed to pursue two primary goals: redistribution of power between President and Parliament and effective protection of human rights.[569] These two goals were addressed under the common theme of "democratization of political system of Kazakhstan."[570] In practice they serve keeping Nazarbayev in power even after his resignation from office through the position of Elbasy added to new laws and to the Constitution.

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[567] Ukaz Prezidenta RK ob ispolnenii polnomochiy Prezidenta Respubliki Kazakhstan [Decree of the President of RK on execution of Presidential powers of the President of the Republic of Kazakhstan] March 19,2019, №887

[568] Rasporyazhenie Prezidenta RK o vsenarodnom obsujdenii proekta zakona RK o vnesenii izmeneniy I dopolneniy v Konstituciu Respubliki Kazakhstan [The Presidential Order of the RK on public hearing of the draft law on introducing amendments to the Constitution of the Republic of Kazakhstan] January 25,2017

[569] For detailed explanation of each amendment see Zhenis Kembyaev, *Recent Constitutional Reforms in Kazakhstan: A Move Towards Democratic Transition?,* 42 Review of Central and East European Law, 294-324 (2017).

[570] Carna Pistan, *2017 Constitutional Reform in Kazakhstan: increasing democracy without political pluralism?,* Constitutionnet (March 28,2017) http://constitutionnet.org/news/2017-constitutional-reform-kazakhstan-increasing-democracy-without-political-pluralism (last visited December 2018).
Anton Morozov, *Konstitucionnaya Reforma v Kazakhstan e: prodoljenie Sleduet* [Constitutional Reform in Kazakhstan continued], Rhythm Eurasia (March 16,2017) https://www.ritmeurasia.org/news--2017-03-16--konstitucionnaja-reforma-v-kazahstane.-prodolzhenie-sleduet-28978 (last visited December 2018).

2.1.1. 2017 Constitutional Amendments Case

Background of the Case

At first sight the amendments of 2017 might seem a great success and move to democratization. However, a closer look at these amendments and the political context of Kazakhstan reflects that it was yet another grand plan of Nazarbayev, namely to prepare the ground for power transition and introduce amendments to fundamental clauses by strengthening the status of the first president by incorporating it into the value system of the constitution. This can be particularly noticed in the following.[571]

First, the eternity clause of the Kazakh Constitution was extended to include the "*fundamental principles of State established by the Founder of independent Kazakhstan, namely Nazarbayev*"[572] and the inviolability of the status of the first president Nazarbayev was also included into the eternity clause as "*the Founder of independent Kazakhstan, the First President and the Leader of Nation*".[573]

Second, additional constitutional requirements for presidential candidates were introduced. Namely the minimum work experience of 5 years in the state service. This specific provision could be viewed as filtering tool targeted against the opposition candidates.[574] Third, no legislative delegation allowed from Parliament to President on issuing decrees with the power of the law.[575]

[571] Zakon Respubliki Kazakhstan o Vnesenii Izmeneniy I Dopolneniy v Konstituciu Respubliki Kazakhstan [Law of the Republic of Kazakhstan on Introducing Amendments to the Constitution of the Republic of Kazakhstan] March 10 2017, № 51-VI.
[572] *Id.* Article 91
[573] *Id.* Article 91
[574] *Id*. Article 41
[575] *Id.* Article 53

Fourth, the jurisdiction of the Council was extended to include the review of already promulgated laws by Parliament upon the request of the President. Required advisory opinion of the Council was introduced to the proposed amendments to the constitution.[576]

Finally, there were number of changes introduced related to constitutional rights including the introduction of the system of revocation of citizenship.[577]

As one can notice most of these changes are clear evidence of Nazarbayev`s plan to prepare constitutional ground for transition while strengthening his status as a first president, reshuffling some powers between President and Parliament while keeping the constitutional arrangement in such a way as to enable Nazarbayev (the first president and leader of nation) to keep de facto control in case of his resignation.

Analysis of the decision

President Nazarbayev requested the Council to review the draft amendments to Constitution. The Council in its opinion[578] stressed that all procedural guarantees on amendments were followed and moreover also highlighted the drafting process of amendments involved wide publicity and participation of the civil society. Accordingly, on procedural grounds the Council did not detect any inconsistences.

Final decision of the Council consisted of 11 pages. Last three pages were dedicated to the actual reasoning of the Council; all the rest 10 pages were merely restating the introduced amendments one by one.

[576] *Id.* Article 74
[577] *Id*. Article 10
[578] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017

On substantive grounds, the methodology and approach of the Council followed the logic of Article 91. Namely the Council was evaluating introduced changes for compatibility with the inviolability of the eternity clause, namely with the principles of "unitary state", "territorial integrity" and "form of governance" listed in the eternity clause of the constitution. Most of the changes as requirements of presidential candidates and others were simply mentioned in the decision without separate analysis.[579] Furthermore, introduced amendments were not analyzed for conformity with the provisions on *fundamentals of constitutional order* as rule of law, democracy and protection of fundamental rights guaranteed by Article 1 of the Constitution, rather amendments had been strictly viewed through the prism of eternity clause, namely section 2 of the Article 91 of the Constitution.[580]

As mentioned earlier, the first half of the decision was restatement of introduced amendments, however, if one reads the decision closely, it is obvious that proposed amendments were not examined properly. Rather it resembled a historical textbook that highlighted achievements of Kazakhstan in broad terms. For instance, the Council stated that the entire recent history of the formation and development of Kazakhstan as an independent, strong and successful state with a developed civil society was due the adoption of modern constitutional values, fundamental principles of the Republic of Kazakhstan and their subsequent implementation. Furthermore, the Council concluded that the degree of protection of constitutional rights were improved by the amendments for three reasons. First, President could apply to the Council for a review of already promulgated laws. Second the institution of the

[579] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017

[580] *Id.*

Commissioner for Human Rights was given a constitutional status. Third, the judicial system and prosecutor's office was improved, yet the decision did not discuss in detail how exactly these systems are being improved. Finally, even though the Council emphasized the increase of the degree of human rights protection, at the same time the Council did not provide any reasoning on norms that obviously decrease the protection, namely the revocation of citizenship.[581]

More emphasis was given to compatibility of amendments to Constitution`s eternity clause, particularly the "form of governance" requirement under this clause. The Council reiterated that redistribution of powers between the branches of government, does not affect the basis of the presidential form of government. The presence of the presidential vertical in local government also testifies the preservation of the presidential form of government. The constitutional reform carried out at the initiative of the President of the Republic of Kazakhstan - Elbasy corresponds to the logic of the country's historical evolution and provides further embodiment of democracy, increasing the responsibility of the Parliament and the Government, while the presidential form of government remains unchanged.[582] As one can notice, the Council persistently repeated that despite some redistribution of power between parliament and president, in fact the form of governance remains as presidential.

Finally, the Council discussed the amendment on expansion of the specially protected values under the eternity clause. Particularly, fundamental values and principles laid down by the first president Elbasy were included into the eternity clause. Those principles are expressed in section 2 of the Article 1"*social harmony and political stability, economic development for the*

[581] *Id.*

[582] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017

benefit of all the people, Kazakhstan's patriotism, deciding the most important issues of state life through democratic methods, including voting in the republican referendum or in Parliament."[583] According to the Council these values are of paramount importance for an individual and determine the content of all subsequent norms of the Constitution and law enforcement practice.

Besides that, the status of the First President of the Republic of Kazakhstan – Elbasy was also included into the eternity clause.[584] In Council`s view this amendment is reasonable, justified and constitutionally confirms the historic mission of Nursultan Nazarbayev as *Elbasy* who substantially contributed to the emergence and development of the independent state of Kazakhstan,[585] who continuously ensured the unity of the Constitution and the protection of the rights and freedoms of citizens and "*who made a decisive contribution to the establishment and development of the constitutional values of the Basic Law and the fundamental principles of the Republic.*"[586] As it is evident from the reasoning of the Council, introduced amendments on eternity clause were not analyzed based on fundamental principles of rule of law, democracy or other, rather the Council adopted a history as a justification.

Accordingly, the Council gave an affirmative opinion on proposed changes and concluded on constitutionality of these amendments.

Aftermath

[583] Konstituciia Respubliki Kazakhstan [Konst.RK] [Constitution of the Respublic of Kazakhstan], Article 1, 1993.
[584] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017
[585] *Id.*
[586] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017. Available in http://ksrk.gov.kz/en (last visited June 9,2019).

Shortly after the amendment of the Constitution, Parliament initiated changes to number of laws related to the security sector, particularly the on-Security Council[587] and the law on Elbasy. The Security Council was first created by the presidential order of Nazarbayev back in 1993 as a consultative body in the field of security. In submitted amendments the status of the security council was proposed to be upgraded to constitutional with the main function of coordinating the activities of other state bodies in the field of national security and defense. Furthermore, the amendment was also proposed to the law on first president which provided the following: "*Elbasy (first President) due to his historic mission is granted lifelong right to chair the Security Council of the Republic of Kazakhstan*"[588]. Thus, by these amendments it was clear that the power of the first president was being enhanced along with the powers of the Security Council that is proposed to be chaired by Elbasy for a lifelong term even after his resignation. Nazarbayaev, as required by the Constitution, requested the Council`s review on proposed bills.

2.1.2. The Case Concerning the Security Council Law

Analysis of the decision

From the very beginning of the decision the Council emphasized that the *Security Council Law* is a logical continuation of the recent constitutional amendments and have been adopted to implement and enforce the Constitution. No analysis was made as to conformity of the law with main principles of rule of law, democracy and separation of powers. Even though it

[587] Zakon Respubliki Kazakhstan o Sovete Bezopasnosti Respubliki Kazastan, Zakon Respublilki Kazakhstan o Vnesenii izmeneniy i dopolneniy v nekotorye zakonodatelnye akty Respubliki Kazakhstan po voprosam deyatelnosti Soveta Bezopasponosti Respubliki Kazakhstan [Law of the RK on Security Council of the Republic of Kazakhstan , Law of the RK on introducing amendments to some legislative acts of the RK on issues related to Security Council of the Republic of Kazakhstan] May 31,2018

[588] *Id* and Konstitucionniy Zakon RK o Pervom Prezidente RK Elbasy [Constitutional Law of the RK on First President of the RK- Elbasy] July 20, 200 No. 83-II.

is not expressly written in the decision, one cannot but think that this approach of the Council was due to its assumptions that the law was adopted to enforce recent amendments to the Constitution that aimed at "democratization of political system of Kazakhstan".[589] Besides that, one can notice the absence of one consistent methodology, approach or test used by the Council while reviewing the constitutionality of the proposed bills.

Furhermore, the Council started talking about global security challenges and importance of these amendments in this global context. Particularly, the Council stated that there are increasing global challenges and international instability and to ensure social harmony and political stability, to prevent and overcome security threats there is a necessity in updating organizational and legal guarantees of Kazakhstan's security sector. To achieve this goal according to the Council there is a need for high quality management of the security sector. Council continued that the *Security Council Law* specifically designed to meet that quality management, namely it had higher level of legal regulation of the legal status, competence and organization of the activities of the Security Council.[590] The purpose of the establishment of this body is the preservation of domestic political stability, the protection of the constitutional system, state independence, territorial integrity and national interests of Kazakhstan in the international arena. The Council continued that the Security Council is also an effective guarantor of the sovereignty of the state, of the legality, as well as the strengthening of the principles of "*a democratic, secular, legal and social state, the highest values of which are a person, his life,*

[589] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan o proverke na sootvetsvie Konstitucii RK Zakona RK o Sovete Bezopasnosti RK I Zakona o Vnesenii Izmeneniy I Dopolneniy v nekotorye Zakonodatelnye akty Respubliki Kazakhstan [Normative Resolution of the Constitutional Council of the Republic of Kazakhstan on reviewing the constitutionality of the law on Security Council and proposed drafts to certain legal acts of the Republic of Kazakhstan] June 28, 2018 No.4.
[590] *Id.*

rights and freedoms."[591] However, the Council did not explain in detail how exactly Security Council guarantee these principles. Furthermore, the Council emphasized that the Law on Security Council does not limit the rights of individuals and does not impose additional obligations on them. Based on these, the Council concluded that the proposed amendments do not contradict the Constitution.

2.1.3. 2019 Constitutional Interpretation Case

Background of the Case

The next Presidential election was expected to be held in 2020. The political life of Kazakhstan was quite for a while and the issue of transition was not discussed as frequent as before. Suddenly, on February 4, 2019 Nazarbayev requested the Council to interpret one specific provision of the Constitution. Since then, the question about protentional early elections have returned to the media again.

President Nazarbayev asked the following question: "*Is the list of grounds for the early termination of the authority of the President of the Republic of Kazakhstan set out in paragraph 3 of Article 42 of the Constitution of the Republic of Kazakhstan exhaustive?"*[592]

According to the internal rules of the Council, it was supposed to announce the interpretation within a month. After ten days on February 15, 2019 the Council published its official interpretation on requested provision of the Constitution. Shortly after the request of the President the media started speaking about possible early elections and guessing possible

[591] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan o proverke na sootvetsvie Konstitucii RK Zakona RK o Sovete Bezopasnosti RK I Zakona o Vnesenii Izmeneniy I Dopolneniy v nekotorye Zakonodatelnye akty Respubliki Kazakhstan [Normative Resolution of the Constitutional Council of the Republic of Kazakhstan on reviewing the constitutionality of the law on Security Council and proposed drafts to certain legal acts of the Republic of Kazakhstan] June 28, 2018 No.4.

[592] Obrashenie Prezidenta RK N.A. Nazarbayeva ob ofisialnom tolkovanii puncta 3 statyi 42 Konstitusii RK [Referral of the President of the Republic of Kazakhstan N.A. Nazarbayev on official interpretation of paragraph 3 of Article 42 of the Constitution of RK] February 4,2019

motivations of the President. However, the next day he made a public speech on all government TV channels assuring that there are no grounds for worrying about early elections and the presence of no hidden motives behind it. He assured that it was made to avoid any misunderstandings in the future since the provision was not clear.[593]

Before discussing the interpretation of the Council, it is important briefly review the disputed Article of the Constitution. A closer look at the provision enables one to assume hidden motives of the President behind it. Article 42 states the following: "*The powers of the President of the Republic are terminated from the moment the newly elected President of the Republic takes office, as well as in the event of early release or removal of the President from office or his death. All former Presidents of the Republic, except those who have been removed from office, have the title of ex-President of the Republic of Kazakhstan*."[594]

This provision distinguishes between early termination and early resignation of presidential powers. Early termination, in other words impeachment, can be initiated by Parliament under Article 47 of the Constitution. Early resignation which assumes voluntary according to Article 47 can be made in case of serious health problems of the President. Most importantly, the same Article stipulates that only former presidents who have either resigned voluntarily or whose term ended by the election of another president is entitled to the status of ex-President. As mentioned earlier, these incremental changes of the Constitution, particularly the 2017 amendments have substantially empowered the status of ex-president specifically Elbasy after his resignation from the presidency. In case if Nazarbayev decides to leave office before the end of the term, without the cause of serious health problems, he might lose his status

[593] Nazarbayev prizval ne shumet v svyazi s ego obrasheniem v Konstitucionniy Sovet [Nazarbayev urged "not to make noise" in connection with his appeal to the Constitutional Council] Radio Azattyq (February 5, 2019) https://rus.azattyq.org/a/29752324.html (last visited February 20, 2019).
[594] Konstitucia Respubliki Kazakhstan [Constitution of the Republic of Kazakhstan], Article 42, January 28,1993.

of ex-president, because Article 42 assumes only condition of serious health conditions. Accordingly, the main question raised before the council for interpretation *"Is the list of grounds for the early termination of the authority of the President of the Republic of Kazakhstan set out in paragraph 3 of Article 42 of the Constitution of the Republic of Kazakhstan exhaustive?"*[595]

Analysis of the Decision

The reasoning of the Council started with listing and defining main functions of the President under the constitution. The Council stated that President among all branches of power is the only one who is personified as a supreme representative of the people. Furthermore, by the constitution he is the head of state and is entrusted with taking measures to protect the sovereignty, independence of the state, implement the fundamental principles of the republic, achieve the goals and implement the values enshrined in the Basic Law.[596]

Then the Council explained the existing constitutional regulation of termination and resignation of presidential powers. Under the Article 42 of the constitution early resignation is possible under serious health problems or death and due to end of the term by election of another candidate. Whereas termination of power derives from such grounds as impeachment of the president or commission of high treason and other serious crimes.[597] The Council continued that section 3 of Article 42 of the Constitution does not contain an exhaustive list of grounds for early termination of powers of the President. Specifically, the Council stated that it does not explicitly

[595] Obrashenie Prezidenta RK N.A. Nazarbayeva ob ofisialnom tolkovanii puncta 3 statyi 42 Konstitusii RK [Referral of the President of the Republic of Kazakhstan N.A. Nazarbayev on official interpretation of paragraph 3 of Article 42 of the Constitution of RK] February 4,2019

[596] Normativnoe Postanovlenie Konstitucionnogo Soveta Respubliki Kazakhstan ob oficialnom tolkovanii puncta 3 stati 42 Konstitucii Respubliki Kazakhstan [Normative Resolution of the Constitutional Council of the Republic of Kazakhstan on official interpretation of paragraph 3 Article 42 of the Constitution of Republic of Kazakhstan] February 15,2019.

[597] Normativnoe Postanovlenie Konstitucionnogo Soveta Respubliki Kazakhstan ob oficialnom tolkovanii puncta 3 stati 42 Konstitucii Respubliki Kazakhstan [Normative Resolution of the Constitutional Council of the Republic of Kazakhstan on official interpretation of paragraph 3 Article 42 of the Constitution of Republic of Kazakhstan] February 15,2019.

allow or prohibit the early termination of powers of the President based at his personal will. This according to the Council can be assumed by the phrase "*as well as in the case of early release of "which in Council`s opinion has a broad meaning*.[598]

Then the Council activated one of the principles protected under the eternity clause, particularly the form of governance which is according to the constitution is presidential. The Council stated that in a presidential form of governance and by the constitutional status of the President as a head of state, the right to have early termination of his powers on personal grounds, per se, right to resign should be considered as an integral element of this form of governance. Moreover, the Council stated that this right can be supported by the fact that President as an individual and citizen of Kazakhstan also has an inherent right to freedom of expression. Finally, the Council used the analogy method and brought examples from the law which grants right to other civil servants resign from the office upon their voluntary will. Based on these grounds, the Council concluded the following. The list of grounds for early termination of powers of the President under section 3 of Article 42 of the Constitution is not exhaustive. The right to terminate presidential powers on the free will of the sitting President is derived from the constitutional status of the President as a head of state.

Aftermath

After the Council announced its decision for a while political life of Kazakhstan was back to normal routine and rumors about possible early transition was no longer actively discussed. However, number of events happened in the capital city, particularly Kazakh mother`s protest after the tragic fire incident in Astana.[599] Women were demanding more social security for child

[598] *Id.*
[599] Tragic Fire In Astana Gives Kazakh Mothers' Protests New Momentum, RadioFreeLiberty (February 12, 2019)

support. A similar wave of protests happened throughout Kazakhstan. Narratives about the deteriorating standard of living, absence of economic reforms and overall the protest mood of the population started increasing. This led to another political move by the President and on February 21 he dismissed the government for failure to work effectively and to meet the living standards problem.[600] Thus he appointed a new prime minister Asqar Mamin.[601] Afterwards in March 19, 2019 Nazarbayev after 30 years in power announced about his resignation from the office of the President[602]. For some it was a sudden decision, however as it is evident from the analysis of cases in last two years, President Nazarbayev had been instrumentalizing the law and particularly the Council by interpreting the Constitution as a preparation ground for the transition of power and ensuring that first President Elbasy will retain substantial de jure and de-facto powers as well. After the announcement about resignation, according to the provisions of the Constitution speaker of the parliament Tokaev became acting president of Kazakhstan until the next election.[603] Notably, in a short period of interim presidency, Tokayaev have also continued the legacy of Nazarbayev and was able to instrumentalize the Council twice in important cases that also worth briefly mentioning in this section. These cases are about succession in office as symbolic as practical, and just like previous cases, constitute the pseudo mega politics involving political legacy of the now resigned ex-president and current Elbasy.

https://www.rferl.org/a/tragic-fire-in-astana-gives-kazakh-mothers-protests-new-momentum/29765930.html (last visited February 15, 2019).

[600] Nazarbayev Fires Kazakh Government Over Low Living Standards, Economic Failures, RadioFreeLiberty (February 21,2019) https://www.rferl.org/a/kazakh-government-resigns-Nazarbayev/29783173.html (last visited February 25, 2019).

[601] Kazakh President Appoints New Prime Minister, RadioFreeLiberty (February 25, 2019) https://www.rferl.org/a/Nazarbayev-appoints-mamin-kazakhstan-prime-minister/29789292.html (last visited March 1, 2019).

[602] Ukaz Prezidenta RK ob ispolnenii polnomochiy Prezidenta Respubliki Kazakhstan [Decree of the President of RK on execution of Presidential powers of the President of the Republic of Kazakhstan] March 19,2019, №887

[603] Konstitucia Respubliki Kazakhstan [Constitution of the Republic of Kazakhstan], Article 48, January 28,1993.

2.1.4. Capital City Renaming case

Background of the Case

The first day when Tokaev took the office as an interim president, during his inaugural speech he proposed to rename the capital city from Astana to Nursultan (first name of Nazarbayev). He justified it by Nazarbayev`s substantial contribution to the development of Kazakhstan that was substantially supported by the Parliament.[604] It was received negatively by the public which triggered public protest against renaming the capital city.[605] Citizens believed that without following a strict procedure provided by the law, the actions of state officials were in violation of the law, particularly of the Constitution. Concerns of the public were well-grounded because, Astana as the capital city has a constitutional status and this status is protected by the constitution, particularly by Article 2. This has been done intentionally by Nazarbayev when the capital was moved from Almaty to Astana due to the concerns of Russian influence, since northern part of Kazakhstan is mostly inhabited by ethnic Russians.[606]

If one looks closely at different provisions of the Constitution and systematizes them related to the given context, there are several important requirements to be followed. First, the name of the capital of Kazakhstan is reflected in Art. 2 of the Constitution[607], which means in order to rename Astana, it is necessary to change the Constitution. Second, Parliament can ammend the Constitution only at the initiative of the president. However, by virtue of section 2

[604] New Kazakh president: Astana should be renamed to 'Nursultan', Aljazeera, (March 20, 2019) https://www.aljazeera.com/news/2019/03/kazakh-president-astana-renamed-nursultan-190320070920671.html (last visited April 19, 2019).
[605] Kazakh police disperse protest against renaming of capital, The Reuters, (March 21,2019) https://www.reuters.com/Article/us-kazakhstan-protests/kazakh-police-disperse-protest-against-renaming-of-capital-idUSKCN1R20K0 (last visited April 15,2019).
[606] Mehmet Arslan, *The Significance of Shifting Capital of Kazakhstan from Almaty to Astana: An Evalution on the basis of Geopolitical and Demographic Developments*, 120 Procedia-Social and Behavioral Sciences, 98 (2014).
[607] Konstitucia Respubliki Kazakhstan [Constitution of the Republic of Kazakhstan], Article 2, January 28,1993.

of Art. 48 of the Constitution, the "transit "or interim president is not entitled to initiate amendments to it, this entitlement is given only to an elected President.[608] This norm is assumed to be aimed at preventing the usurpation of power by the interim president. In fact, since Tokayaev was an interim President, it was obvious that while he is in a transit president position, Parliament had no right to amend the constitution. However, despite these restrictions, amendments to the constitution on renaming the capital city were proposed and as required by the Constitution, it was sent for a review by Constitutional Council.[609]

Analysis of the Decision

The Council did not address the procedural guarantees on introducing amendments to the constitution and right away jumped into analyzing the substance. However, in previous opinions and reviews the Council always used to start with the procedural requirements. Given the political context and most likely the expected outcome of the review, it is clear to guess the motivation of the Council on this particular strategic choice on interpretative tool.[610] From substantive point of view the Council reiterated that in 2017 by constitutional amendments the role of the first president and leader of nation was confirmed by the constitution and the grounding principles by Elbasy was included into the list of eternity clause.[611] This according to the Council constitutionally confirmed the status of Nazarbayev as *Elbasy* who substantially contributed to the emergence and development of the independent state of Kazakhstan,[612] who continuously ensured the unity of the Constitution and the protection of the rights and freedoms

608 *Id.* Article 48
609 Proekta zakona Respubliki Kazakhstan o vnesenii izmeneniy v konstituciu Respubliki Kazakhstan [The draft law on introducing changes to the Constitution of the RK] March 20,2019.
610 Zakluchenie Konstitucionnogo Soveta Respubliki Kazakhstan o proverke proekta zakona Respubliki Kazakhstan o vnesenii izmeneniy v konstituciu Respubliki Kazakhstan na sootvestvie Konstitucii Kazaksthana [Conclusion of the Constitutional Council of RK on reviewing the constitutionality of the draft law on introducing changes to the Constitution of the RK] March 20, 2019 No.2.
611 *Id*.
612 *Id.*

of citizens and "*who made a decisive contribution to the establishment and development of the constitutional values of the Basic Law and the fundamental principles of the Republic.*"[613]

Thus, the proposed draft law on introduction of the amendments were found in conformity with the constitution and based on the conclusion of the Council and irrespective of the protests by the local population, the capital city of Kazakhstan was renamed from Astana to Nursultan.[614] It is highly important to note that the Council again used the eternity clause and the historical mission of Elbasy reasoning to justify the introduced amendments, meanwhile disregarding the procedural requirements on amendments guaranteed by the constitution.

Aftermath

Shortly after the capital city name was renamed to Nursultan, Nazarbayev`s daughter was elected as a speaker of the Parliament.[615] Later in early April, President Tokayev issued a decree on calling early presidential elections and the date was set to June 9, 2019 however, the next elections were excepted to be held in April 2020. [616] In April 11, 2019 the Council amended its own internal regulations rule by including the following provision: "*In view of the high importance and urgency of the appeal received, the Constitutional Council may decide to consider it in an expedited manner. In this case, the preparation of materials for the meeting of the Council is carried out by the rapporteur in the manner determined by the Chairman of the*

[613] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017. Available in http://ksrk.gov.kz/en (last visited June 9,2019).

[614] Zakon Respubliki Kazakhstan o vnesenii izmeneniy v konstituciu Respubliki Kazakhstan [The law of the RK on introducing changes to the Constitution of the RK] March 23, 2019 No. 238-VI ЗРК.

[615] Nursultan Nazarbayev's daughter of appointed Speaker of Parliament, AsiaNews (March 21, 2019) http://www.asianews.it/news-en/Nursultan-Nazarbayevs-daughter-of-appointed-Speaker-of-Parliament-46560.html (last visited April 1, 2019).

[616] Ukaz Prezidenta RK o naznachenii o Vneocherednyh vyborov Prezidenta Respubliki Kazakhstan [Decree of the President of RK on announcing early presidential elections of the Republic of Kyrgyzstan] April 9, 2019

Constitutional Council."[617] Before this amendment, by the rules the Council was supposed to consider cases within a period of one month. On April 23, 2019 Tokaev was proposed by Nazarbayev as a candidate from the ruling political party Nur Otan and based on the session of the Nur Otan Tokaev was officially proposed as a Presidential candidate.[618]

The same day the acting president applied to the Council for interpretation of Article 41 of the Constitution. Particularly, he requested the Council to interpret the norm that requires the candidate to President to reside in Kazakhstan for the last fifteen years.[619]

Moreover, following question was asked: "*Whether the residence time of a citizen outside Kazakhstan while working in foreign institutions representing Kazakhstan would count to this 15-year period*?"[620] Tokayaev for the last 10-15 years had been mostly working as an Ambassador or representative of Kazakhstan in organizations as UN, therefore the motivation behind applying for the Council was clear. The Council announced its decision on April 25th by triggering a new amendment on internal rules. Basically, as expected the Council stated that this type of residence abroad will be accepted to fulfill the residence requirements under Article 41.[621] Once all candidates were registered, the political activism started growing, particularly

[617] Normativnoe Postanovlenie Konstitucionnogo Soveta RK ot 11 aprelya 2019 goda o vnesenii izmeneniy I dopolneniy v Reglament Konstitucionnogo Suda RK [The Normative Ruling of the Constitutional Council as of April 11, 2019 on introducing amendments to the Reglament of the Constitutional Council of the RK] April 11, 2019 No. 3.

[618] Kazak Ruling Party nominates Tokayev for Presidency, The Aljazeera, (April 23, 2019) https://www.aljazeera.com/news/2019/04/kazakh-ruling-party-nominates-tokayev-presidency-190423071300116.html (last visited April 30, 2019). Kazakh Ruling Party nominates Tokayev for President, Radio Azattyq (April 23, 2019) https://www.rferl.org/a/kazakh-ruling-party-poised-to-announce-presidential-election-candidate-at-congress/29897909.html (last visited April 30, 2019).

[619] Obrashenie Prezidenta RK Konstitucionnomu Sovetu ob ofisialnom tolkovanii puncta 2 stati 41 Konstitucii RK [Referral of the President of RK to Constitutional Council of the RK for official interpretation of paragraph 2 of Article 41 of the Constitution of RK] April 23, 2019

[620] Obrashenie Prezidenta RK Konstitucionnomu Sovetu ob ofisialnom tolkovanii puncta 2 stati 41 Konstitucii RK [Referral of the President of RK to Constitutional Council of the RK for official interpretation of paragraph 2 of Article 41 of the Constitution of RK] April 23, 2019.

[621] Normativnoe postanovlenie Konstitucionnogo Soveta RK ob ofisialnom tolkovanii punkta 2 stati 41 Konstitucii Respubliki Kazakhstan [Normative regulation of the Constitutional Council of the RK on official interpretation of the paragraph 2 Article 41 of the Constitution of the RK], April 25, 2019 No.4.

among the youth who claimed that the elections are going to be without any choice, since none of the candidates could in fact compete with Tokayaev.[622] Moreover, the 2017 constitutional amendments on requirements of presidential candidate blocked number of people to be registered since they did not have minimum 5 years of work experience in civil service. Protest activism grew, as well as the police brutality and massive arrests of protesters.[623] Election took place on June 9, 2019 Tokayaev received more than 70%. However, the election day and post-election days were marked with protests throughout Kazakhstan boycotting the elections and the results as well. Overall, it was estimated the arrest of 4000 protestors and number of international organizations[624] including the OSCE election observation mission, Amnesty International[625], Human Rights Watch[626] and UN Human Rights Office[627] urged Kazakh government to stop massive arrest of protestors.[628]

Despite the resignation of Nazarbayev de facto Kazakhstan now is experiencing duality of power where the role of the ex-president remains substantial. It can be reflected on different levels. For instance, he established the office (*канцелярия*) of the ex-president and requested an

[622] Anna Klevcova, *Smehotvorno Zloveshaya Kazakhstan skaya Demokratia* [Ridiculously ominous Kazakhstan`s democracy], Radio Azattyq (May 18,2019) https://rus.azattyq.org/a/kazakhstan-in-the-foreign-media-review-2019-05-18/29949299.html?fbclid=IwAR0I8p6XfGPKsARNdHUH0WN4EDnl0rPE-_49fe-PIttBWmkGMdsFRiYU2CE (last visited in May 20, 2019).

[623] Nick Kennedy, *Kazakhstan: Are the Upcoming Democratic Elections Merely a Facade?*, International Policy Digest, (May 15, 2019).

[624] *Reportery bez granic prizvali Tokayaeva otkazatsya ot repressivnyh metodov ego predshestvennika* ["Reporters Without Borders urged Tokaev to abandon the "repressive methods" of his predecessor], Radio Azattyq, (May 10, 2019) https://rus.azattyq.org/a/29931988.html (last visited May 19, 2019).

[625] Amnesty International, *Kazakhstan: Thousands Detained Across the Country Following Disputed Presidential Elections*, EUR 57/0504/2019 (June 11, 2019). Amnesty International, *Kazakhstan: Fundamental Freedoms Under Pressure: Amnesty International Submission for the UN Universal Periodic Review, 34th Session of the UPR Working Group*, November 2019, EUR 57/0502/2019 (June 11, 2019).

[626] Human Rights Watch, *Protesters Detained in Kazakhstan, 11 May 2018*, available at: https://www.refworld.org/docid/5b39f32d6.html (last visited July 2019).

[627] UN Human Rights Office calls on Kazakhstan to respect freedoms of peaceful assembly, expression and right to political participation, (June 12, 2019) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24691&LangID=E (last visited June 20, 2019).

[628] Moncey Cage, *Kazakhstan`s Police are cracking down protestors as political activism keeps rising*, Washington Post, (June 20, 2019).

allocation of money from the budget.[629] Even though it was the middle of the fiscal year, government introduced amendments to the republican budget and allocated substantial amount of money for the creation of this office of the Ex-President. Furthermore, Presidents of foreign states while visiting Kazakhstan, besides having meetings with newly elected President, they are also having meetings with the ex- president/ Elbasy.[630]

2.2. Façade Constitutional Court of Tajikistan

Unlike in Kazakhstan or Kyrgyzstan CCs of Tajikistan and Uzbekistan are rarely involved in any political disputes, this is due to institutional architecture of these courts and substantially lower level of political pluralism. However, Presidents of both of these states from time to time used these courts to decide upon politically sensitive questions or to achieve their own goals. In case with Tajikistan it was related to the oppression of one of the strongest opposition party and in case of Uzbekistan it was related to the Karimov`s aim to centralize power in different regions and clans.

As it was mentioned in earlier chapter, the establishment of the CC in Tajikistan was delayed due to civil war that erupted shortly after the independence. Once the Court was established, unlike in Kyrgyzstan or Kazakhstan it lacked substantial competencies and looked like a façade court created upon the recommendation of various international organizations. Since the establishment the Court was inactive and had very few complaints. However, there were two politically sensitive cases that was brought before the Court. First one related to the

[629] Vice Ministr: Na Sozdanie Kancelyarii Nazarbayeva Potratyat Milliard Tenge [For the Establishment of Secretariat of Nazarbayev 1 billion tenge will be spent], Radio Azattyq (April 3, 2019) https://rus.azattyq.org/a/29858156.html (last visited May 17, 2019).
[630] Catherine Putz, South Korean President Moon Travels Across Central Asia, The Diplomat (April 24, 2019) https://thediplomat.com/2019/04/south-korean-president-moon-travels-across-central-asia/ (last visited May 10, 2019).

Islamic Renaissance Party of Tajikistan while the second one was about 2017 constitutional amendments. The first case requires a brief explanation of the background political situation.

In early 1990s after the independence of Tajikistan, *Islamic Renaissance Party* and the Democratic Party emerged as key opposition parties to the communist ruling elite.[631] During the first presidential elections Nabiev (from communist party) received a majority support and became the president of Tajikistan. Nabiev was a classical representative of soviet *nomenklatura* from northern part of Tajikistan who organized and ruled the independent Tajikistan according to soviet styles.[632] Regionalism in Tajikistan up to these days play a key role in political and social structure. During soviet regime majority of government officials and civil servants were representatives of Leninabad region on the north, while southern region had been historically oppressed and dominated by the north.[633] Given the fact that Nabiev was from Leninababad and his political agenda was a continuation of soviet style regime, the political and social situation in Tajikistan intensified that lead to a 5-year long civil war. The main parties of the Civil War included on the one hand people`s front led by Emomali Rahmonovov (current president of Tajikistan and scholars suggest that he was substantially supported by Russia) and on the other hand the UTO (United Tajik Opposition) Democratic Party and *Islamic Renaissance Party*. It lasted for around five years and it is estimated the death of around 80,000 people and around 800,000 people displaced and sought refuge in neighboring states.[634] There are different

[631] Tim Epkenhans, *4 The Islamic Renaissance Party of Tajikistan: Episodes of Islamic Activism, Postconflict, Accommodation, and Political Marginalization*, 9 Brill (2018).
[632] Lena Johnson, *Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam*, 18.3 Journal of Islamic Studies, 425-427 (2007).
[633] *Id.* 427
[634] Lena Johnson, *Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam*, 18.3 Journal of Islamic Studies, 425-427 (2007).

scholarly opinions as to the root causes of the civil war,[635] some claim it was due to ineffective soviet policy that did exacerbated the regional tensions between north and south which later,[636] once the soviet union collapsed turned into massive conflict.[637] Others claim that there was an element of Afghan factor[638], economic causes[639] of the civil war are being actively discussed lately as well.[640] On December 1996 National Reconciliation Commission was established as a result of agreement between major fighting forces of the civil war.[641] Based on the agreement the parties consented that the referendum on amendments to the Constitution will be held along with reforms and adoption of major laws, particularly the election law that would be as much inclusive as possible to include opposition parties.[642] Afterwards, in June 1997 under the moderation of the UN, peace negotiations were held and eventually a *General Peace Agreement* was signed.[643] As a result of the peace agreement compromised amendments to the Constitution of Tajikistan were adopted. The peace agreement did not include these amendments. They were

[635] Sergei Gretsky, *Civil War in Tajikistan: Causes, Developments and Prospects for Peace*, in Roald Z. Sagdeev, Susan Eisenhower (eds.) Central Asia Conflict, Resolution, and Change, 217-225 (Maryland, CPSS Press, 1995).
[636] Helene Thibault, Transforming Tajikistan: State-building and Islam in Post-Soviet Central Asia, (London, I.B. Tauris, 2018).
[637] Bahtrier Sobiri, *S Shiroko Zakrytymi Glazami: Dolgoe Eho Grazhdanskoi Voiny v Tajikistane* [With eyes wide shut down: Long Echo of the Civil War in Tajikistan], Open Democracy (June 22, 2017) https://www.opendemocracy.net/ru/exo-grazhdanskoi-voiny-tadzhikistan/ (last visited March, 2019).
[638] Sally N. Cummings, Understanding Central Asia: Politics and Contested Transformation, 64 (Routledge 2012)
[639] Isaac Scarborough, Economic Causes of Strife in Tajikistan, Voices on Central Asia (March 20, 2018) https://voicesoncentralasia.org/economic-causes-of-strife-in-tajikistan/ (last visited January 2019). Bahtrier Sobiri, *S Shiroko Zakrytymi Glazami: Dolgoe Eho Grazhdanskoi Voiny v Tajikistane* [With eyes wide shut down: Long Echo of the Civil War in Tajikistan], Open Democracy (June 22, 2017) https://www.opendemocracy.net/ru/exo-grazhdanskoi-voiny-tadzhikistan/ (last visited March, 2019).
[640] Isaac Scarborough, Economic Causes of Strife in Tajikistan, Voices on Central Asia (March 20, 2018) https://voicesoncentralasia.org/economic-causes-of-strife-in-tajikistan/ (last visited January 2019). Bahtrier Sobiri, *S*
[641] Lena Johnson, Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam, 18.3 Journal of Islamic Studies, 425-427 (2007).
[642] Tim Epkenhans, The Origins of the Civil War in Tajikistan: nationalism, Islamism and Violent conflict in Post-Soviet Space, (Lexington Books, 2016).
[643] General Agreement on the Establishment of Peace and National Accord in Tajikistan, June 27, 1997 (available at Peace Accords Matrix).

adopted afterwards. One of the important provisions proposed by the opposition was the possibility of the formation of political parties on religious grounds.[644]

After the parliamentary elections the *Islamic Renaissance Party* became the second largest party in Tajikistan. Thus, for a long time IRPT was an active opposition party in Tajikistan. Later in November 1999 Tajikistan held presidential elections and Rakhmonov was elected with substantial majority. It was one of the strategic failures of the United Tajik Opposition, because they were not able to agree on one common candidate and each political party presented by its own candidate, thus enabling Rakhmonov to get the majority. Afterwards, in March 2000 Parliamentary elections took place and Rakhmonov`s party got most of the seats in Parliament while the IRPT 8%, however the Democratic Party was not able to pass the 5% threshold. Once Rahmonovov became president like his peer presidents from other Central Asian states, he started consolidating power by using laws, constitutional amendments and also a Constitutional Court. Unlike in Kazakhstan or Kyrgyzstan powers Tajik Constitutional Court was substantially lower, and initially there was no right of individual constitutional complaint. However, in 2008 the jurisdiction of Tajik Constitutional Court was expanded to include complaints from individuals and legal entities by the initiative of the President.[645] From political point of view, the motivation behind it was not clear, however in 2009 it became more or less evident. Comparable to other Central Asian states this was due to legalism and desire to institutionalize the law and fulfill formalities of the law and to use Constitutional Court as a tool by the President to legitimate his own power.

[644] Konstituciya Respubliki Tadzhikistan [Constitution of Tajikistan] adopted by the referendum in November 6, 1994.

[645] Zakon RK o vnesenii izmeneniy v Zakon o Konstitucionnom Sude RT [The Law of the RT on introducing amendments to the Law on Constitutional Court of the Republic of Tajikistan] March 20, 2008.

2.2.1. The Case Involving the Islamic Renaissance Party

Background of the Case

In 2009 there were two deputies from the Islamic Renaissance Party in the Parliament. The leader of the Party M.Himmatzoda voluntarily gave up his deputy mandate as a boycott for the adoption of the law by Parliament on *Freedom of religion and religious organizations.*[646] Members of the party claimed that the new law imposed unjustified restrictions on freedom of religion and viewed it as specifically targeted against Muslims.[647] Once he resigned his parliamentary seat, the Islamic Renaissance Party requested the Central Election Commission to transfer the deputy mandate to a next candidate from the party list. However, this request was rejected by the Central Election Commission.[648] The Commission claimed that according to the law on elections to Parliament such transfer is not possible if less than a year left before the next elections of Parliament. Furthermore, the Central Election Commission stated that for further clarification the applicant should approach the body who adopted this law, namely the Parliament. Committee within the parliament reviewed the decision of the Central Election Commission and found no violations of the law.[649] Thereafter, the applicant applied to Supreme Court challenging the legality of the decision of the CEC, however the Supreme Court upheld the

[646] Lider Partii Islamskogo Vozrajdenia Tajikistana snyal s sebya detupatskie polnomochia[The Leader of the Islamic Renaissance Party gave up his deputy mandate], Islamnews (April 15, 2009) https://islamnews.ru/news-Lider-Partii-islamskogo-vozrozhdeniya-Tadzhikistana-snyal-s-sebya-deputatskie-polnomochiya (last visited March 2019).

[647] Zakon o svobode sovesti I o religioznyh organizaciah [Law on freedom of conscience and religious organizations], May 5, 2009.

[648] Centrberkom Tadjikistana ofisialno otkazal PIVT vystavit novogo kandidata v parlament strany vmesto svoego duhovnogo lidera [The Central Election Commission of Tajikistan officially refused the IRPT to nominate a new candidate for parliament instead of its spiritual leader] AsiaPlus (May 26, 2009) http://www.asiaplus.tj/tj/node/96584 (last visited February 9, 2019).

[649] It was a confusing procedure since there is no such competency of the Parliamentary Committee on reviewing the decisions of the Central Election Committee.

legality of the CEC decision.[650] Thus, finally the applicant applied to the Constitutional Court challenging the constitutionality of the law on parliamentary elections and the decision of the CEC respectively.

Analysis of the Decision

From a legal point of view, the decision of the Court was confusing, since at the same time the Court found the challenged norm constitutional while refusing to accept the complaint of the applicant. Basically, the argument and logic of the Court was following: if the norm is constitutional, there is no point to review the decision of the Central Election Commission, thus the applicant had no standing.[651] However, the main argument of the applicant was about challenging the constitutionality of the norm. Therefore, from procedural point of view it was confusing. Furthermore, the reasoning of the Court on substantive part lacked clarity as well.

The Court started its reasoning by referring to Article 21 of the UDHR and the Tajik Constitution and stating that all power and sovereignty belongs to people. Next step of the Court involved restating constitutional guarantees on right to vote and that this right by the Constitution is implemented and defined by law.[652] Then the Court logically said that since it is written in the constitution that the voting and election is defined by law, it should make its decision based on the law on elections. After that, the Court right away jumped into the challenged norm claiming that it is less than a year left until the next Parliamentary elections, and CEC will not be able to

[650] Verhovniy sud ne udovletvoril zhalobu PIVT na reshenoe Centrsberkoma [RT Supreme Court did not satisfy the IRPT complaint against the decision of the Central Election Commission], (June 1, 2009) https://asiaplustj.info/ru/news/tajikistan/laworder/20090601/verkhovnyi-sud-rt-ne-udovletvoril-zhalobu-pivt-na-reshenie-tsentrizbirkoma (last visited March 9, 2019).

[651] Postanovlenie Konstitucionnogo Suda Respubliki Tajikistan po hodataistvu Partii islamskogo vozrojdenia Tajikistana ob opredelenii sootvetsvia stati 57 Konstitucionnogo zakona o vyborah v Madjilis o postanovlenia CIK state 49 Konstitucii Respubliki Tajikistan [Ruling of the Constitutional Court of the Republic of Tajikistan on the complaint of the IRPT on reviewing the constitutionality of Article 57 of the Constitutional Law on Elections to Parliament and resolution of the Central Election Commission] December 8, 2009.

[652] *Id.*

conduct another election to fill one deputy seat. However, the Court did not mention that this rule about "less than a year" is applicable to those deputies that are elected not by party list but by single constituency vote that is clearly differentiated in the law.[653] In case with the Islamic Renaissance Party, its members were elected by party list and to transfer the vote it would not have required any additional elections. Thus, Court by applying the norm related to single constituency vote to party list voting concluded that the law does not contradict to the constitution and then decided to reject the application.[654]

Aftermath

Eventually, no transfer of seat happened and in the next parliamentary elections the Islamic Renaissance Party failed to surpass the 5% required threshold. In 2015 the Supreme Court of Tajikistan declared the Islamic Renaissance Party of Tajikistan [655] a terrorist organization and thus banned its operation in Tajikistan. President Rahmonov by consolidating power around himself and changing the constitution slowly had been targeting his efforts against the IRPT, thus finally succeeding in 2015 and completely banning the IRPT.[656] The same year parliament of Tajikistan adopted the law on establishing a special status of President Rahmonov

[653] Konstitucionnogo zakona RT o vyborah v Madjilisi Ori [The Constitutional Law of the RT on Elections to Parliament] December 10, 1999, No.856. Article 57.
[654] Postanovlenie Konstitucionnogo Suda Respubliki Tajikistan po hodataistvu Partii islamskogo vozrojdenia Tajikistana ob opredelenii sootvetsvia stati 57 Konstitucionnogo zakona o vyborah v Madjilis o postanovlenia CIK state 49 Konstitucii Respubliki Tajikistan [Ruling of the Constitutional Court of the Republic of Tajikistan on the complaint of the IRPT on reviewing the constitutionality of Article 57 of the Constitutional Law on Elections to Parliament and resolution of the Central Election Commission] December 8, 2009.
[655] Reshenie Verhovnogo Suda Respubliki Tajikistan ob obyasvlenii Partiu Islamskogo Vozrojdenia Tadjikistana ekstremistko-terroristicheskoi organizaciey [Decision of the Supreme Court of the Republic of Tajikistan on declaring the Islamic Renaissance Party of Tajikistan as extremist terrorist organization] Sep.19, 2015
[656] Reshenie Verhovnogo Suda Respubliki Tajikistan ob obyasvlenii Partiu Islamskogo Vozrojdenia Tadjikistana ekstremistko-terroristicheskoi organizaciey [Decision of the Supreme Court of the Republic of Tajikistan on declaring the Islamic Renaissance Party of Tajikistan as extremist terrorist organization] Sep.19, 2015

as "*Founder of Peace and National Unity, Leader of the Nation*".[657] The law in many aspects resembled the Elbasy law of Kazakhstan.

2.2.2. 2016 Constitutional Amendment Case

Background of the Case

The second time Constitutional Court was involved in another politically sensitive case, namely the one concerning the amendments to the constitution. In the proposed amendments special status of the President Rahmonov was introduced (*Founder of Peace and National Unity, Leader of the Nation*) and any term limits applied to him were lifted, thus constitutionalizing a lifelong presidential term for Rahmonov. The Court was asked by the President to review the constitutionality of proposed amendments. Briefly, following norms are particularly worth looking at.

First, *"In Tajikistan, the activities of political parties of other states, the creation of parties of a national and religious nature, as well as the financing of political parties by foreign states and organizations, foreign legal entities and citizens are prohibited."*[658] It is evident that this norm was aimed against opposition party namely the IRPT. Despite the fact that under the Constitution adopted afterwards the Peace Agreement the formation of the political parties under religious grounds were allowed, 2016 amendments removed this right justifying on radicalization and national security grounds.

Second, "*A person not younger than 30 years old can be nominated for the post of the President of the Republic of Tajikistan, who has only the citizenship of the Republic of Tajikistan,*

[657] Zakon Respubliki Tajikistan ob Osnovatele Mira, Nacionalnogo Edinstva- Lidera Nacii [Law of the Republic of Tajikistan on Founder of Peace, National Unity- Leader of Nation] December 25, 2015 No. 12.
[658] Konstituciia Respubliki Tajikistan [Konst.RT] [Constitution of Republic of Tajikistan] November 6, 1994, (after 2016 amendments). Article 8.

a higher education, who speaks the state language and has lived in the republic for at least the last 10 years."[659] It was speculated that the age for the presidential candidate was intentionally lowered to prepare the ground for Rahmonovov`s son to become his successor in case of extraordinary circumstances.

Third*, "The restriction provided for in part four of this Article does not apply to the Founder of Peace and National Unity - the Leader of the Nation. The legal status and powers of the Founder of Peace and National Unity - the Leader of a Nation are determined by constitutional law."*[660] Basically, this provision lifted any presidential term restrictions for Rahmonovov and just like with Kazakhstan `s first president laid down a special constitutional status and protection of the first president.

Analysis of the decision

The decision of the Court consisted of 8 pages out of which only 1,5 pages contained some elements of analysis or reasoning, the rest of the decision was restatement of proposed amendments. There was no clear test or approach used in evaluating the constitutionality of the amendments. Rather the reasoning contained some abstract thoughts of the Court with no specific constitutional analysis whatsoever. Furthermore, the Court avoided evaluating each proposed amendment, rather it used a chapeau general justification and broadly applied to all amendments. Basically, the Court said the following. The Constitution, as the highest law of the state, defines the unchangeable character of the "*republican form of government, territorial integrity, democratic, legal, secular and social essence of the state, as the main condition and*

[659] *Id.* Article 65.
[660] *Id.* Article 65.

stability of the state and nation".[661] The Court continued that the Constitution created the necessary gournds for economic and political independence, development and established conditions for social and political stability in Tajikistan.[662]

Furthermore, Court stated that proposed amendments to the Constitution pursued the strengthening the "*fundamentals of the constitutional order*"[663], protection of human rights and freedoms, strengthening the constitutional status of citizenship, strengthething of the legislative, executive and judicial power and development of local self governance.[664] However, the Court did not specifically analyze or discussed examples of how exactly these amendments pursue the aims mentioned above.[665] After this chapeau general justification, Constitutional Court concluded that the proposed amendments were in line with the Constitution and with the existing world practice of constitutional amendments, as well as with basic principles and values implied by the Constitution of Tajikistan. Thus, proposed amendments to the constitution were approved by the Court.

Aftermath

After amendments entered into force, the Tajik government started an aggressive secularization process. This led to the adoption of number of laws allegedly aimed to fight with radicalization and Islamization. These extreme policies were expressed by the adoption of laws

[661] Postanovlenie Konstitucionnogo Suda Respubliki Tadjikistan po predstavleniu Madjlisa nemoyandan Oli Respubliki Tajikistan ob Opredelenii sootvestvia proekta izmeneniy I dopolneniy vnosimyh v Konstituciu Respubliki Tadjikistan [Ruling of the Constitutional Court of the Republic of Tajikistan upon the referral of Parliament on reviewing the constitutionality of proposed amendments to the Constitution of the Republic of Tajikistan] February 4, 2016. Available in English at http://www.constcourt.tj/eng/ (last visited July 9,2019).
[662] *Id.*
[663] *Id.*
[664] *Id.*
[665] *Id.*

on banning heads raves, hijab and beards[666] However, the fight against religious extremism in Tajikistan is much more nuanced and rather a camouflaging of Governmental efforts to avoid the renewal of the IRPT opposition or any parties on religious grounds. Furthermore, the status of the leader of nation was also updated and the new law, this time a constitutional law was adopted on the *Leader of Nation* which granted lifelong immunity for the leader of nation along with other lifelong privileges and powers.[667] This status looks somewhat similar to the Elbasy status in Kazakhstan and it can be speculated that Rahmonov might follow the scenario of Nazarbayev when the transition of power will come.

2.3. Façade Constitutional Court of Uzbekistan

Constitutional Court of Uzbekistan from the early establishment had substantially limited competencies and powers in comparison to Kyrgyzstan or Kazakhstan and also have been formed relatively later. There were number of political factors that influenced it. Due to limited competencies, the jurisprudence of the Uzbek Constitutional Court is not rich and diverse for cases, especially in politically sensitive cases. However, in the context of Uzbekistan this Court played a substantial role in Karimov`s centralization of power and in his regional clan politics, therefore it is highly important to discuss those cases in order to understand constitutional review in the context of Uzbekistan.

[666] Zakon o vnisenii izmineiy I dopolneniy v Zakon Respubliki Tajikistan Ob uporyadochenii tradiciy, torjestv I obryadov v Respublike Tajikistan, [Law on introducing changes to the Law of the Republic of Tajikistan On streamlining traditions, celebrations and rites in the Republic of Tajikistan] July 11, 2017

[667] Konstitucionniy Zakon Respubliki Tajikistan ob Osnovatele mira I nacionalnogo edinstva- Lidera nacii [Constitutional Law of the Republic of Tajikistan on Founder of peace, National Unity- Leader of Nation] November 8, 2016 No. 1356.

Uzbekistan in comparison to Tajikistan had a peaceful transition[668] and in contrast to Kazakhstan and Kyrgyzstan from almost the beginning President Karimov was able to consolidate the power around presidency and suppress political pluralism.[669] It is argued by scholars and historians that relatively quick centralization of power by Karimov in comparison to other Central Asian presidents takes its roots from the events of 1980s. During this time, under Soviet regime substantial amount of top political elite was purged by Moscow administration for their involvement in embezzlement scheme in the cotton industry.[670] Thus during the period of independence in contrast to other Central Asian states political competition and pluralism in Uzbekistan was relatively lower. This allowed President Karimov via instrumentalization of the law combined with administrative resources and active suppression of potential political opposition to strengthen his power throughout Uzbekistan.[671]

Despite the quick success of Karimov on centralization of power, there were two challenging areas that required more efforts from Karimov, namely the regional clan politics[672] and regional cotton mafia in the context of controlled state economy.[673] While other Central Asian states opted for a transition to a market economy, Uzbekistan sustained state-controlled economy and as scholars suggest from soviet times there was an established cotton mafia based

[668] Nick Megoran, *The Magic of Territory: Remaking of Border Landscapes as a Spatial Manifestation of Nationalist Ideology*, in Marlene Laruelle (ed.) Constructing the Uzbek State: Narratives of Post-Soviet Years, 21-31 (Lexington Books, 2017).
[669] Anita Sengupta, The Formation of the Uzbek Nation-State: a study in Transition, (Lexington Books, 2003).
[670] Alisher Ilkhanov, *The Limits of Centralization: Regional Challenges in Uzbekistan*, in Pauline Jones Luong, The transformation of Central Asia: state and societies from soviet rule to independence Pauline Jones Luong 159-181 (Cornell University Press, 2004).
[671] Bohr Annette, Uzbekistan: Politics and Foreign Policy (Royal Institute of International Affairs Press, 1998).
[672] Alisher Ilkhanov, *The Limits of Centralization: Regional Challenges in Uzbekistan*, in Pauline Jones Luong, The transformation of Central Asia: state and societies from soviet rule to independence Pauline Jones Luong 159-181 (Cornell University Press, 2004).
[673] Russel Zanca, *Government, Cotton Farms, and Labor Migration from Uzbekistan*, in Marlene Laruelle (ed.) Constructing the Uzbek State: Narratives of Post-Soviet Years, 65-70 (Lexington Books, 2017).

on certain regional clans.[674] When Karimov first came to power, he first seemed to continue the status quo established during the soviet regime. However, against the expectations of regional clans, Karimov started a central state control over all resources, particularly on cotton. Furthermore, since Karimov was not originally form any big clan[675], he did not have an evident clan support, therefore it is speculated that he used law and institutions as a tool to support his concentration of power.[676] Thus, starting from 1992 Karimov created a State Control Committee to supervise the enforcement of laws in regions. Besides the law, Karimov have actively used Constitutional Court to tame regional clans and regional *hokims* (head of the region). It is particularly interesting, since competencies of the Court were very limited, and the Court was rarely involved in any inter-branch disputes. However, there was one specific triggering mechanism of the constitutional review that is unique to Uzbekistan and cannot be found in other Central Asian states. This competency is related to Karimov`s motives to use formal institutions as Constitutional Court to legitimate his power and to use as a tool of consolidation of power and gaining full control in regionalism and clan politics in Uzbekistan. The mechanism was provided in the law on Constitutional Court, in Article 25 "*A matter for consideration by the Constitutional Court may also be submitted on the initiative of at least three judges of the Constitutional Court*."[677] The Court used this triggering mechanism in two cases in 1996 and 1997, this is the early period when Karimov was strengthening and centralizing his power and building the power vertical, thus any attempts by other regional heads (*hokims*) that did not

[674] Richard Pomfret. The Central Asian Economies in the Twenty-First Century: Paving a New Silk Road 95-110, (Princeton University Press, 2019).
[675] Roger D. Kangas, Uzbekistan: the Karimov Presidency- Amir Timur Revisited, in Sally N. Cummings (ed,), Power and Change in Central Asia, 130-145 (New York: Routledge, 2002).
[676] Alisher Ilkhanov, *The Limits of Centralization: Regional Challenges in Uzbekistan*, in Pauline Jones Luong, The transformation of Central Asia: state and societies from soviet rule to independence Pauline Jones Luong 159-181 (Cornell University Press, 2004).
[677] Zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Law of the Republic of Uzbekistan on Constitutional Court of the Republic of Uzbekistan] August 30, 1996, #103.1

represent the central power was being replaced or tamed. If we now look in retrospect it is possible to see that the Court was used as a tool in this process of taming the regional *hokims*.

2.3.1. The Case Involving the Regional Hokims (1996)

This case was initiated by three judges of the Constitutional Court to check the constitutionality of the order of the *hokim* of the Surkhandarya region.[678] The *hokim* of the Surkhandarya region, adopted the order that obliged the cotton-cleaning joint-stock company to donate 5,800,000 sums through sponsoring organizations and enterprises for production of the book in the Surkhandarya region. This according to the initiated judges, the order violated constitutional rights of the joint-stock company to use and manage their own funds.

The decision of the Court was short and straightforward it simply stated that under Article 113 of the *Law on joint stock companies* state guarantees observance of the rights and legitimate interests of shareholders, and that government bodies and other organizations are not allowed to intervene in economic and other activities of joint-stock companies. The governor of the Surkhan-Darya region intervened in the economic activity of the joint-stock company, restricted the rights of the owner to own, use and dispose of the property belonging to him at his discretion.[679] Thus, the order of the *hokim* was found unconstitutional. A similar decision by the self-initiation of the Court against another regional *hokim* was issued in 1997 where the order of

[678] Prikaz Hokima Surkhandarisnkoi Obralist [order of the hokim of the Surkhandarya region] August 15, 1996 No. 164.
[679] Postanovlenie Konstitucionnogo Suda Respubliki Uzbekistan po delu o proverke Konstitucionnosti rasporyajenia Hokima Surhandarinskoi Oblasti [Ruling of the Constitutional Court of the Republic of Uzbekistan on case involving the review of the constitutionality of order of the Hokim of the Surhandariya Region] August 15, 1996 No. 164.

the Khorezm Region hokim was found unconstitutional.[680] Shortly after these decisions, the regional heads of these regions were released from their offices by the President.[681]

3. Analysis of Approaches

This Chapter explored politically senstitive cases in the context of genuine mega politics and pseudo mega politics. The first part of the chapter discussed cases that involved genuine political and constitutional conflicts with transitional justice and regime transition dimension. Kyrgyz Constitutional Chamber[682] decision on the constitutionality of decrees of the interim government was analyzed in the context of regime legitimacy. Judicial Yuan`s decisions was explored in the context of regime continuity in Taiwan. Finally, cases involving the criminal responsibility and immunity of former presidents were discussed in the context of Kyrgyzstan and South Korea. The second half of the chapter explored cases involving Kazakh, Tajik, and Uzbek CCs, where presidents used constitutional litigation as window dressing to maximize and legitimize their power.

Following patterns could be revealed after the overview and contextual analysis of mega politics cases in Centrl Asian and East Asia decisions. When faced with politically sensitive issues, the CC of Korea tends to adopt constitution-preservationist approach, namely the decisions are interpreted and reasoned in a way to preserve the legitimacy of the constitution. Another observation on South Korea is that unlike in Taiwan and Central Asia, there was no subsequent extension of jurisdiction and powers of the Court while deciding those mega politics

[680] Postanovlenie Konstitucionnogo Suda Respubliki Uzbekistan po delu o proverke Konstitucionnosti polojenia ot 11 Noyabrya 1996 goda prinyatogo resheniem Hokimiata Horezmskoi Oblasti [Ruling of the Constitutional Court of the Republic of Uzbekistan on case involving the review of the constitutionality of regulation as of November 11, 1996 adopted by the decision of the Hokimiyat of the Khorezm Region] February 25, 1997.
[681] Alisher Taksanov, Regionalnye Elity, korrupcia I nelegalniy bizness v Uzbekistane [Regional Elite, corruption and illegal business in Uzbekistan], (Tashkent, Elit 2012).
[682] Unlike in Kyrgyzstan other Central Asian CCs of Kazakhstan, Tajikistan and Uzbekistan were not actively involved in mega politics and have not yet faced the issues related to the regime change

cases. This pattern could be explained and coped with the institutional design of court, namely from the foundation, the KCC was granted with substantial judicial review powers.

The Judicial Yuan of Taiwan in cases involving mega politics showed itself to be reactive and on extremely sensitive issues as transitional justice, unlike South Korean Court the Judicial Yuan was more conservative and rather used a regime-preservationist approach, namely the cases involving transitional justice seemed to be decided with the purpose of preserving the legitimacy of the KMT. Furthermore, unlike in South Korea, the decisions of Judicial Yuan were accompanied with gradual extension of constitutional review either by the Judicial Yuan itself, or via statutes or constitutional amendments. This could also be explained by the institutional design of the constitutional review in Taiwan and the incremental procedure of constitution-making. Another interesting observation is that most of the times the Court is being active through self-expansion (revision of standing rules) and textual expansion (amendments are being introduced to the constitution, since the constitution-making in Taiwan is more incremental) and its own Interpretation.

Kyrgyz Constitutional Chamber adopted a deferential approach on issues involving mega politics and politically sensitive issues. Such an approach could also have root causes on constitutional framework. Namely, since 2010 the powers of Constitutional Chamber were substantially reduced by the drafters fearing that the Chamber might repeat the past mistakes of previous Constitutional Court that had been used by former Presidents for their own sake thus serving as a demise of Constitution.

Unlike in Kyrgyzstan, CCs in Tajikistan, Kazakhstan and Uzbekistan due to less competitive power dynamics were not actively involved in mega politics. Even if they were, they were mostly invited by the will of the President and followed their creator`s will. The experience

of Central Asia sheds some light to the fact that it is a well established practice in authoritarian constitutionalisms, where courts are widely used for regime legitimization purposes in authoritarian regimes.[683] In the context of Kazakhstan, Constitutional Council was used by Nazarbayev to legalize his *Elbasy* status and hold on power even after the resignation from the office. In Tajikistan Rahmonov used Constitutional Court to extend presidential powers and to extinguish the opposition. Implications of these cases in broader judicial review context will be discussed in part I, section 1 of the Chapter 5 of the dissertation.

[683] Tom Ginsburg, Tamir Moustafa (eds.), *Introduction*, Rule by Law: The Politics of Courts in Authoritarian Regimes, 2 (Cambridge University Press, 2008).

Chapter 3 Powers and Confrontations: Central Asian and East Asian Constitutional Courts' Approaches in Cases Involving Institutional Conflicts/Ordinary Politics

Chapter 2 analyzed cases on mega politics involving regime transition, regime legitimacy, and pseudo mega politics/ facade constitutional litigation used by authoritarian regimes as window dressing in Centra Asia. This chapter is about the exploration of CCs` approaches in dealing with cases on ordinary politics, namely in disputes involving institutional conflicts. The confrontation between branches is always a big test for any constitutional democracy. In emerging democracies, the degree of pressure and challenges faced by constitutional courts become much bigger and sometimes with much higher stakes such as court packing, taming or turning the court into complete irrelevance. When it comes to the constitutional review of open political conflicts, it is always important to see approaches and strategies adopted by constitutional courts to cope with these issues. The chosen approach and the path by constitutional courts can greatly impact the integrity of the constitution and constitutionalism.

This chapter will analyze these issues in the context of new democracies in Central Asia and East Asia by drawing parallels between the adjudication of such disputes by constitutional courts. It aims at identifying specific patterns and antipatterns shared by these courts in their ability to facilitate the dialogue between political branches by making the text of the constitution matter (both written and unwritten), while preserving the legitimacy of constitutional courts themselves. Based on these propositions, the current chapter will explore cases involving institutional conflicts in the jurisprudence of CCs in Mongolia, Taiwan, South Korea, Kyrgyzstan, and Kazakhstan. The experience of Mongolian Constitutional Court in institutional

conflicts is actively cited in existing scholarship[684] on judicial review in new democracies and was intentionally included as an added value and potential lesson for the courts of Central Asia. Finally, it is important to highlight that cases concerning Kyrgyzstan and Kazakstan present an earlier jurisprudence of constitutional courts before they were reorganized into Constitutional Council and Constitutional Chamber. The Kazakh case discussed in this chapter provided an opportunity for Nazarbayev to put the Court under his control and enabled the consolidation of presidential power by Nazarbayev and eventually the suspension of the Court and reorganization into much weaker Constitutional Council.

The jurisprudence of earlier Kyrgyz Constitutional Court will also reveal how the Court became a tool in the hands of former presidents Akayev and Bakiev in their power maximization efforts. This negative experience of the Court led to the suspension of this institution by the Interim Government and replacement with the newly created Constitutional Chamber. Finally, the chapter will explore to what extent the unhelpful experience of Kyrgyz Constitutional Court shaped the Constitutional Chamber.

1. Aggressive approach: Mongolian Constitutional Court

Mongolia in 1990s comparative constitutional law scholarship captured an honorable place as an example of successful transition to democracy.[685] As any newly emerged democracy Mongolia had its own successes and challenges, most of the challenges were due to the vague provisions of the Constitution. The 1992 text of the Mongolian Constitution contained numerous

[684] Tom Ginsburg, Judicial Review in New Democracies Constitutional Courts in Asian Cases 158-205 (Cambridge University Press. 2003).
[685] Tom Ginsburg, Judicial Review in New Democracies Constitutional Courts in Asian Cases 158-205 (Cambridge University Press. 2003). Tom Ginsburg,Gombosuren Gansorig, *When Courts and Politics Collide: Mongolia`s Constitutional Crisis*, in Albert Chen, Tom Ginsburg (eds.), Public Law in East Asia 78, 79 (Routledge 2016). Tom Ginsburg, *Between Fire and Ice: Mongolia in 1996*, 37 ASIAN SURVEY 60 (1997); Tom Ginsburg, *Deepening Democracy: Mongolia in 1997*, 38 ASIAN SURVEY 64 (1998).

ambiguous provisions, at some parts it was silent on important issues. The ambiguity of the text was the root cause of tensions between branches, particularly between Parliament and the Constitutional Court. One of the fundamental arguments that revolved around the Constitution was on the type of system of governance enshrined in the text. Some scholars claimed the system to be semi-presidential, the others claim it as semi-parliamentary.[686] To shed some light on this debate, it is worth looking at the original text of the Constitution before the 1999 amendments. According to the Constitution:

- The Parliament (State Great Hural) of Mongolia is the "*highest body of the State power and the legislative power*" elected by people for 4 years[687]
- The Parliament (Hural) appoints, replaces and removes the PM and members of the Cabinet[688]
- President is the head of state under and could be elected by people no more than twice for the period of 4 years[689]. Presidential Candidates are nominated by either Political Parties or Coalitions in the Parliament.[690] President is responsible to the Parliament (Hural).[691]
- The Cabinet of Mongolia is the highest executive body and Prime Minister is the head of the Cabinet.[692] Cabinet is fully responsible before Parliament (Hural) only[693]
- The President has a right to propose to the Parliament (Hural) the candidate for the Prime Minister.[694]
- The"*Prime Minister, in consultation with President, shall submit his/her proposals on the structure and composition of the Government and on the changes in these to the Parliament (Hural*)."[695]
- Article 34 stipulated that members of the Parliament (Hural) "*shall not hold concurrently any posts and employment other than those proscribed by law*"[696]

From the above text following ambiguities should be highlighted. First, under Article 34 could deputies concurrently hold posts in the Cabinet if it was stipulated in the law? Under

[686] UNDP, *The Role of the Constitution of Mongolia in Consolidating Democracy: an Analysis*, 18-19, (2015) http://www.mn.undp.org/content/dam/mongolia/Publications/DemGov/ConstReview_eng.pdf
[687] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 20
[688] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 25
[689] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 30
[690] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 31
[691] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 35
[692] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 38,39
[693] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 35
[694] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 33
[695] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 39
[696] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 34

Article 35 is it required for the President to propose the candidate of the Prime Minister? Does it mean a prior approval by the President? What is his role in the process of forming the cabinet? What happens in the case of the disagreement between the president and parliament on this issue?

Furthermore, under Article 31 presidential candidates are nominated by political parties, however, according to the law, president upon election must suspend his membership in political parties.[697] Does it mean that President in Mongolia is assumed to be apolitical and neutral? Practically, how is it possible especially if the incumbent president wishes to be elected for the second term since to do that the president is expected to be nominated by a political party or a coalition in the parliament. Finally, what happens if president does not approve the proposals of the PM on cabinet members? Potentially any of these issues could have appeared before the Court and would be a serious test on the role of this institution in meditating disputes between branches. It was precisely what happened in 1996.

1.1. The Constitutional Court Ruling on the State Great Hural Members Serving in the Cabinet

Background of the Case

To understand the context of the case, it is essential to go back to the 1996 Parliamentary election results. In 1996 the Democratic Union Coalition (DUC) got 50 out of 76 seats in the unicameral parliament in Mongolia.[698]. It was particularly remarkable taking into consideration that for the last 70 years the Communist rule dominated Mongolia, namely the Mongolian People`s Revolution Party (MPRP). The results of the elections soon were covered by western media as a promising vote for democratic reform in the country. Meanwhile, President Ochirbat

[697] The Law of the Posts Proper to Be Suspended from Membership in Parties, [Mongolia] May 6, 1993.
[698] *Communists In Mongolia Are Toppled After 70 Years*, N.Y. TIMES (Jul. 3. 1996), https://www.nytimes.com/1996/07/03/world/communists-in-mongolia-are-toppled-after-70-years.html

was in his second presidential term. Initially during the first term he was a candidate from the MPRP, however for his second Presidential term (1993-1997) he run as a candidate from the Social Democratic Party.[699]

The DUC having a majority in the Parliament (*Hural*) started to form the Government. This procedure was interrupted by a constitutional complaint initiated by D. Lamjav claiming that deputies could not take cabinet positions while retaining their seats in parliament (*Hural*). Up until now, it is entirely not clear what was the motivation of Lamjav, especially taking into consideration the fact that he was himself a member of the Social Democratic Party which was part of the DUC.[700] This question raised a critical challenge to the Court since it had to face the ambiguity of the Constitution, particularly the Article 34.

Before analyzing the decision, it is essential to discuss its possible implications, namely what was at stake for the Democratic Union and would it be a significant loss for them? As mentioned earlier the Democratic Union Coalition got 50 out of 76 seats in the Parliament, so it had almost precisely the quorum of two-thirds in the Parliament. The most influential members of the Union were already elected MPs, and the Union was planning to appoint at least fourteen of them for the ministerial position.[701] The Constitutional Court`s ruling had the potential consequences that the DUC in a difficult position. Namely, in case of the resign of deputies from the DUC to take Cabinet seats, the DUC would lose its two-thirds quorum in the Parliament.[702]

In Mongolia, the model of constitutional review is the closest model of the weak form of judicial review. Namely, before reaching the final decision the Court has to send its initial

[699] Lhamsuren Munkh-Erdene, *The Transformation of Mongolia's Political System: From Semi-parliamentary to Parliamentary?*, 50.2 Asian Survey, 311-320, (2010).
[700] Tom Ginsburg, Gombosuren Gansorig, *When Courts and Politics Collide: Mongolia`s Constitutional Crisis,* 14 CJAL. 309, 311(2001)
[701] *Id*. 313.
[702] This difficulty was due to lack of clarity in the Constitution and in other laws about further regulation of circumstance when the deputy vacates his seat.

decision to Parliament, and if Parliament rejects it, only the full bench of the Court can overcome the rejection[703] and the decision of the full bench will be deemed to be final.

Analysis of the decision

The applicant Mr. Lamvaj was challenging the constitutionality of Article 22 the *Law on the Parliament (State Great Hural)* which stated the following:

> *"If a member of the State Great Hural is appointed as a member of the government, the membership shall remain the same, and the number of members of the State Great Hural in the government shall not exceed one-third of all members of the government."*[704]

This Article according to the applicant was in violation of Article 29 of the Constitution and the principle of separation of powers, since it was allowing the merger of legislative and executive powers. As was mentioned earlier the 1992 Constitutional provisions on formation of the Government was ambiguous and did not contain specific rules on conflict of interest. It is also worth mentioning that neither the *Law on Parliament* nor the *Law on Government* contained specific clarifications and provision on conflict of interest of deputies and the Cabinet members. To a certain extent the Court faced constitutional silence. However, prior to the decision there were still certain tools available for the Court to resolve this dispute.

First, even though the Constitution was not explicit about this issue, yet it was not completely silent as well. According to Article 29 of the Constitution:

> *"Members of the State Ih Hural shall be remunerated from the State budget during their tenure and shall not hold concurrently any posts and employment other than those assigned by law"*[705]

It could be assumed that the provision appears to be allowing deputies to take Cabinet seats subject to certain law that defines the conditions and of such employment. Second, the

[703] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 66.3
[704] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 22
[705] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 29

drafting history and process of the Constitution suggested certain assumptions and premises as to the intentions of the drafters. In one of the 1991 early drafts of the constitution Article 32 stipulated that "*Members of the State Great Hural cannot concurrently occupy the posts of members of the government*."[706] However, this provision was rejected and instead Article 29 of the constitution was approved with the provision stating that "*members shall not concurrently hold any posts other than those assigned by law*."[707] Finally, there was already a prior practice between 1992 and 1996 when deputies could serve in the cabinet as well.

The Court faced a dilemma on what approach to take while interpreting the Article 29 of the Constitution, originalist approach, literal textual interpretation or purposive? Based on the outcome we could assume that the Court decided to apply purposive approach. Within 15 days after the acceptance of the application, the Court submitted its conclusion to Parliament deciding that deputies cannot hold cabinet posts and that such an action would be in violation of Article 29 of the constitution.[708] The main justification of the Court was that the Constitution of Mongolia provided a different and separate Article for the Government and for the Parliament, for the specific purpose of preservation of separation of powers.

The DUC criticized the Court claiming that the decision was politically motivated and that it was not grounded on law, the Court failed to conduct the legal expertise such as looking at the preparatory documents of the constitution and intentions of the drafters. Furthermore, deputies also claimed that if one looks closely to the text of Article 20 of the constitution Mongolia is provided to be a parliamentary state. Article 20 stipulates the following: "*The Hural of Mongolia is the highest organ of State power, and the supreme legislative power shall be*

[706] Ginsburg, Gansoring, *supra* note 509, at 312
[707] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 29
[708] Decision of the Constitutional Tsets of Mongolia as of July 17, 1996

vested only in the Hural."[709] Furthermore, MPs also claimed that the established political practice of Mongolia supports the text of the constitution. Since 1992 there were few occasions when deputies served as Cabinet members simultaneously. Thus, it reflected the elements of parliamentary tradition in Mongolia. Parliament exercised their power under the Constitution and rejected the decision of the court. Nevertheless, the Court in full bench upheld their initial judgment, thus generating a more controversy and instability for many years to come.[710]

Aftermath

The impact of the 1996 decision of the Court in the further development of constitutionalism in Mongolia was fundamental. In June 1997 N. Bagabandi became the next President of Mongolia nominated by MPRP. In January 1998 the State Great *Hural* amended *the Law on Legal Status of Parliament* allowing the deputies to hold concurrently the offices in the cabinet.[711] After the amendment of April the DUC formed a new government and appointed a sitting deputy Ts. Elbegdorj as Prime Minister. Ts. Elbegdorj was one of the key leaders of the DUC and he later held the offices of the Prime Minister in 2004 again and the office of the President in 2009. Elbegdorj remained as a Primer Minister only till July due to the resignation demand by the parliamentary opposition MPRP over the decision of Elbegdorj to sell the state-owned Renovation bank to the private Golomt Bank.[712] Opposition deputies believed that this state bank merger was a threat to national financial policies.[713] This led to the internal crisis

[709] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 20
[710] Decision of the Constitutional Tsets of Mongolia as of September 7, 1996
[711] The Law on the Legal Status of Members of the State Great Hural (Parliament) of Mongolia, Art. 11. Also see *MPs now allowed to sit in parliament and be cabinet members,* BBC Summary of World Broadcasts January 21, 1998, Wednesday, available in LexisNexis Academic
[712] *Merger of state and private banks announced* BBC Summary of World Broadcasts June 10, 1998, Wednesday, available in LexisNexis Academic
[713] *Opposition calls on government to resign over state bank merger*, BBC Summary of World Broadcasts July 11, 1998, Saturday available in LexisNexis Academic

within the Parliament where the MPRP boycotted Parliamentary sessions paralyzing its work for over 30 days by quorum busting.[714]

Eventually this led to the compromise, namely DUC prevented the state bank merger and Elbergdorj had to resign.[715] However, soon it became evident that initial decision of Elbergdorj was the correct one, the Renovation Bank bankrupted causing the Mongolian Government to suffer substantial economic crisis.[716] The next Prime Minister was appointed only on December 1998 and until then Elbergdorj was an acting Prime Minister. The appointment process was delayed because President Bagabandi was repetitively turning down all the candidates proposed by DUC. Overall there were 3 candidates D. Ganbold (was turned down 7 times by President), G. Gankhuyag (was turned down twice) and E. Bat-Üül (was turned down once). President was claiming that he enjoys this negotiating power over the appointment of the Prime Minister under Article 33 of the Constitution. However, as it was mentioned earlier it was an ambiguous provision with no clarification of what are the limits of proposal? Who has the final say on the appointment of the PM.

Finally, the DUC appointed the mayor of the capital city Ulanbator J. Narantsatsralt as Prime Minister. He was on the shortlist of candidates proposed by President. As stated earlier, President Bagabandi was nominated by MPRP and replaced previous President from Democratic Party. It was the first time when Mongolia was experiencing a cohabitation period. The next Parliamentary elections were scheduled to July 2000. In addition to a tension with the Court, The Parliament started wrestling with the President.

[714] *Id*
[715] Government falls over bank merger issue, BBC Summary of World Broadcasts, July 27, 1998, Monday, available in LexisNexis Academic
[716] MONGOLIA'S ECONOMIC SITUATION WORSENS - RUSSIAN AGENCY, BBC Monitoring Asia Pacific – Political, Supplied by BBC Worldwide Monitoring, September 9, 1998, Wednesday available in LexisNexis Academic

1.2. The Ruling on Amended Law on Legal Status of the Parliament

Meanwhile, the amended *Law on Legal Status of the Parliament* was challenged by Mr. Lamjav (the same applicant in 1996 case) before the Constitutional Court. The Court re-emphasized their original decision of 1996 and found the amended law was in contradiction with Article 29 of the Constitution. The Court applied the same logic and argumentation as in its original judgement. The decision was forwarded to State Hural, as expected the State Hural rejected the decision. However, the Court in full bench upheld their original judgment.[717] It led to the chaos within the Parliament, the Parliamentary opposition MPRP was demanding the resignation of all deputies from parliament who were concurrently holding cabinet seats, while the DUC was threatening with early Parliamentary elections.[718] President Bagabandi also supported the position of the MPRP and urged the DUC to comply with the decision of the Court.

Aftermath

Having failed to regulate the issue of conflict of interest through regular law Parliament decided to introduce amendments to the Constitution. According to the procedure of amendments the vote of 2/3 of the Parliament was required. The DUC had 50 out of 76 seats in the Parliament, it was almost the quorum of two-thirds (50 out of 51). To guarantee the adoption of the amendments the DUC had to convince the MPRP on the importance of the amendments, especially taking into consideration that the next Parliamentary Elections was planned to be held in less than a year. On December 22, 1999 Parliament adopted the amendments. 58 deputies out of 61 voted in favor of the amendments, thus the DUC was able to convince the MPRP. Close look at the introduced amendments might shed some light on a sudden cooperation of opposing

[717] The decision of the Constitutional Court (Tsets) of Mongolia as of November 24,1998
[718] Party urges progress on selection of premier, ministerial post issue, BBC Summary of World Broadcasts, December 2, 1998, Wednesday

political parties in Parliament that were recently wrestling with each other. The amendments included the following:

- Allowed deputies to concurrently hold seats in the Cabinet (Article 29)
- President`s power to propose the candidate for Prime Minister was eliminated. However, it was reformulated in a form of duty. Namely Article 33 obliged the President to submit to Parliament the candidate for Prime Minister nominated by the Parliamentary majority within five days.
- Proposed amendments reduced the quorum minimum on the Parliament to 39 deputy presents. It was done for the purposes of avoiding the quorum busting.
- "*If the Prime Minister was not able to reach a consensus on the structure and composition of the Cabinet with the President, within a week, then he/she shall submit it by himself/herself to the State Great Hural (Parliament).*"[719] (Article 39)

It is evident that amendments substantially increased Parliamentary powers vis-à-vis President and yet brought clarifications to the most ambiguous provisions of the Constitution that had been constantly creating a political deadlock in Mongolia. Even though the original text allowed these issues to be regulated by law, Parliament was not able to do this either because being blocked by the Constitutional Court or by the President. Furthermore, it is also evident from the text that both DUC and MPRP were not interested in further encroachment and consolidation of Presidential power. Most likely this hidden motivation was the uniting point which let both parties to set aside their differences and unite for the common goal.

When the *Bill on Introducing changes to the constitution* was presented to President for signature, President Bagabandi vetoed it justifying that introduced amendments were in violation of the procedural rules of the Constitution since it lacked the consultation of the Constitutional Court required by Article 68 of the Constitution. Such a reading of Article 68 could be defined as Ginsburg put it "tortured interpretation".[720] Article 68 stated that proposals for the amendments

[719] *Constitution of Mongolia* [Mongolia], 13 January 1992, Article 39.
[720] Tom Ginsburg, Gombosuren Gansorig, *When Courts and Politics Collide: Mongolia`s Constitutional Crisis,* 14 CJAL, p. 315, (2001).

of the constitution along with other competent bodies could be submitted to State Great Hural by the Constitutional Court. However, there is no requirement of prior consultation with the Constitutional Court on amendments. Furthermore, among the competencies and jurisdiction of the Court there is also no mention on the Court`s jurisdiction over constitutional amendments cases. Parliament with overwhelming majority override the Presidential veto.

1.3. The Case Involving the Bill on Constitutional Amendments

Soon after the vote overthrowing the presidential veto a law professor from the Mongolian National University S. Narangerel applied to the Constitutional Court challenging the constitutionality of amendments on procedural grounds, namely that during the voting there were only 61 deputies present out 76. The Court in its initial hearing found the amendments unconstitutional both on procedural and substantive grounds. On the procedural matter, the Court stated that the proposed amendments were directly submitted to Parliament by 65 members. However, according to the Court under Article 68 only the Constitutional Court had power to submit proposals to the Parliament. This reading assumed exclusive power by the Court on initiating proposals to the Constitution. However, as mentioned earlier it was not exactly what Article 68 stated. Furthermore, on substantive grounds the Court found proposed amendments in violation of the principles of separation of powers.

Aftermath

When the judgement was forwarded to Parliament, it refused to recognize the decision of the Court. According to the procedural rules of the law on the Constitutional Court, Parliament within 15 days was supposed to either reject or accept the decision of the Court. In case of the former, the full bench of the Court could override the rejection of the Parliament and the decision of the Court was final. Parliament chose to ignore the decision of the Court and did not issue any

formal rejection on it. Without the absence of the official Parliamentary rejection the Court could not re-examine the case. President Bagabandi urged Parliament to comply with the rules. Meanwhile, during the July 2000 Parliamentary elections the MPRP gained the absolute majority in Parliament with 72 deputies out of 76.[721]

The cohabitation period between Parliament and President ended. However, against the expectations of President Bagabandi the newly elected Parliament was also not in a rush of putting Constitutional Court`s decision into the agenda of the Parliament and continued ignoring it. Moreover, the MPRP went ahead and formed the Cabinet that included deputies of the Hural. On July 28, 2000 the Parliament discussed the Constitutional Court`s decision and declared that the Court went beyond its jurisdiction by deciding on constitutionality of constitutional amendments, thus it avoided issuing any formal rejection. In response to Parliament the Constitutional Court on November 2000 without the formal rejection of the Parliament re-examined the issue in full bench and upheld its original decision. On December 2000, Parliament decided to end the wrestling with the Court and the President by proposing another constitutional amendment with the same text and it was adopted by vote of 68 v. 0.[722]President as expected vetoed the amendments, Parliament override the veto. The case was never brought to the Constitutional Court. In May 2001 the incumbent President Bagabandi was re-elected for the second term.[723]

The experience of Mongolia can be a good lesson for constitutional courts of newly emerging democracies. The aggressive approach taken by the Court towards resolving the

[721] Former Communist party wins parliamentary elections in Mongolia, BBC Monitoring Former Soviet Union Political Supplied by BBC Worldwide Monitoring, July 2, 2000, Sunday available in LexisNexis Academic
[722] Tom Ginsburg, Chimid Enhbaatar, *Avoiding Rights: The Constitutional Tsets of Mongolia* in Albert Chen, Andrew Harding (eds.), Constitutional Courts in Asia: a Comparative Perspective 168, 176 (Cambridge University Press 2018).
[723] Mongolia: Incumbent president re-elected for second term, BBC Monitoring Asia Pacific – Political Supplied by BBC Worldwide Monitoring, May 21, 2001, Monday, available in LexisNexis Academic

political conflicts of open character can be detrimental to the democratization process of states and most importantly to the legitimacy of the institution of constitutional courts themselves.

2. Facilitative approach: South Korean Constitutional Court

Looking at the jurisprudence Korean Constitutional Court and the Judicial Yuan of Taiwan one can observe the specific pattern and commonality as to how they coped and dealt with cases involving open political conflict among parties, most of the times among President and Parliament. Both tend to adopt a facilitative approach, mediating between Presidential and Parliamentary powers instead of siding with one or the other. This approach is in complete contrast to the usual strategies developed by CCs in Central Asia and Mongolia.

2.1. The Case about the Impeachment of President Roh Moo-hyun (2004)

Background of the Case

President Roh Moo-hyun was elected in 2002, a charismatic human rights activist without a university degree but with an ambitious reformist agenda.[724] After the elections his presidency coincided with the ruling of the conservative opposition party GNP [725] in the Parliament that blocked most of the reformist policies initiated by Roh.[726] Meanwhile, President Roh`s party in Parliament titled MDP was experiencing challenges and a strong division internally due to a generational difference. Mainly, the evident divide was among the older generation of MPs who were active supporters of previous president Kim Dae-guy and the

[724] Barbara Demick, *A "Lincoln" Climbs to Top in Elitist Korea*, L.A. Times (Dec. 20, 2002) 26, http://Articles.latimes.com/2002/dec/20/world/fg-roh20 , YOUNGJAE LEE Law, *Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 Am. J. Comp. L. 403. 408 (2005)
[725] For more information on electoral system of South Korea see Aurel Croissant, *Electoral Politics in South Korea*, in Aurel Croissant (ed.) Electoral Politics in Southeast and East Asia, 233 (Friedrich Ebert-Stiftrung, 2002).
[726] *Id* at 409

younger generation of MPs who were active supporters of President Roh.[727] In 2003 the supporters of President Roh left the MDP to form their own new political party Uri Party.[728] This exodus enabled the GNP and the MDP party to form the majority coalition against President Roh. South Korea was experiencing an open battle between President and hostile and powerful Parliament. In October 2003 close associates of President Roh were entangled in a scandal revolving around their involvement in accepting illegal campaign contributions during the 2002 Presidential elections.[729] To handle this situation, President Roh decided to initiate a national referendum asking public confidence in him.[730]

Furthermore, President Roh publicly announced and assured that if the amount of campaign contributions received by his team in 2002 exceeds 1/10 of the illegal contributions accepted by the GNP party during the same presidential elections, he would resign.[731] Finally, President Roh publicly supported the Uri Party, thus provoking a fierce criticism by the opposition coalition in parliament.[732] The MDP filed a complaint to the National Election Commission claiming that Roh`s speech and comments violated election laws. The Commission addressed a letter to President Roh, requesting him to remain neutral as a public official concerning the elections. The MDP demanded a public apology from the President. Instead, they have experienced yet another press conference from the President where he refused to apologize

[727] Hwang Jang-jin, *Post-Election Crisis Deepens in Ruling Party: Roh Supporters, Old Guards Face Off Over Creation of New Party*, Korea Herald (Apr. 30, 2003)
[728] Lee Joo-hee, *Ruling Party Splits Today: About 40 Pro-Roh Lawmakers to Form New Party*, Korea Herald (Sept. 20, 2003); *New Party Changes Name to "Uri Party", Korea* Times (Oct. 24, 2003)
[729] Anthony Faiola, *Crisis Widens for S. Korea Leader: Aides' Arrest in Bribery Scandal is Latest in Roh's Brief Tenure*, Wash. Post (Oct. 24, 2003), Roh's *Former Top Aide Arrested*, Korea Times (Oct. 16, 2003)
[730] Anthony Faiola, *South Korean President Calls for Vote: Roh Offers to Quit If Referendum Goes Against Him*, Wash. Post (Oct. 13, 2003)
[731] *Id*
[732] *Roh Calls on Nation to Support Pro-Government Party*, Korea Times (Feb. 25, 2004)

for his public statements in support of the Uri Party.[733] Moreover, he publicly announced that he disagreed with the opinion of the Election Commission on this issue. Eventually, the National Assembly passed a motion to impeach the president.[734]

According to Article 65 of the Korean Constitution if "*president has violated the Constitution or other acts in the performance of official duties, the National Assembly may pass motions for his/her impeachment.*"[735] The impeachment process of the President consists of three main stages.

- First, the majority of the National Assembly proposes the motion.
- Second, two thirds or more of the total number of MPs shall approve it.
- Finally, the Constitutional Court of Korea must adjudicate the impeachment process.
- During this time President is suspended from exercising powers until the impeachment has been adjudicated[736]

The Constitutional Court (KCC) could not avoid this dispute on political question grounds. Article 111 of the Korean Constitution expressly states that the KCC shall have jurisdiction over the impeachment cases.[737]

It is important to note that during the next Parliamentary elections, the Uri Party won the parliamentary majority, these results were already available while the impeachment case was pending before the court.[738]

Analysis of the decision of the Court

Grounds for impeachment: legal v. political

[733] Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53.2. The American Journal of Comparative Law, 409, (2005)
[734] Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53.2. The American Journal of Comparative Law, 410, (2005)
[735] Daehanminkuk Hunmeob [Hunbeob] [Constitution] art. 65 (S.Kor.).
[736] Daehanminkuk Hunmeob [Hunbeob] [Constitution] art. 65 (S.Kor.).
[737] Daehanminkuk Hunmeob [Hunbeob] [Constitution] art. 111 (S.Kor.).
[738] *South Korea's liberal Uri Party has won a large majority in the country's parliamentary elections,* BBC News (Apr.16 2004)

Since it was the very first decision of the KCC on presidential impeachment it was important for the KCC to highlight some general terms in the Constitution involving this issue, clarify certain ambiguities in the text. Let us go through the logic of the court and what kind of interpretative approach was taken by the court.

First, the KCC started with the grounds for impeachment. It made clear right away that the KCC is bound by the grounds listed in the impeachment resolution only.[739] Ostensibly, such an approach can be characterized as being deferential to the legislature. However, the KCC further continued that determination of legal provisions of alleged violations and the "*structure of the grounds"*[740] for impeachment is upon the discretion of the KCC. The Court stated, "*the question of in which relations the grounds for impeachment are legal is examined and absolutely to be determined by the Constitutional Court*".[741] Interestingly, such an approach can be interpreted as KCC`s treatment of impeachment processes a legal process, rather than political since the subject in question can be impeached only on legal grounds but not political. Thus, the KCC narrowed down the influence of parliament in impeachment cases at least if we look at it from the perspectives of the legislative branch.

Furthermore, the KCC was constantly directing all the parties of the dispute to the text of the Constitution even if that text included unwritten principles. It can be particularly noticed in further reasoning of the decision. The KCC refered to Article 65 of the Constitution again and highlighted the following phrase as the ground for impeachment: "*violated the Constitution or*

[739] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court[Const.Ct], 2004Hun-Na1,May14,2004,(2004 16-1 KCCR,609) (S.Kor.)
[740] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court [Const.Ct], 2004Hun-Na1, May14,2004,(2004 16-1 KCCR,609) (S.Kor.)
[741] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court [Const.Ct], 2004Hun-Na1, May14,2004,(2004 16-1 KCCR,609) (S.Kor.)

other Acts in the performance of official duties".[742] According to KCC the Constitution under this Article shall also include the "*unwritten constitution formed and established by the precedents of the constitutional court."*[743]

Merits: Did president violate the constitution and statutes? Neutrality Laws

Under the South Korean Constitution there is no expressed requirement for political neutrality of president. However, this rule derives from Article 7.2 of the Constitution stipulating: "*The status and political impartiality of public officials shall be guaranteed as prescribed by Act*".[744] Article 9 of the Public Officials Election Act requires a public official "*to maintain political neutrality (including an agency and organization) and shall not exercise any unreasonable influence over the election or perform any act likely to have an effect of the election result".*[745]

The public statements of President Roh in support of a specific political party were found by the KCC in violation of Articles 7, 41, 67 and 116 of the Constitution along with Article 9 of the *Public Officials Election Act*. According to the Court the President is a public official, by virtue of holding this position as a public official he is obliged to maintain neutrality during the elections, and it concerns "*any and all public officials (with an exception for members of national assembly) who are in a in a position to threaten the principle of free election and equal opportunity among political parties at the election*".[746] By publicly supporting a specific political party, President Roh according to the KCC took "*advantage of the political significance and*

[742] Daehanminkuk Hunmeob [Hunbeob] [Constitution] art. 65 (S.Kor.).
[743] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court [Const.Ct], 2004Hun-Na1, May14,2004,(2004 16-1 KCCR,609) (S.Kor.)
[744] Daehanminkuk Hunmeob [Hunbeob] [Constitution] art. 7 (S.Kor.).
[745] Public Official Election Act art. 9 Mar. 16, 1994 Act No. 4739 (S. Kor.), translated in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.).
[746] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court[Const.Ct], 2004Hun-Na1,May14,2004,(2004 16-1 KCCR,609) (S.Kor.)

influence of the office of the president"[747] thus violating his obligations under the Constitution and statutes to remain neutral concerning the elections.

Violation of the rule of law and obligation to protect the constitution

The actions of the President concerning National Election Commission, particularly public criticism of the Commission`s decision by President according to the KCC was in violation of Article 66(2) of the Constitution which obliges president "*to abide by and protect the Constitution*."[748] The KCC emphasized that this norm was an essential norm that originates from the principle of rule of law, and President by his very nature of being "*a head of state and chief of the executive branch is the symbolic existence personifying the rule of law and the observance of law toward the entire public*."[749] Instead of serving as a good example for all citizens of Korea and public officials by questioning the legitimacy and criticizing the decisions of other state officials president was "*lowering the public`s awareness to abide by the law*."[750] These actions of the President accordingly were tantamount to violation of the rule of law and obligation to protect the constitution.

Suggestion to hold a national referendum, corruption, and abuse of power

The KCC identified President`s suggestion to hold a referendum as a violation of the constitutional obligation regulated by Article 72 of the Constitution of "*not to abuse the mechanism of the national referendum as a political tool to fortify his political position*."[751]

As for the corruption scandals involving his close associates about their involvement in accepting illegal campaign contributions during the 2002 the KCC found no violation on the

[747] *Id.*
[748] Daehanminkuk Hunmeob [Hunbeob] [Constitution] art. 66 (S.Kor.).
[749] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court[Const.Ct], 2004Hun-Na1,May14,2004,(2004 16-1 KCCR,609) (S.Kor.)
[750] *Id*
[751] Daehanminkuk Hunmeob [Hunbeob] [Constitution] art. 72 (S.Kor.).

grounds of abuse of power. The KCC justified by saying that these corruption scandals allegedly were held before Roh become president and thus he was not exercising the official duty as President.

Impeach or not to impeach?

A close look at the decision so far suggests the inclination of the KCC towards the upholding the impeachment motion, and it all looked as advantageous towards the Parliament. However, by the end of the decision when it had to decide whether to uphold the impeachment motion or not, we observe a total shift. The KCC has developed a constitutional test of proportionality/balancing in deciding whether to remove the respondent from the office or not. Namely, the KCC emphasized that the removal for any minor violation of the law would not meet the proportionality test. There must be "*a grave violation of law sufficient to justify the removal of a public official from office*."[752] The level of gravity shall be determined accordingly, namely by weighing and balancing between the degree of harm caused by the illegal actions of the President to the constitutional order and the "*effect to be caused by the removal of the respondent from the office*."[753] Even though on most of the grounds raised by the impeachment motion President Roh`s actions were found in violation of law and the constitution, KCC yet was not convinced that those violations were of serious gravity that required the removal of him from the office. Therefore, the petition for the impeachment adjudication was rejected.

Thus, in summary, the Court has developed a standard test to be followed in adjudicating the impeachment cases. First, the President can be impeached only for violations of law.[754]

[752] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court[Const.Ct], 2004Hun-Na1,May14,2004,(2004 16-1 KCCR,609) (S.Kor.)
[753] *Id*
[754] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court[Const.Ct], 2004Hun-Na1,May14,2004,(2004 16-1 KCCR,609) (S.Kor.)

Second, he can be impeached only for the conducts or misconducts taken place while he served as a public official, namely while in the office. Finally, the impeachment motion can be approved only if the damage caused by the actions of the President is so grave that only removal of him from the office can repair that damage.[755]

In the impeachment case, the KCC reached an interesting conclusion that fuels, even more, the never-ending debate on Impeachment being a political or legal process. For the KCC impeachment is a legal process and the grounds for impeachment can be based on legal not on political grounds. Such position, on the other hand, can generate a thought of judicialization of politics[756] or how Ran Hirshl put it paving the way to juristocracy, expansion of judicial review.[757] Should the Constitutional Court have the final say on impeachment disputes or the legislature? However, this debate will be elaborated more in further chapters. For this chapter, the Court`s abundant reliance on law and legal arguments rather than on political ones have played a big favor for the court itself. Such a strategy enabled the court to serve as a facilitator, resolve the political deadlock while at the same time keeping its legitimacy and credibility. It could be considered a well thought and well-chosen strategy by the court.

Aftermath

After the *Impeachment case*, President Roh had three more years to serve as president. Even though the Uri Party got the majority in the Parliament, President Roh was facing an aggressive opposition by GNP. If before the Impeachment case, he was facing major push backs within his own party due to generational difference, this time the GNP was blocking all his

[755] *Id.*
[756] Jonghyun Park, *The Judicialization of Politics in Korea*, 10.1 Asian-Pacific Law&Policy Journal, 65 (2008).
[757] Ran Hirschl, Towards Juristocracy The Origins and Consequences of the New Constitutionalism (Harvard University Press 2007)

initiatives as relocation of National Capital by referring them to the Constitutional Court.[758] Due to inability of implementing his campaign promises the popularity of President Roh dropped. In the next presidential and parliamentary elections, the GNP got the majority support.

2.2. The Case about the Impeachment of President Park (2017)

Background of the Case

President Park was elected in 2012 mostly by getting the support in conservative regions and from the older generation. Her political platform was keen to support the needs of the older generation and overall expansion of the welfare state in South Korea. Particularly her promised policies included the pension for seniors, the revival of the cultural and historical traditions of Korean society.[759] However, after the election, her policy considerations have slightly shifted and were no longer evident. Furthermore, several events also took place that negatively affected her presidency. One of them was the sinking of the ship Sewol in 2014 that was a big catastrophe for Koreans and was also characterized as "mandate disaster" for President Park.[760]

2016 can be marked in Park`s presidential history as a year of "Park-Choi gate."[761] This scandal eventually led to the motion of impeachment raised by Parliament. On October 2016 one of the local TV stations published a report claiming that throughout her presidency President Park was under the influence of Choi Soon-sil.[762] Particularly, the allegations suggested that President Park divulged confidential documents to Miss Choi on essential state affairs.

[758] YOUNGJAE LEE *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 Am. J. Comp. L. 403. 408 (2005)
[759] Uk Heo, Seongyi Yun, *South Korea in 2017 Presidential Impeachment and Security Volatility*, Asian Survey 58.1, 67 (2017)
[760] Dostal, J. M, *South Korean Presidential Politics Turns Liberal: Transformative Change or Business as Usual?* The Political Quarterly, 88(3), 480-491 (2017) http://nbn-resolving.de/urn:nbn:de:0168-ssoar-55605-8
[761] *Id* 482
[762] Mystery of Park's heavy reliance on Choi, The Korea Herald, (October 20, 2016) http://www.koreaherald.com/view.php?ud=20161030000180 (last visited February 9,2019).

Furthermore, Miss Choi was also actively involved in the appointment process of some public officials, strictly speaking, the President appointed certain public officials upon the recommendation of Miss Choi.[763] Finally, there were also facts about abuse of authority by Park namely exercise of coercion on some companies and involvement in corruption schemes with companies such as KD Corporation, Mir and K-Sports, Blue K, Playground and others.[764] Furthermore, it is worth noting several facts that sharply contrasted 2017 impeachment case with 2004. First, the ruling majority in Parliament were supporters of President Park unlike in the case of the presidential impeachment of Roh. Furthermore, constitutional experts have also stated several times that the state of nature of constitutional court is more conservative namely seven conservative judges against one progressive judge and that it might also somehow affect the decision.[765] Finally, "Park-Choi gate" scandal raised a massive public outrage and social movement named candlelight rally where hundreds of thousands of South Koreans protested against the Park`s administration demanding the justice and fight with corruption and demanding her resignation and impeachment.[766]

Analysis of the decision of the Court

Although the political context and general sentiments of the population in 2017 impeachment case in many aspects were different from 2004 case the KCC remained consistent and applied the test developed itself in the previous impeachment case.

[763] Dostal, J. M, *South Korean Presidential Politics Turns Liberal: Transformative Change or Business as Usual?* The Political Quarterly, 88(3), 480-491 (2017) http://nbn-resolving.de/urn:nbn:de:0168-ssoar-55605-8
[764] *Id* 483
[765] Hyun-Soo Lim, A Closer Look at the Korean Constitutional Court's Ruling on Park Geun-hye's Impeachment, *Yale Journal of International law* (May 2017), http://www.yjil.yale.edu/a-closer-look-at-the-korean-constitutional-courts-ruling-on-park-geun-hyes-impeachment/
[766] Chang, Paul, *Candlelight Protests in South Korea: The Legacies of Authoritarianism and Democratization*, 34.1 Ewha Journal of Social Sciences (2018).

Legal grounds for impeachment by analyzing the decision can be grouped into following legal grounds: 1. Abuse of presidential authority+ violation of the Criminal Act and other laws related to bribery. 2. Infringement on the free press (under this ground the Court found lack of evidence). 3. Violation of duty to protect the right to life (no direct nexus (causation) was demonstrated between President`s action and the tragedy).[767]

Broadening of the notion of public official

Based on the assessment of facts the KCC concluded that the actions of the president violated Article 7 of the Constitution (fair performance of duties) and the duty of confidentiality. Interestingly, this time the Court made a strong emphasis on what constitutes being a public official. If in 2004 decision it was mostly interpreted as a representation of people, personification of the rule of law and obedience to law and order this time the KCC went beyond it. The KCC stated that being a president and holding a position of public official means to be entrusted by people to exercise the authority for the benefit of public interest, namely it means to be a servant of "the entire population."[768] It also means independent, neutral and fair exercise of this entrusted authority without representing the interests of a particular group, political party, religion, region or any social organization.

Furthermore, according to the KCC, president Park also abused her presidential powers and failed to perform her official duties fairly. The abuse of power was reflected in following actions: the appointment of certain governmental officials by Choi`s suggestion, intervention to the management of specific private corporations and the divulging of the confidential documents

[767] Impeachment of the President (Park Geun-hye) case, Constitutional Court [Const.Ct], 2016 Hun-Na1,Mar. 10,2017, (KCCR,605) (S.Kor.)
[768] *Id*

to Choi. The KCC stated that these actions were in violation with Article 7 of the Constitution and Article 60 of the State Public Officials Act. [769]

Unlike in case with President Roh, this time the KCC decided to uphold the motion for impeachment. [770] The Court applied the proportionality/balancing test developed in 2004 impeachment case[771] and concluded that that acts of President Park constituted a grave violation of her obligations to serve the people, the court even used such terms as "*betrayal of the people`s confidence*" and "*unpardonable*" to demonstrate *the gravity of the violation* caused by the actions of President Park.[772] Another interesting parallel is the fact that this time the Court invoked the doctrines of separation of powers and checks and balances which was not the case in 2004 Impeachment case. Namely, the KCC stated that due to continues maladministration of President Park for over three years, it became "*practically impossible for constitutional institutions such as National Assembly to provide checks and balances under the doctrine of separation of powers*."[773] This in view of the court absolutely "*undermines the principle of representative democracy and the spirit of the rule of law*".[774]

As we can see the language of the KCC and overall attitude and outcome was different in comparison to the 2004 decision, yet it is important to highlight that the KCC remained consistent in application of the same constitutional standards. In both cases the KCC found the violations of law and constitution by both President Park and Roh, however, only in 2017

[769] Impeachment of the President (Park Geun-hye) case, Constitutional Court [Const.Ct], 2016 Hun-Na1,Mar. 10,2017, (KCCR,605) (S.Kor.).
[770] *Id*
[771] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court[Const.Ct], 2004Hun Na1,May14,2004,(2004 16-1 KCCR,609) (S.Kor.)
[772] Impeachment of the President (Park Geun-hye) case, Constitutional Court [Const.Ct], 2016 Hun-Na1,Mar. 10,2017, (KCCR,605) (S.Kor.)
[773] Impeachment of the President (Park Geun-hye) case, Constitutional Court [Const.Ct], 2016 Hun-Na1,Mar. 10,2017, (KCCR,605) (S.Kor.)
[774] Impeachment of the President (Park Geun-hye) case, Constitutional Court [Const.Ct], 2016 Hun-Na1,Mar. 10,2017, (KCCR,605) (S.Kor.)

decision KCC decided to change the political status quo and uphold the motion to impeach the president. The logical question would be - why? One can claim that the acts of President Roh were not grave enough in comparison with President Park. However, closer and broader look at the political context can help us understand the decision of the KCC. There was one factor that distinguished these two cases: public sentiments.[775] In case with President Roh general support of the public was high and also, as it was mentioned earlier, by the time the KCC reached its decision the Uni Party won the parliamentary majority. Thus, the decision of impeachment might have created more controversy, rather than the solution of the political deadlock. Whereas in case with President Park the wave of public demonstrations titled candlelight rally spreaded around entire South Korea, people were demanding the investigation, the impeachment[776] and overall the change in the system and fight with corruption. Even though President Park had majority support in Parliament, yet the MPs themselves turned around and voted for the motion to impeach President Park. Accordingly, one can assume that it played a tremendous impact on the decision of the KCC that it had to take into consideration the public sentiments and acted as a pro-majoritarian institution in both impeachment cases while at the same time accurately working with text of the Constitution with its expressed provisions and unwritten principles as well. Another distinction between 2004 and 2017 Impeachment cases was the presence of concurring opinions in the later.[777]

[775] Alexis Daden, *Revolution by Candlelight: How South Koreans Toppled a Government,* Dissent Magazine (Fall 2017) https://www.dissentmagazine.org/Article/revolution-by-candlelight-how-south-koreans-toppled-a-government

[776] According to the Gallup Korea poll before the decision of the Consitutional Court 77% of Koreans supported the impeachment and 18% opposed it. Gallup Korea, ‘‘Daily Opinion No. 248,’’ 2017, <http://www.gallup.co.kr/gallupdb/reportContent.asp?seqNo¼817>

[777] There were two separate concurring opinions one written by Justice Ahn Chang-Ho, and another one by Justices Kim Yi-Su and Lee Jin-Sung. Why it is noteworthy of analyzing them is the language and overall tone of the concurring opinions. For instance, Justice Ahn openly criticized the deficiencies of the current constitutional framework and was calling for constitutional reform of the “imperial presidential system.” On the other hand, Justices, Kim Yi-Su and Lee Jin-Sung addressed the Sewol Ferry disaster criticizing the inefficient and

Aftermath

After the decision of the Court to uphold the impeachment motion, President Park was subsequently arrested and an impeached president in April 2018 was convicted and sentenced to 24 years in prison by Seoul Central District Court.[778] On May 2017 as a result of special presidential elections Moon Jae-in a liberal from the Democratic Party was elected as a new President of South Korea. One of the major promises of Moon Jae`s presidential campaign was reforming the culture of authoritarian/imperial presidentialism in Korea.[779] Even though the 2017 election revealed a general shift of voters` preference to liberal candidates, the generational differences in voting remained; the older generation tended to support conservative candidates.[780]

3. Facilitative approach: Constitutional Court of Taiwan

3.1. Presidential Immunity case in Taiwan

Background of the Case

The politics of Taiwan for last decades was predominantly occupied and divided between two camps, namely the Blue camp ruling party KMT that was under the lead from the end of civil war till 2000 and green camp Democratic Progressive Party (DPP). President Chen Shui-bian former leader of the DPP became the first non-Nationalist President, thus putting an end to the era of KMT ruling in Taiwan that has been a ruling party since the end of world war two.[781]

inappropriate action of president Park during the event and Justices believed that President Park failed her obligation and duty as a commander in chief to protect the right to life.

[778] Brian Pedden, *Impeached South Korean President Sentenced to 24 Years in Prison*, Voanews (April 2018) https://www.voanews.com/a/former-south-korea-leader-park/4335087.html

[779] Cynthia Kim & Jane Chung, *Factbox: South Korean President-elect Moon's main policy pledges*, Reuters (May 2017)

[780] Uk Heo & Seongyi Yun, South Korea in 2017 Presidential Impeachment and Security Volatility, *Asian Survey* 58.1, 67 (2017)

[781] Wen-Chen Chang, *Strategic judicial responses in politically charged cases: East Asian experiences*, 8 ICON.887, 891 (2010)

From September to November 2006 a group of people that proclaimed themselves Red-shirt Army led by the former leader of DPP Shih Ming-teh organized the anti-corruption protest in front of the Presidential Building on Ketagalan Boulevard.[782] It was a spontaneous social movement that lasted for several months and included the demands of the red shirt army- the resignation of President Chen due to his involvement in a number of corrupted acts.

In response to protests prosecutors of the Taipei District Court started the investigation. Claiming his presidential immunity rights guaranteed under the Article 52 of the Constitution, president Chen immediately raised his concerns as to the legitimacy of these investigations.[783] The Prosecutor`s office claimed that the investigations were addressed against the first lady upon the suspicion of her involvement in embezzlement of a presidential fund and in November the prosecutor's office brought official charges against the first lady. President Chen was indicted as an accomplice but was not officially changed by the prosecutors.[784] This was a good opportunity for the Nationalist Party to initiate a motion for presidential impeachment and this initiative had been brought into the agenda of the Legislative Yuan several times. Meanwhile, President Chen claimed the unconstitutionality and illegitimacy of the prosecution, particularly that this would encroach upon the presidential privileges and immunities guaranteed to him by the constitution and that the prosecution of him would be in violation with the principles of separation of powers.[785] On January 2007, the secretary general of President filed a constitutional complaint challenging the legality and constitutionality of the prosecution.

Analysis of the decision

[782] Chien-Chin Lin, *Autocracy, Democracy, and Juristocracy: the Wx and Wane of Judicial Power in the Four Asian Tigers, 48* Georgetown Journal of International law 1061, 1079 (2017).
[783] Po Jen Yap, Courts and Democracies in Asia, 106 (Cambridge University Press, 2017).
[784] Wen-Chen Chang, Li-ann Thio, Kevin YL Tan, Jiunn-rong Yeh, Constitutionalism in Asia: Cases and Materials, 169 (Hart Publishing, 2014).
[785] *Id.* 169

There were three main questions brought before the JUDICIAL YUAN. "*What is the scope of the presidential immunity? Whether the president can claim state secret privilege? If yes, what is the scope of the privilege*."[786]

A close look at the decision enables the reader to see facilitative tone of the Judicial Yuan throughout the entire Interpretation. In other words, the current decision was a perfect balancing of interests between the President and Parliament. In the issue of presidential immunity Judicial Yuan seemed to be taking the side of the legislature. Whereas in the issue of state secret privilege the court seemed to be taking the side of the president. Thus, the approach of the court facilitated the dialogue between branches rather than created more tension.

Presidential criminal immunity

The main constitutional provision referred by the Judicial Yuan in resolving the issue of presidential immunity was Article 52 of the Constitution which stipulated the following:

"The President shall not, without having been recalled or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason."[787]

The Judicial Yuan allowed some investigatory actions as long as they do not undermine the esteem of the president as a head of state.[788] The Judicial Yuan also emphasized that presidential criminal immunity guaranteed by Article 52 of the ROC Constitution is just a "procedural barrier" and in no means can be defined as "substantive immunity." The Judicial Yuan here distinguished the difference between the status of the president from criminal procedural law perspective and the perspective of actions of the investigators (search, seizure and

[786] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 627 (2007).
[787] Zhonghua Minguo Xianfa art. 52 [Constitution of the Republic of China, ROC] (1947) (Taiwan)
[788] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 627 (2007).

other investigatory acts).[789] The Judicial Yuan continued that sometimes certain investigatory acts could be allowed, and the decision of defining it belongs solely to the legislature not to the judiciary. So, the Judicial Yuan here was deferential and unlike in Mongolia`s case did not attempt to take full control of interpreting the constitution and having the final say on it. The Judicial Yuan also emphasized the meaning of the law and did not base their argument on political grounds instead it was on legal grounds.

State secret privilege

Unlike in the issue of presidential immunity, in state secret privilege issue the Judicial Yuan seemed to be facing partial constitutional silence, in other words there was no expressed constitutional provision that guaranteed this right to President. However, the Judicial Yuan inferred this right from broader scope of presidential powers. Namely, the Judicial Yuan emphasized that President according to the text of the Constitution is the head of state, supreme commander and highest executive officer.[790] Court reaffirmed that in order to exercise abovementioned powers President is granted with such privilege and if he believes that certain information is detrimental to national security he may refuse to testify or present certain documents.[791] Interestingly, just like with presidential criminal immunity here Judicial Yuan also had to decide who owns this discretion of identifying what constitutes state secret information or not. In this case, again Judicial Yuan gave the privilege to the legislative branch but not to the judiciary. Thus, acting with due respect to political branches of power.

Aftermath

[789] *Id* para. 2
[790] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 627 (2007).
[791] *Id*

The interpretation of the Judicial Yuan produced some disagreements from the side of the President and Parliament[792]however both actors reacted to the decision within the constitutional framework and complied with the decision.[793] In 2008 the KMT was able to win in both presidential and parliamentary elections, Chen`s Party lost. After President Chen left his office, he faced criminal charges for embezzlement, bribery and money laundering. On September 2009 he was found guilty under all charges and received a life sentence, in 2010 as a result of the appeal the High Court reduced his sentence to 20 years on imprisonment[794].

4. Tamed approach: Constitutional Courts of Central Asia under the strong presidentialism

Next sections of the chapter will discuss the jurisprudence of Kyrgyz and Kazakh constitutional courts in cases of open political conflict between president and parliament. It is important to highlight that "tamed approach" in the context of Kyrgyz and Kazakh CCs should be understood more in terms of compromised decisions of the court dictated through political power plays, not as a judicial choice. As it was mentioned before, these cases reflect earlier jurisprudence of constitutional courts before they were reorganized into Constitutional Council and Constitutional Chamber. Remarkably, such disputes of open political confrontation among branches appeared only in CCs of Kazakhstan and Kyrgyzstan. Whereas, the CCs of Tajikistan and Uzbekistan did not face such disputes. In case of Tajikistan, the Civil War in the early 1990s

[792] Chien-Chin Lin, *Autocracy, Democracy, and Juristocracy: the Wx and Wane of Judicial Power in the Four Asian Tigers, 48* Georgetown Journal of International law 1061, 1080 (2017).
[793] Wen-Chen Chang, *Strategic judicial responses in politically charged cases: East Asian experiences*, 8 ICON.885, 891 (2010)
[794] *Taiwan court jails former president for corruption*, the Guardian (Sep.2009) https://www.theguardian.com/world/2009/sep/11/taiwan-jails-former-president-corruption

substantially delayed the entire process of constitution-making and establishment of the CC.[795] The establishment of the CC of Uzbekistan did not happen until 1995.[796] It is important to highlight that most of the cases happened after the wave of forced parliamentary dissolutions that was discussed in chapter 1.

5. The Tamed Constitutional Court of Kazakhstan

5.1.1995 Decision of the Kazakh Constitutional Court

Background of the Case

On September 1994 one of the unsuccessful deputy candidates for the 1994 parliamentary elections applied to the CC[797] questioning the constitutionality of elections in the district where she was running for the Parliament. The CC was considering the case from September 1994 till March 4, 1995. The CC annulled the results of the whole parliamentary elections which led to the second parliamentary dissolution.[798] Before going into details of the case, it is worth highlighting that current case is the outcome of the extreme case of constitutional silence.

First, the Constitution of Kazakhstan did not expressly enumerated the competencies of the Constitutional Court. Those competencies were defined in Article 10 of the *Law on Constitutional Court*. Article 10 of the Law on the other hand stipulated the following:

> *Constitutional Court reviews constitutionality of:*
> - *"laws and resolutions adopted by the Supreme Council of the Republic of Kazakhstan;*
> - *decrees, resolutions and orders of the President of the Republic of Kazakhstan;*
> - *resolutions of the Cabinet of Ministers of the Republic of Kazakhstan;*
> - *regulatory acts of ministries, state committees and departments of the Republic of Kazakhstan;*

[795] Sally N. Cummings, Understanding Central Asia: Politics and Contested Transformation, 64 (Routledge 2012)
[796] Konstituciia Respubliki Uzbekistan (1992) [Konst.RK] [Constitution]
[797] The Constitutional Court of Kazakhstan was not suspended yet and replaced by the Constitutional Council.
[798] Postanovlenie Konstitusionnogo Suda RK ot 6 marta 1995 g. po isku Kvyatkovkoi [Ruling of the Constitutional Court of the Republic of Kazakhstan of March 6,1995], Kazakhstan skaya Pravda March 16, 1995

- *acts of a regulatory nature, adopted by the Prosecutor General of the Republic of Kazakhstan, guidance clarifications of the Supreme Court of the Republic of Kazakhstan, as well as the Supreme Arbitration Court of the Republic of Kazakhstan.*
- *international treaty and other obligations of the Republic of Kazakhstan that have not entered into force."*[799]

Even though it said that the CC can review acts of governmental bodies such as Central Election Commission, it did not expressly state that the CC can invalidate the results of the elections. We also need to remember that there was still no *Electoral Code* in Kazakhstan. The entire Parliamentary elections were organized by the rules developed by Election Commission under the supervision of the President. Second, the Constitution of Kazakhstan was silent about any circumstances on dissolution of Parliament. Taking these notes into consideration, chapter will proceed to the details of the case.

Analysis of the Decision

Tatyana Kvyatkovskaya a journalist and unsuccessful legislative candidate brought a constitutional complaint to CC. Her main claims were unconstitutionality of the regulation of Central Election Commission on organization and counting of the votes as of the electoral district where she was running for the Parliament. Kvyatkovskaya claimed that her district was disproportionately drawn, and she also challenged the constitutionality of the cross out method.[800] Even though the claims of Kvyatkovskaya concerned the conduct of elections in her district only, the CC found the entire Parliamentary elections of 1994 unconstitutional and annulled the elections. [801] Main justifications of the court were the following.

[799] Zakon RK o Konstitusionnom Sude Respubliki Kazakhstan [The Law of the RK on Constitutional Court of the Republic of Kazakhstan], June 5, 1992
[800] Postanovlenie Konstitusionnogo Suda RK ot 6 marta 1995 g. po isku Kvyatkovkoi [Ruling of the Constitutional Court of the Republic of Kazakhstan of March 6,1995], Kazakhstan skaya Pravda March 16, 1995.
[801] *Id*

The method of vote counting introduced by the CEC essentially changed the electoral rules established by the Election Code. Thus, the Central Election Commission violated Article 60 of the Constitution, exceeding its competence[802].

The CC also stated that the disproportion in the number of voters in the applicant`s district led to a violation of the principle of equal representation of citizens by deputies in the Parliament. This disproportion in numbers in CC`s opinion effected one of the fundamental principles guaranteed by the constitution, namely equal representation.[803] Furthermore, the CC concluded that the violations in one district affected the results of the elections in the entire Republic of Kazakhstan and equally affected the constitutional rights of all citizens. Based on these arguments, CC annulled the results of the 1994 parliamentary elections.

It is important to highlight that the applicant was challenging the regulation of the Central Election Commission as applied to one specific district, there were no arguments raised by the applicant on the principle of equal representation. However, the CC went beyond those claims and transformed the case on its own discretion.[804]

If we look at this case from retrospect and an analyze the decision of the CC in broader political context one could assume that speculations and shared views of opposition leaders and western scholars were well grounded. Namely, most likely this decision was part of the well-orchestrated grand plan of Nazarbayev on building superpresidentialism in Kazakhstan. Next development of political situation looks like a very well scripted plan orchestrated by the President.[805]

[802] *Id*
[803] Konstituciia Respubliki Kazakhstan (1993) [Konst.RK] [Constitution], Article 111.
[804] Postanovlenie Konstitusionnogo Suda RK ot 6 marta 1995 g. po isku Kvyatkovkoi [Ruling of the Constitutional Court of the Republic of Kazakhstan of March 6,1995], Kazakhstan skaya Pravda March 16, 1995.
[805] Olcott Martha Brill, Kazakhstan: Unfulfilled promise 110 (Washington, DC: Carnegie Endowment for International Peace 2002), Alexandra George, Journey into Kazakhstan: the True Face of the Nazarbayev Regime

First, on March 1, 1995, President N. Nazarbayev signed the Decree "*On the formation of the Assembly of Peoples of Kazakhstan*"[806], with the status of a consultative and advisory body under the Head of State.[807] The Assembly had no grounding on the Constitution, it was the body created by the President on the side and not affiliated with Parliament. The Assembly was later used by Nazarbayev many times to pursue his political agenda and in 2007 the Assembly was entrenched to the Constitution by the amendments proposed by President.[808]

Second, on March 8, 1994 Nazarbayev submitted objections to the ruling of the Constitutional Court.[809] This was the rule stipulated in the Law on Constitutional Court.[810]The Speaker of the Parliament did the same the next day.[811] The procedure for objections to the decision of the Court was provided in the *Law on Constitutional Adjudication*. Article 14 of the *Law on Constitutional Adjudication* stipulated that the decision of the Court is final unless the President or the Speaker express the objection within 10 days.[812]The Court could overcome the objection by 2/3 vote of the full bench and this decision was deemed to be final.[813] On March 10, 1994, the CC overcame the submitted objections and upheld its original decision.[814]On March 11,

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47 (University Press of America 2001), Pauline Jones Luong, Institutional Change and Political Continuity in Post-Soviet Central Asia: Power, Perceptions, and Pacts 234-236 (Cambridge University Press 2002), D. Nurumov & V. Vashcankha, *Constitutional Development of Independent Kazakhstan* in R. Elgie, S. Moestrup, Semi-Presidentialism in the Caucasus and Central Asia 146-150 (2016)

[806] Ukaz Prezidenta RK ob Obrazovanii Assamblei Narodov Kazakhstan a [The Order of the President of RK on Establishment of the Assembly of Peoples of Kazakhstan] March 1, 1995

[807] Polojenie ob Assamblei Narodov Kazakhstan a [Regulation on the Assembly of Peoples of Kazakhstan] March 1, 1995

[808] Konstituciia Respubliki Kazakhstan (1993) [Konst.RK] [Constitution] amended in 2007

[809] Vozrajenie Prezidenta RK na Reshenie Konstitusionnogo Suda RK [Objection of the President to the Decision of the Constitutional Court of the RK] March 10,1995

[810] Zakon RK o Konstitusionnom Sude Respubliki Kazakhstan [The Law of the RK on Constitutional Court of the Republic of Kazakhstan], June 5, 1992,

[811] Vozrajenie Predsedatelya Verhovnogo Soveta RK na Reshenie Konstitucionnogo Suda RK [Objection of the Speaker of the Supreme Soviet of RK to the Decision of the Constitutional Court of RK] March 10, 1995

[812] Zakon RK o Konstitucionnom Sudoproizvodstve v Respublike Kazakhstan [The Law of the RK on Constitutional Adjudication in the Republic of Kazakhstan], June 5, 1992 No.2550, Article 14

[813] *Id*

[814] Opredelenie Konstitusionnogo Suda RK o vozrajenii Prezidenta RK Nazarbayeva I vozrajenii predsedatelya Verhovnogo Soveta RK Kekilbaeva na Postanovlenie Konstitucionnogo Suda RK ot 6 Marta 1995 goda po isku

1994, the Parliament adopted the Constitutional Law "On Amendments and Additions to the Constitution"[815] and the Decree "On Suspending the Activities of the Constitutional Court".[816]On the same day, N. Nazarbayev appealed to the Constitutional Court, with a request, on the legal actions of the decision of March 6, 1995. The President asked for clarification:

- *"Does this mean the unconstitutionality of the elections, as well as the unconstitutionality of the powers of the elected deputies of the Supreme Council?*
- *If yes, then who is entitled to make legislative decisions.*
- *Does the decision of the Constitutional Court mean that the law "On the temporary delegation of additional powers to the President of the Republic of Kazakhstan and the heads of local administrations" of December 10, 1993, enters into force? This was the law on "unilateral" Presidential rule."*[817]

On the same day, the CC gave positive answers to the questions of the President, and the Parliament of Kazakhstan was dissolved for the second time.[818] Nazarbayev in his public speech emphasized that the dissolution of Parliament was made due to decision of the Constitutional Court and since Kazakhstan is the state governed by rule of law he had no choice but to respect and comply with the decision of the Court.[819]

Aftermath

Kvyatkovskoi [Ruling of the Constitutional Court of RK to the objections of President Nazarbayev and Speaker of the Supreme Soviet Kekilbaeva to the ruling of the Constitutional Court of March 6 1996] March 16, 1995

[815] Zakon RK o Vnesenii Izmeneniy v Konstituciu [The Law of the RK on Introducing Amendments to Constitution] March 11, 1995

[816] Postanovlenie Verhovnogo Soveta RK o priostanovlenii deyatel`nosti Konstitusionnogo Suda RK [The Decree of the Supreme Soviet of RK on Suspending the activities of the Constitutional Court] March 11,1995.

[817] Zapros Prezidenta RK v Konstitusionniy Sud RK o Pravovyh Posledstviyah Postanovlenia Konstitusionnogo Suda ot 6 marta 1995 goda [Referral of the President of RK to the Constitutional Court of RK on clarifying legal consequences of the Ruling of the Constitutional Court of March 6 1995] March 11,1995

[818] Razyasnenie Konstitusionnogo Suda RK po zaprosu Prezidenta RK ot 11 marta 1995 goda [Explanation of the Constitutional Court on the referral of the President of RK] March 11,1995

[819] Nazarbayev N. Kazakhstan kiy Put [The Kazakhstani Way], (Karaganda 2006)

Right after the decision of the CC, President Nazarbayev signed the presidential order[820] and activated the law "*On the temporary delegation of additional powers to the President*".[821] Just like a year ago the President became the personification of all branches of power: 1. Legislative, it adopts laws, issues decrees having the force of law. 2. The executive, he is the President, the head of all executive power in the Republic of Kazakhstan. 3. Judicial, the President alone decides on the appointment of judges, prosecutors[822]. From March 1995 till December 1996 Kazakhstan for the second time was living under the unilateral rule of the President. It is also worth mentioning that the Parliamentary Decree of March 11, 1995 "*On Suspending the Activities of the Constitutional Court*" remained in force, thus the Constitutional Court of Kazakhstan was also suspended.[823]

The Assembly of Peoples of Kazakhstan that was formed by the President right before the decision of the CC came up with the initiative of organizing the referendum about extending the Presidential term till 2000 without holding elections.[824] This proposal was widely supported and with the consent of the President, a referendum was held on April 29, 1995, in which 91.21% of voters took part, 95.46% of which were in favor of extending N. Nazarbayev's powers as President of Kazakhstan.[825] Thus, Nazarbayev continued his presidency till 2000 without holding Presidential elections. On August 30, 1995, another referendum was held, this time on

[820] Ukaz Prezidenta RK o Merah Vytekaushih iz Postanovlenia Konstitusionnogo Suda RK ot 6 Marta 1995 goda [The Order of the President of RK on measures arising from the Ruling of the Constitutional Court of the Republic of Kazakhstan dated March 6, 1995]
[821] Zakon Respubliki Kazakhstan o vremennom delegirovanii Prezidentu Respubliki Kazakhstan I glavam mestnyh administraciy dopolnitel`nyh polnomochiy [The Law of the Republic of Kazakhstan on ad hoc delegation of additional powers to the President of the Republic of Kazakhstan and to Heads of local administrations] Dec. 10, 1993, No.2576-XII Art. 3
[822] *Id*
[823] Postanovlenie Verhovnogo Soveta RK o priostanovlenii deyatel`nosti Konstitusionnogo Suda RK [The Decree of the Supreme Soviet of RK on Suspending the activities of the Constitutional Court] March 11,1995
[824] Sheretov, S.G. Noveishaya istoria Kazakhstana (1985-2002) [Recent history of Kazakhstan (1985-2002)] 46 (Almaty: Jurist 2003)
[825] *Id* 47

introducing changes to the constitution. Substantial changes included the introduction of a bicameral Parliament, substantial increase of presidential powers and most importantly the Constitutional Court was removed, instead replaced by Constitutional Council by the French model of constitutional review.[826] The Constitutional Council started to operate in 1996 and it consisted of 7 members. Significantly out of 11 former judges of the Constitutional Court only one made it to the Council in 1996. However, the career boom of the majority of former judges of the Court was impressive. For instance, former Chief Justice Rogov after the dissolution of the Court became an advisor of the President and later in 2000 the Minister of Justice.[827] Former Justices Baishev and Kasimov became official representatives of the President in Parliament.[828] Former Justice Kim was appointed as a Chairman of the Governmental Committee on National Politics.[829] Malinovskiy became a deputy Rector of one of the universities in Kazakhstan and later in 2007 was appointed by President Nazarbayev as a member of the Constitutional Council.[830]

6. Tamed Constitutional Court of Kyrgyzstan

Two Tulip revolutions in Kyrgyzstan created three constitutional moments that were accompanied by constant confrontations between president and parliament. It is essential to discuss all three periods, and powers dynamics since the role of the Constitutional Court was vital in all of them. Therefore, the current section will address those transitional moments in the constitutional history of Kyrgyzstan with a specific emphasis on the jurisprudence of the

[826] Konstituciia Respubliki Kazakhstan (1993) [Konst.RK] [Constitution] amended in 1995
[827] See Biography of the Judge Rogov http://online.zakon.kz/Document/?doc_id=30100689#pos=1;-160
[828] See Biography of Judge Kasimov https://online.zakon.kz/Document/?doc_id=35923502#pos=2;121
[829] See Biography of Judge Kim https://online.zakon.kz/Document/?doc_id=30100654#pos=12;-62
[830] See Biography of Judge Malinovskiy https://online.zakon.kz/Document/?doc_id=30122548#pos=2;22

Constitutional Court in cases involving powers and confrontations. For clarity the time frame will include the following:

- The first period is pre-2005 first Tulip Revolution, the period between the 1990 and 2005, namely Akayev`s Presidency and accordingly the Constitutional Court will also be referred as Akayev`s Court
- The second period is post-2005, the period between 2005 and 2010, namely Bakiev`s Presidency and accordingly the Constitutional Court will also be referred as Bakiev`s court
- The third period is post-2010 second Tulip Revolution, namely current time and the period of establishment of the Constitutional Chamber.

6.1. Kyrgyz Constitutional Court under the President Akayev

In Kazakhstan, there was one single groundbreaking decision of the Constitutional Court on open political confrontation that have fundamentally changed the course of constitutional history. The jurisprudence of the Kyrgyz Constitutional Court, unlike its peer, involved tens of decisions in each of these periods that was directly involved in an open political confrontation.[831] The current section will present the most significant and important ones concerning how courts treated the text of the constitution while resolving the critical disputes among different branches of power. It is also necessary to note the difficulty of understanding the whole scope of these decisions without contextualizing them into broader political context since most of the times those political dynamics substantially influenced the decision-making of the Court.

The first Constitution of independent Kyrgyzstan was adopted in 1993[832], and the Constitutional Court delivered its first historic decision in 1995. That decision involved the constitutionality of proposed constitutional amendments by president. The amendments were

[831] Selected decisions of the former Constitutional Court of the Kyrgyzstan Republic can be found in http://cbd.minjust.gov.kg/ru-ru/sud/DocumentList?documentListId=d77f1f1e-cbdc-4890-85eb-df70efdd2d5e
The database of the decisions of current Constitutional Chamber of the Supreme Court of the Kyrgyz Republic can be found in http://constpalata.kg/ru/category/akty/resheniya/

[832] Konstituciia Kyrgyzskoi Respubliki (1993) [Konst.KR] [Constitution]

designed to substantially extend presidential powers. This particular decision was a defining moment for the Court, since it would have shaped its position in separation of powers disputes and its adjudication and analysis of the text of the constitution. Before discussing the 1995 decision of the Court it is important to remind that the first Kyrgyz parliament experienced the forced "self-dissolution" dicussed in chapter 1, since this particular event impacted the consolidation of power by president along with taming the Constitutional Court.

6.1.1. Presidential-Parliamentary crisis

After the "self-dissolution of parliament"[833] Akayev initiated a referendum[834] on October 22, 1994. Referendum asked two primary questions: *Whether Kyrgyz people agree on the use of referendum as a procedure to introduce constitutional amendments? Whether Kyrgyz people agree for the establishment of bicameral parliament?*

The first question could be justified by his inner motivation, since according to the text of the 1993 Constitution, particularly chapter VIII only parliament could introduce amendments to the Constitution. A positive response to the first question would have allowed the president to amend the Constitution.

As for the second question, deputies of the dissolved parliament were claiming that the presidential strategy with the establishment of bicameral parliament was among those of divide and rule that would allow him to bifurcate parliament within to further strengthen his presidential powers.[835] However, the idea of bicameral parliament was not a new one. This issue was one of the central debates during the drafting process of the 1993 Constitution, especially among the

[833] This forced dissolution was discussed in Chapter 1
[834] Ukaz Prezidenta KR o Referendume po Popravkam k Konstitusii Kyrgyzskoi Respubliki [The Order of the President of KR on Referendum on Amendments to the Constitution] Sep.21, 1994 No. 245
[835] *President Akayev seeks wider powers,* BBC Summary of World Broadcasts, January 8, 1996, Monday, available at available in LexisNexis Academic

representatives from the northern regions of the Kyrgyzstan.[836] As it was mentioned earlier regionalism and clan politics is one of the biggest challenges throughout Central Asia.[837] Bicameralism was proposed by northern regional representatives but was rejected by representatives from the south and never reached the final text of the constitution. On July 1994, the district council of the Chui (north) region (local self-governance) together with the head of the Chui (north) regional state administration (regional representation of the Central Government) Felix Kulov announced the proposal about the establishment of the bicameral parliament and the introduction of appropriate amendments to the Constitution, however, the initiate was rejected by the Parliament again.[838]

On October 22, 1994, the majority of the voters had approved both questions on referendum.[839] Afterwards, on February 1995 parliamentary elections for the establishment of bicameral parliament took place. It is worth mentioning that elections for a bicameral parliament were held without the Constitution ever being amended to include a bicameral parliament.

This time parliament had more tamed deputies, yet Akayev was not able to make it fully the "pocket parliament" since independent deputies such as Tekebaev, Baibolov, Madumarov, Usubaliev, and others were able to get elected as well.[840] Contrary to expectations of the President bicameral parliament was resistant in multiple issues. On September 1995 the Parliament received open letters from the initiative groups on holding a referendum on extending the powers of the President until October 2001 without elections. The Parliament, particularly

[836] Murat Ukushev, 25 Let Konstitucii Kyrgyzstana, Istoriya [25 years for the Constitution of the Kyrgyz Republic, the history] Centr Politiko Pravovyh Issledovaniy (April 23, 2018).
[837] Pauline Jones Luong, Institutional Change and Political Continuity in Post-Soviet Central Asia: Power, Perceptions, and Pacts 182-184 (Cambridge University Press 2002),
[838] Murat Ukushev Kyrgyzstan I Parlamentskaya Forma Pravlenia Opyt Razocharovania [Kyrgyzstan and Parliamentary form of Governance: the experience of disappointment] 2017, http://center.kg/Article/84
[839] John Anderson, Kyrgyzstan: Central Asia`s island of democracy? 28-36 (Routledge 1999)
[840] John Anderson, Kyrgyzstan: Central Asia`s island of democracy? 28-36 (Routledge 1999)

the Legislative Chamber rejected the initiative rights away, thus not allowing the Kazakh scenario of Presidential extension of power to happen in Kyrgyzstan.[841]

After the Legislative Chamber rejected the initiative on referendum, President through the House of Representatives of the Parliament managed to get the resolution on holding early presidential elections in 1995.[842] However, according to the schedule the next Presidential elections were supposed to take place in 1996. To reemphasize, the Constitution was not amended to include the bicameral Parliament. According to Article 58.1 of the 1993 Constitution, only Parliament could call for early Presidential elections.[843] Given the de-facto realities it was not clear if President needed the support of both Chambers and if newly elected Parliament can call early presidential elections at all until the Constitution will be amended to include the bicameral President. Nevertheless, early elections were scheduled, and not surprisingly President Akayev was re-elected again.

6.1.2. The Case Involving the Referendum of Constitutional Amendment

Background of the Case

The first agenda of Akayev`s second term started with another referendum of 1996 involving the amendments to the constitution.[844]

It was presented to voters as a follow up to 1994 referendum and merely the formalization of the already agreed issues such as bicameral parliament and referendum as a tool

[841] Postanovlenie Zakonadatel`nogo Sobrania Jogorku Kenesh KR ob Obrasheniah inisiativnyh grupp po provedeniu Referenduma o prodlenii polnomochiy Prezidenta KR do Oktyabrya 2001 goda [The Regulation of the Legislative Chamber of Jogorku Kenesh of the KR on requests of the initiative group on holding a Referendum on extension of Presidential term till October 2001], Sep.20, 1995 No.198-1

[842] Postanovlenie Sobrania Narodnyh Predstavitelei Jogorku Kenesh KR o naznachenii vyborov Prezidenta KR [The Regulation of the House of Representatives of Jogorku Kenesh of the KR on assigning the Presidential Elections of the Kyrgyz Republic] Sep.26, 1995

[843] Konstituciia Kyrgyzskoi Respubliki (1993) [Konst.KR] [Constitution]

[844] Ukaz Prezidenta KR o Referendume v Kyrgyzskoi Respublike 10 fevralya 1996 goda [The Order of the President on Referendum in the Kyrgyz Republic on Feb.10,1996] Jan.3,1996

to amend the constitution. In fact, on top of those two significant changes the proposed draft included numerous provisions that have enhanced presidential powers. The 1996 referendum proposed following major revisions:

- Possibility of constitutional amendments by referendum called by President
- Establishment of bicameral parliament: legislative 35 and peoples representative chamber 70
- Presidential appointment of the diplomatic mission without the approval of parliament
- Presidential appointment of chairman and 1/3 of the Central Election Commission (before this power belonged to Parliament only)
- Establishment and appointment of the Security Council by President (there was no such body before)
- Presidential power to establish and dismiss executive bodies outside the structure of the government
- Foreign policy powers shifted from Parliament to President (Article 58)
- Formation of the government by President with the approval of people's representative chamber[845]

The amendments were referred to the Constitutional Court by the President for an advisory opinion. The Court approved the changes and found them constitutional, main reasoning and logic of the court was the following.[846]

Analysis of the Decision

The Court emphasized and centered its reasoning entirely around the Chapter 4 of the Constitution that regulated parliamentary powers and bypassed the analysis of all previous Articles on presidential powers. According to the Court the central issue of introduced amendments concerned the establishment of bicameral parliament expressed in Chapter 4.[847] Revisions to other chapters of the Constitution were merely bringing them in compliance with introduced amendments in chapter 4. Further, the Court continued its logic by saying that the

[845] Proekt Zakona Kyrgyzskoi Respubliki o Vnisenii izmeneniy v Konstitusiu Kyrgyzskoi Respubliki [The Proposed Draft Law of the KR on Introducing Changes to the Constitution of the Kyrgyz Republic] Jan. 3, 1996
[846] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 9 noyabrya 1995 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Nov. 9, 1995], Nov. 1995
[847] *Id*

bicameral Parliament was already formed as a result of the 1994 referendum and subsequent elections.

The Court treated current changes as the formal constitutional institutionalization of de facto existing bicameral parliament. The Court went on to analyze each amendment to Chapter 4, and finally, came to the conclusion that proposed amendments retain the same constitutional powers of the Parliament without breaching the system of separation of powers and checks and balances and thus suggested changes were constitutional.[848] The most interesting observation about the decision is that the Court ignored specific amendments concerning the extension of presidential powers on foreign policy, the appointment of a diplomatic mission, central election commission and other competencies.

Furthermore, the decision was full of technical details about the wording of each proposed amendments on chapter 4, they have replaced some words with another.[849] However, the Court did not mention the core changes and evident extension of presidential powers and the implications of these changes to the overall system of separation of powers in Kyrgyzstan.[850] This decision was merely a continuation of the mainstream narrative used by the President. The narrative was simple; it was claimed that the referendum was meant to align the new text of the constitution with the de facto bicameral parliament that was introduced by the popular will of the majority in the previous referendum. This selective reading of the introduced amendments in combination with ignorance of the text of the constitution allowed the court to escape analyzing the respective changes on presidential powers. In other words, the Court left the most contentious and crucial parts of the amendments undecided.

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[848] *Id*

[849] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 9 noyabrya 1995 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Nov. 9, 1995], Nov. 1995

[850] *Id*

Aftermath

After Court gave a green light, on February 10th, 1996 the referendum on constitutional amendments took place and 98% of the participated voters approved the proposed changes.[851] The President had gained substantial powers, even though Akayev continued his slogan of "Kyrgyzstan- the island of democracy in Central Asia," both de jure and da facto circumstances reflected the opposite.[852] Confrontations between president and parliament continued. To tame the independent deputies, president Akayev launched pressure by force on parliament. Law enforcement agencies opened criminal cases against three deputies of the Legislative Assembly and nine deputies of the Assembly of People's Representatives.[853] However, both chambers of the Jogorku Kenesh did not give consent to the Prosecutor General to lifting the parliamentary immunity to prosecute deputies. To tame Parliament Akayev initiated another referendum on constitutional amendment in 1998[854] and majority of the voters as usually voted in favor. Proposed amendments for the following:

- In Article 56.6 of the constitution following sentence was taken out "*Deputy of the Legislative Assembly and Deputy of the Assembly of People's Representatives have immunity*".[855]
- Number of the deputies were changed: Legislative Chamber was increased from 35 to 60 deputies and Peoples Representative chamber was decreased from 70 to 45 deputies (Article54)
- Opportunity for the privatization of the land was introduced (Article 4)

[851] Matteo Fumagalli, *Semi-presidentialism in Kyrgyzstan* 181-183 in R. Elgie, S. Moestrup, Semi-Presidentialism in the Caucasus and Central Asia 146-150 (2016)
[852] John Anderson, Kyrgyzstan: Central Asia`s island of democracy? 28-36 (Routledge 1999)
[853]Johan Engvall, *Kyrgyzstan and the Trials of Independence* 6-7 in Marlene Larvelle & Johan Engvall Kyrgyzstan beyond Democracy Island and Failing State: social and Political Changes in a Post-Soviet Society (Lexington Books 2015)
Murat Ukushev, Ternistiy Put` Parlamentarizma v Kyrgyzstane: dvuhpalatniy Jogorku Kenesh [Thorny Path of Parliamentarism in Kyrgyzstan: bicameral Jogorku Kenesh], 2009 http://www.pr.kg/gazeta/number441/781/
[854] Ukaz Prezidenta KR o Referendume v Kyrgyzskoi Respublike 17 oktyabrya 1998 goda [The Order of the President on Referendum in the Kyrgyz Republic on Oct.17,1998] Oct.1,1998
[855] Proekt Zakona Kyrgyzskoi Respubliki o Vnisenii izmeneniy v Konstitusiu Kyrgyzskoi Respubliki [The Proposed Draft Law of the KR on Introducing Changes to the Constitution of the Kyrgyz Republic] Oct. 1, 1998 No. 292

- Any changes to the Republican budget by parliament must be made by the agreement with Government (Article 65)[856]

Unlike in 1994, this time Akayev did not request the opinion of the Constitutional Court on the constitutionality of proposed amendments. Meanwhile, the Constitutional Court was busy with another heated dispute between the Parliament and President. The case revolved around the possibility of the Akayev to run for another Presidential term in upcoming 2000 elections.

6.1.3. The Case Involving the Constitutional Term of the Presidential (1998)

Background of the Case

In 1998 the mass media in Kyrgyzstan was actively discussing the possibility of Akayev to run for the next presidential elections. This issue raised a heated debate since according to Article 43 of the Constitution "*the same person shall not be elected as President for more than two terms.*"[857] Taking into consideration that Akayev was first elected as President in 1991 and the second time in 1995 it was a valid ground for debates. Deputies of the Parliament applied to Constitutional Court with the request of adjudicating this dispute and claiming that Akayev cannot participate in 2000 Presidential elections since it will be his third term, thus a violation of Article 43 of the Constitution[858].

Analysis of the Decision

The Court concluded that Akayev can participate in the upcoming elections, and if elected it will be considered as his second term, not the third one.[859] The logic of the court behind it was the following reasoning. When Akayev was first elected in 1991, Kyrgyzstan was

[856] Proekt Zakona Kyrgyzskoi Respubliki o Vnisenii izmeneniy v Konstitusiu Kyrgyzskoi Respubliki [The Proposed Draft Law of the KR on Introducing Changes to the Constitution of the Kyrgyz Republic] Oct. 1, 1998 No. 292
[857] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic], Article 43, 5 May 1993.
[858] Konstituciia Kyrgyzskoi Respubliki (1993) [Konst.KR] [Constitution], amended in 1996 Art. 43
[859] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 13 iulya 1998 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Jul. 13, 1998], Jul. 13, 1998

bound by the text of the 1978 Constitution of the Soviet Kyrgyz Republic. The Court continued that the 1993 Constitution of independent Kyrgyzstan "*introduced new principles of organization of the state*"[860] and state power, respectively changed the scope and structure of the powers of the President. These changes according to the Court caused the need for the further legitimization of presidential power that was implemented through a referendum held on January 30, 1994.[861] Since 1991 presidential elections were governed by the 1978 Kyrgyz SSR Constitution when Kyrgyzstan was still part of the Soviet Union, this term according to the court could not be counted towards the term limit in the new Constitution.[862] The Court continued that under the procedure the 1993 Constitution of the Kyrgyz Republic Akayev was elected for the first time only on 24 December 1995. Under these circumstances, the Court concluded that by the requirements of Articles 43 and 45 of the 1993 Constitution the first term of the Akayev`s presidential mandate started in 1995. Thus, he was entitled to participate in the next 2000 presidential elections.

Interestingly, the Court`s position in this case was in complete opposition to its earlier decision. On 28th of December 1995 the Constitution Court on the case involving the results of the Presidential elections stated the following:

> *"The fact is indisputable, Askar Akayev was first elected President of the country on October 1991 and from that moment began to fulfill his duties as the Head of State. Consequently, the term of office of the first President of the Kyrgyz Republic, Askar Akayev, is calculated from the day he took office, namely from October 1991."*[863]

Aftermath

[860] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 13 iulya 1998 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Jul. 13, 1998], Jul. 13, 1998
[861] *Id*
[862] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 13 iulya 1998 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Jul. 13, 1998], Jul. 13, 1998
[863] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki po Resultatom vyborov Prezidenta KR 24 dekabrya 1995 goda [The Decision of the Constitutional Court of the Kyrgyz Republic on the results of the Presidential elections of Dec.25, 1995], Dec. 28, 1995

President Akayev was elected in 2000 till 2005 for the 3rd time de facto, 2nd time de jure following the logic of the Court. The elections were detected to include number of violations, especially the use of administrative resources and spontaneous laws and regulations adopted last minute such as changes in the signature collection.[864] One of the key opponents of Akayev was Felix Kulov, former head of the Chui regional administration, former minister of defense and former mayor of the capital city Bishkek. Most of the spontaneous laws were targeted against him.[865] For instance, Kulov did not possess a good level of the Kyrgyz language, therefore a mandatory examination of Kyrgyz Language test for Presidential candidates was introduced.[866]

The third term of Akayev was associated with oppression of the opposition, the tragic events in Aksy and another Referendum on constitutional amendments. After the elections, politically motivated trials against the opposition were carried out. One of them concerned Felix Kulov, in 2002 under the corruption charges he was sentenced for 10 years of imprisonment[867]. The UN Human Rights Committee issued a recommendation identifying the violation of Kulov`s fair trial rights under the ICCPR.[868]Another politically motivated charges against the opposition member Azimber Beknazarov led to tragic events. On March 17, 2002, law enforcement officials used force against the protestors who were supporting Beknazarov in Aksy, which led to the death of 6 people[869]. During these events Akayev was outside of the country and Kurmanbek

[864] OSCE, Kyrgyzstan, Presidential Election, 29 October 2000: Final Report (Jan.15, 2001)
[865] Postonovlenie SIK on Instruksii o poryadke ucheta postuplenia I rashodovania denejnyh sredstv izbiratelnyh fondov kandidatov, politicheskih partiy, izbiratelnyh blokov [The Resolution of the Central Election Commission on Instructions on the procedure for recording income and expenditure of the funds of candidates 'electoral funds, political parties, election blocs], Nov.9, 1999, No. 162
[866] Polojenie SIK o Lingvisticheskoi Kommissii po ustanovleniu vladenia gosudarstvennym yazykom KR kandidatom na doljnost` Prezidenta KR [The Regulation of the Central Election Commission on the establishment of the Linguistic Commission on the proficiency in the Kyrgyz language by candidates for the post of President Kyrgyz Republic] Jun.28, 2000, No. 333
[867] Disrupted March in Support of Felix Kulov (CACI Analyst, Apr.21, 2004) https://www.cacianalyst.org/publications/field-reports/item/8938-field-reports-caci-analyst-2004-4-21-art-8938.html
[868] Kulov v. Kyrgyzstan, Comm. 1369/2005, U.N. No. CCPR/C/99/D/1369/2005
[869] Scott Radnitz, *Networks, Localism and Mobilization in Aksy, Kyrgyzstan,* Central Asian Survey 410-410 (2005)

Bakiev was prime minister. (Bakiev later became one of the opposition leaders during 2005 Tulip Revolution and the second president of Kyrgyzstan.)

These events were negatively effecting Akayev`s presidency and he urgently needed some form of rehabilitation and to do that he initiates another referendum[870] in 2003. Two main questions were put into the agenda: *Whether President Askar Akayev should be allowed to remain in office until 2005?Whether voters approve the amendments to the constitution?*[871]

Proposed amendments were the following:

- Bringing back the unicameral parliament consisting of 75 deputies
- Higher arbitration court was merged with the Supreme Court
- Powers of constitutional court decreased: particularly powers on constitutionality of actions of public authorities on constitutional rights (sort of horizontal application). Instead the new power was created for constitutional court: 8) decides on the constitutionality of political parties, public associations and religious organizations. This was due to the change of the election system in Parliament, from 2005 candidates for the deputy can be proposed by political parties or by citizens.[872]

The referendum was successful and Akayev received the majority support again. Just like in the 1998 referendum, the Constitutional Court was not asked to review the draft amendments to the constitution. It is worth mentioning that from the establishment of the Constitutional Court till 2007 Cholpon Baekova was a continuous chairwoman of the Constitutional Court. Once loyal to President Akayev, later she took an active part in overthrowing him in 2005 and further strengthening the power of the second president. Afterwards under the Political Party of the second president Bakiev she would be elected to Parliament in 2007 and become the deputy speaker of the Legislative branch.

[870] Ukaz Prezidenta KR o provedenii Referenduma v Kyrgyzskoi Respublike 13 yanvarya 2003 goda [The Order of the President on conducting the Referendum in the Kyrgyz Republic of Jan. 13,2003] Jan.13,2003
[871] *Id*
[872] Proekt Zakona Kyrgyzskoi Respubliki o Vnisenii izmeneniy v Konstitusiu Kyrgyzskoi Respubliki [The Proposed Draft Law of the KR on Introducing Changes to the Constitution of the Kyrgyz Republic] Jan 13, 2003 No. 8

The changing attitude of Chief Justice Cholpon Baekova can be noticed in the 2004 ruling of the Court when for the first time it reached a deferential opinion.[873] Deputies of the legislative chamber of the Parliament applied to Constitutional Court to decide on constitutionality of possibility of Akayev to participate in next 2005 presidential elections. The Constitutional Court did not accept the application claiming that this issue is under the consideration in one of the committees of Parliament and shall be resolved by Parliament.[874]

The political dynamics in Kyrgyzstan were getting very tense, and February 2005 parliamentary elections were the turning point for these power dynamics. Akayev`s daughter and son participated in the election and got seats in parliament. Monitoring organizations criticized the elections for not following international standards.[875] Pro-presidential candidates occupied the majority of the deputy seats under the Alga Kyrgyzstan political party headed by Akayev`s daughter. Opposition party Ata-Jurt directed by Roza Otunbaeva, Tekebaev and others was able to secure very few seats.[876] Repetitive corruption scandals involving Akayev and his family, abuse of power and finally the massive violations during 2005 parliamentary elections fueled the public anger and frustration culminating with March 2005 Tulip Revolution and the fall of the Akayev`s regime. Main opposition leaders during the Tulip Revolution were Bakiev (former Prime Minister), Roza Otunbaeva, Tekebaev, Beknazarov and others. It should also be noted that after the revolution Felix Kulov (former presidential candidate and political prisoner)

[873] Opredelenie Konstitucionnogo Suda Kyrgyzskoi Respubliki on 21 sentyabrya 2004 goda [The Ruling of the Constitutional Court of the Kyrgyz Republic as of Sep.21,2004], Sep.21, 2001
[874] *Id*
[875] OSCE, Kyrgyzstan, Parliamentary Elections, 27 February and 13 March 2005: Final Report (May 20,2005)
[876] Matteo Fumagalli, *Semi-presidentialism in Kyrgyzstan* 181-183 in R. Elgie, S. Moestrup, Semi-Presidentialism in the Caucasus and Central Asia 146-150 (2016), Huskey Eugene, *Eurasian semi-presidentialism: the development of Kyrgyzstan`s model of government* in R.Elgie and S. Moestrup 162-179 (Routledge 2007)

was freed from prison and by the decision of the Supreme Court acquitted.[877] The two main possible candidates for the position of the next President of Kyrgyzstan were Bakiev and Kulov.

6.2. Kyrgyz Constitutional Court under President Bakiev

The storyline of the Bakiev`s court starts after the first Tulip Revolution. The first President Akayev was removed from the office and fled to Russia. In Russian Embassy with the presence of Kyrgyz delegation he signed a resignation letter on April 11, 2005.[878] Bakiev coming from a strong clan of the South was able to consolidate power around himself first by using his clan connection in the south. Regionalism and clan politics[879] up until now remain as important card for politicians to play and it was particularly strong during Bakiev`s presidency.[880]

Second, Bakiev promised to his counterparts and pledged constitutional reforms redesigning system of governance in favor of parliament, which during Akayev`s time had been shifted into strong presidentialism.[881]

Third, he entered into a gentleman`s agreement with Felix Kulov (from the north) creating a tandem. In case of Bakiev`s election Kulov would become Prime Minister. This tactic and strategy allowed Bakiev to become a leading candidate in coming presidential elections and finally to be elected as the next president of Kyrgyzstan.[882] After he assumed the office, the obvious tension between Parliament and President emerged, since he was no longer willing to

[877] Verhovniy Sud Opravdal Feliksa Kulova [The Supreme Court acquitted Felix Kulov], RFE/RL, April 6, 2005, available at https://rus.azattyk.org/a/2424197.html
[878] Postanovlenie Jogorku Kenesha Respubliki Kyrgyzstan o zayavlenii Prezidenta KR A.A. Akayeva o dosrochnom slojenii prezidentskih polnomochiy [Resolution of the Parliament of the KR on application of the President of the KR A.Akayev on resignation] April 11,2005, N 133-III
[879] Kathleen Collins, Clan Politics and Regime Transition in Central Asia 210-215 (Cambridge University Press, 2006)
[880] *Id.* 139, 148
[881] *Id*
[882] CRS Report for Congress, Kyrgyzstan`s Constitutional Crisis: Context and its implications for US Interests, 2-3 (Jan. 5 2007)

sustain his promises and rebalance the constitution in favor of parliament.[883] He postponed any constitutional reforms for the upcoming two years. Kyrgyzstan again was split into two conflicting camps: the Government headed by President Bakiev + PM Kulov tandem and the opposition movement "For reforms" that included majority of deputies headed by Tekebaev, Beknazarov, Otunbaeva. To note, in 2005 majority of deputies were not elected by Party system, it was the combination of party list and single district list. However, since the elections were held during Akayev`s time most of the deputies were Akayev`s supporters, at least they used to be.

The opposition movement *For Reforms* started organizing number of protests in the streets of the capital city urging the President to approve the new text of the Constitution that limited the presidential power.[884] The draft amendments were prepared by the Constitutional Council that was created by Parliament soon after April 2005 events. Venice Commission welcomed proposed amendments in its conclusion.[885] According to the text of the existing Constitution particularly Article 98, any amendments to the constitution could have been introduced only by referendum that can be called only by President. Bakiev was not willing to do that which have fundamentally contradicted his promises and pledges made earlier. The tension between president and parliament escalated to the degree that on November 7 2006 thousands of protestors headed by the opposition movement *For Reforms* gathered in front of the White House demanding the president to approve the proposed amendments to the Constitution by Parliament.[886] This event forced the president to enter the negotiations with parliament, as a result of the negotiations the compromised text of the constitution was adopted by the parliament

[883] *Id*
[884] *Id*
[885] Venice Commission, Draft Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic, *CDL(2005)077*, (October 7, 2005).
[886]Bruce Panier, Kyrgyzstan*: Battle Over The New Constitution Continues To Rage*, RFE/RL, December 2006 https://www.rferl.org/a/1073747.html

that night.[887] In order to make the entire process of the amendment legally acceptable, parliament revised its internal law, namely chapter 16 of the *Law on Internal Regulation of Parliament*.[888] The revised law empowered parliament with the right to introduce amendments to the Constitution without prior decision of the Constitutional Court.[889] These changes were necessary, since according to the 2003 text of the Constitution any amendments were possible either via referendum initiated by president or via parliament but with mandatory prior conclusion of the Constitutional Court.[890]

Under the 2006 amended text of the Constitution that resulted from a compromise (compromised text) key changes were the following:

- Number of MPs was increased from 74 to 90 deputies
- Voting system of the Parliament was also altered introducing the mixed system. One- half of the parliament would be elected by party lists and one-half by single-seat electoral districts[891]
- Nomination of PM and the cabinet of government will be made by the majority faction in parliament
- Government is responsible only before Parliament and can be dismissed by Parliament
- Amendments to the constitution can be made only by Parliament upon the initiate of majority deputies, President, and 300,000 voters initiative. The possibility of amending the constitution by referendum was omitted. (Article 93)
- National Security Service was placed under the purview of the Prime Minister before it was under the exclusive control of the president
- President can make appointment of general prosecutor, head of the National Bank and Central Election Commission only upon the approval of Parliament[892]

[887] Zakon Kyrgyzskoi Respubliki o novoi redaksii Konstitusii KR [The Law of the KR on new text of the Constitution of the Kyrgyz Republic] Jogorku Kenesh Kyrgyzskoi Respubliki [JKKR] [The Supreme Council of the KR, Parliament], Nov. 9, 2006, No. 180

[888] Zakon Kyrgyzskoi Respubliki o vnisenii dopolneniy v Zakon KR o Reglamente Jogorku Kenesh KR [The Law of the KR on introducing additional provisions to the law on Internal Regulations of the Jogorku Kenesh of the Kyrgyz Republic] Jogorku Kenesh Kyrgyzskoi Respubliki [JKKR][The Supreme Council of the KR, Parliament] Nov. 8, 2006

[889] *Id*

[890] Konstituciia Kyrgyzskoi Respubliki (2003) [Konst.KR] [Constitution], Article 96

[891] Zakon Kyrgyzskoi Respubliki o novoi redaksii Konstitusii KR [The Law of the KR on new text of the Constitution of the Kyrgyz Republic] Jogorku Kenesh Kyrgyzskoi Respubliki [JKKR] [The Supreme Council of the KR, Parliament], Nov. 9, 2006, No. 180.

The compromised text also stipulated that the initial expiration of the term for both Parliament and President remain the same, namely until 2010. However, it was still unclear how existing sub-constitutional laws would be applied and regulated in this interim period especially in case of the resignation of Prime Minister and the cabinet. Unfortunately, the compromised text did not contain any information about it. November 2006 was a tough period for president-parliament relationship. Parliament was not approving the republican budget for a long time, deputies have initiated number of laws: privatization of municipal property[893], the law on political parties and new electoral code.[894] According to some expert's opinion, Bakiev and Kulov agreed among each other to trigger the resignation of the government thus threatening the parliament with dissolution.[895] The analysis of the December 2006 political development in Kyrgyzstan in retrospect sheds some light to the accuracy of those speculations. Felix Kulov resigned from PM along with the cabinet of ministers.[896] The amended text of Constitution stipulated that the government will be formed by the majority party in the Parliament[897], however as we remember sitting Parliament was not elected by party system. Bakiev could have easily used this provision to dissolve the Parliament and calling for early Parliamentary elections.

[892] Zakon Kyrgyzskoi Respubliki o novoi redaksii Konstitusii KR [The Law of the KR on new text of the Constitution of the Kyrgyz Republic] Jogorku Kenesh Kyrgyzskoi Respubliki [JKKR] [The Supreme Council of the KR, Parliament], Nov. 9, 2006, No. 180.
[893] Zakon KR o vnisenii izmenenia i dopolnenia v Zakon KR o municipalnoi sobstvennosti na imushestvo [The Law of the KR on introducing changes to the law of the KR on Municipal property] November 22, 2006 No. 184.
[894] CRS Report for Congress, Kyrgyzstan`s Constitutional Crisis: Context and its implications for US Interests, 2-3 (Jan. 5 2007)
[895] Murat Ukushev, Ternistiy Put` Parlamentarizma v Kyrgyzstane: dvuhpalatniy Jogorku Kenesh [Thorny Path of Parliamentarism in Kyrgyzstan: bicameral Jogorku Kenesh], 2009 http://www.pr.kg/gazeta/number441/781/
[896] *Kyrgyz President Kurmanbek Bakiev has accepted the resignation of his Cabinet, amid a continuing stand-off between him and parliament*, BBC News (Dec. 19. 2006) http://news.bbc.co.uk/2/hi/asia-pacific/6192955.stm
[897] Zakon Kyrgyzskoi Respubliki o novoi redaksii Konstitusii KR [The Law of the KR on new text of the Constitution of the Kyrgyz Republic] Jogorku Kenesh Kyrgyzskoi Respubliki [JKKR] [The Supreme Council of the KR, Parliament], Nov. 9, 2006, No. 180

This dissolution card worked out very well for President; he used this opportunity to push Parliament to rewrite the constitution by restoring two main presidential powers:

- Power to appoint PM, Cabinet along with the responsibility of Government both before president and Parliament and to bring back Governmental Committee of National Security under his purview
- Restoring the procedure of introducing amendments to the constitution by Referendum called by the President.

Parliament had to accept the ultimatum of Bakiev and amend the Constitution restoring the above-mentioned presidential powers.[898] As for the other provisions it retained all the innovations introduced in November 2006. The constitution was promulgated and entered into force on January 2007. When the new constitution entered into force, Bakiev tried to restore Kulov in his PM position by proposing his candidacy to Parliament. However, parliament refused two times. However, he did not risk doing it third time allegedly avoiding the possibility of creating a political crisis by dissolution. Thus, he proposed another candidate who was approved by Parliament. Felix Kulov perceived this action as a violation of their gentlemen pact, and experts speculated that by doing this Bakiev wanted to get rid of Kulov by appointing a more lenient Prime Minister.[899] It was a turning point for Kulov who later joined the opposition and played an active role in overthrowing Bakiev in the 2010 Tulip Revolution.

The overall picture suggested that President Bakiev was not be willing to commit himself to reforms and just like his predecessor took the path of extending his presidential power by using the Court. This is the key case that the Court had to resolve during Bakiev's regime that involved open political confrontation.

[898] Zakon Kyrgyzskoi Respubliki o novoi redaksii Konstitusii KR [The Law of the KR on new text of the Constitution of the Kyrgyz Republic] Jogorku Kenesh Kyrgyzskoi Respubliki [JKKR] [The Supreme Council of the KR, Parliament], Dec. 30, 2006, No. 180

[899] Erica Marat, *Bakiev Maneuvers to Stay on Top in Kyrgyzstan*, Eurasia Daily Monitor Volume: 4 Issue: 13 (Jan. 2007)

6.2.1. 2007 Decision on Annulling the Existing Constitution

Background of the Case

In August 2007 Melis Eshimkanov (deputy) applied to the Constitutional Court challenging the constitutionality of chapter 16 of the *Law on Internal Regulation of Parliament.*[900]This Chapter of the Law that the applicant was referring to was amended by Parliament in November 2006. Interestingly in his application, he was not referring to January 2007 Constitution, instead to the text of 2003 Constitution that was no longer in force in Kyrgyzstan. The Court accepted the case and on September held oral hearings where deputy of Parliament Melis Eshimkanov claimed the following:

He referred to November 2006 events when the compromised text of the constitution was adopted. The deputy believed that Parliament violated procedural rules on amendments to the constitution since according to the 2003 constitution any changes introduced by Parliament required prior conclusion of the Constitutional Court. The applicant continued that no such conclusion of the Court was obtained. Furthermore, the applicant continued that Parliament by amending its internal law empowering itself with the right introduce changes to the Constitution abused its authority thus violating Article 96 of the constitution[901].

Analysis of the Decision

The Court ruled in favor of the deputies and concluded on the unconstitutionality of the law on internal regulation of parliament.[902] The Court reached its decision not based on the text of the acting 2007 Constitution, instead used the text of the 2003 Constitution that was annulled

[900] Zakon Kyrgyzskoi Respubliki o vnisenii dopolneniy v Zakon KR o Reglamente Jogorku Kenesh KR [The Law of the KR on introducing additional provisions to the law on Internal Regulations of the Jogorku Kenesh of the Kyrgyz Republic] Jogorku Kenesh Kyrgyzskoi Respubliki [JKKR][The Supreme Council of the KR, Parliament] Nov. 8, 2006

[901] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 14 sentyabrya 2007 goda [The Decision of the Constitutional Court of the Kyrgyz Republic] Sep. 14, 2007

[902] *Id*

by Parliament in November and was not in force in Kyrgyzstan for almost a year. The Court did not provide any justification and explanation about using the text of the annulled Constitution to resolve the dispute and was completely silent about ignoring the acting 2007 text of the Constitution. As a result, the Court revoked both January 2007 and compromised November 2006 Constitutions and brought back the text of the 2003 Constitution that was adopted during Akayev`s time with broad presidential powers over parliament.

In summary, Constitutional Court used the *Law on International Regulations of Parliament* to invalidate recent constitutional amendments and brought back the old 2003 Constitution adopted during the Akayev`s Presidency. Thus lifted all the limitations imposed on presidential powers by recent constitutional reforms. The Venice Commission commented on this particular decision of the Court the following:

> *"It is indeed highly unusual, if not unprecedented, that a Constitutional Court declares the full text of an acting constitution to be unconstitutional. As a general rule, constitutional courts have to take their decisions on the basis of the Constitution valid at the moment of their decision. Former versions of the Constitution are irrelevant. This means that the Court could take this decision only if the text of the Constitution adopted on 30 December 2006, and which was supposed to have entered into force on 15 January 2007, was invalid ab initio."*[903]

Aftermath

Bakiev just like his predecessor with the help of the Court was able to strengthen his power and positions. As a result of the decision, the President dissolved Parliament announced early elections[904] and also announced the referendum on amending the Constitution[905]. In

[903] CDL-AD(2007)045 Opinion on the Constitutional Situation in the Kyrgyz Republic, adopted by the Commission at its 73rd plenary session (Venice, 14-15 December 2007) p. 4. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)045-e (last visited May 17, 2019).

[904] Ukaz Prezidenta KR o naznachenii dosrochnyh vyborov deputatov Jogorku Kenesh KR [The Order of the President on announcement of the early elections of deputies of the Jogorku Kenesh of the KR] Oct.23, 2007

October 2007 President proposed amendments to the Constitution. Overall the Constitution retained majority of the provisions of 2003 text (the old Constitution brought back by the Court) with several changes. The referendum on constitutional amendments took place and the majority voted in favor of the proposed amendments along with the new electoral code. One of the major revisions of the constitution included the increase of the number of deputies from 75 to 90, elected according to party lists by a proportional system.[906]Members of political parties declared unconstitutional would lose their deputy seats.[907] Presidential power on appointments was substantially increased. It should be noted that Melis Eshimkanov (applicant) after the decision of the Court became the General Director of the National Television Corporation of Kyrgyzstan.

Another critical issue in the political agenda of the opposition which was highly supported by the civil society in Kyrgyzstan was opposing the membership of Kyrgyzstan in the World Bank HIPC initiative.[908] World Banks *Heavily Indebted Poor Countries Initiative* was designed to help poor countries to reduce external debt by write-offs in response to substantial deregulation and economic reforms. Even in the international level, there are two camps and schools of thoughts as to the success and failure of the HIPC. One of the major critics of the HIPC claim that this initiative is designed to help rich states rather than poor since its primary objective and goal is to enable the poor states to repay debts rather than to cancel the debt[909]. This anti-HIPC hype reached Kyrgyz opposition as well and was supported by the civil society.

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[905] Ukaz Prezidenta KR o provedenii Referenduma v Kyrgyzskoi Respublike 19 Sentyabrya 2007 goda [The Order of the President on conducting the Referendum in the Kyrgyz Republic] Sep.19,2007

[906] Proekt Zakons Kyrgyzskoi Respubliki o novoi redaksii Konstitusii KR [The Law of the KR on new text of the Constitution of the Kyrgyz Republic] Po Ukazu Presidenta KR [Upon the Order of the President of the KR], Oct. 3, 2007

[907] *Id*

[908] Erica Marat, *Moscow Condemns the HIPC Initiative in Kyrgyzstan*, Eurasia Daily Monitor Volume: 4 Issue: 19 (Jan. 2007) https://jamestown.org/program/moscow-condemns-hipc-initiative-in-kyrgyzstan/

[909] Emmanuel Innocents Edoun & Dikgang Motsepe, Critical assessment of Highly Indebted Poor Countries (HIPIC) Initiative in Africa and the Implication of the New Partnership for Africa's Development (NEPAD) (2001-2016): a theoretical perspective, *Investment Management and Financial Innovations (2016)*

In response to criticisms of the opposition Bakiev canceled the initiative to join the World Bank HIPC program.[910] Even though it was perceived positively, later it became clear that this strategic move by Bakiev allowed him to kill two or maybe even three birds with one stone. First, he calmed down the opposition and civil society. Second, he satisfied the interests of the business elite in the energy sector that was unwilling for the substantial deregulation and economic reforms. Lastly, he satisfied the interests of Russia. This move later played a bad joke with the opposition itself and turned Kyrgyzstan into massive scheme of corrupted offshore state in Central Asia[911]. To do that Bakiev with the help of the Court initiated early presidential elections and was reelected from 2009-2014.

He started his second term with so-called reform of the governmental authority and passed the Order[912] in October 2009 about reforming his Presidential apparatus which consisted of three primary branches: Apparatus, Secretary and Central Agency on Development of Investments and Innovations which is best known in Kyrgyzstan with Russian acronym ЦАРИИ.[913] The same month he appointed his son Maxim Bakiev as the head of the ЦАРИИ. Main objectives and goals of the reform according to the text of the presidential order was to create conditions for the formation of national and state ideology, the establishment of a reasonable balance between innovations and traditions, building dialogue and cooperation between public authorities and civil societies. However, the establishment of ЦАРИИ will later end up being the opposite of all the goals set above. ЦАРИИ was used for the purposes of

[910] Erica Marat, With Kulov Gone, Bakiev dumps the HIPC Initiative, *Eurasia Daily Monitor Volume: 4 Issue: 38,* Feb. 2007
[911] Alexander Cooley and John Heathershaw *Kyrgyzstan`s prince Maxim and the Switzerland of the East* in Dictators without borders power and money in Central Asia 143-150 (Yale University Press 2017)
[912] Ukaz Prezidenta o merah po effektivnomu obespecheniu deyatel`nosti Prezidenta Kyrgyzskoi Respubliki [The Order of the President on Measures of effective functioning of the institute of the President of the KR] Oct. 26, 2009
[913] *Id*

money laundering, expropriation of foreign gold mining companies and for regulating the work of the AUB bank which was used as an offshore bank for the UK shell companies.[914]

The parliamentary opposition tried to set up the commission and investigate but it was almost impossible given the fact that the constitution was substantially revised, and parliamentary powers were substantially reduced. The high rate of corruption, nepotism, tribalism, contract killings[915] and this entire scheme of offshore money laundering was escalating the tension between Bakiev and the opposition. This time his former ally Felix Kulov joined the opposition. The final and turning point that again entangled the Constitutional Court was the initiative of the President to introduce amendments to the Constitution.[916]

6.2.2. 2010 Constitutional Amendments Case

Background of the Case

There were a number of amendments proposed as to the presidential appointment powers. However, they essential revision that was particularly criticized by the opposition was following:

- Under the competencies of the draft empowered President to establish a Presidential Assembly and other council bodies. The council`s membership, functions, and composition will be solely defined by the president
- In case of the inability of President to undertake his duties, Presidential Assembly is charged with defining the Acting President by simple majority vote among the members of the Presidential Assembly. The existing text of the constitution, namely Article 52 clearly defined the position of the acting President. Firstly, the text identified Speaker of the parliament, in case of inability of the Speaker of the Parliament acting president shall be Prime Minister.[917]

[914] Alexander Cooley and John Heathershaw *Kyrgyzstan`s prince Maxim and the Switzerland of the East* in Dictators without borders power and money in Central Asia 144-150 (Yale University Press 2017)
[915] Kyrgyz Commission: 30 Contract Killings During Bakiev Presidency https://www.rferl.org/a/kyrgyz_commission_report_30_contract_killings_under_bakiev/3555238.html
[916] Proekt zakona o vnisenii izmeneniy v Konstitisiu Kyrgyzskoi Respubliki [Draft Law on Introducing changes to the Constitution of the Kyrgyz Republic] Prezident Kyrgyzskoi Respubliki [President of the KR] Dec. 14,2009
[917] *Id*

Presidential Assembly was envisioned by President to be body not affiliated with Parliament that would choose an acting President in case of Bakiev`s inability to undertake his duties. These amendments were perceived by some of the deputies particularly the opposition as an attempt of Bakiev to prepare his Presidential seat to his son Maksim Bakiev. The bill on proposed amendments was brought before the Constitutional Court for the opinion of constitutionality[918].

Analysis of the Decision

As for the competencies of the president to establish a Presidential Assembly and other council bodies, the Constitutional Court confirmed that by the Constitution President enjoys such power[919]. The Court justified it by referring to Article 42 of the Constitution which states that President is a head of state whose primary function is to be a symbol of unity, the guarantor of the constitutional rights and freedoms who must maintain the unity and "*coordinated functioning and interaction of state bodies."*[920] To fulfill these functions according to the Court president shall be empowered by certain authority. The Constitutional text cannot in detail regulate that authority, and thus President as a head of state shall enjoy certain discretion in decision-making and in exercising Presidential powers. However, the Court said that discretion should directly derive from his functions and the letter and spirit of the constitution.[921]

[918] Postanovlenie Jogorku Kenesh KR o napravlenii proekta zakona o vnisenii izmeneniy v Konstituciu KR dlya dachi zakluchenia v Konstitusionniy Sud KR [The Ruling of the Supreme Council of the KR on referral of the draft law on Introducing Amendments to the Constitution of the KR to the Constitutional Court of the KR for a review on constitutionality] Dec. 17,2009

[919] Zakluchenie Konstitucionnogo Suda KR po proektu zakona o vnisenii izmeneniy v Konstitisiu Kyrgyzskoi Respubliki vnesennogo Prezidentom KR na rassmotrenie JK [The Conclusion of the Constitutional Court of the KR on the draft law on introducing amendments to the constitution proposed by the President for a review of the Supreme Council of the KR] Jan.21, 2010

[920] Konstituciia Kyrgyzskoi Respubliki (1993) [Konst.KR] [Constitution], amended in 2007, Art. 42

[921] Zakluchenie Konstitucionnogo Suda KR po proektu zakona o vnisenii izmeneniy v Konstitisiu Kyrgyzskoi Respubliki vnesennogo Prezidentom KR na rassmotrenie JK [The Conclusion of the Constitutional Court of the KR on the draft law on introducing amendments to the constitution proposed by the President for a review of the Supreme Council of the KR] Jan.21, 2010

As for the amendments to provisions regarding the Acting President the Court clarified that this institute is an emergency institute caused by extraordinary and unpredictable factors. Even if it is an ad hoc and extraordinary body it requires strict legal procedural rules regulating who should be the acting president.[922] According to the Court the existing mechanism namely, Speaker of the Parliament or Prime Minister taking over the position of the Acting President contains certain loopholes and contradictions. The Constitutional Court claimed that the combination of head of the legislative body or head of the executive body with the position of acting president is in contradiction with the central principle of separation of powers guaranteed under Article 7. Thus, in Court`s view the existing mechanism of defining the acting president needs "perfection" this is the exact word used by the court. However, the Court emphasized that Assembly cannot define it, rather it should be an ad hoc collegial body that should contain as members Speaker and Prime Minister. However, the Court did not clarify who defines other members, how many members shall be in that Collegial body. Essentially the Court proposed to revise the word Presidential Assembly with the Collegial body.[923]

Thus, with these small revisions, the Court concluded that introduced amendments correspond to the Constitution and can be adopted. This decision also demonstrates an abusive attitude of the Court to the text of the constitution. Even though the text contained a clear procedure of regulating the Institute of acting president, the Court not only ignored it but dared to say that the existing framework is not perfect and needs developments.

Aftermath

This decision was adopted on January 21, 2010 and it was the last decision of the Court. On April 2010 President Bakiev was overthrown and Kyrgyzstan marked that day as the day of

[922] *Id.* 175.
[923] *Id* 176.

the second Tulip Revolution.[924] Unlike President Akayev, Bakiev was not willing to give up his powers easily. On April events around 80 people were killed by the snipers under the order of the Bakiev and 300 demonstrators were wounded[925]. Bakiev fled Kyrgyzstan and obtained political asylum status in Belarus and his son Maksim Bakiev obtained the political asylum status in the UK.[926] Up to this date both the UK and Belarus are refusing to extradite them to Kyrgyzstan.[927]

Unlike in 2005, the second Tulip revolution took a different root, the opposition that overthrew Bakiev did not identify an evident leader, in fact, none of the parties were able to consolidate power around themselves. Power within the group was fragmented, given these circumstance and fear of not repeating the same mistake they have decided to suspend the entire governmental structure including the Constitution and rule Kyrgyzstan under the Interim Government. On 7th 2010 of April the *Interim Government* consisting of Otunbaeva, Tekebaev, Sariev, Atambayev, Beknazarov and Isakov passed the first Decree[928] announcing the dissolution of the Parliament and establishment of the Interim Government. The Decree stated that state authority (legislative, executive and presidential powers) were transferred to the Interim Government. Until the adoption of the new Constitution and election of the new Parliament Kyrgyzstan was ruled by the Decrees of Provisional Government. On April 12, 2010 the *Interim Government* adopted the Decree on *"On the dissolution of the Constitutional Court of the Kyrgyz Republic".* The Decree stated the following:

[924] Cummings, S., M. Ryabkov, *Situating the 'Tulip Revolution*, 27.3 Central Asian Survey 27, 241–252, (2008). Cummings, S. (ed), Domestic and International Perspectives on Kyrgyzstan's Tulip Revolution: Motives, Mobilizations and Meanings, (London: Routledge, 2010).

[925] Dilip Hiro, *Kyrgyzstan`s Second Tulip Revolution*, The Guardian (April 2007) https://www.theguardian.com/commentisfree/2010/apr/08/kyrgyzstan-second-tulip-revolution

[926] Jim Nichol, The April 2010 Coup in Kyrgyzstan and its Aftermath: Context and Implications for U.S. Interests (CRS Report for Congress), Congressional Research Service (June 15,2010).

[927] Alexander Cooley and John Heathershaw *Kyrgyzstan`s prince Maxim and the Switzerland of the East* in Dictators without borders power and money in Central Asia 143-150 (Yale University Press 2017)

[928] Dekret Vremennego Pravitel`stva Kyrgyzskoi Respubliki [The Decree of the Interim Government of the Kyrgyz Republic] Apr.7, 2007, No. 1

"The Constitutional Court of the Kyrgyz Republic, throughout its activities did not justify the hopes placed on it and contributed to the concentration of power in the same hands, both under Akayev and Bakiev. The actions of the Constitutional Court to strengthen the power of one person led to the events of April 2010 and the fall of the anti-people regime of Bakiev. To exclude attempts to use the Constitutional Court to destabilize the situation, the Provisional Government of the Kyrgyz Republic, in accordance with Decree No. 1 of April 7, 2010, adopts this Decree to Disband the Constitutional Court of the Kyrgyz Republic until a special decision of the Provisional Government of the Kyrgyz Republic."[929]

7. Coming out from the shadow of tamed approach? The Constitutional Chamber of Kyrgyzstan post 2010 Tulip Revolution

7.1. The Initial Phase of the work of the Chamber

Under the purview of the *Interim Government* the Constitutional Assembly was established headed by Tekebaev to prepare the text of the 2010 Constitution.[930] The proposed text contained following key innovations:

- Establishment of the premier-presidential form of governance
- Unicameral parliament consisting of 120 deputies elected by party System
- Structure and Composition of Government is formed by the majority faction and the government is responsible only before the Parliament
- Prime Minister as the head of the executive can initiate the vote of confidence
- President is head of state elected once for six years.
- President no longer can call for a referendum, he has no right for the legislative initiative, no direction of foreign policy
- Constitutional Chamber of the Supreme Court of the KR was established with much narrower competencies then before. They can only review the constitutionality of normative legal acts, international treaties not ratified by KR, amendments to the constitution. No more powers on election results, political parties, removal of the President
- Special status of International human rights treaties
- Prosecutors office powers independent, the only body that can prosecute state officials
- The moratorium was established on the ban of any amendments before 2020

[929] Dekret Vremennego Pravitel`stva Kyrgyzskoi Respubliki [The Decree of the Interim Government of the Kyrgyz Republic] Apr.12, 2007, No. 2

[930] Dekret Vremennego Pravitel`stva Kyrgyzskoi Respubliki [The Decree of the Interim Government of the Kyrgyz Republic] Apr.7, 2007, No. 1

The referendum[931] on adoption of the new 2010 Constitution took place and on June 27, 2010 the Constitution of the KR was adopted. The Constitutional Chamber of the Supreme Court of the KR was not formed until 2014 there were a number of speculations and thoughts about it. Some claimed that the *Interim Government* members were cautious that the Chamber might repeat the mistakes of former Constitutional Court and will be abused by political actors.[932] Others argued that the procedure was intentionally delayed to avoid potential complaints on constitutionality of decrees of the provisional government.[933] As a result, required quorum was established and judges were appointed. Roza Otunbaeva was appointed as the President of the transitional period before the elections of the President.[934] As it was stipulated in the text of the Constitution next presidential elections took place in 2011 and Atambayev became the next president of Kyrgyzstan.[935] The Constitutional Chamber from its early days of functioning was entangled in powers and confrontations among branches, particularly the ones that involved presidential powers.

As the earlier political history of Kyrgyzstan demonstrated, it had a negative experience of former presidents with tendencies to authoritarianism. They have actively used all possible legal, formal and informal means to extend their powers. It was particularly true in the field of judiciary, and other branches such as security, defense, and law enforcement. The 2010 Constitution developed a better and much more balanced system of separation of powers and it

[931] Dekret Vremennego Pravitel`stva Kyrgyzskoi Respubliki o Referendume [The Decree of the Interim Government of the Kyrgyz Republic on Referendum] Apr.21, 2007, No. 20
[932] Dzhuraev Emilbek, Saniia Toktogazieva et all, *The Law and Politics of Keeping a Constitutional Order: Kyrgyzstan`s Cautionary Story*, 7.2 Hague Journal on the Rule of Law, 263 (2015).
[933] Timur Toktonaliev, Constitutional Tinkering in Kyrgyzstan, Institute for War and Peace Reporting, (May 14, 2015). https://iwpr.net/global-voices/constitutional-tinkering-kyrgyzstan (last visited October 8, 2018).
[934] Dekret Vremennego Pravitel`stva Kyrgyzskoi Respubliki o Prezidente perehodnogo perioda [The Decree of the Interim Government of the Kyrgyz Republic on President of the transitional period] May.19, 2007, No. 39
[935] *PM Atambayev wins Kyrgyzstan Presidential Elections*, BBC News (Oct. 2011) https://www.bbc.com/news/world-asia-pacific-15510217

was also the case in the field of the power block. Namely, certain powers such as the prosecution of state officials were taken out from the purview of the Governmental Committee on National Security which was under the personal supervision of president and given exclusively to the General Prosecutor that is appointed by parliament.[936] However, even if the 2010 Constitution entered into force, parliament did not manage to bring into conformity with the Constitution number of laws. One of them was the Criminal Procedural Code, particularly Article 34 which was once amended during Bakiev time stating the following: "*under certain circumstances, general prosecutor may transfer the case involving the prosecution of state officials to other investigative bodies, regardless of jurisdiction"*. [937] Other investigative bodies such as Governmental Committee on National Security and Ministry of Inferior are always under the purview of the President since he is a commander in chief.

The constitutionality of this Article was challenged by a judge who was adjudicating a case involving the prosecution of another judge. The Chamber found this Article unconstitutional based on the principle of separation of powers and justified its decision by the text of the constitution that exclusively granted this power to prosecutor's office only.[938] The decision was highly criticized by president since he no longer had a long hand on cases involving the prosecution of state officials.

However, he justified his criticism blaming the Chamber in creating chaos in the justice system since dozens of cases involving state officials, including the figures related to Bakiev's clan were not prosecuted by the office of the prosecutor, thus all these cases must have been

[936] Konstituciia Kyrgyzskoi Respubliki (2010) [Konst.KR] [Constitution], Art. 104
[937] Ugolovno-Protsessualn`niy Kodeks Kyrgyzskoi Respubliki [UPK KR] [Criminal Procedural Code of the KR] Art. 34
[938] Reshenie Konstitusionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitusionnosti stat`I 34 UKRKR [The Decision of the Constitutional Chamber of the Supreme Court of the KR on case involving the constitutionality of Article 34 of the CPCRK] Jan.13, 2014

reviewed. However, if we compare it with the jurisprudence of the previous Constitutional Court there is one evident fact that dramatically stands out. It is the fact of how the Chamber treated the constitutional text, the Constitutional Chamber took the text of the Constitution seriously and justified its decision solely and only based on the Constitution, namely Article 104. It was the starting point of the emerging tension between the Chamber and the President.[939] The Chamber`s approach to dealing with cases involving political confrontation was a starting sign and hope that it was not willing to continue the legacy of the former Constitutional Court.[940] However, the Chamber faced a challenge that precluded it from fully coming out of the legacy of tamed Court. Parliament took the side of the President and actively criticized the decision of the Chamber as well. In its further decisions, the Chamber no longer was as confident and committed to the text of the Constitution as in Prosecutor`s case.

Given the balanced architecture of the 2010 Constitution, one would assume that the Chamber unlike previous Court not to be tamed since the Constitution contained blended and detailed system of checks and balances which was not the case when former Constitutional Court operated. Broader political context might help to understand this paradox. Even though formally and by the Constitution Kyrgyzstan was premier-presidential it was more and more transforming to president-parliamentary without introducing amendments the Constitution. To a certain extent Parliament itself contributed to this transformation.

First, the Parliament passed some controversial laws that extended the powers of the President under the new Constitution. For instance, the *Law on Foreign Relations* stipulated that

[939] Reshenie Konstitusionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitusionnosti stat`I 34 UKRKR [The Decision of the Constitutional Chamber of the Supreme Court of the KR on case involving the constitutionality of Article 34 of the CPCRK] Jan.13, 2014

[940] Reshenie Konstitusionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitusionnosti stat`I 34 UKRKR [The Decision of the Constitutional Chamber of the Supreme Court of the KR on case involving the constitutionality of Article 34 of the CPCRK] Jan.13, 2014

the President defined the foreign policy[941], however this particular power was taken away from the President while drafting the 2010 Constitution, therefore was not included in the final text. Furthermore, instead of strengthening the position of Prime Minister and activating the formal provisions of the Constitution to promote premier-presidential system Parliament intentionally created the wave of constant change of Prime Ministers.[942] This constant change of the Cabinet was later explained by one of the deputies and founding fathers of 2010 Constitution Tekebaev as an urgent and desperate strategy to avoid the possibility of 3rd *coup d`etat*.[943] All these power dynamics along with informal politics allowed President Atambayev to become a strong branch again and de facto transform Kyrgyzstan to president-parliamentary system. This de facto imbalance in power also affected further decisions of the Constitutional Chamber as well. It can be particularly demonstrated by the 2016 constitutional amendments case.

7.2. December 2016 Constitutional Amendments Case

Background of the Case

[941] Art. 4.1 Zakon KR o vzaimodeistvii Gosudarstvennyh Organov v sfere vneshnei politiki Kyrgyzskoi Respubliki [The Law of the KR on Coordination of the Governmanetal bodies in the field of foreign policy of the Kyrgyz Republic] Jul. 4, 2012. No. 96

[942] Ukaz Prezidenta KR ob ispolnyashem obyatannosti Prem`er-ministra Kyrgyzskoi Respubliki [The Order of the President on acting Prime-Minister of the Kyrgyz Republic] Sep.1, 2012 the resignation of Babanov was accepted by President Atambayev as a result of the collapse of the Majority Coalition in Parliament
Ukaz Prezidenta KR ob ispolnyashem obyatannosti Prem`er-ministra Kyrgyzskoi Respubliki [The Order of the President on acting Prime-Minister of the Kyrgyz Republic] March.26, 2014 the resignation of Satybaldiev was accepted by President Atambayev
Ukaz Prezidenta KR ob ispolnyashem obyatannosti Prem`er-ministra Kyrgyzskoi Respubliki [The Order of the President on acting Prime-Minister of the Kyrgyz Republic] Apr.24, 2015 the resignation of Otorbaev was accepted by President Atambayev
Ukaz Prezidenta KR ob ispolnyashem obyatannosti Prem`er-ministra Kyrgyzskoi Respubliki [The Order of the President on acting Prime-Minister of the Kyrgyz Republic] Apr.11, 2015 the resignation of Sariev was accepted by President Atambayev

[943] Omurbek Tekebaev, *Atambayev sobiraetsya uhodit, sohranyaya za soboi status lidera Nasii* [Atambayev is going to leave while preserving the status of the Leader of Nation], Chyndyk KG (Aug.2016) http://chyndyk.kg/d0-be-d0-bc-d1-83-d1-80-d0-b1-d0-b5-d0-ba-d1-82-d0-b5-d0-ba-d0-b5-d0-b1-d0-b0-d0-b5-d0-b2-d0-b0-d1-82-d0-b0-d0-bc-d0-b1-d0-b0-d0-b5-d0-b2-d1-81-d0-be-d0-b1-d0-b8-d1-80-d0-b0-d0-b5-d1-82/ (last visited March 2019).

In 2016 Kyrgyzstan experienced another Referendum on constitutional amendments.[944] Even though the Constitution prescribed a moratorium for any amendments until 2020.[945] Up to this date, it is not clear who was the official initiator of the amendments. It is essential because according to Article 114 of the 2010 Constitution only 300,000 voters or the majority of deputies in Parliament can initiate changes to the Constitution. However, it was a well-known fact that main de facto initiator of these changes was President Atambayev.[946] Significant changes revolved around the following:

- The status of international treaties, especially on Human Rights were adjusted. Particularly following provision was excluded from the proposed text: "*The provisions of international treaties on human rights shall have direct action and be of priority in respect of provisions of other international treaties*."[947]
- The new provision was included stating that procedure and conditions of application of international norms and treaties will be defined by law;
- Revocation of citizenship was introduced. Before citizenship right used to be the absolute right;
- Marriage was defined only between man and woman;
- Members of the Parliament could hold governmental positions while saving the deputy mandate;
- Some changes regarding the powers of the Prime Minister were altered (can raise the question of confidence before Parliament twice a year as opposed to once a year, the appointment of the cabinet functions of the PM was increased)
- Office of the prosecutor was no longer the exclusive body who could prosecute state officials. This power could be transferred to other governmental bodies (this particular amendment is in contradiction to the earlier 2014 decision of the Chamber mentioned prior.)[948]

[944] Zakon KR o naznachenii Referenduma po proektu Zakona KR o vnesenii izmeneniy v Konstitusiu Kyrgyzkoi Respubliki [The Law of the KR on appointing the Referendum on the basis of the draft law on introducing amendments to the Constitution of the KR] Nov.3, 2016, No.174

[945] Konstituciia Kyrgyzskoi Respubliki (2010) [Konst.KR] [Constitution]

[946] Daniel Kadyrbekov, *Atambayev ubil Konstitucionniy Liberalism v Kyrgyzstane* [Atambayev destroyed the constitutional liberalism in Kyrgyzstan], RFE/RL (Jan. 2017)

[947] Proekt Zakona Kyrgyzskoi Respubliki o vnesenii izmeneniy v Konstituciu KR [Draft Law of the KR on introducing changes to the Constitution of the KR] Aug.16, 2016, Article 6.

[948] Proekt Zakona Kyrgyzskoi Respubliki o vnesenii izmeneniy v Konstituciu KR [Draft Law of the KR on introducing changes to the Constitution of the KR] Aug.16, 2016

The main narrative behind the proposed amendments was strengthening the parliamentarism, the protection of traditional family values, sovereignty and national security.[949] Most of the times the entire referendum went under the slogan of "if you are against gays go and vote."[950] The rumors about possible referendum started in early 2016. One of the founding fathers of the 2010 Constitution Omurkek Tekebaev along with other opposition members sharply criticized the possibility of the referendum claiming that it would be considered as the usurpation of power by Atambayev. In light of these criticisms, Tekebaev was accused of corruption and arrested.[951] Despite being arrested, he continued opposing the referendum along with his supporters and deputy colleagues under the Ata-Meken faction.

Firstly, they claimed that the text of the Constitution should be respected, and it stipulated a moratorium for any amendments until 2020. Secondly, they have raised concerns about heinous procedural violations particularly the Article 114 which clearly stated on who can be considered as an initiator. Finally, the opposition claimed that there was no law on the referendum in force. Despite these criticisms, in a short period, Parliament passed the law on referendum decreasing the required number of acceptances from 50% to 30%.[952] Finally, the draft law on amendments to the constitution was brought to the Constitutional Chamber for a review.

Analysis of the Decision

[949] Margarita Meldon, *Kyrgyzstan's Constitutional Referendum: Steering populism toward securing vested interests?*, Constitutionnet (October 28,2016). http://constitutionnet.org/news/kyrgyzstans-constitutional-referendum-steering-populism-toward-securing-vested-interests (last visited January 2019).
[950] Farangis Najibullah, *Kyrgyz Referendum seeks to Prevent same-sex marriage* RFE/RL (Dec. 2016), https://www.rferl.org/a/kyrgyzstan-constitutional-amendments-bans-same-sex-unions/28168416.html (last visited September 15, 2019).
[951] Kyrgyz Opposition Leader Tekebaev Handed Eight-Year Prison Sentence, RFE/RL (Aug.16,2017), https://www.rferl.org/a/kyrgyzstan-tekebaev-8-year-sentence-/28680250.html (last visited September 15, 2019).
[952] Konstitusionniy Zakon KR o Referendume Kyrgyzskoi Respubliki [The Constitutional Law of the KR on Referendum of the Kyrgyz Republic] Oct.31, 2016, No. 173

The Current decision of the Chamber was substantially different from its earlier cases. Chamber was no longer taking the text of the constitution seriously as it did before. To a certain extent the analysis and strategies used by the Chamber resembled its predecessor Akayev`s and Bakiev`s Constitutional Court. Chamber concluded that all proposed amendments are constitutional. In order to reach this decision, it had to apply the strategy of ignoring the text. The Chamber did not mention anything about Article 114 (procedure of introducing amendments to the constitution). Instead of starting from procedural rules, the court chose to directly jump into the substantive analysis of the proposed amendments.[953]

A more detailed analysis of the substantial issues will be discussed in other parts of the dissertation. For the current chapter it was important to demonstrate what strategy the Chamber used to cope with this issue. It seems like the Chamber was inspired by the jurisprudence of its predecessor and seemed to be repeating the mistake of the former Kyrgyz Constitutional Court. The reasoning resembled the common tactics used by the former court, ignorance of the text in combination with selective reading and application of the constitution. The most controversial part of the Chamber`s reasoning is its analysis of the proposed amendments on the powers of the Prosecutor`s office[954]. Two years earlier, the Chamber reached the conclusion that such transfer of power would constitute the violation of principle of separation of powers. However, in 2016 the Chamber found this amendment constitutional.[955] It is also worth mentioning that Judge Oskonbaev wrote the only dissenting opinion on this case. He was the only judge who closely

[953] Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016

[954] Reshenie Konstitusionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitusionnosti stat`I 34 UKRKR [The Decision of the Constitutional Chamber of the Supreme Court of the KR on case involving the constitutionality of Article 34 of the CPCRK] Jan.13, 2014

[955] Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016

looked at the Article 114 and found procedural violations concerning the proposed amendments. Based on that he saw no point of looking at the substance since one of the fundamental provisions of the constitution was violated.

8. Conclusion

This chapter analyzed the jurisprudence of Central Asian and East Asian CCs in cases involving ordinary politics/ institutional conflicts. Based on approaches adopted by these courts, they were grouped into several blocks depending on how they coped and decided such cases. The Mongolian court adopted an aggressive approach, which created a greater deadlock and tension among branches that eventually undermined the legitimacy of the court before political branches. The CCs of Taiwan and South Korea adopted a more facilitative approach. This approach allowed them to successfully cope with the political deadlock at the same time keeping its legitimacy and credibility before other branches of power. Finally, Central Asian CCs "under the strong presidential rule" became tamed courts. While the outcome of their decisions was always predictable (pro-presidential), it was never possible to predict the reasoning and rationale behind it.

Cases concerning Kyrgyzstan and Kazakstan presented an earlier jurisprudence of constitutional courts before they were reorganized into Constitutional Council and Constitutional Chamber. The Kazakh case of 1995, allowed Nazarbayev to put the Court under his control and enabled the consolidation of presidential power by Nazarbayev and eventually the suspension of the Court and reorganization into much weaker Constitutional Council. The jurisprudence of earlier Kyrgyz Constitutional Court revealed how the Court became a tool in the hands of former presidents Akayev and Bakiev in their power maximization efforts. This negative experience of the Court led to the suspension of this institution by the Interim Government and replacement

with the newly created Constitutional Chamber. Finally, the chapter explored to what extent the unhelpful experience of Kyrgyz Constitutional Court shaped the Constitutional Chamber. The Chamber tried to decide the *2016 amendment case* in a principled manner as it was doing in cases involving mega politics discussed in Chapter 2. However, in the 2016 decision, the Chamber fell back to old ways of the previous Constitutional Court, because political branches were not willing to play by the rules of the Constitution. More detailed comparative analysis of cases involving institutional conflicts will be made in part I, section 2 of the Chapter 5 of the dissertation.

Chapter 4 Premises Through Constitutional Rights Adjudication: Comparative Parallel between Central Asian and East Asian Constitutional Courts

This chapter will address issues related to the adjudication of constitutional rights in Central Asia and East Asia. This is an unconventional choice as in the literature the region is usually known for its relatively low interest in fundamental rights protection.[956]

Existing scholarship in comparative constitutional law approaches fundamental rights adjudication issue from the perspectives of socio-economic and civil and political rights divide,[957] judicial techniques in rights protection: use of different test on proportionality, reasonableness, and others.[958] However, minimal attention is given to the influence of broader socio-political, economic and geopolitical factors along with constitutional transformation to the process of constitutional adjudication of rights. The main purpose of this chapter is to demonstrate that in the context of Central Asia and Eeast Asia these factors, in fact, play a crucial role.

Chapter 4 is divided into two parts. The first part will explore relatively recent cases from KCC, Judicial Yuan, and one case from the Kyrgyz Constitutional Chamber that were politically

[956] Jiunn-Rong Yeh, Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59.3 The American Journal of Comparative Law, 816-818 (2011).Karen Engle, *CultureAnd Human Rights: The Asian Values Debate In Context*, 32 N.Y.U. *J.Imr'L* L. & POL. 291 (2000).

[957] Lon Fuller, *The Forms and Limits of Adjudication*, 92 Harvard Law Review, 353(1978). Cass R. Sunstein, *Against Positive Rights: Why Social and economic rights don't belong in the new constitutions of post-communist Europe*, in Vicki C. Jackson, Mark Tushnet (eds.), Comparative Constitutional Law, 1739 (New York: Foundation Press, 2006). Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale Law Journal, 1346-145 (2006). Malcom Langford (ed), Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law (Cambridge: Cambridge University Press, 2008).

[958] Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012). Robert Alexy, A Theory of Constitutional Rights (Oxford University Press, 2010). Francisco Urbina, A Critique of Proportionality and Balancing (Cambridge University Press, 2016). Niels Petersen, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany, South Africa (Cambridge University Press, 2017).

sensitive and involved the interaction with political branches. The case selection was designed to see how the idea on incremental transformation[959] and political branches willingness to become agents of transition holds in fundamental rights issues that are politically sensitive.

The second part of the chapter will explore rights adjudication in Central Asia in the context of external power dynamics. The case selection was also designed to see how one of the premises from chapter 1, namely the influence of foreign policy choices of Central Asian states to the work of CCs, holds in fundamental rights domain. The chapter will reveal that external factors are shaping the internal political dynamics and the fundamental rights adjudication in Central Asia. The cases discussed in this chapter will reveal a shared trend among Central Asia reflected in the shift from monism towards dualism in constitutional texts and in the interpretations of CCs on the relationship between domestic law and international human rights law. Furthermore, the chapter will reveal that Central Asian CCs tend to adopt a pluralistic approach while interpreting the relationship between domestic law and laws regulating Russian led regional organizations as Eurasian Economic Union and Collective Security Treaty Organization.

It is also important to highlight some general points before going into a detailed analysis of cases. First of all, there are certain access barriers (standing requirements) before Central Asia CCs. Among all Central Asian CCs, Kyrgyz Constitutional Chamber (successor of the Court) from its early foundation was empowered to accept individual complaints.[960] Therefore, in comparison with its peer Central Asian CCs the jurisprudence of the Chamber on fundamental

[959] Theunis Roux, The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis, 297 (Cambridge: Cambridge University Press, 2018)

[960] Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011, No. 37, Article 4. Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnom Sude [Constitutional Law on the Constitutional Court of the Kyrgyz Republic] December 18, 1993, No. 1335-XII 37, Article 13.

rights protection is more diverse. Other Central Asian CCs did not have direct individual complaints mechanisms.[961] They could only engage with issues of rights protection in the context of the interpretation of the constitution triggered by the referral of other governmental bodies. Therefore, in practice, there is a very limited number of cases in fundamental rights domain in Central Asian CCs.

Second, there is no regional human rights protection mechanism in Central Asia and East Asia. The lack of this mechanism makes international or regional human rights references by CCs more tricky and less pressing until citizens of these states go to the UN treaty-based mechanisms of human rights protection. This is clearly the case in South Korea as the chapter will reveal and as chapter 3 showed there are regular cases before the Human Rights Committee of the UN trigerred by Kyrgyz citizens.

1. Constitutional Rights Adjudication of Politically Senstive Cases Involving the Interaction with Political Branches

1.1. Shifting Approach of South Korean Constitutional Court

Korean Constitutional Court besides facilitative adjudicator of separation of powers disputes, is also widely known as an activist court[962] when it comes to adjudication of

[961] Before 1995, when Kazakhstan had Constitutional Court, the power of the Court was substantially larger, and it included individual complaints and the review of actions of state officials including the decisions of ordinary courts. For more information see Konstitucionnuj zakon Respubliki Kazakhstan o Konstitucionnom Sude Respubliki Kazakhstan [Constitutional Law on the Republic of Kazakhstan on Constitutional Court] June 5, 1992, Articles 10. From 2008, Tajikistan introduced individual complaint mechanism, however the caseload on on these cases is still very low, almost no complaints are being accepted. Konstitucionnuj zakon Respubliki Tajikistan o Konstitucionnom Sude Respubliki Tajikistan [Constitutional Law on the Republic of Tajikistan on Constitutional Court] November 3, 1995, No. 84, Articles 34.

[962] Yoomin Won, *The Role of International Human Rights law in South Korean constitutional Court practice: An empirical study of decisions from 1988 to 2015*, 16.2 International Journal of Constitutional Law, 596 (2018).

constitutional rights.[963] However, conscientious objection is an exceptional case in the jurisprudence of the KCC where the Court remained reluctant to be as activist as in other cases. This reluctance was due to the continued military tension in the Korean Peninsula. However, the 2018 decision of the Court on this issue sheds some light into shifting approach of the Court, and current section will analyze this case by contextualizing it in broader internal and external factors that have impacted the decision of the KCC.

1.1.1. The Conscientious Objection: brief overview of the issue

Challenges on constitutional adjudication of conscientious objection in South Korea are rooted in history. In 1945 Korea from formal colony emerged as an independent nation after Japan was defeated by Allied Powers. However, due to the bipolar nature of international order after WWII and due to competing geopolitical interests of Soviet bloc and Western bloc, Korean Peninsula experienced another wave of political crisis that led to the division of Korea into North and South Korea with subsequent Korean War.[964] Since then, South Korea is in constant threat to be attacked by the neighbor with a nuclear arsenal. These historical events shaped the existing laws of South Korea in the field of military service.

Since 1949 when the first *Military Service Act* was adopted, compulsory military service was introduced in Korea and the law did not contain any exceptions and provided no reference

[963] Constitutional Court [Const. Ct.], 2017 Hun-Ba127, Apr. 11, 2019, (KCCR, 141) (S.Kor.).; Constitutional Court [Const. Ct.], 88Hun-Ma22, Sept. 4, 1989, (KCCR, 176) (S. Kor.); Constitutional Court [Const. Ct.], 89Hun-Ma160, Apr. 1, 1991, (KCCR ,149) (S. Kor.).; Constitutional Court [Const. Ct.], 98Hun-Ma363, Dec. 23, 1999, (KCCR ,770) (S. Kor.). Constitutional Court [Const. Ct.], 97Hun-Ka12, Aug. 31, 2000, (KCCR ,52) (S. Kor.).; Constitutional Court [Const. Ct.], 2002Hun-Ma193, Nov. 27, 2003, (KCCR, 242) (S. Kor.).; Constitutional Court [Const. Ct.], 2000Hun-Ma138, Sept. 23, 2004, (KCCR75) (S. Kor.).; Constitutional Court [Const. Ct.], 2002Hun-Ma478, Dec. 16, 2004, (KCCR 206) (S. Kor.).

[964] For more information on Korean war see William Stueck, The Korean War: An International History (Princeton University Press, 1995).

for conscientious objection.[965] Historically and before 2000s conscientious objection to military service was mostly associated and triggered by minority christian denomination groups as Jehovah`s Witnesses and Seventh-Day Adventist.[966] Furthermore it is claimed by scholars that while the drafting process of the Korean Constitution there was no agreed opinion regarding Article 12 freedom of conscience neither among the society nor among the constitutional assembly members.[967] Moreover it is claimed that "*the idea that peace can be maintained by refusing to serve in the military was an unfamiliar and extrinsic one in Korean society*."[968]

For a long time these objectors were not supported by other major christian denominations in Korea, namely Roman Catholics and protestants and it is claimed that majority of christian churches approached this doctrine of conscientious objection as something "heretic".[969] When these objectors appeared before courts it was argued by scholars that they shaped their arguments not within the realm of individual rights, but rather as a doctrine of their churches. "*In other words, the Korean debate on conscientious objection was framed as a confrontation between the Korean state and specific Christian denominations."*[970] Accordingly, the jurisprudence of Supreme Court of Korea reflected similar approach as well, specifically for a long time the issue of conscientious objection was not perceived as an individual constitutional

[965] Military Service Act, 1949, art 8, (S.Kor.), *translated in Statutes of the Republic of Korea* (Korea Legislation Research Inst.)
[966] Kuk Cho, Conscientious Objection to Military Service in Korea: The Rocky Path from Being an Unpatriotic Crime to a Human Right, 9, OR. REV. INT'L L. 192 (2007); Kwon Insook, *A Feminist Exploration of Military Conscription,* 3 (1), International Feminist Journal of Politics, 26–54 (2001); Ihntaek Hwang, *Militarising national security through criminalisation of conscientious objectors to conscription in South Korea,* Critical Studies on Security, 3 (2018)
[967] Mun Soo-Hyun, An Analysis of the Debate over Conscientious Objection in Korea, 25 Seoul Journal of Korean Studies, 243-274 (2012)
[968] Mun Soo-Hyun, An Analysis of the Debate over Conscientious Objection in Korea, 25 Seoul Journal of Korean Studies, 273 (2012)
[969] *Id*. 194
[970] Mun Soo-Hyun, *An Analysis of the Debate over Conscientious Objection in Korea*, 25 Seoul Journal of Korean Studies, 243-274 (2012)

right,[971] rather as a threat to national security or "*to the the physical and discursive survival of the nation*".[972] However in early 2000s the situation started changing and gradually the conscientious objectors started framing their arguments as individual right[973] and overall society`s perception and mindset also started broadening.[974] In 2001 Oh Tae-yang announced himself as an objector to military service based on his conviction to buddhism and pacifism. This case was documented by scholars as "*case of the conscientious objection, based on political convictions and framed as a human and individual rights issue."*[975] Thus, it was a starting point when conscientious objection was no longer perceived as a religious doctrine limited to minor christian denominations. Besides that, from 2001 pacifists' movements, human rights and civil society activists, lawyers and academia started conducting discussions, campaigns and have mobilized into such groups as Korean Solidarity for Conscientious Objection.[976] Some of the movements framed themselves as anti-war and have even raised "*concerns over the land appropriation for building the US military establishments and against the 2003 Iraq War*."[977]

These substantial changes eventually allowed objectors to appear for the first time before the KCC. In 2004 upon the request of the Judge Park Si-Hwan (lower court) constitutionality of Article 88 of the *Military Service Act* was reviewed on conscientious objection grounds. This

[971] Supreme Court [S.Ct.], 65Do894, Dec. 21, 1955 (S.Kor.).;Supreme Court [S.Ct.], 69Do934, Jul. 22, 1969 (S.Kor.).; Supreme Court [S.Ct.], 85Do1094, Jul. 23, 1985 (S.Kor.).; Supreme Court [S.Ct.], 92Do1534, Sept. 14,1992 (S.Kor.).

[972] Ihntaek Hwang, *Militarising national security through criminalisation of conscientious objectors to conscription in South Korea*, Critical Studies on Security, 2 (2018)

[973] Supreme Court [S.Ct.], Do2965, Jul. 15, 2004 (S.Kor.).

[974] Mun Soo-Hyun, *An Analysis of the Debate over Conscientious Objection in Korea*, 25 Seoul Journal of Korean Studies, 243-274 (2012)

[975] Kuk Cho, *Conscientious Objection to Military Service in Korea: The Rocky Path from Being an Unpatriotic Crime to a Human Right*, 9, OR. REV. INT'L L. 195 (2007); Lim, J., *The History of Conscientious Objection in South Korea: Approached through the Making Process of Conscription System*, 88, Society and History, 387–422 (2010)

[976] Kuk Cho, *Conscientious Objection to Military Service in Korea: The Rocky Path from Being an Unpatriotic Crime to a Human Right*, 9, OR. REV. INT'L L. 187 (2007)

[977] Ihntaek Hwang, Militarising national security through criminalisation of conscientious objectors to conscription in South Korea, Critical Studies on Security, 3 (2018)

provision stipulated imprisonment for up to 3 years for military service refusal. With the decision of 7-2 the KCC upheld the constitutionality of Article 88.[978] Even though the KCC recommended parliament to consider providing alternative services, the reasoning of the KCC was substantially grounded on the idea of national security and necessity due to military tension in Korean Peninsula.[979] As some scholars further noted the Court "equated conscientious objection with draft-dodging".[980]

After the 2004 decision of the KCC, the debates over conscientious objection became heated that led to number of important events and factors both internally and externally. First all, opinion polls with regard this issue started changing. As noted by scholars "*according to a survey conducted in 2004 by the Chosun Ilbo and Korean Gallup, 32-38% of respondents supported conscientious objection. In 2008, when the social debate on this issue reached its apex, supporters of conscientious objection outnumbered opponents, 44.3% vs. 38.7%.*"[981]

Furthermore, the National Human Rights Commission urged and recommended National Assembly and the Minister of Defense to introduce alternative service system for conscientious objectors.[982] The case on consciences objection appeared before the Human Rights Committee of the UN.[983] Amnesty international and other international organizations started repeatedly raising concerns about unacceptance of compulsory military service for conscientious objectors

[978] Constitutional Court [Const. Ct.], 2002Hun-Ka1, Aug. 26, 2004, (2004 KCCR, 141) (S.Kor.).
[979] Constitutional Court [Const. Ct.], 2002Hun-Ka1, Aug. 26, 2004, (2004 KCCR, 141) (S.Kor.).
[980] Ihntaek Hwang, *Militarising national security through criminalisation of conscientious objectors to conscription in South Korea*, Critical Studies on Security, 3 (2018)
[981] Mun Soo-Hyun, *An Analysis of the Debate over Conscientious Objection in Korea*, 25 Seoul Journal of Korean Studies, 271 (2012)
[982] National Human Rights Commission Act, art. 25(1), May 24, 2001, Act No. 6481 (S. Korea)
[983] *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, CCPR/C/88/D/1321-1322/2004, UN Human Rights Committee (HRC), 23 January 2007, available at: https://www.refworld.org/cases,HRC,48abd57dd.html [accessed 24 June 2019]

in South Korea.[984] Human Rights Committee in its concluding observation on South Korea stated the following "*The State party should take all necessary measures to recognize the right of conscientious objectors to be exempted from military service. It is encouraged to bring legislation into line with Article 18 of the Covenant. In this regard, the Committee draws the attention of the State party to its General Comment 22 on the right to freedom of thought, conscience and religion.*"[985] It can be argued that this overall shifting socio-political context both internally and externally substantially influenced the decision of the Constitutional Court when this case appeared once again in 2018.

1.1.2. 2018 Decision of the Constitutional Court on Conscientious Cbjection[986]

Background of the Case

Applicants[987] claimed the unconstitutionality of Article 3 and 5 of the *Military Service Act*[988] which stipulated specific categories of military service: "*active duty service, reserve service, supplementary service, preliminary military service, and wartime labor service*"[989] Applicants argued that challenged law did not provide conscientious objector an opportunity to choose an alternative service and such an imposition of compulsory uniform military service

[984] Amnesty Int`l, *South Korea must immediately release all conscientious objectors and introduce alternative to military service,* ASA 25/006/2011 (May 15,2011), Amnesty Int`l, *South Korea: Amnesty International`s submission to the UN Human Rights Committee, 115th session (19 October-6 November),* ASA 25/2372/2015 (October 1, 2015); UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 24 June 2019],

[985] UN Human Rights Committee (HRC), *Concluding observations of the Human Rights Committee: Korea, South*, 28 November 2006, CCPR/C/KOR/CO/3

[986] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).

[987] The case included 22 applicants and 7 judicial referrals on pending cases.

[988] Besides these provisions Article 88 (provision on penalties for military service refusal) of the law military service act was challenged as well, however due to lack of enough votes on Justices side, this provision was not discussed on merits. However, four Justices issued separate opinions on constitutionality of Article 88. Particularly, they argued the unconstitutionality of Article 88 since it was in contrary to the ban on excessive punishment.

[989] Military Service Act, Act No. 4685, Dec.31, 1993, art 3,5, (S.Kor.), *translated in Statutes of the Republic of Korea* (Korea Legislation Research Inst.)

were in violation of their rights to freedom of conscience[990] guaranteed by the Constitution. However, the applicants did not demand complete exemption from military service obligations, but rather requested alternative services.

Analysis of the decision

Unlike in 2004 decision which was heavily based on the importance of national security and necessity, reasoning of the KCC in 2018 case was substantially different. The KCC engaged with the statistics, international instruments and made a big emphasis on balancing of interests.

The reasoning started with identifying the **meaning of conscientious objection**. The KCC stated that conscientious objection should be understood as "*an act of refusing to fulfill military service obligations on the grounds of a conscientious decision to be made in religious, ethical, philosophical or similar motives in a conscription state in which military service obligations are recognized".*[991]

The KCC continued that conscientious objection is based on eager hopes and determination for the peaceful coexistence of mankind and that the Constitution of South Korea also declares a part of this ideology by proclaiming "*to contribute to lasting world peace and human prosperity*."[992] Then the KCC emphasized that many countries in the world have recognized conscientious objection to military service and international organizations have constantly confirmed their need for protection through various resolutions. On the other hand, KCC continued that in the context of South Korea it was continuously questioned whether the recognition of conscientious objection to military service was a special treatment for specific religions or doctrines, particularly Jehovah's Witnesses. However, KCC suggested that Korean

[990] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).
[991] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).
[992] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).

society is departing from this attitude and conscientious objection is widely being perceived as a protection of conscience against wearing arms in order to defend peace, which is the common aspiration of humanity, as we have seen before, but not to protection of certain religions or doctrines.[993] Then the KCC referred to **international instruments** that have addressed this issue and have binding force on South Korea.[994]

After setting the ground, the KCC analyzed **accepted restrictions of fundamental rights.** Since the challenged law was generating conflict of values, namely between security/ defense and freedom of conscience the KCC stated that it should be analyzed via the principles of proportionality identified in Article 37 (2) of the Constitution.[995]

(A) Justification of purpose and reasonableness of means were analyzed, and the Court made following statements. The law enumerated types of military service, however did not provide any exceptions.[996] This was done to equitize the military service burden and to allocate the military service resources effectively considering the physical and other characteristics of subjects. This was ultimately aimed at realizing the constitutional legitimacy of national security, so the above-mentioned legislative purpose was just, and the military service provision was a suitable mean for achieving such a legislative purpose[997].

(B) The KCC reviewed **the minimal infringement** of adopted means**.** Namely, if adopted measures were least intrusive in limiting the fundamental right. The KCC stated that in

[993] *Id*
[994] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 24 June 2019], UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: https://www.refworld.org/docid/453883fb22.html [accessed 24 June 2019], The United Nations Commission on Human Rights Resolution No. 59 of 1989, recognition of the right to conscientious as provided for in Article 18 of the ICCPR. In its Resolution No. 77 of 1998.
[995] Daehanminkuk Hunbeob [Hunbeob][Constitution] art.37(S.Kor.).
[996] Military Service Act, Act No. 4685, Dec.31, 1993, art 3,5 (S.Kor.), *translated in Statutes of the Republic of Korea* (Korea Legislation Research Inst.)
[997] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).

the context of conscientious objection it was evident that an alternative service system was the least restrictive mean than a uniform imposition of military service accompanied by military training and was a viable alternative to the conflict of constitutional values that arises between the duty of defense and the guarantee of freedom of conscience. Moreover, KCC continued that it had long been proposed as a mean, however legislator was reluctant to introduce this system due to number of reasons. One of the arguments was that adoption of the alternative service system would lead to deterioration of national defense and to the instability of military service obligations. Thus, the KCC decided to analyze this argument in in depth, particularly in three areas[998].

First, the KCC examined **potential effect** of the introduction of alternative service system on the national defense force of Korea**.** To do that the KCC heavily relied on statistics and based on available data reached the conclusion. According to the Defense White Paper in 2016, the number of troops in Korea were approximately 490,000 Army, 70,000 Navy (including Marines) and 65,000 Air Force troops, totaling 625,000, The total number of personnel who were tested for military service was estimated to be 340,000 (281,000 in active duty, 43,000 in supplementary service, and 8,000 in exhibition workers). [999] In contrast, the number of conscientious objectors in Korea were only about 600 people per year, so in KCC`s opinion it was not a meaningful scale to worry about the reduction of military service or combat power. Moreover, the KCC continued that when conscientious objectors are punished, they can only be imprisoned, and they still cannot be used as military resources. Thus, the introduction of alternative service system cannot lead to the loss of resources[1000].

[998] *Id*
[999] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).
[1000] *Id*

Second, the KCC examined **the issue of equality** and concerns about possible increase of conscientious objectors in numbers in case of the introduction of an alternative system. It was long argued that since it was difficult to screen true conscientious objectors, an introduction of alternative service might lead to substantial increase in numbers of conscientious objectors. However, the KCC claimed that if the state has an objective and impartial pre-screening procedures and rigorous post-screening procedures, there will be no difficulty in identifying true conscientious objectors and those who are not.

Third, the KCC analyzed the alternative service system considering the **special security situation on the Korean peninsula**.

Although the basis for the change in the Korean peninsula has been laid in recent years, there are still many problems to be solved in order to establish permanent peace, and it is difficult to predict the international situation surrounding Korea and neighboring countries. However, the KCC reiterated that the analysis of potential effects of alternative service showed that it will not influence the effectiveness of the military service system.[1001] Moreover, the KCC continued that even during World War II, the United States allowed non-combat servicemen or non-combat personnel to serve civilian duties for nationally important civilian affairs instead of serving combatants for religious reasons. Thus, the KCC concluded that even if the substitution service system is adopted, it is difficult to see that there will be a significant effect on Korean defense force.

(C) Finally, the KCC moved to the last element of proportionality, namely the **balance of interests**. The KCC accepted that the public interest pursued by the military service clause is of great importance to the existence of the state and the equitable burden of national security and

[1001] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).

military service obligation. However, it continued that even if an alternative service system is introduced to the military service clause, it can be said that the above-mentioned public benefits can be sufficiently achieved. On the other hand, the burden imposed on conscientious objectors by law is substantially high. First, conscientious objectors are sentenced to imprisonment, they cannot be employed as public officials for a certain period even after the termination of the sentence. [1002] Therefore, the KCC stated that rather than punishing conscientious objectors, the imposition of alternative service would be more helpful in broadening national security and public interest. Simply putting military service resources in prison is an action that does little to help national security or the public interest. Today, the concept of national security is not only a traditional security crisis like military threat, but also natural disaster, social disaster, And the latter is becoming increasingly important in modern countries.[1003] Therefore, if conscientious objectors are to engage in public affairs such as firefighting, health, medical care, disaster relief, and relief, they should be punished uniformly and have substantially more security in a broader sense than simply accepting them in prison.

Based on the analysis KCC concluded that provisions of the *Military Service Act* which do not provide alternative service for conscientious objectors, were in violation of objectors' freedom of conscience. The KCC reiterated that back in 2004 it was recommended to introduce alternative military service, however there was no progress on legislator`s side for 14 years. Therefore, KCC concluded that Government can no longer postpone the recommendation and obliged it to introduce alternative service system.[1004]

Aftermath

[1002] State Public Officials Act, Act No. 7796, Dec. 29, 2005, art. 33, 31 (3) (S.Kor.), *translated in Statutes of the Republic of Korea* (Korea Legislation Research Inst.)
[1003] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).
[1004] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).

After the decision of the KCC, it created a heated debate over how to introduce the alternative service and what exactly it should be considered as an alternative service. Arguments about potential negative effect of alternative service is still being predominantly discussed among the public.[1005] To implement the decision, Ministry of National Defense developed a plan for alternative service which required 36 months of work on correctional facilities the plan will be introduced to the National Assembly and if approved it is expected to enter into force in 2020[1006]. Moreover, the Government is also proposing to substitute the term "conscientious objection" to "religious objection". These proposed plans are facing critics from civil society and some other international organizations.[1007]

1.2. Same Sex Marriage Case and the Constitutional Court of Taiwan

1.2.1. Brief overview of the issue

Previous chapters of the dissertation demonstrated that Constitutional Court (Judicial Yuan) of Taiwan earned its legitimacy and activism through politically charged separation of powers cases. It had substantially contributed to the facilitation of democracy and played a crucial role in the transition period of Taiwan.[1008] Constitutional rights jurisprudence of the Court also sheds some light on activist approach of the Court in this field as well. To bring few examples: the introduction of the concept of actual malice,[1009] recognition of privacy as one of

[1005] Tae-jun Kang, *Controversy Swells Over South Korea's Conscientious Objectors,* The Diplomat, Jan. 12, 2019, https://thediplomat.com/2019/01/controversy-swells-over-south-koreas-conscientious-objectors/ (last visited Apr. 14,2019)
[1006] Yeo Jun-Suk. *Government considers 36 months in correctional facilities for alternative service,* The Korea Herald, Nov.15, 2018, http://www.koreaherald.com/view.php?ud=20181115000685 (last visited March 16,2019)
[1007] Amnesty Int`l, *South Korea: alternatives for military service conscientious objectors: open letter,* ASA 25/9408/2018 (Dec. 4,2018),
[1008] Tzu-Yi Lin, Ming-Sung Kuo, Hui-Wen-Chen, *Seventy Years On: The Taiwan Constitutional Court And Judicial Activism In A Changing Constitutional Landscape*, 48, Hong Kong Law Journal, 995-1027 (2018)
[1009] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 509 (2000).

the unenumerated rights of the constitution,[1010] women`s rights in marriage,[1011] important cases involving freedom of speech and assembly,[1012] and other cases.[1013]

However, one specific issue, namely the same-sex marriage case, raised questions about the ability of the Court to adjudicate controversial and sensitive fundamental right protection cases the same way as it used to adjudicate controversial and sensitive separation of powers cases. In order to understand the same sex marriage case, it is important to discuss the historical and political context that shaped this issue for years. Movements for legalization of same-sex marriage in Taiwan started back in 1980s.

One of the long time LGBT activists Chia-Wei CHI (who was also the applicant in same-sex marriage case) first approached the Parliament of Taiwan with the request of legalization of same-sex marriage in 1986 and the request was immediately rejected, taking into consideration that Martial Law was still in place and Parliament consisted of MPs elected back when Taiwan and China were united.[1014] The Legislative Yuan stated the following: "*The union marriage is not merely for sexual satisfaction. It too serves to produce new human resources for both state and society. It is related to the existence and development of state and society. Therefore, it is distinguishable from pure sexual satisfaction between homosexuals*".[1015] Then Chia-Wei CHI several times proceeded with the application to Ministry of Justice and Ministry of Interior,

[1010] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 509; Interpretation No 535 (2001); Interpretation No 585 (2004); Interpretation No 603 (2005), Interpretation No 631 (2007), and Interpretation No 756 (2017)
[1011]Yuan Cheh Tzu [Judicial Yuan] Interpretation No 365 (1994); Interpretation No 410 (1996); Interpretation No 452 (1998).
[1012] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 509 (2000); Yuan Cheh Tzu [Judicial Yuan] Interpretation No 509 (2000)
[1013] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 603 (2005); Yuan Cheh Tzu [Judicial Yuan] Interpretation No 452 (1998).
[1013]Yuan Cheh Tzu [Judicial Yuan] Interpretation No 445 (1998); Interpretation No 644 (2008); Yuan Cheh Tzu [Judicial Yuan] Interpretation No 445 (1998); Interpretation No 644 (2008).
[1014] Ming-Sung Kuo, Hui-Wen Chen, *The Brown Moment in Taiwan: Making Sense of the Law on Politics of the Taiwanese same-sex Marriage Case in a Comparative Light*, 31 Columbia Journal of Asian Law, 80, (2017)
[1015] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017) p. 4

however was not successful as well.[1016] In 2001 Mr. Chi applied to Judicial Yuan, however the petition was dismissed by the Court on the grounds of admissibility. By that moment President from the DPP party won the elections as well as majority of the Parliament consisted from DPP faction.[1017]

Afterwards, the issues on legalization of same-sex marriage started repeatedly appearing in the agenda of the Parliament with the initiative of the DPP: bill on Same-Sex Marriage Act in 2006, initiative to amend marriage provision of the Civil Code in 2013, then later in 2016.[1018] However, none of these bills succeeded to be passed in Parliament. Meanwhile in 2016 DPP presidential candidate Ing-wen Tsai won the election. She openly supported legalization of same-sex marriage and during the campaign promised of putting this issue back to the agenda of the Parliament, however, once the bill was reintroduced the parliament it did not succeed again due to political deadlock in Parliament[1019]

For a long time the Judicial Yuan was out of this debate on same-sex marriage, before the applicants applied to the Court requesting the interpretation, President Tsai appointed seven new justices of the Court, five of them were expected to leave the office on the completion of their terms and two more Justices voluntarily decided to step down.[1020] This reconfiguration or newly

[1016] Ministry of Justice Letter 83-Fa-Lu-Jue-17359 (August 11,1994), Ministry of Justice Letter Fa-Lu-10000043630(January 2, 2012), Ministry of Justice Letter Fa-Lu-10203506180 (May 31, 2013)
[1017] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017) p. 5
[1018] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017) p. 5
[1019] Saurav Jung Thapa, *Pro-Equality Candidate Triumphs in Taiwanese Presidential Elections*, Human Rights Campaign, Jan. 20, 2016, https://www.hrc.org/blog/pro-equality-candidate-triumphs-in-taiwanese-presidential-elections (last visited January 20, 2019)
[1020] Ming-Sung Kuo, Hui-Wen Chen, *The Brown Moment in Taiwan: Making Sense of the Law on Politics of the Taiwanese same-sex Marriage Case in a Comparative Light*, 31 Columbia Journal of Asian Law, 90, (2017)

packed composition of the Court perhaps was also a catalyst for the applicants to apply to Judicial Yuan. Thus in 2017 the Court issued its interpretation on same-sex marriage.[1021]

1.2.2. Interpretation No. 748 on Same sex-marriage

Background of the Case

Constitutionality of provisions of Civil Code on marriage and family were challenged, particularly applicants claimed that these provisions were contrary to Article 22 (freedom of marriage) and Article 7 (equality) of the Constitution.

There were several applicants, and one of them was the Taipei City Government responsible for marriage registration. While processing registration by two same sex couple, the City Government assumed that the Civil Code provisions were unconstitutional thus applied to the Judicial Yuan. The City Government argued that these provisions unreasonably limited individual`s right to choose whom to marry which is according to the petitioner protected by Article 22 (freedom of marriage) of the Constitution. Furthermore, the applicant claimed that there was no rational connection demonstrated between means and ends and provision fails to fulfill the proportionality test guaranteed by Article 23 of the Constitution. The applicant argued that differential treatment based on sexual orientation according to the applicant falls under the

[1021] For detailed analysis of the Interpretation see *Id*. and Ming-Sung Kuo, Hui-Wen Chen, *Responsibility and Judgment in a Muted 3-D Dialogue: A Primer on the Same-Sex Marriage Case in Taiwan*, INT'L J. CONST. L. BLOG (May 26, 2017), http://www.iconnectblog.com/2017/05/responsibility-and-judgment-in-a-muted-3-d-dialogue-a-primer-on-the-samesex-marriage-case-in-taiwan/ (last visited March 23, 2019). Emily Rauhala, *In Historic Decision, Taiwanese Court Rules in Favor of Same-Sex Marriage*, WASH. POST, (May 24, 2017). Geoffrey Yeung, *First in Asia – Taiwan's Marriage Equality Ruling in Comparative and Queer Perspectives*, OXHRH BLOG, (July 6, 2017), http://ohrh.law.ox.ac.uk/first-in-asia-taiwans-marriage-equality-ruling-in-comparative-and-queer-perspectives (last visited March 30, 2019).

"heightened scrutiny" and challenged provisions do not demonstrate "furtherance of important public interest" thus, it was in violation of Article 7 of the constitution.[1022]

Second applicant was Chia-Wei CHI long time LGBT activist. Since the subject matter of both petitions were the same, the Judicial Yuan decided to consolidate them in one case. Arguments of the second applicant were almost the same, where he emphasized his argument on the right to personal development and human dignity.

Ministry of Justice, the representative of the respondent argued that prior jurisprudence of the Judicial Yuan reflects that the marriage is defined as a "*union between husband and wife, man and woman*."[1023] Therefore, constitutionally there was no ground to assume that Article 22 grants "*freedom to marry a person of the same sex*".[1024] Furthermore, respondent claimed that marriage provisions of the civil code were adopted to protect "marriage institutions" that are "rooted in social order of marriage between husband and wife". Thus, restriction provided in the law was not arbitrary and there was a clear rational connection between ends and means. Ministry of Interior seconded the arguments of the Ministry of Justice.

Analysis of the Decision

Before going into the analysis, the Judicial Yuan clarified that in its prior jurisprudence reference to husband and wife was in the context of factual grounds of the original cases. However, the Judicial Yuan emphasized that thus far it "*has not made any interpretation on the issue of whether two persons of the same sex are allowed to marry each other*".[1025] After freeing itself from previous jurisprudence and demonstrating that substantively the Judicial Yuan had not reviewed this issue before, it faced another legal barrier before going into the subject matter.

[1022] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1023] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1024] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1025] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).

The formulation in the marriage section of the civil code did not expressly stated that marriage is only between man and woman.[1026] Thus, to some extent the Judicial Yuan was under pressure of avoiding reviewing the case deferring to legislator`s statutory interpretation powers. Taken into consideration a sensitive nature of the topic, it could have avoided the case. However, the Judicial Yuan decided to go beyond the avoidance and constitutionalized this issue and justified that it was the case of constitutional rights protection. To do that the Judicial Yuan engaged with other provisions of the *Civil Code* regulating marriage issues. Particularly, the sections on betrothal agreement [1027] which identified marriage "as a union of man and woman".[1028] According to the Judicial Yuan these provisions of the *Civil Code* along with implementation letters of Ministry of Justice issued for local authorities on marriage registration allowed to conclude that the entire system or marriage institution was based on the assumption of "union between man and woman", thus creating a differential treatment "*incompatible with the spirit and meaning of the freedom of marriage protected by Article 22 of the Constitution*".[1029]

Thus, after the justification of constitutionalization of the issue of same sex marriage, the Judicial Yuan moved to the analysis of the law. First of all, it is important to note that under the ROC constitution there is no explicit mention of right to marry, in other words it is not among enumerated rights of the Taiwanese constitution. However, in previous jurisprudence[1030], the

[1026] Bîn-hoat (Civil Code) chapter 2 (1929) (Taiwan).
[1027] Bîn-hoat (Civil Code) art.972 (1929) (Taiwan).
[1028] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017)
[1029] *Id.*
[1030] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 362 (1994)

Judicial Yuan have recognized this right/ freedom to marry is guaranteed by Article 22[1031] which is also characterized by scholars as an "equivalent of US substantive due process clause."[1032]

Main reasoning or ratio decidendi of the Judicial Yuan stands out from its previous fundamental rights jurisprudence, especially in terms of judicial style, technique and the choice of sources. Furthermore, it is important to highlight that the reasoning can be divided into two parts. First part engages with the freedom/liberty to marry and second with the principle of equality.

As for the freedom to marry the Judicial Yuan reiterated that this right although is not enumerated is still guaranteed under the Article 22 of the Constitution. The Judicial Yuan stated that this right includes "*freedom to decide whether to marry and whom to marry*".[1033] Therefore "*such decisional autonomy is vital to the sound development of personality safeguarding of human dignity and therefore is a fundamental right to be protected by Article 22 of the Constitution*."[1034] Thus, the Judicial Yuan have confirmed that freedom to marry is among fundamental rights. Afterwards the Judicial Yuan continued that "*the need for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals, given the importance of the freedom of marriage to the sound development of personality and safeguarding of human dignity.*"[1035]

Thus, from Article 22 the Judicial Yuan inferred that freedom to marry is granted and guaranteed not only to heterosexuals but also to homosexuals. Furthermore, the Judicial Yuan stated that marriage provisions of the Civil Code did not grant right to marry persons of the same

[1031] Article 22 of the ROC Constitution states the following: "*All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution."*
[1032] Ming-Sung Kuo, Hui-Wen Chen, *The Brown Moment in Taiwan: Making Sense of the Law on Politics of the Taiwanese same-sex Marriage Case in a Comparative Light*, 31 Columbia Journal of Asian Law, 97, (2017)
[1033] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1034] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1035] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).

sex, thus established a differential treatment. Notably further analysis of the Judicial Yuan on the liberty part stops here. Against expectations that Judicial Yuan will start proportionality analysis of right to marry, the Judicial Yuan chose to move to the equality and make it the heart and center of the reasoning. This choice of the technique demonstrated Judicial Yuan `s deviation from its previous constitutional rights jurisprudence which used to follow a strict adherence to proportionality analysis.

Accordingly, Judicial Yuan moved into the analysis of same sex marriage in the context of Article 7 (equality). Although Article 7 lists five main classifications as sex, religion, race, class and party affiliation, the Judicial Yuan stated that this list is rather illustrative than exhaustive. Thus, these classifications can also be extended to disability or sexual orientation. Furthermore, the Judicial Yuan continued that marriage provisions of the Civil Code that stipulated marriage as a union between man and woman[1036] constituted classification on the basis of sexual orientation, "*which gives homosexuals relatively unfavorable treatment in their freedom of marriage*."[1037] Notably, the Judicial Yuan constructed its further reasoning based on scientific evidences and reports on physical and psychological aspects of homosexuals. Court stated that "*sexual orientation is an immutable characteristic that is resistant to change*" and that there were number contributing factors to sexual orientation as "*physical, psychological, life experience and social environment*".[1038]

To support the argument the Judicial Yuan cited to reports of the WHO,[1039] Pan American Health Organization,[1040] World Psychiatric Association[1041] and the US Supreme Court

[1036] Bîn-hoat (Civil Code) chapter 2 (1929) (Taiwan).
[1037] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1038] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1039] The World Health Organization, *The Tenth Revisioin of the International Statistical Classification of Diseases and Related Health Problems*, ICD-10 (2016).

case *Obergefell v. Hodges*.[1042] After providing this documentary support, the reasoning continued that historically homosexuals were excluded or discriminated by social tradition and custom, were subjected to stereotypes and have been "insular minority in the society". Thus, the Judicial Yuan concluded that due to historical disadvantage of homosexuals, while reviewing the constitutionality of differential treatment by sexual orientation "heightened standard" must be applied, in other words the Judicial Yuan have categorized homosexuals as "suspect classification". It is highly important note that while analyzing the Judicial Yuan `s reasoning one can make an observation that when the Judicial Yuan was reviewing the scope of freedom to marry, its reasoning was predominately based on individuals or in other words subjects of the right to marry, while in the equality part the reasoning of the Judicial Yuan substantially shifted towards the institution of the marriage not only rights of individuals or subjects within the marriage.

Thus, the Judicial Yuan went into deeper analysis of the marriage institution within the context of equality. First, the Judicial Yuan discussed reasons of the state for adopting the marriage law requiring "opposite sex marriage". One of the potential reasons were protection of reproduction. However, the Judicial Yuan continued that if reproduction would be the main purpose of the marriage, then the laws would reflect it as well, namely in case if incapability of opposite-sex couples to procreate either on grounds of unwillingness or incapacity, then norms on subsequent divorce or void and voidable status of the marriage would have been provided. However, there were no such requirements in the law thus the Judicial Yuan concluded that

[1040] The Pan American Health Organization, Cures for an Illness that does not exist, https://www.paho.org/hq/dmdocuments/2012/Conversion-Therapies-EN.pdf (last visited March 9,2019).
[1041] The World Psychiatric Association, Position Statement on Gender Identity and Same-Sex Orientation (2016).
[1042] Obergefell v. Hodges 135 S. Ct. 2584 (2015).

obviously reproduction was not "essential element of marriage".[1043] Therefore, the Judicial Yuan continued that "*disallowing the marriage of two persons of the same sex because of their inability to reproduce is a different treatment having no apparent rational basis*."[1044] Then the Judicial Yuan also stated that prohibiting same sex marriage for the sake of "*safeguarding basic ethical orders*"[1045] was also a differential treatment having no "apparent rational basis". Thus, the Judicial Yuan came to conclusion that differential treatment in *Marriage Laws* was incompatible with "*spirit and meaning*" of the right to equality guaranteed under Article 7 of the Constitution.[1046]

Accordinly, the Judicial Yuan emphasized that this issue is "very controversial social and political issue" and yet it was constitutional duty of the Judicial Yuan to provide a binding decision. Referring to the principle of "mutual respect among governmental powers" and the Judicial Yuan requested the Legislative Yuan by the process of negotiations and consensus introduce amendments to the challenged laws within the period of two years.[1047] In case if Legislative Yuan fail to amend respective laws in two-year period, the Court stated that the current marriage provisions of the *Civil Code* will be extended to same-sex couples automatically, by virtue of the judgement of the Judicial Yuan.

Aftermath

Once the Judicial Yuan announced its decision, it created a public tension and disagreements between supporters and opponents of same-sex marriage. More then 20 members of the Yunlin County Council filed a petition to impeach the president of the court and other

[1043] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1044] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1045] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1046] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017)
[1047] *Id.*

judges for deciding the case in favor of the applicants.[1048] Thereafter, the opponents of same-sex marriage proposed to hold a referendum on these issue and after collecting necessary signatures for the initiative proposed their questions to the Central Election Commission. In response to this, the supporters of same-sex marriage also came up with their own set of questions for the referendum and collected necessary signatures. Thus, the final list of questions were approved by the Central Election Commission and the national referendum was held where the majority of voters rejected same-sex marriage.[1049] The referendum results exacerbated the controversy and despite the result the Executive Yuan announced that the draft bill on same sex marriage will be presented before the Legislative Yuan. Moreover, the Secretary General of the Judicial Yuan at the press conference announced that "referendum results cannot override the 2017 ruling."[1050] Later in February, the Executive Yuan published a draft bill named "*The Enforcement Act of*

[1048] Joy Chang, *Yunlin County Council calls for impeachment of Grand Justices for same-sex marriage ruling*, Taiwan News, May 31,2017, https://www.taiwannews.com.tw/en/news/3176464 (last visited May 7, 2019)

[1049] Three questions from the opponent's side were following: "Do you agree with using means other than the marriage regulations in the Civil Code to protect the rights of two people of the same gender to build a permanent life together? Do you agree that the marriage regulations in the Civil Code should define marriage as between a man and a woman? Do you agree that during the elementary and junior high school stage, the Ministry of Education and schools at all levels should not implement same-sex education as stipulated in the Gender Equity Education Act's implementation rules? And two questions from the supporter`s side: Do you agree that the Civil Code marriage regulations should be used to guarantee the rights of same sex couples to get married? Do you agree that gender equity education as defined in 'the Gender Equity Education Act' should be taught at all stages of the national curriculum and that such education should cover courses on emotional education, sex education and gay and lesbian education? For more information, see *CEC passes review of same-sex marriage referendum proposals*, Focus Taiwan, April 18, 2018, http://focustaiwan.tw/news/asoc/201804180011.aspx (last visited March 9, 2019), *Taiwan votes down same-sex marriage as China welcomes midterm results*, The Guardian, November 25, 2018, https://www.theguardian.com/world/2018/nov/24/anti-gay-marriage-groups-win-taiwan-referendum-battle (last visited May 8, 2019), Hsu, Elizabeth, *Taiwanese vote against gay marriage, back 6 other referendum questions*, Focus Taiwan News Channel, November 25, 2018, http://focustaiwan.tw/news/aipl/201811250002.aspx (last visited Mar 9, 2019).

[1050] Ryan Drillsma, *Judicial Yuan SG: Constitutional Court ruling on same-sex marriage cannot be overridden by referendum*s, Taiwan News, (November 29, 2018). https://www.taiwannews.com.tw/en/news/3585861 (last visited May 2019).

Judicial Yuan Interpretation No. 748".[1051] In May 2019, Legislative Yuan of Taiwan (controlled by the DDP party) passed Asia`s first same sex marriage law.[1052]

1.3. Kyrgyz Constitutional Chamber and the Biometric Registration Case

Background of the Case

Mandatory system of biometric registration for elections was introduced in July 2014 and was justified by Kyrgyz government on the grounds of national security and elimination of fraud and falsifications during the elections. Thus, the *Law on Biometric Registration* was adopted that have stipulated a mandatory registration of biometric data.[1053] Human rights activists and lawyers immediately raised their concerns about the constitutionality of the law since there were many flaws in the provisions about the security of the storage of biometric data. Thus, several activists and lawyers have filed separate constitutional complaints to Constitutional Chamber. Since all the complaints concerned the same subject matter, the Chamber decided to combine them into one case and started a constitutional complaint procedure on November 2014.

Applicants challenged constitutionality of three main provisions of the law. First, mandatory nature of the collection, storage and use of biometric data[1054] and biometric

[1051] Taiwan: Draft law to allow same-sex marriage is a huge step forward for human rights, Amnesty International (February 21, 2019). https://www.amnesty.org/en/latest/news/2019/02/taiwan-draft-law-to-allow-same-sex-marriage-is-a-huge-step-forward-for-human-rights/ (last visited May 10, 2019).
[1052] Ralph Jennings, *It's Official: Same-Sex Marriage Is Legal in Taiwan*, The Diplomat, (May 17, 2019). https://thediplomat.com/2019/05/its-official-same-sex-marriage-is-legal-in-taiwan/ (last visited May 25, 2019).
[1053] Zakon Kyrgyzskoi Respubliki o Biometricheskoi Registracii grazhdan Kyrgyzskoi Respubliki [Law of the Kyrgyz Republic on Biometric Registration of the Citizens of the Kyrgyz Republic], No.136, July 14,2014
[1054] Biometric data according to the law included following: digital graphic image of a person, graphical structure of papillary patterns fingers of both hands, handwritten signature. Besides that personal information such as name, nationality, personal identification ID, passport number and etc. Zakon Kyrgyzskoi Respubliki o Biometricheskoi Registracii grazhdan Kyrgyzskoi Respubliki [Law of the Kyrgyz Republic on Biometric Registration of the Citizens of the Kyrgyz Republic], No.136, July 14,2014

registration.[1055] Second, the provision that stated that the biometric database is considered as property of the Kyrgyz Republic.[1056] Third, the provision that stipulated that for the purposes of maintenance of justice without the permission of the citizens the access to the biometric data is available to all bodies related with the system of justice.[1057]

Applicants claimed that contested norms allowed unlawful collection of confidential information about citizens without their consent, as well as without a corresponding court decision, whereas citizens' biometric data, according to the *Law on Personal Information*,[1058] was considered as personal data protected by the privacy right guaranteed under Article 29 of the Constitution.[1059] Furthermore, they argued that no legislative act "*can impose a duty on citizens to provide their personal data*"[1060] and no state body has the right to require citizens to provide their personal data. Furthermore they argued that according to Article 20 of the Constitution "*the establishment of restrictions on rights and freedoms for other purposes and to a greater extent than provided for by the Constitution*" is not allowed.[1061] Besides that, applicants indicated that international standards on personal data protection and the domestic law of Kyrgyzstan stipulate that only holders of personal data have the right to decide whether or not to provide their personal data to someone or not.

Judge Sooronkulova was appointed as pudge rapporteur for this case. For almost six months Sooronkulova had been preparing the case for the final hearing, and even invited external

[1055] Zakon Kyrgyzskoi Respubliki o Biometricheskoi Registracii grazhdan Kyrgyzskoi Respubliki [Law of the Kyrgyz Republic on Biometric Registration of the Citizens of the Kyrgyz Republic], No.136, July 14,2014, Article 4 p.1
[1056] *Id.* Article 5.
[1057] *Id.*
[1058] Zakon Kyrgyzskoi Respubliki ob informacii personalnogo haraktera [The Law of the Kyrgyz Republic on the information of personal character], April 14, 2008 No. 58.
[1059] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] Article 29, 27 June 2010.
[1060] *Id.*
[1061] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] Article 29, 27 June 2010, Article 20.

experts from abroad. According to Article 30 of the law on Constitutional Chamber, the reporting judge prepares a draft decision based on all available materials and facts for that moment.[1062] Afterwards, all the materials of the case are sent to the judges and parties of the process 10 days prior to the oral hearings.[1063] Thus, preliminary discussion of the draft decision is a developed practice in the constitutional adjudication process of the Chamber. Sooronkulova prepared the draft on unconstitutionality of the law on biometric registration.

On May 27, 2015 during the oral hearings, the respondent (representative from the Parliament) Svetlana Boldzhurova requested the recusal of Judge Sooronkulova from the case for two main reasons. First, the respondent claimed that Judge Sooronkulova expressed her position on the unconstitutionality of the law on biometrics before the official announcement. Second, she claimed that Sooronkulova and Umetalieva the human rights activist, one of the applicants of the case are allegedly relatives since they come from the same village.[1064] Judges of the Constitutional Chamber deliberated and based on voting which was 50/50 with the casting vote of Chairman Kasymaliev have decided to disqualify Sooronkulova from the case and re-scheduled oral hearings for another day and Judge Bobukeeva was appointed by Chairman as a new Judge Rapporteur.[1065]

Shortly after the incident, Sooronkulova appeared on media claiming that disqualification was illegal and groundless, and that the decision of her colleagues, particularly of Chairmain Kasymaliev, was illegal, unjust, biased and subjective since respondent's allegations had no

[1062] Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] Article 30, June 13, 2011, No. 37.
[1063] *Id.*
[1064] Sudia Sooronkulova Zayavlyaet o davlenii na sebya [The Judge Sooronkulova claimes that she is under pressure] Radio Azattyk (May 28, 2015) https://rus.azattyk.org/a/27041336.html (last visited February 18, 2019).
[1065] Constitutional Chamber issued the definition No. 10-

factual basis.[1066] Furthermore, Sooronkulova claimed that the prerequisite of disqualification was her persistent resistance to pressure from the Chairman Kasymaliev, who insisted on drafting a decision on constitutionality of the contested norms. She also claimed that Kasymaliev and other Judges were under pressure from the side of the President.[1067]

Once the interview appeared in the media, Boldzhurova filed a complaint to Council of Judges against Sooronkulova requesting a disciplinary sanction against her for violating *Code of Ethics of Judges*.[1068] The Disciplinary Commission of the Council of Judges of the Kyrgyz Republic initiated disciplinary trial and as a result of the trial recommended removal of Sooronkulova from the position of Judge of the Constitutional Chamber.[1069] The final decision was on Parliament, with grave procedural violations during the voting process Parliament have voted for removing Sooronkulova[1070] from the position of the Judge.[1071]

Sooronkulova claimed that her case was a tremendous pressure on the independence of the judiciary with blatant violations on all stages and expressed her conviction that everything was an orchestrated planned action from the side of the President[1072] to make sure that biometric registration law would be upheld. Eventually, the Chamber upheld the constitutionality of the

[1066] Klara Sooronkulova, Reshenie otstranit menya ot dolzhnosti sudi rascenivau kak davlenie [The Decision about my disqualification is considered as undue pressure on the judiciary] 24.kg (June 18, 2015).
[1067] Klara Sooronkulova, Vlast vvela Biometriu dlya Falsifikacii Vyborov [The Government adopted the Biometric law for the purposes of falsification of elections], Vecherniy Bishkek, (June 20, 2015) https://www.vb.kg/doc/318525_klara_sooronkylova:_vlast_vvela_biometriu_dlia_falsifikacii_vyborov.html (last visited February 9, 2019).
[1068] Kodeks Chesti Sud`I Kyrgyzskoi Respubliki [Code of Ethics of Judges of the Kyrgyz Republic] adopted by the Congress of Judges of the KR, 2009.
[1069] Marat Uraliev, Sovet Sudei rekomendoval osvobodit Klaru Sooronkulovu ot dolzhnosti sudi Konstitucionnoi Palaty [The Council of Judges Recommended Klara Sooronkulova to be removed from the position of the Judge of the Constitutional Chamber] Vecherniy Bishkek (June 18, 2015).
[1070]Catherine Putz, *Kyrgyz Judge Removed, Another Reprimanded: Fingerprints, the right to vote, a Supreme Court scandal and a brewing constitutional crisis*, The Diplomat (June 27, 2015).
[1071] Parlament otstratil Sud`u Konstitucionnoi Palaty [Parliament recalled the Judge of the Constitutional Chamber] Central Asian Bureau for Analytical Reporting (June 20, 2015).
[1072] Anna Yalovkina, *Kyrgyzstan Judge's Dismissal Looks Like Government Interference*, Institute for War and Peace Reporting, (June 26, 2015).

biometric registration law. Meanwhile the information about unsafe storage of biometric data have been constantly appearing on the media. It was claimed that Government did not ensure the safety and confidentiality of the collected data. All of them were poured on unprotected laptops and were stored in computers from collectors. From the regions they are transported on ordinary flash drives.[1073]

Analysis of the decision

Final decision of the Chamber was delivered on September 2015, as it was expected after all prior events with judge Sooronkulova, Chamber found the law on biometric registration constitutional.[1074]

Instead of focusing the reasoning and analysis on right to privacy per se, the Chamber approached the case from the perspectives of benefits during the elections. Much of the attention of the court was shifted towards elections and purpose of the law, rather than evaluating and balancing between two conflicting interests. Furthermore, the Chamber avoided the issue of mandatory registration and the analysis of biometric registration in the context of the *Law on Personal Data*.[1075]

First of all, the Chamber brought forward the provision of the Constitution on right to privacy and have emphasized that under Article 29 of the Constitution the "*collection, storage, use and dissemination of confidential information, information about the private life of a person*

[1073] Vlasti zayavili o bolshih problemah v ohrane biometricheskih dannyh [State Officials announced about big problems on the protection of biometric data] Kloop, (March 30, 2015), https://kloop.kg/blog/2015/03/30/vlasti-zayavili-o-bolshih-problemah-v-ohrane-biometricheskih-dannyh/ (last visisted March 15, 2019).
[1074] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitucionnosti zakona o biometricheskoi registracii grazhdan Kyrgyzskoi Respubliki [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on constitutionality of the law on biometric registration of the citizens of the Kyrgyz Republic] September 14, 2015 No. 11-p.
[1075] *Id.*

without his consent is prohibited, except as required by law."[1076] Furthermore, Chamber continued that by substance and scope, the provision on privacy in the Constitution mean that the Government, on the one hand, guarantees citizens the right to control their personal information by legally prohibiting the disclosure of personal information, on the other hand, it allows interference by the Government on legal grounds.[1077]

Moreover, the Chamber stated that even in international instruments regulating human rights there are admissibility of legitimate restrictions by the state on individual rights and freedoms and listed examples as the *Universal Declaration of Human Rights* (Article 29), the *International Covenant on Economic, Social and Cultural Rights* (Article 4), the *International Covenant on Civil and Political Rights* (Article 19).[1078] Chamber continued that under these international documents legal restrictions of the right to privacy is allowed if certain criteria is fulfilled, such as[1079]: "*restrictions must be imposed by national law*; *they must be necessary in a democratic society*; t*hey must serve one of the legitimate goals set out in each of the provisions on the limitations of the International Covenant on Civil and Political Rights*.[1080]

Furthermore, Chamber continued that human identification via biometric data, as an achievement of modern science and technology, is gaining increasing recognition in many countries and international organizations. In particular, the use of biometric identification is

[1076] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] Article 29, 27 June 2010.
[1077] *Id.* p. 3
[1078] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitucionnosti zakona o biometricheskoi registracii grazhdan Kyrgyzskoi Respubliki [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on constitutionality of the law on biometric registration of the citizens of the Kyrgyz Republic] September 14, 2015.
[1079] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitucionnosti zakona o biometricheskoi registracii grazhdan Kyrgyzskoi Respubliki [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on constitutionality of the law on biometric registration of the citizens of the Kyrgyz Republic] September 14, 2015.
[1080] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 12, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 24 June 2019].

considered and successfully used in the international civil aviation organization (ICAO).[1081] Regulation of issues of biometric data at the EU level is carried out in at least two areas: in terms of biometric visas and biometric passports. Another direction is the issuance of national electronic citizen cards in selected EU countries containing biometric information. Thus, the Chamber concluded that introduction of new technologies using biometric data is becoming a common practice in the world and is an important mean of ensuring national security. Based on above grounds, the Chamber stated that the principle of compulsory biometric registration, consisting in the compulsory delivery of biometric data cannot be considered as a violation of Article 29 of the Constitution if this restriction fully complies with the general limitation clause of the Constitution, namely Article 20.[1082] Moreover, the Chamber repeated that the right to privacy is a fundamental human and citizen right, but this right is not absolute. Thus, the mandatory nature of the norm that was contested by the applicants had been negated by the Chamber.[1083]

It could be presumed from the reasoning of the Court that the first element of the proportionality test was fulfilled, the legality per se. However, at close look at the reasoning one cannot but notice that the Chamber was missing an important analysis under the legality element and it seemed that the Chamber was rushing to move as quickly as possible to the next element of proportionality.[1084] There is one very important fact both on constitutional and sub constitutional level that had been ignored by the Chamber. According to Article 29 of the Constitution the "*collection, storage, use and dissemination of confidential information and*

[1081] *Id.* p. 20
[1082] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitucionnosti zakona o biometricheskoi registracii grazhdan Kyrgyzskoi Respubliki [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on constitutionality of the law on biometric registration of the citizens of the Kyrgyz Republic] September 14, 2015.
[1083] *Id.* p. 4
[1084] *Id.* p. 7

information about the private life of a person is prohibited without his consent, except as required by law."[1085] As one can notice, acceptable limitation of this right must be regulated by the law. The main Law in Kyrgyzstan that regulates or concretizes this constitutional provision is the Law on Personal information.[1086] This law stipulates that personal data can be handled by the holder/owner of personal data only upon his/her consent.[1087] Legislative requirements for the need to obtain the consent of the data subject are a general rule from which exceptions may be allowed, which must be expressly stated in the law. At the same time, the aforementioned law does not provide for cases of forced or mandatory submission of personal data by the subject.[1088] Thus, if Chamber made a proper analysis of principle of legality the possibility of contested norm to pass the proportionality test would be less likely. Therefore, Chamber chose to avoid it and rather move to the next element right away.

Therefore, substantial part of the Chamber`s decision was dedicated to the discussion of the law in the context of elections. The Chamber stated that elections as the basis of the constitutional order in the organization and functioning of state power are subject to national security. Periodic holding of elections of representative bodies acts as a guarantor of timely reproduction of institutions of state power and local self-government and ensures the stability of the constitutional system. Elections serve as an indicator of people's trust in the government and the most important way to legitimize it.[1089]

[1085] Konstitucia Kyrgyzskoi Respubliki prinyataya referendumom 27 iunya 2010 goda [Constitution of the Kyrgyz Republic adopted by referendum] June 27, 2010 art. 29.
[1086] Zakon Kyrgyzskoi Respubliki ob informacii personalnogo haraktera [The Law of the Kyrgyz Republic on the information of personal character], April 14, 2008 No. 58.
[1087] Zakon Kyrgyzskoi Respubliki ob informacii personalnogo haraktera [The Law of the Kyrgyz Republic on the information of personal character], April 14, 2008 No. 58.
[1088] Zakon Kyrgyzskoi Respubliki ob informacii personalnogo haraktera [The Law of the Kyrgyz Republic on the information of personal character], April 14, 2008 No. 58.
[1089] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitucionnosti zakona o biometricheskoi registracii grazhdan Kyrgyzskoi Respubliki [Decision of the Constitutional Chamber of

Furthermore, the Chamber stated that at the same time, due to the socio-political significance of the elections, they can become the object of unlawful aspirations of various groups and individuals aimed at falsifying election results, through manipulation of votes, which can, as the recent history of the country shows, lead to different social - political upheavals that could damage the national security of the Kyrgyz Republic.[1090] Therefore, the state has the right to develop and use various tools to ensure the transparency, fairness and fairness of the elections. One of such tools may be the use of new technologies in compiling an updated voter list. Thus, on these grounds, the Chamber concluded that the *Law on Biometric Registration* corresponded to the constitution.[1091]

However, Chamber also emphasized that when creating state information systems, the following conditions should be observed: the fixation of biometric data of citizens without degrading the dignity of the individual and causing harm to health; exclusion of the possibility of illegal reproduction, use and dissemination of citizens' biometric data; ensuring the confidentiality and security of information contained in the state information system, and limiting this information to only those information that is necessary to verify the authenticity of the new generation of identification documents.[1092]

Aftermath

There are always different factors that help researchers to assess and understand behavior and strategic choices of the Court and time is one of those of factors. Sometimes only with

the Supreme Court of the Kyrgyz Republic on constitutionality of the law on biometric registration of the citizens of the Kyrgyz Republic] September 14, 2015 No. 11.

[1090] *Id.* p. 12

[1091] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitucionnosti zakona o biometricheskoi registracii grazhdan Kyrgyzskoi Respubliki [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on constitutionality of the law on biometric registration of the citizens of the Kyrgyz Republic] September 14, 2015 No. 11.

[1092] *Id.*

certain lapse of time one can understand the reason behind certain decision. Biometric registration case is one them. Two years after the adoption of the case, the motivations of the rulling power became clear about their consistent persistence on the adoption of the biometric registration law as well undue pressure exercised upon the Chamber. In 2017 Sooronbay Jeenbekov was elected as president of Kyrgyzstan.[1093] As it was mentioned in earlier chapters, former president Atambayev have been actively supporting Jeenbekov and few reports suggested that Atambayav have used administrative resources in order to ensure the election of Jeenbekov.[1094] The accusations of such nature during elections are common, especially in Central Asian states and despite complaints and recorded violations, overall OSCE observers have concluded that 2017 elections were fair, democratic and competitive.[1095] However, shortly after the elections, one of the leading independent media *Kloop* published an Article that contained information about Government`s alleged influence on presidential elections by using citizens biometric data via the webpage named *samara.kg*, this scandal later was dubbed as "Samara-gate".[1096] The Article claimed that website *samara.kg* contained personal data of all Kyrgyz citizens such as passport numbers, TIN and biometric data and for a certain period of time up, to the election date was accessible to everyone. *Kloop* also claimed that evidences pointed to the fact that the server belonged to the *State Registration Service* of Kyrgyzstan. Moreover, *Kloop* have requested Swiss digital criminology experts to conduct a forensic investigation, and the

[1093] Postanovlenie Centralnoi Izbiratelnoi Komissii KR ob opredelenii resultatov vyborov Prezidenta Kyrgyzskoi Respubliki ot 15 oktyabrya, 2017 goda [Resolution of the Central Election Commission of the Kyrgyz Republic on results of the Presidential elections of Kyrgyzstan] October 15, 2017 No. 526.
[1094] Vybory v Kirgizii: Nechestnye no spokoinye? [The Elections in Kyrgyzstan: not fair but peaceful?] Deutsche Welle, (October 16, 2017).
[1095] *Kyrgyzstan, Presidential Election, 15 October 2017: Final Report*, Organization for Security and Cooperation in Europe, (March 8,2018) https://www.osce.org/odihr/elections/kyrgyzstan/374740 (last visited May 2019).
[1096] Rinat Tuhvatshin, Samarageit epizod 1. Kak server pravitel`stva Kyrgyzstana ispolzovali dlya popytki vliyania na prezidenskie vybory, [Samagate episode 1: how governmental server of Kyrgyzstan was used to attempt to influence the presidential election?], *Kloop*, Oct.26,2017, https://kloop.kg/blog/2017/10/26/samara_elections_kg/(last visited April 8,2019)

report on the results of the investigation was published in the Article as well.[1097] Investigation report highlighted that "*evidence strongly suggests that a government operated server in Kyrgyzstan contained a non-state website created to influence voters during the presidential election*."[1098]

Furthermore, *Kloop* continued that there were suspicions that *Samara* might have been used "*to track voters' intentions, and influencing their decisions by means of bribes and threats and as a managing tool for the agitation campaign of pro-government candidate Sooronbai Jeenbekov."*[1099] Government have denied all the accusations and State Registration Service reassured that samara.kg was not stored in governmental service and that all personal data of Kyrgyz citizens were kept safe and sound. Despite the demands for opening an investigation, government up to this date have been denying and refusing to launch the investigation. Recently on July 1st 2019, former President Atambayaev, once his ex-presidential immunity was lifted, publicly announced that Jeenbekov is not a legitimate President. This speech of Atambayev generated another wave of suspicions about Samara-gate and biometric data of citizens. After these events one cannot but recall judge Sooronkulova`s claims after she was removed from her position. Namely, that biometric data was necessary for the Government for the purposes of election falsification.[1100]

[1097] *Elections in Kyrgyzstan 2017- Exposing Samara, a Fraudulent Voter Management System*, Quirium Media, Foundation, https://www.qurium.org/alerts/kyrgyzstan/kyrgyzstan-election (last visited April 10,2019)
[1098] *Elections in Kyrgyzstan 2017- Exposing Samara, a Fraudulent Voter Management System*, Quirium Media, Foundation, https://www.qurium.org/alerts/kyrgyzstan/kyrgyzstan-election (last visited April 10,2019)
[1099] *Elections in Kyrgyzstan 2017- Exposing Samara, a Fraudulent Voter Management System*, Quirium Media, Foundation, https://www.qurium.org/alerts/kyrgyzstan/kyrgyzstan-election (last visited April 10,2019), Rinat Tuhvatshin, Samarageit epizod 1. Kak server pravitel`stva Kyrgyzstana ispolzovali dlya popytki vliyania na prezidenskie vybory, [Samagate episode 1: how governmental server of Kyrgyzstan was used to attempt to influence the presidential election?], *Kloop*, Oct.26,2017, https://kloop.kg/blog/2017/10/26/samara_elections_kg/(last visited April 8,2019)
[1100] Vlasti zayavili o bolshih problemah v ohrane biometricheskih dannyh [State Officials announced about big problems on the protection of biometric data] Kloop, (March 30, 2015), https://kloop.kg/blog/2015/03/30/vlasti-zayavili-o-bolshih-problemah-v-ohrane-biometricheskih-dannyh/ (last visisted March 15, 2019).

2. Rights Adjudication in Central Asia in the Context of External Power Dynamics: The Shifting Trend from Monism to Dualism

Unlike in Kyrgyzstan, Kazakh, Tajik and Uzbek CCs did not have a mechanism of individual complaints. Even though it was recently introduced in Tajikistan and is being introduced in Uzbekistan, the jurisprudence on fundamental rights protection of these states are limited. The issues of fundamental rights protection are usually raised in the context of either interpretation of the constitutional text or constitutional amendments. Lately a common pattern can be observed among Central Asian states, except for Uzbekistan, that was reflected in constitutional amendments. First, provisions on revocation of citizenship were introduced in constitutional texts. Second, constitutional provisions on the relationship between international law and domestic law were shifted from monism to dualism thus negatively effecting protection of human rights in international institutions as UN Human Rights Committee. In international law the relationship between international and domestic law is usually explained by two opposing theories: dualism and monism.[1101] Dualism assumes distinct characteristics of both systems that cannot alter one another. In case of a conflict between domestic law and international law dualism claims that domestic law prevails.[1102] Monism on the other hand

[1101] For information on these theories see Malanczuk Peter, Akehurst's Modern Introduction to International Law, (London: Routledge, 1997). Charlesworth Hilary, Madelaine Chiam, Devika Hovell, George Williams, The Fluid State: International Law and National Legal Systems, (Sydney, Australia: Federation Press, 2005).

[1102] Nijmann Janne, Andre Nollkaemper, *New Perspectives on the Divide between National and International Law*, (Oxford: Oxford University Press, 2007). Higgins Rosalyn, Problems and Process: International Law and How We Use It, (Oxford: Clarendon Press, 1994).

presumes that these two systems constitute one single legal order and in case of a conflict the norms of international law prevails.[1103]

Central Asian CCs except for Uzbekistan were involved in this process and have provided their opinions on these issues and it is particularly interesting to draw a parallel between main approaches and reasonings adopted by these courts in the context of fundamental rights protection. Before going into detailed analysis, it is important to highlight geopolitical factors that are common in the Central Asian context and it can be assumed that these factors also substantially influence Central Asian CCs decision-making process. First of all, all Central Asian states except for Uzbekistan[1104] are members of Russian-led Collective Security Treaty Organization (CSTO),[1105] that aims at strengthening peace, collective security, territorial integrity and cooperation in the region[1106]. Due to war in Syria and Afghanistan one of the key aspects of this organization was fight against terrorism and drug trafficking.[1107]Besides, the security sector, Central Asia is also actively involved in the Russian-led Eurasian Economic

[1103] Hans Kelsen, General Theory of Law and State, (1945). Ferrari-Bravo, Luigi, *International and Municipal Law: The Complementarity of Legal Systems*, in R. S. J. Macdonald, Douglas M. Johnston, The Structure and Process of International Law, (The Netherlands: Martinus Nijhoff, 1983).

[1104] Uzbekistan refused to prolong the membership in 1994, for further details see Protokol o Prodlenii Dogovora o Kollektivnoi Bezopasnosti [Protocol on prolongation of the treaty on Collective Security], Apr.20, 1994, https://en.odkb-csto.org/documents/documents/protokol_o_prodlenii_dogovora_o_kollektivnoy_bezopasnosti/ (last visited February 19, 2019)

[1105] Collective Security Treaty, Collective Security Treaty Organization, May 15,1992, https://en.odkb-csto.org/documents/documents/dogovor_o_kollektivnoy_bezopasnosti/ (last visited March 2, 2019)

[1106] Charter of the Collective Security Treaty Organization, Collective Security Treaty Organization, Oct. 7, 2002, https://en.odkb-csto.org/documents/documents/ustav_organizatsii_dogovora_o_kollektivnoy_bezopasnosti_/ (last visited March 2,2019)

[1107] Spisok podpisannyh dokumentov na sessii soveta Kollektivnoi Bezopasnosti ODKB 23 dekabrya 2014 goda Moskva [List of signed documents on the session of the Council of Collective Security of CSTO as of December 23, 2014 Moscow], Dec. 23,2014, https://en.odkb-csto.org/documents/documents/spisok_podpisannykh_dokumentov_na_sessii_soveta_kollektivnoy_bezopasnosti_odkb_23_dekabrya_2014_goda/ (last visited March 2, 2019)

Union (EAEU).[1108] These organizations from institutional point of view could be claimed as an imitation of the EU and NATO in the post-soviet region.[1109]

Thus, the membership in this organization and as implied by some experts the dominance of Russia in this organization and overall the Russian influence as a trend setter in the region, might be the reason and root causes of the wave of constitutional amendments regarding the status of international treaties and citizenship revocation.[1110] Accordingly, current section will analyze respective decisions of Kyrgyz, Kazakh and Tajik CCs. It is important to note that Kyrgyz Constitutional Chamber while reviewing the constitutionality of constitutional amendments analyzed and reviewed each provision separately. However, Kazakh and Tajik Courts avoided such detailed approach and rather chose to make a general review of all amendments at once.

2.1. The Experience of the Kyrgyz Constitutional Chamber

Besides geopolitical influence, in the context of Kyrgyzstan the shift from monism to dualism takes roots from a very sensitive issue. After April events of 2010 President Bakiev was overthrown from the presidency and the *Interim Government* was established. Unlike in 2005 first revolution[1111] 2010 was bloody and it is estimated to have caused the death of around 100 people who have been ordered by Bakiev and his regime to be shot from the roof top by snipers.[1112]

[1108] Treaty on the Establishment of the Eurasian Economic Community, (October 10, 2000) 2212 UNTS 309.
[1109] Zhenis Kembayev, Regional Integration in Eurasia: The Legal and Political Framework, 41.2 Review of Central and East European Law, 117-53 (2016).
[1110] Alexander Cooley, *Ordering Eurasia: The Rise and Decline of Liberal Internationalism in the Post-Communist Space*, 28.3 Security Studies,588-613 (2019).
[1111] Radnitz Scott, *What Really Happened in Kyrgyzstan?,* 17/2 Journal of Democracy (2006). Radnitz Scott, *Networks, Localism and Mobilization in Aksy, Kyrgyzstan*, 24/4 Central Asian Survey (2005)
[1112] Collins Kathleen, *Kyrgyzstan's Latest Revolution*, 22/3 Journal of Democracy, 22/3 (2011)

Once the *Interim Government* was established, it was a very unstable and tenuous time for Kyrgyzstan, especially in the southern part which resulted with the ethnic conflict between Uzbek minorities and Kyrgyz ethnic majority that caused hundreds of deaths, physical injuries and property damages.[1113] As a result, there were number of investigations conducted[1114] and governmental commissions established to investigate the events[1115], besides that number of local and international NGOs[1116] have also published independent reports on this issue.[1117] There was a clear difference in the outcome of these reports between governmental commissions and independent international inquiry commissions. First, Ombudsman report concluded that "*In the south of Kyrgyzstan there was a local conflict, which began by people of Uzbek nationality, such as K. Batyrov and others. They started this conflict, they financed, provoked."*[1118] National

[1113] According to the official numbers provided, 408 people were killed, 2574 people were injured, for more details see Zakluchenoe Nacionalnoi Komissii po vsestoronnemu izucheniu prichin, posledstviy i vyrabotke rekommendaciy po tragicheskim sobytiam, proizoshedshim na uge respubliki v Iune 2010 goda [Conclusion of the National Comission on eveluation of the root causes and consequences and recommendations regarding the tragic events that took place in the Southern part of the Republic in June 2010] 2011

[1114] Osenka Nezavisimoi Komissii Ombudsmena (Akiykatchy) Kyrgyzskoi Respubliki po trigicheskim sobytiam v iune 2010 goda, proizoshedshih v Oshkoi, Jalal-Abadskoi oblastyah i v gorode Osh. O sobludenii prav i svobod cheloveka i grazhdanina v Kyrgyzskoi Respublike v 2010 godu. Doklad Akyikatchy [Report of the Ombudsman of the Kyrgyz Republic. Evaluation of the independent Comission of Ombudsman of the Kyrgyz Republic on tragic events in June 2010 that took place in Osh, Jalal-Abad regions and on protection of rights and freedoms of invididuals and citizens of the Kyrgyz Republic in 2010], Bishekek 2011

[1115]Zakluchenoe Nacionalnoi Komissii po vsestoronnemu izucheniu prichin, posledstviy i vyrabotke rekommendaciy po tragicheskim sobytiam, proizoshedshim na uge respubliki v Iune 2010 goda [Conclusion of the National Comission on eveluation of the root causes and consequences and recommendations regarding the tragic events that took place in the Southern part of the Republic in June 2010] 2011; Otchet Vremennoi Deputatskoi komissii Jogorku Kenesha Kyrgyzskoi Respubliki po vyiavleniu i rassledovaniu obstoyatelstv i usloviy, privedshih k tragicheskim sobytiam, proizoshedshim v respublike v aprele-iune 2010 goda, i dache im politicheskoi ocenki [Report of the interim Deputy Comission of the Jogorku Kenesh (Parliament) of the Kyrgyz Republic on defining and investigating the circumstances and reasons of the tragic events that took place in the Republic within the period of April-June 2010 and providing a political eveluation for these events] June 9, 2011

[1116] Amnesty Int`l, *Kyrgyzstan: Partial Truth and Selective Justice: the Aftermath of the June 2010 Violence in Kyrgyzstan*, EUR 58/022/2010 (December 16,2010).

[1117] Where is the Justice?: Interethnic Violence in Southern Kyrgyzstan and its Aftermath, *Human Rights Watch*, August 16, 2010, https://www.hrw.org/report/2010/08/16/where-justice/interethnic-violence-southern-kyrgyzstan-and-its-aftermath (last visited February 15,2019).

[1118] Osenka Nezavisimoi Komissii Ombudsmena (Akiykatchy) Kyrgyzskoi Respubliki po trigicheskim sobytiam v iune 2010 goda, proizoshedshih v Oshkoi, Jalal-Abadskoi oblastyah i v gorode Osh. O sobludenii prav i svobod cheloveka i grazhdanina v Kyrgyzskoi Respublike v 2010 godu. Doklad Akyikatchy [Report of the Ombudsman of the Kyrgyz Republic. Evaluation of the independent Comission of Ombudsman of the Kyrgyz Republic on tragic

Commission evaluated June events as "*attempts to use the situation by various separatist groups led by K.Batyrov, supporters of Kurmanbek Bakiev and external forces interested in destabilizing the situation*".[1119]

Evidently, the main narrative of the Government about June events was a separatist attempt taken by the Uzbek minorities led by leaders as ethnic Uzbek as K. Batyrov and also contributed by overthrown President Bakiev. Furthermore, governmental reports clearly singled out Uzbeks as instigators of the conflict and also did not take into consideration that majority of victims were actually Uzbek minorities themselves.[1120]

Notably the independent international inquiry commission that was established upon the invitation of the *Interim Government* implied that if further intendent and impartial investigations will be conducted, the events might be characterized as crimes against humanity and highlighted as root causes of the conflict the failure of the *Interim Government* to take effective steps to prevent and stop conflicts.[1121] Furthermore, the report emphasized that the evaluation of the June events must be made in the political and historical context and noted the following "*under-representation of ethnic Uzbeks in public life and the rising force of ethno-nationalism in the politics of Kyrgyzstan*".[1122] Once the report was published it was received by Kyrgyz *Interim*

events in June 2010 that took place in Osh, Jalal-Abad regions and on protection of rights and freedoms of invididuals and citizens of the Kyrgyz Republic in 2010], Bishekek 2011, p. 102

[1119] Zakluchenoe Nacionalnoi Komissii po vsestoronnemu izucheniu prichin, posledstviy i vyrabotke rekommendaciy po tragicheskim sobytiam, proizoshedshim na uge respubliki v Iune 2010 goda [Conclusion of the National Comission on eveluation of the root causes and consequences and recommendations regarding the tragic events that took place in the Southern part of the Republic in June 2010] 2011;

[1120] *Id.*

[1121] Report of the Independent International Commission of Inquiry into the events in southern Kyrgyzstan in June 2010, *Kyrgyzstan Inquiry Commission*, May 3, 2011, https://reliefweb.int/report/kyrgyzstan/report-independent-international-commission-inquiry-events-southern-kyrgyzstan (last visited February 10, 2019)

[1122] *Id* p.2

Government aggressively and as an attempt to violate the sovereignty of Kyrgyzstan and the main head of the report was declared persona non grata.[1123]

Shortly after, deputy commission under the Parliament was established that published another report supporting the narrative of previous reports of Ombudsman and the National Commission. The report stated that "*the cause of the conflict was the actions of such separatist politicians as K.Batyrov and others and the organized criminal group, as well as the drug business, contributed to the incident".*[1124] Thus, all the assumptions about potential crimes against humanity were absolutely denied by the Kyrgyz Government and they have decided to conduct investigations themselves and try the suspects in ordinary courts of Kyrgyzstan. Number of international organizations and NGOs raised concerns about fairness of these investigations. Namely the reports suggested that victims of June events had been denied justice, lack of impartial and fair investigation and trial. Reports also stated that Kyrgyz authorities had been exercising discriminatory treatment against Uzbek minorities by conducting arbitrary arrest and torture against them.[1125] There were two important trials against ethnic Uzbek activists K.Batyrov and A. Askarov that later created tension between the Government of Kyrgyzstan and international organizations. K. Batyrov that had been repeatedly indicated in all governmental reports was tried in absentia and was found guilty under separatism charges and incitement of

[1123] Head Of Commission On Kyrgyz Violence Declared Persona Non Grata, *Radio Free Europe/Radio Liberty*, May26,2011,https://www.rferl.org/a/head_of_commission_on_kyrgyz_violence_declared_persona_non_grata/24205930.html (last visited February 10,2010) Banned Investigator Regrets Kyrgyz Probe Response, Institute for War and Peace Reporting ,9 June 2011, https://www.refworld.org/docid/4df720632.html (last visited Ferbruary 10,2019)
[1124] Otchet Vremennoi Deputatskoi komissii Jogorku Kenesha Kyrgyzskoi Respubliki po vyiavleniu i rassledovaniu obstoyatelstv i usloviy, privedshih k tragicheskim sobytiam, proizoshedshim v respublike v aprele-iune 2010 goda, i dache im politicheskoi ocenki [Report of the interim Deputy Comission of the Jogorku Kenesh (Parliament) of the Kyrgyz Republic on defining and investigating the circumstances and reasons of the tragic events that took place in the Republic within the period of April-June 2010 and providing a political eveluation for these events] June 9, 2011
[1125] Amnesty Int`l, *Will there be Justice? Kyrgyzstan`s Failure to Investigate June 2010 Violence and its aftermath*, EUR 58/001/2013, (June 11, 2013).

hatred among ethnic groups and was sentenced to life imprisonment.[1126] Batyrov had been granted an asylum status in Sweden and Kyrgyz government was refused on extradition request.[1127] Later Batyrov applied to UN Human Rights Committee claiming the violation of fair trial rights under the ICCPR by Kyrgyzstan, and the case remained pending for a long time.

Another case involved human rights activist A.Askarov ethnic Uzbek who had been documenting human rights abuses by law enforcement bodies in his hometown Bazar-Korgon. After the June events he was arrested and later found guilty as a complicit in the death of the police officer and for instigating ethnic hatred and for threatening constitutional order and was sentenced to life imprisonment.[1128] Askarov once exhausted all available domestic remedies, applied to UN Human Rights Committee and the Committee on April 2016 concluded that Kyrgyzstan violated its obligations under the ICCRP and that Askarov was "arbitrarily detained, held in inhumane conditions, tortured and mistreated, and prevented from adequately preparing his trial defense."[1129] Furthermore, the Committee also concluded that Kyrgyzstan was obliged to make reparations to Askarov and to conduct new trial "subject to the principles of fair hearings, presumption of innocence and other procedural safeguards"[1130] and if necessary to release Askarov immediately. Furthermore, in 2017 the report prepared by Norwegian Helsinki Committee on June 2010 events was found to be extremist report and was banned by the court

[1126] Prigovor Jalal-Abadskogo gorodskogo suda v otnoshenii K.Batyrova ot 28 oktyabrya 2011 goda [Sentencing decision of the Jalal-Abad city Court in relation to K.Batyrov] October 28,2011

[1127]Kyrgyzstan: Prominent Uzbek community leader's appeal hearing adjourned, *Radio Free Europe/Radio Liberty*, 22 December 2011, https://www.refworld.org/docid/4f1431dc1e.html (last visited February 17, 2019)

[1128] Prigovor Verhovnogo Suda Kyrgyzskoi Respubliki v otnoshenii A. Askarova ot 20 dekabrya 2011 goda [Sentencing decision of the Surpreme Court of the KR in relation to A. Askarov] December 20,2011.

[1129] Human Rights Committee, *Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2231/2012*, CCPR/C/116/D/2231/2012, 21 April 2016

[1130] Human Rights Committee, *Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2231/2012*, CCPR/C/116/D/2231/2012, 21 April 2016

order. The report contained some evidences based on interviews about serious violations of Uzbek ethnic minority during those events.[1131]

As it is evident, both cases, particularly Askarov`s case was very sensitive for Kyrgyz Government and had put the authorities in a difficult position. If the recommendations of international community were reassured, most of whom claim that Askarov was unjustly imprisoned, then this could have caused acute discontent of some highly nationalistic groups.

Therefore, this particular issue became one of the root causes of constitutional amendments adopted via referendum in 2016. In chapter 2, details about 2016 constitutional referendum was covered including all procedural violations and the general approach of the Chamber in terms of constitutionality of constitutional amendments. In this section, substantive analysis of one specific provision will be made, namely the one related to the status of international treaties.

2.2. 2016 Constitutional Amendment Case: Lowering the Status of International Human Rights Treaties

Background of the Case

The constitutional assembly that drafted the Constitution of 2010 consisted from number of civil society and human rights activists.[1132] In order to ensure that Kyrgyzstan will not repeat its previous two mistakes, the drafters decided to prioritize the norms of international human rights law and the Article 6 of the 2010 Constitution stipulated the following: "*The provisions of international treaties on human rights shall have direct action and be of priority in respect of*

[1131] Hronika Nasilia: sobytia iunya 2010 goda na uge Kyrgyzstana (oshskiy region) [The Cronicles of violence: June 2010 events in the South of Kyrgyzstan (Osh region)] Norwegian Helsinki Committee, Memorial Human Rights Center, Freedom House (2012).

[1132] Postanovlenie Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ob obrazovanii konstitucionnogo soveshania [The Decree of the Interim Government of the Kyrgyz Republic on establishment of the Constitutional Assembly] April 30, 2010 No. 29.

provisions of other international treaties."[1133] Thus, the norms of international human rights law as well as decisions of human rights institutions had priority over other international treaties as well as domestic law. Referring to this provision lawyers of Askarov based on recommendations adopted by the UN HRC could demand from Kyrgyz authorities an immediate release of Askarov. In 2016 constitutional amendments were introduced and Article 6 was reformulated accordingly: "*The procedure and conditions for the application of international treaties and generally recognized principles and norms of international law are determined by law."*[1134] Thus, as it is evident the amendments shifted the constitutional regulation and approach to international norms from monistic approach to dualistic.

Analysis of the Decision

The Chamber before analyzing introduced changes to Article 6 stated that each amended provision was considered for compliance with fundamental rights and freedoms of individuals, the permissibility of their restrictions; principles of a democratic, legal, secular state and the procedure for amending the Constitution, as provided for by Article 114 of the Constitution of the Kyrgyz Republic.[1135]

The Chamber continued that fundamental rights and freedoms of individuals are natural opportunities for a person and a citizen to use the basic benefits of the state in order to exist and develop as an individual. It is for this purpose that the status of a person and a citizen is reflected

[1133] Konstitucia Kyrgyzskoi Respubliki prinyataya referendumom 27 iunya 2010 goda [Constitution of the Kyrgyz Republic adopted by referendum] June 27, 2010 art. 6

[1134] Zakon Kyrgyzskoi Respubliki o naznachenii referenduma po proektu po proektu zakona Kyrgyzskoi Respubliki ot 2 noyabrya 2016 goda [Law of the Kyrgyz Republic on calling the referendum on introduced amendments to the Constitution of the KR] November 2, 2016
Postanovlenie Sentralnoi Izbiratelnoi Komissii Kyrgyzskoi Respubliki o resultatah referenduma KR ot 11 dekabrya 2016 goda [Resolution of the Central Election Commission of the Kyrgyz Republic on results of the referendum of

[1135] Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016

in the Constitution and the range of legal guarantees is established, the protection of which is ensured by all state bodies. The state, based on the principles of equality and justice, is obliged to ensure at the same time the protection of the values of the individual, society and the state, creating a balance of these values through legal mechanisms.[1136] Taking into account these provisions, the compliance of the norms of the draft amendments to the Constitution of the Kyrgyz Republic with an international agreement was checked. In this connection, Chamber concluded that the new wording of the Article 6 of the draft Law did not provide for the abolition or restriction of human rights and freedoms.[1137] This reasoning was justified by referring to the principle of *pacta sunt servanda*. Namely, the Chamber stated that under international law it is assumed that once international treaties are ratified, they create binding international legal norms for its participants as well as rights and obligations. The operation and application of international treaties implies strict fulfillment by all of its parties of the obligations arising from it, in other words, *pacta sunt servanda*.

Thus, the provisions of international treaties that have entered into force and are ratified by state party, must be implemented by the States parties voluntarily, on the basis of the principle of conscientious performance of obligations. The states themselves fulfill and control the implementation of the concluded agreement. In this regard, the proposed new wording of the second part of Article 6 of the Constitution implies the consolidation of organizational measures aimed at ensuring the implementation of international treaties, including human rights treaties ratified by Kyrgyzstan. Such a law may also include provisions aimed at the adoption of relevant legislative and other domestic legal acts, that is, legislative support of international treaties in

[1136] Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016
[1137] *Id.*

force in the Kyrgyz Republic and measures taken in case of violation of international treaty. Thus, Chamber concluded that the new wording of the Article 6 of the Constitution did not provide for the abolition or restriction of human rights and freedoms, therefore did not contradict to the existing principles on fundamental rights protection.[1138]

Another amended constitutional provision was in relation to right to citizenship. It is important to highlight that even before the amendments to Constitution in 2015, despite the absolute nature of the citizenship, Parliament amendment the law on citizenship which allowed the revocation of citizenship in case of the involvement in terroristic activities.[1139] Article 50 of the Constitution prior referendum stipulated that "*No one may be deprived of his/her citizenship and denied the right to change his/her citizenship*."[1140] After the referendum this norm stated "*No citizen can be deprived of his citizenship and the right to change his citizenship except in cases and in accordance with the procedure established by constitutional law*."[1141] Constitutional Chamber concluded the following on this issue.

First, the Chamber stated that the institution of citizenship is of a dual nature, on the one hand, it protects human rights and freedoms, and on the other hand it protects the interests of the state. The state, by granting a person rights and freedoms, guarantees the realization of his interests and opportunities, protection from unlawful actions due to the jurisdiction of the given state. In exchange, the state requires a person to observe the established rules of conduct and duties. Such a requirement is based on the principle of the sovereignty of the state and is aimed

[1138] Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016

[1139] Zakon o vnesenii Izmeneiy v nekotorye zakonodatelnye akty Kyrgyzskoi Respubliki [Law of the KR on introducing amendments to certain legal acts of the Kyrgyz Republic] January 27, 2015 No. 27. Article 9.

[1140] Konstitucia Kyrgyzskoi Respubliki prinyataya referendumom 27 iunya 2010 goda [Constitution of the Kyrgyz Republic adopted by referendum] June 27, 2010 art. 50 (prior to 2016 amendments)

[1141] Konstitucia Kyrgyzskoi Respubliki prinyataya referendumom 27 iunya 2010 goda [Constitution of the Kyrgyz Republic adopted by referendum] June 27, 2010 art. 50 (post 2016 amendments)

at the performance by the state of its functions.[1142] This provision is consistent with Article 15 of the Universal Declaration of Human Rights. Second, the Chamber continued that the deprivation of citizenship as a punishment sanction is practiced by many democratic states. Deprivation of citizenship is an extreme measure to which the state resorts, usually when the behavior of a citizen is not consistent with the interests and laws of the state. As a rule, deprivation of citizenship is a sanction against a certain person in connection with his behavior.[1143] The Kyrgyz Republic, guided by the principle of sovereignty, provided for in paragraph 1 of Article 1 of the Constitution of the Kyrgyz Republic, is free to choose the legal regulation on the issue of citizenship. Wherein the constitutional law must establish the grounds and procedure for deprivation of citizenship, precluding arbitrariness of actions in this direction. In this regard, the proposed amendment, according to which no citizen can be deprived of his citizenship and the right to change his citizenship except in the cases and manner established by constitutional law, cannot be considered as a discriminatory norm or unacceptable restriction of the rights and freedoms of a person and citizen. Thus, Chamber confirmed the constitutionality of this proposed amendment and justified it by referring to the principle of sovereignty.

Aftermath

As it was discussed in earlier chapters, the 2016 constitutional amendments were accepted via referendum.[1144] Parliament was supposed to adopt two important new laws in this field, namely the law on nationality and the law on implementation of international law. However, none of them have been adopted by Parliament yet.

[1142] Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016

[1143] *Id.*

[1144] Postanovlenie Sentralnoi Izbiratelnoi Komissii Kyrgyzskoi Respubliki o resultatah referenduma KR ot 11 dekabrya 2016 goda [Resolution of the Central Election Commission of the Kyrgyz Republic on results of the referendum of the Kyrgyz Republic on constitutional amendments] 11 December 2016.

2.3. The Experience of Kazakhstan: 2017 Constitutional Amendment Case

Background of the Case

In the context of Kazakhstan there were no evident tensions or sensitive political cases involved between Kazakh authorities and UN Human Rights Committee or other UN Human Rights Treaty Bodies. Most of the recommendations concerned women`s rights in the context of CEDAW.[1145] However, in 2017 when Nazarbayev announced about constitutional reforms and modernization of democratic institutions the similar wording just like in Kyrgyz constitution appeared in Kazakh constitution as well. Before the amendment, Article 4 of the Kazak Constitution stated that: "*International treaties ratified by the Republic take precedence over its laws and are applied directly, except when it follows from an international treaty that its application requires the issuance of a law*."[1146]

Proposed amendments reformulated the same Article accordingly: "*International treaties ratified by the Republic have priority over its laws. The procedure and conditions for the operation on the territory of the Republic of Kazakhstan of international treaties to which Kazakhstan is a party are determined by the legislation of the Republic*."[1147] In the same vein as in Kyrgyzstan, this provision shifted Kazakh approach on the relationship between domestic law and international law form monism to dualism.

2009 Interpretation of the Council

[1145]Committee on Elimination of Discrimination against Woman, *Views adopted by the Committee at its sixty-first session, Communication No. 45/2012, (*6-24 July 2015).
[1146] Konstituciia Respubliki Kazakhstan [Konst.RK] [Constitution of Republic of Kazakhstan] August 1995, Article 50 (prior 2017 amendments)
[1147] Konstituciia Respubliki Kazakhstan [Konst.RK] [Constitution of Republic of Kazakhstan] August 1995, Article 50 (post 2017 amendments)

It is important to note that back in 2009 the Council was requested to interpret the same Article in the context of the implementation of the obligations under the Customs Union (now EAEU).

Namely, the Prime Minister of the Republic of Kazakhstan requested the Council to interpret Article 4 and to explain how to implement decisions of the Commission of the Customs Union (later became EAEU) to which Kazakhstan was a member State and treaty of which was ratified by Kazakhstan.

The Council [1148] stated that although constitution of Kazakhstan did not contain a special rule providing for the possibility of the transfer/ delegation of certain state powers to international organizations, this right can be deduced from the preamble and Article 8 of the Constitution. The preamble stipulated that the people of Kazakhstan is willing to occupy a worthy place in the world community, and Article 8 of the Constitution requires respect for the principles and norms of international law, on pursuing a policy of cooperation and good neighborly relations between states. [1149] Kazakhstan as a member state of international organization is obliged to carry out all necessary organizational and legal measures aimed at the fulfillment of such a requirement, including the harmonization of domestic law. Therefore, Council concluded that acts of the *Commission of Customs Union* are binding under the Treaty. In case of the conflict between the acts of the Commission and other regulatory legal act of the Republic of Kazakhstan, then as a rule, the legal norm adopted by the Commission shall prevail. At the same time, the Council underscored that decisions of international organizations and their

[1148] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 5 noyabrya 2009 goda No.6 ob ofisialnom tolkovanii norm stat`I 4 Konstitusii Respubliki Kazakhstan primenitelno k poryadku ispolnenia resheniy mezhdunarodnyh organizaciy I ih organov [Normative Regulation of the Constitutional Council of the Republic of Kazakhstan as of November 5 2009 No.6 on official interpretation of the norms of Article 4 of the Constitution of the Republic of Kazakhstan concerning the implementation of decisions of international organizations and their bodies] November 5,2009 No.6

[1149] Konstituciia Respubliki Kazakhstan [Konst.RK] [Constitution of Republic of Kazakhstan] August 1995.

bodies cannot violate the provisions of the Constitution that guarantees the sovereignty of the Republic and inadmissibility of changing the unitarity and territorial integrity of the state, the form of government of the republic established by the Constitution.

Analysis of the Decision (2017 Interpretation)

Thus, with this decision in mind, let us analyze of the 2017 aonstitutional amendments case. Unlike Kyrgyz Chamber, the Council of Kazakhstan did not analyze each proposed provision separately, rather the decision included one chapeau justification which was presumably applicable to all provisions. The Council stated that number of amendments and additions to the Constitution[1150] made by the law aimed at ensuring its supremacy in the system of existing law and unconditional execution throughout the country, improving state management, strengthening the protection of citizens' constitutional rights and freedoms, ensuring their constitutional duties.[1151] The Council continued that the entire recent history of the formation and development of Kazakhstan as an independent, strong and successful state with a developed civil society is the result of the adoption of modern constitutional values, fundamental principles of the Republic of Kazakhstan and their subsequent implementation. Furthermore, the Council continued that proposed amendments fill constitutional values and fundamental principles of the Republic with new content. Thus, as one can notice the reasoning resembled more a proclamation rather than a judicial decision, it did not engage with the analysis

[1150] Zakon Respubliki Kazakhstan o Vnesenii Izmeneniy I Dopolneniy v Konstituciu Respubliki Kazakhstan [Law of the Republic of Kazakhstan on Introducing Amendments to the Constitution of the Republic of Kazakhstan] March 10 2017, № 51-VI.

[1151] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017

of the relationship between domestic law and international law, furthermore, it disregarded its previous interpretation on that the Council made in the context of the Customs Union.[1152]

In addition to that, proposed amendments included a new norm on the revocation of citizenship. Namely, before amendments the provision stated, "*Under no circumstances may a citizen of the Republic be deprived of citizenship, the right to change his citizenship, nor can he be expelled from Kazakhstan*." After amendments it stipulated: "*Deprivation of citizenship is allowed only by a court decision for the commission of terrorist crimes, as well as for causing other grave harm to the vital interests of the Republic of Kazakhstan*." It is important to highlight that just the same as in Kyrgyzstan, prior to the amendments to the constitution, Kazakh parliament amended the law on citizenship regulating the possibility of revocation in case of the involvement in terroristic activities.[1153]

Just like with previous part of the reasoning, on this issue, the Council did not go into details with analyzing the revocation of citizenship, rather the Council preferred to resort to general terms. Namely, it stated that the proposed amendments upgraded the degree of protection of human rights and freedoms. In Council`s opinion it was reflected in following ways.[1154] First, the Commissioner for Human Rights had gained constitutional status. Second, the judicial system and prosecutor's office was strengthened. Third, President can challenge the

[1152] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 5 noyabrya 2009 goda No.6 ob ofisialnom tolkovanii norm stat`I 4 Konstitusii Respubliki Kazakhstan primenitelno k poryadku ispolnenia resheniy mezhdunarodnyh organizaciy I ih organov [Normative Regulation of the Constitutional Council of the Republic of Kazakhstan as of November 5 2009 No.6 on official interpretation of the norms of Article 4 of the Constitution of the Republic of Kazakhstan concerning the implementation of decisions of international organizations and their bodies] November 5,2009 No.6

[1153] Zakon o vnesenii Izmeneiy v nekotorye zakonodatelnye akty Respubliki Kazakhstan [Law of the RK on introducing amendments to certain legal acts of the Republic of Kazakhstan] December 24, 2015 No. 421-V.

[1154] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017

constitutionality of already promulgated laws in Constitutional Chamber. Furthermore, strengthening parliamentary control over the Government, as well as the institution of constitutional control, is an indispensable trend in the development of a democratic and legal state, testifying to the commitment of the Republic to the idea of the rule of law.[1155]

The Council did not explicitly state it, however, based on abovementioned reasoning one can assume that perhaps Council was suggesting that these new provisions were creating a new national mechanism of human rights protection. Thus, one can conclude that similar with the issue on international human rights norms, in case with revocation of citizenship the Council was also promoting the principle of sovereignty.

2.4. The Experience of Tajikistan: 2016 Constitutional Amendment Case

Background of the Case

The wave of constitutional amendments happened in Tajikistan as well. Particularly Article 14 was amended followingly: "*Restrictions on the rights and freedoms of a person and citizen are allowed only with the aim of ensuring the rights and freedoms of others, public order, protecting the foundations of the constitutional order, state security, national defense, public morality, public health and the territorial integrity of the republic*."[1156] Furthermore, the norm on citizenship was revised to state the following: "The procedure for the acquisition and termination of citizenship of the Republic of Tajikistan is governed by constitutional law."[1157]

Analysis of the Decision

[1155] *Id.*
[1156] Konstituciia Respubliki Tajikistan [Konst.RT] [Constitution of Republic of Tajikistan] November 6, 1994, Article 14 (after 2016 amendments)
[1157] Konstituciia Respubliki Tajikistan [Konst.RT] [Constitution of Republic of Tajikistan] November 6, 1994, Article 15 (after 2016 amendments)

The Court was asked to review the constitutionality of proposed amendments and as discussed in previous chapters, the reasoning of the court lacked consistency, clarity and specific test. The Court in general terms stated that proposed changes to the Constitution correspond to the current stage of development of the state and society[1158], and were aimed at strengthening the foundations of the constitutional system, protection of human rights and freedoms, strengthening the constitutional status of citizenship, legislative, executive and judicial power, development of local governments, active involvement of citizens, especially young people, in political life and government.[1159] However, the Court did not specifically analyze or discussed examples of how exactly these amendments pursue the aims mentioned above. Moreover, no detailed analysis neither on limitation of rights nor on citizenship revocation was made.

3. Conclusion

In this chapter the adjudication of constitutional rights in Central Asia and East Asia was analyzed in the context of broader socio-political geopolitical dynamics. Based on the analyzed cases, one can conclude that when constitutional rights related cases are politically charged or influenced by internal or external factors and political dynamics, these courts tend to adopt a different approach depending on timing, and broader socio-political context. South Korean CC`s decision on *Conscientious Objection* demonstrated that with gradual strengthening of the civil society and consistent criticism of major international human rights organization as UN Human Rights Committee, the KCC gradually shifted its position on this issue as well. The *Same-Sex*

[1158] Postanovlenie Konstitucionnogo Suda Respubliki Tadjikistan po predstavleniu Madjlisa nemoyandan Oli Respubliki Tajikistan ob Opredelenii sootvestvia proekta izmeneniy I dopolneniy vnosimyh v Konstituciu Respubliki Tadjikistan [Ruling of the Constitutional Court of the Republic of Tajikistan upon the referral of Parliament on reviewing the constitutionality of proposed amendments to the Constitution of the Republic of Tajikistan] February 4, 2016.
[1159] *Id.*

Marriage case demonstrated that the support of the DPP of this agenda played a crucial role on the outcome of the case. Both cases led to the dialogue among branches and subsequent enforcement of CCs decisions by political actors irrespective of political sensitivity. Whereas in Kyrgyz *Biometric Registration* case, it led to the firing of the Judge Sooronkulova. Thus, the central proposition of the dissertation on incrementality of the transition and dependence of the transition from the willingness of the political branches to become agents change also holds in fundamental rights issues that are politically sensitive.

Furthermore, the chapter revealed that in the context of Central Asia, internal political dynamic and the fundamental rights related jurisprudence of these Courts are being shaped by external geopolitical factors, thus one can observe an emerging trend among these Courts where they are promoting the shift from monism to dualism on norms of international law, particularly in the field of human rights protection and pluralistic approach in norms related to regional organizations. The author of this dissertation argues that such a two-fold trend in treatment of the norms of international law is an alarming tendency for Central Asian states. This issue will be discussed in more details in part I, section 3 of the chapter 5 of the dissertation.

CHAPTER 5 Patterns of Learning: Lessons from Constitutional Courts of Central Asia with Comparative Elements from Taiwan and South Korea as an Added Value to Existing Global Discourse on Judicial Review

This chapter provides a synthesis of all previous chapters based on an analysis of shared patterns and anti-patterns of Central Asian and East Asian CCs in the context of the dissertations`s primary research questions. First, the causes of success and failure of CCs. Second, the added value of the comparative study of Central Asian and East Asian CCs to the current global discourse on judicial review. Furthermore, the chapter will particularly contextualize lessons learnt from Central Asian CCs into a global discourse on judicial review. Finally, it will address existing challenges that Central Asian CCs are facing or will face in the nearest future.

1. The Role and Success of Constitutional Courts as Agents of Constitutional Transformation in Central Asia

What constitutes success for constitutional courts and how can we assess and measure that success. Methodologically[1160] there are different approaches taken by scholars. Some view it predominantly as part of the quantitative Large N constitution assessment.[1161] Others believe that it should be part of the small N qualitative study.[1162] Some scholars suggest a combined

[1160] For overview of the methodological challenges see David Law, *Constitutions*, *in* Peter Cane, Herbert Kritzer, The Oxford Handbook of Emperical Legal Research, 376-386 (Oxford University Press, 2010).
[1161] David Law, Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012). Anne Mauwsee, Mila Versteeg, *Quantitative Methods for Comparative Constitutional Law*, *in* Maurice Adams, Jacco Bonhoff (eds), Practice and Theory in Comparative Law,(Cambridge University Press, 2012).
[1162] Vicki Jackson, Constitutional Engagement in a Transnational Era, (Oxford Univ. Press, 2010).

methodology of both.[1163] This dissertation claimed that both methods will fail if these courts are not placed into their broader political, historical, economic and transitional context. One of the main premises of the dissertation involved Roux`s proposition on constitutional transformation, namely, that the transformation and formation of judicial review regimes happen incrementally and largely depend on the commitment of the political branches.[1164] This section pursues two main objectives. First, it will revisit Chapter 2 and will assess the role and success of Central Asian CCs in cases on mega politics in the context of Roux`s proposition on inceremental change. Second, following the exploration of Chapter 3 in cases involving institutional conflicts, the role and success of CCs will be measured with reference to two interrelated factors: (1) the role of the constitutional text in the case of the of Central Asian courts and (2) relations of CCs to political branches and their ability of making the branches cooperate and dialogue with each other in the spirit of constitutional checks and balances.

1.1.Patterns in Cases on Mega Politics

The jurisprudence of Central Asian and East Asian CCs on mega politics and politically sensitive questions confirmed the hypothesis suggested by Roux on incremental change of the transformation of judicial review. Exogenous shocks took place in both regions. In the context of Central Asia, it was the collapse of the Soviet Union and the move towards democratization. In the context of South Korea and Taiwan they have also experienced colonialism, authoritative military regimes and then headed towards democratization. However unlike in Taiwan and South Korea, Central Asian CCs did not succeed, rather soon after the establishment they became tamed and served as a façade CCs under strong super-presidents. The cases analyzed in chapter 2

[1163] Sujit Choudhry, *Method in Comparative Constitutional Law: A Comment on Law and Versteeg*, 87 N.Y.U. L. Rev. 2078 (2012).
[1164] Theunis Roux, The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis, 297 (Cambridge: Cambridge University Press, 2018)

in combination with the historical and political background of these courts discussed in Chapter 1 enables one to see the unwillingness of legal and political actors of Central Asia to foster the transformation. As it was mentioned in Chapter 1, unlike in Eastern European states the revolution from below never happened in Central Asia, and transition mostly reflected the top-down approach undertaken by former soviet elite[1165] with the continued strength of "*subnational clan identities and patronage networks."*[1166] Furthermore, none of these states have gone through the process of decommunization,[1167]rather they have retained the soviet[1168] approach to law[1169] and elements of soviet law[1170] with pervasive legalism[1171] and formalism.[1172] Despite the fact that Central Asian states adopted new democratic constitutions, actively promoted economic and other legal reforms, they have retained the legacy of soviet institutions[1173] as Prokuratura and

[1165] Uuriintuya Batsaikhana, MarekDabrowski, Central Asia — Twenty-Five Years After the Breakup of the USSR, 3.3 Russian Journal of Economics, 296-301 (2017).

[1166] Sally Cummings, Power and Change in Central Asia, Politics in Asia, (Routledge, 2002). John Anderson, Kyrgyzstan: Central Asia's Island of Democracy*? (* London: Routledge, 1999). Collins, Kathleen, Clans, *Pacts, and Politics in Central Asia*, 13/3 *Journal of Democracy* (2002). Murzakulova Asel, Schoeberlein John, *The Invention of Legitimacy: Struggles in Kyrgyzstan to Craft an Effective Nation-State Ideology*, 61/7 Europe-Asia Studies *(2009)*. Huskey Eugene, Iskakova, Gulnara, *Narrowing the Sites and Moving the Targets*, 58/3 Problems of Post-Communism, 58/3 (2011). For an overview of constitutional framework of Central Asian states see Newton Scott, The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis. (Bloomsbury Publishing 2017)

[1167] Uuriintuya Batsaikhana, MarekDabrowski, *Central Asia — twenty-five years after the breakup of the USSR*, 3.3 Russian Journal of Economics, 296-301 (2017).

[1168] For more on socialist legality see Kazimierz Grzybowski, Soviet Legal Institutions: Doctrines and Social Functions, 172 (University of Michigan Press, 1962).

[1169] Armen Mazmanyan, *Constitutional Courts,* in Pippa Norris, Alessandro Nai, Election Watchdogs: Transparency, Accountability and Integrity (eds), (Oxford University Press, 2017). Havard Baekken, Law and Power in Russia: Making Sense of Quasi-legal practices (Routledge, 2019). Kathryn Hendley, *Who Are the Legal Nihilists in Russia?*, 28.2Post-Soviet Affairs, 149-186 (2012).

[1170] See chapter3 the ideological foundations of soviet law, chapter 4 sources of soviet law in William Butler, Soviet Law (second edition), (London Butterworths, 1988). Harold Berman, Justice in the USSR: an Interpretation of Soviet Law, 13-30 (Harvard University Press, 1963).

[1171] Scott Newton, Law and Making of the Soviet World: The Red Demiurge (Routledge, 2015). Harold Berman, *The Spirit of Soviet Law*, 23 Washington Law Review and State Bar Journal, 152 (1948).

[1172] Gordon B. Smith, Soviet Politics: Continuity and Contradiction, 137–62 (London: Palgrave, 1988). Andrew Wilson, Virtual Politics: Faking Democracy in the Post-Soviet World, chapter 8 (Yale University Press, New Haven , CT, 2005). Sean P. Roberts, Converging party systems in Russia and Central Asia: A case of authoritarian norm diffusion? *Communist and Post-Communist Studies*, p. 147-157 (2015)

[1173] Konstantin Syroezhkin, *Russia: On the Path to Empire?* In Boris Rumer (ed.), Central Asia at the end of the Transition 152 (M.E.Sharpe, Inc, 2005).

KGB.[1174] Moreover, the public educational system,[1175] particularly legal education continued to be grounded on the soviet style[1176] of legal education[1177] with strong emphasis on formalism, legalism [1178] and extreme positivistic approach to law. [1179] This is in sharp contrast to the fundamental legal education reforms that were undertaken in Taiwan[1180] and South Korea.[1181] Soviet legal culture never assumed law as "*objective virtue*", but only as "*man-made rule*" deeply rooted on procedural formality. [1182] This according to Mazmanyan "*seriously complicated[1183] the development of post-Soviet constitutional systems*".[1184]

[1174] Richard Sakwa , *Constitutionalism and Accountability in Contemporary Russia: The Problem of Displaced Sovereignty*, in Gordon Smithand Robert Sharlet(eds) Russia and its Constitution: Promise and Political Reality, chapter 1 (Martinus Nijhoff , Leiden , 2007). more on legalism and formalism see William Butler, *Jus and Lex in Russian Law*, in Denis J Galliganand Marina Kurkchiyan (eds.), Law and Informal Practices: the Post-Communist Experience 50-60 (Oxford University Press, 2003). Judith Shklar, Legalism: Law, Morals, and Political Trials 140-60 (Harvard University Press, 1964). Armen Mazmanyan, *Constrained, Pragmatic Pro-democratic: Appraising Constitutional Courts in Post-Soviet Politics*, 43.4 Communist and Post-Communist Studies (2010).

[1175] Carolyn Kissane, *Education in Central Asia: transitional challenges and impacts*, in Amanda E. Wooden, Christoph H. Stefes (eds.) The Politics of Transition in Central Asia and the Caucasus: Enduring Legacies and Emerging Challenges, 226-238 (New York: Routledge, 2009).

[1176] For more information on Soviet legal education see William Butler, Soviet Law (second edition), 64-75 (London Butterworths, 1988).

[1177] Maria Voskobitova, Olga Shepeleva, Arkady Gutnikov, *Legal Education in Russia: Historical Overview and Current Reforms*, in Shuvro Prosun Sarker (ed.), Legal Education in Asia, 139 (Eleven International Publishing, 2014).

[1178] Kim Lane Scheppele, *Autocratic Legalism*, 85 The University of Chicago Law Review (2018).

[1179] Aigul Kantoro Kyzy, *Does the Large Number of Universities in Kyrgyzstan Reflect the Quality of Higher Education?*, Central Asian Bureau for Analytical reporting, (July 10, 2019) https://cabar.asia/en/is-the-large-number-of-universities-in-kyrgyzstan-reflect-the-quality-of-higher-education/?fbclid=IwAR17BT_vdIvsvo-XBbf7K_SzJFZ_B_QsHPs9h9G5gzuTdCDoYT5RIJVbWGA (last visited July 15, 2019).
World Bank, *Belt and Road Economics: Opportunities and Risks of Transport Corridors,* Advance Edition. (World Bank, Washington, DC. 2019).

[1180] Thomas Chih-hsiung Chen, *Legal Education in Taiwan: A Plural System in Transition*, in Shuvro Prosun Sarker (ed.), Legal Education in Asia, 155 (Eleven International Publishing, 2014). Tay-Sheng Wang, (translated by Sean Cooney), *The Development of legal education in Taiwan: an analysis of the history of law and society*, in Stacey Steele, Kathryn Taylor (eds.) Legal Education in Asia: Globalization, change and contexts, 137 (New York: Routledge, 2010).

[1181] Rosa Kim, *Legal Education in South Korea: Challenges in Transition*, in Shuvro Prosun Sarker (ed.), Legal Education in Asia, 197 (Eleven International Publishing, 2014). Simon Spencer Reyner Lee, *Legal Education in Korea: new law school reforms*, in Stacey Steele, Kathryn Taylor (eds.) Legal Education in Asia: Globalization, change and contexts, 169 (New York: Routledge, 2010).

[1182] Robert Sharlet, *Stalinism and Soviet Legal Culture*, in Robert C. Tucker, Stalinism: Essays in Historical Interpretation, (Transaction Publishers, 1999).

[1183] For instance similar challenges now can be observed in Armenia and Moldova. For more information see Armen Grigoryan, *Political Crisis Underlines Need for Constitutional Reform in Armenia,*16.81 Eurasia Daily Monitor Volume, (2019). Legal Resources Centre for Moldova, *Brief account of latest developments in Moldova*, June 11, 2019 https://crjm.org/en/en-brief-account-of-latest-developments-in-

The Constitutional Chamber of Kyrgyzstan was an exception among other Central Asian CCs. In both cases involving mega politics the Chamber tried to set the ground for transformation of constitutionalism. However, the attempts to integrate new concepts were perceived both by the legal community and political actors very harshly. The political question doctrine incorporated in the case involving the *Decrees of the Interim Government* was simply misunderstood by the majority of the legal community.[1185] The Chamber was accused of not following formal rules stipulated in the *Law on the Constitutional Chamber* and of departing from strict formalism, thus abusing its power. The conditional constitutionality doctrine (inspired by the South Korean CC) in the case involving the immunity of the ex-president[1186] triggered a tension between deputies and judges of the chamber where judges again were condemned for abusing their power by not strictly following the norms written in the law on Constitutional Chamber. Because of the un-readiness and immature level of other governmental institutions grounded on strict formalism and legalism the consequences of the decision led to a cycle of legal and political events[1187], up to the political tension, resulting in the detention of ex-president with the involvement of special forces and the death of the servicemen. This example also

moldova/?fbclid=IwAR2Fk_qujdOwI9nTHaKY-mHHi2hnk5WtV2VwPHTGryeLoPCUwmfJucRf9eo (last visited June 20,2019).

Legal Resources Centre for Moldova, *Declaration of the National Platform of the Civil Society Forum of the Eastern Partnership Regarding the situation in the Republic of Moldova*, June 9, 2019 https://crjm.org/en/declaratia-platformei-nationale-a-forumului-societatii-civile-din-parteneriatul-estic-privind-situatia-din-republica-moldova/?fbclid=IwAR1_pscxq3mIxaepBq7QB8MpRcuibqXn-uwZV0AGfVxF6haujmaBRHgzOt8 (last visited June 20, 2019).

[1184] Armen Mazmanyan, *Constitutional Courts*, in Pippa Norris, Alessandro Nai, Election Watchdogs: Transparency, Accountability and Integrity (eds), 18 (Oxford University Press, 2017).

[1185] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverki konstitucionnosti dekretov Vremennogo Pravitelstva KR o nacionalizasii ot 11 iulya 2014 goda [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on case involving the constitutionality of decrees of Interim Government of the Kyrgyz Republic on nationalization] July 11, 2014.

[1186] Reshenie Konstitucionnoi Palaty po delu o proverke constitucionnosti stati 12 Zakona o Garantiah Prezidenta KR [Decision of Constitutional Chamber on reviewing the constitutionality of Article 12 of the law on Guarantees of the Presidents] October 3, 2018.

[1187] Glava Konstitucionnoi Palaty Poluchil Preduprejdenie ot Dissiplinarnoi Kommissii [The Chairman of the Constitutional Chamber received warning from the disciplinary commission], Vesti.kg (May 24,2019).

supports Roux claim that transformation of the "*judicial review regime*" cannot happen without the intention of legal and political actors.[1188]

Furthermore, the ex-presidential immunity case of the Kyrgyz Constitutional Chamber is a good lesson for other Central Asian courts. Generally, in the context of Post-Soviet Central Asia the status of "ex-president" is a very sensitive issue and to a certain extent a trap for all sitting presidents. By constantly adjusting the legal framework and the Constitution to the political situation in order to strengthen the positions of ruling elites, Central Asian sitting presidents trap themselves in legal lawlessness, when in the eyes of the authorities and society the Constitution and laws are nothing more than written pieces of paper that can always be revised and replaced. As a result, after losing power, ex-presidents may become victims of the system that they themselves created, a system where principles of legality are ignored, independent courts are absent, and the repressive power apparatus remains. Therefore, in this context the role of CCs is extremely important, if they want to make constitutions matter and to cultivate a vibrant culture of rule of law and constitutionalism, these courts should start adopting principled decisions that will strike a fair balance between law and politics.

In South Korea in the *December 12 Incident Non-institution of Prosecution Decision Case* the overall approach taken by the KCC was not in engaging with the text of the Constitution,[1189] the Court did not clearly identify what constitutes the scope of the prosecutorial discretion and what does arbitrary decision mean. Instead it looked more of an engagement with philosophy and history, more importantly the entire decision of the Court seemed like an attempt of the court to preserve the legitimacy of the current regime and system but not legitimacy of the

[1188] Theunis Roux, The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis, 297 (Cambridge: Cambridge University Press, 2018).
[1189] Constitutional Court [Const.Ct.], 1996 Hun-Ka2, February 16, 1996, (KCCR,51) (S.Kor.).

Constitution. This particular decision was perceived extremely negatively by the public and in further cases involving the transitional justice the Court would be taking a different approach.

In the *May 18 Incident Non-institution of Prosecution* decision**,** unlike in previous case, the language of the KCC was different, it did not heavily rely on legal-philosophical arguments, rather the KCC pointed to the text of the Constitution and delivered the decicion strictly based on the text and principles guaranteed by the Constitution.[1190] If in the first case the KCC seemed to be preserving the legitimacy of the regime, this time it was deliberately preserving the legitimacy of the Constitution. Perhaps for this reason the decision was positively accepted by the public and pushed the President to reconsider his policy on this issue and adoption of the special act.[1191]

In Taiwan, three cases demonstrated how the Judicial Yuan have coped with sensitive questions. Most of the times the Judicial Yuan`s decisions were shaped by overall political context. In the first case the internal divide within the KMT (old generation of first term elected members v. the new generation of KMT) in combination with public demonstrations have influenced the court to change its opinion from *Interpretation No. 31* and asking the members to step down and be re-elected.[1192] The second case showed that the Judicial Yuan was more conservative, since the KMT on this issue was not divided and the DDP have not yet become a strong opposition on this issue.[1193] While deciding *Interpretation No. 499*,[1194] the Judicial Yuan acted in the split political context when the DDP emerged as a strong opposition and the first DPP president was elected. Thus in this context the decision of the Court was more activist and

[1190] Constitutional Court [Const.Ct.], 1995 Hun-Ma221, December 15, 1995, (KCCR,697) (S.Kor.).
[1191] Constitutional Court [Const.Ct.], 1995 Hun-Ma246, January 20, 1995, (KCCR,15) (S.Kor.).
[1192] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 261 (1990).
[1193] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 272 (1991).
[1194] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000).

bold.[1195] Finally, all these decisions were also accompanied with the gradual expansion of constitutional review power in Taiwan through constitutional and statutory amendments and judge made law as well.[1196]

Thus one cannot but notice, that CCs of South Korea and Taiwan in cases involving mega politics gradually, depending on the readiness and willingness of other legal and political actors, were able strike a fair balance between law and politics divide and deliver principled decisions that were acceptable both on legal and political accounts. Such a reactive approach combined with adherence to the text of the Constitution enabled these courts to successfully contribute to the facilitation of transition to democracy.

1.2. Patterns in Cases on Institutional Conflicts

How should constitutional courts adjudicate separation of powers disputes and what approach these courts should take while resolving such disputes? The measure of success of Constitutional Courts inevitably leads to a debate on the moral justification of judicial review and to the never-ending debate on the role of the judiciary in democracy, namely the relationship between law/politics and which institution would have the final say: elected parliament or

[1195] Some scholars argue that post transition period is transforming the Court into irrelevant institution. For more information, see Ming-Sung Kuo, Moving *Towards a nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan`s Constitutional Politics*, 25 Pacific Rim Law and Policy Journal, 597 (2016).

[1196] On July 1997 Amendments following changes were introduced: "The budget of the Judicial Yuan shall be independent, no longer requiring the approval of the Executive Yuan" Besides constitutional amendments powers and jurisdiction of the Judicial Yuan was expanded via ordinary law and interpretations of the court. Standing requirements before the Judicial Yuan were loosened by the Constitutional Interpretation Procedure Act (1993) congressional minorities became able to challenge the constitutionality of laws by petitioning the Court. Standing requirements were loosened to include judges of different level (judicial referral) Interpretation 371 (1995). Power to invalidate constitutional amendments (Interpretation 499). Power to adjudicate vertical SOP (Local Government Act). Finally, the Referendum Act, enacted in 2003, also prescribed that referendum disputes regarding the vertical separation of powers should be settled in accordance with the Court's constitutional decisions. Owing to these revisions, the Court has more opportunities to step into the political arena.

unelected judges.[1197] Constitutional courts are expected to be facilitators of dialogue betweenthe other branches and serve as a forum for reasoned deliberation.[1198]

Second, from a legal account these courts are expected to say what the law is[1199] and base their decisions exclusively on the text of the Constitution,[1200] be it written or unwritten.[1201] If the text is silent, then the decision shall be grounded on legal culture and tradition.[1202] Therefore, when we assess the jurisprudence of constitutional courts on institutional conflicts the most important thing is the value of comparing how these courts have approached the text of the Constitution and what their attitude was towards the text in various circumstances such as constitutional silence or an express constitutional prescription. Furthermore, it is also crucial to

[1197] Alexander Bickel, The least dangerous branch, (Yale University Press, 1986).

[1198] Philip Pettit, *Depoliticizing Democracy*, 17.1 Ratio Juris, 52 (2004). Samuel Huntington, *Chapter III: the United States*, in Huntington, Crozier, Watanuki, The Crisis of Democracy: A Report on the Governability of Democracies to the Trilateral Commission, (New York University Press, 1975). John Dewey, The Public and its Problems, 143-84 (Ohio University Press/Swallow Press, 1927). Nadia Urbinati, *Unpolitical Democracy*, 38.1 Political Theory, (2010). Benjamin Barber, Strong Democracy, (Berkeley, University of California Press, 1984). Richard Bellamy, Political Constitutionalism, (Cambridge University Press, 2007). George Thomas, *Recovering the Political Constitution: the Madisonian Vision*, 66.2 Review of Politics, (2004). Jurgen Habermas, Between facts and norms: contributions to a discourse theory of law and democracy, 447-48 (Cambridge, Mass: MIT Press, 1996). John Rawls, Political Liberalism, (Columbia University Press, 1993). Joshua Cohen, *Chapter 3: Deliberation and Democratic Legitimacy*, in James Bohman, William Rehg (eds), Deliberative Democracy (Boston: MIT Press, 1998). Donald Horowitz, *Constitutional Design: Proposals versus Processes*, in Andrew Reynolds (eds.), The Architecture of Democracy, (Oxford University Press,2002).

[1199] Hans Kelsen, Pure Theory of Law, translated by Knight. Berkeley, (CA: University of California Press, 1960). Austin John, The Province of Jurisprudence Determined. (London: John Murray, 1832). Jeremey Bentham, An Introduction to the Principles of Morals and Legislation. (New York: Hafner Publishing Co., 1948). Jeremy Bentham, Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution, ed. P. Schofield, C. Pease-Watkin, and C. Blamires, 317-30 (Oxford, 2002).

[1200] H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harvard Law Review 593, (1958). Hart, H. L. A. The Concept of Law (2 ed.). (London: Oxford University Press,1994). Hart, H. L. A. The Concept of Law (1961), (Oxford University Press, 2012). Hart, H. L. A. The Concept of Law (2 ed.). 123-30, (London: Oxford University Press,1994).

[1201] Joseph Raz, Ethics in the Public Domain Essays in the Morality of Law and Politics, 350-60 (Oxford University Press, 1994). Hart, H. L. A. The Concept of Law (2 ed.). 123-30, (London: Oxford University Press,1994). Joseph Raz, The Authority of Law: Essays on Law and Morality, 47-50 (Oxford: Clarendon P, 1979). Joseph Raz, Between Authority and Interpretation, 169 (Oxford: Oxford University Press, 2009). Joseph Raz, Ethics in the Public Domain Essays in the Morality of Law and Politics, (Oxford University Press, 1994).

[1202] Ronald Dworkin, Taking Rights Seriously, (Cambridge: Harvard University Press, 1977). Ronald Dworkin, Justice in Robes, (Cambridge: Harvard University Press, 2006). Ronald Dworkin, Law's Empire, 238-50 (Cambridge: Harvard University Press, 1986).

explore whether broader political dynamics[1203] influence the decision-making of the court? The comparative analysis of the jurisprudence of Central Asian and East Asia CCs enabled to observe following patterns.

First, all five courts faced a certain level of constitutional ambiguity and reacted to it differently. Mongolian CC used the constitutional ambiguity (conflict of interest rule, amendments provision) to create an opportunity for judicial intervention instead of mediation.[1204] It eventually led to a political deadlock and parliamentary disregard of the Court. The Court could have avoided such a consequence, if it had deferred the decision-making to the parliament on both issues: conflict of interest rule and amendments provision.[1205] The Court could have given instructions and constitutional guidance to the parliament like the Judicial Yuan in Taiwan did.[1206] It is especially true since the constitutional framework in Mongolia is designed in way that requires the Court to be deferential, namely the Court could not even take a final decision without the Hural`s consent. Thus, from a legal account the decision of the Court failed to meet the required expectations which eventually led to the unacceptance on political ground as well.

The Korean Court in both impeachment cases literally created the constitutional ambiguity itself (unwritten constitution, proportionality, balancing) to be able to decide these disputes in a nuanced manner.[1207] The Court had no other option but to take this path, because

[1203] Fore more information on political context and adjudication see the schools on legal realism as Karl Llewellyn and ideational and behaviorist approach. Karl N. Llewellyn, The Bramble Bush: on our Law and its study, (New York: Oceana Publications, 1930). Mark Tushnet, *Critical Legal Studies and Constitutional law: an Essay in Deconstruction*, 36.1/2 Stanford Law Review, 623-30 (1984). Duncan Kennedy, A Critique of Adjudication, (Harvard University Press, 1997). Richard Posner, Overcoming Law, (Harvard University Press, 1995).

[1204] Decision of the Constitutional Tsets of Mongolia as of September 7, 1996

[1205] Decision of the Constitutional Tsets of Mongolia as of July 17, 1996. Decision of the Constitutional Tsets of Mongolia as of September 7, 1996. Decision of the Constitutional Court (Tsets) of Mongolia as of November 24,1998.

[1206] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 627 (2007).

[1207] Impeachment of the President (Park Geun-hye) case, Constitutional Court [Const.Ct], 2016 Hun-Na1,Mar. 10,2017, (KCCR,605) (S.Kor.). Impeachment of the President (Roh Moo-hyun) case, Constitutional Court[Const.Ct], 2004Hun-Na1,May14,2004,(2004 16-1 KCCR,609) (S.Kor.).

the text of the Constitution required the Court to be the final instance in impeachment cases. Therefore, the Court acted within the framework required by the Constitution and had to do the balancing and meditation itself without deferring it to the Parliament, thus ultimately deciding the outcome of the impeachment itself.[1208]

The Judicial Yuan of Taiwan used the constitutional ambiguity to create an opportunity for mediation and facilitation of dialogue between President and Parliament. However, in contrast to Korean Court, the Judicial Yuan was more deferential on both counts: presidential immunity and state secret privilege. It gave the guidance both to the President and Parliament on how to exercise their constitutional powers, however, the discretionary decision was referred back to the Parliament and the Court did not decide the outcome of the case itself.[1209] In a given constitutional framework (no requirement of being a last instance like in Korean Impeachment case) it was a wise decision to take a facilitative and more deferential approach. Otherwise, if the Yuan chose to decide the outcome of the case itself it would have risked repeating the experience of Mongolian Constitutional Court.

Finally, it is also important to highlight how these courts have treated the text of the Constitution. The approach of courts in Taiwan and Korea was facilitative and with an accurate and cautious attention to the text of the Constitution.[1210] Both courts while resolving the disputes of political confrontations were pointing to the text of the Constitution, activating it and making the text matter even if it contained the unwritten principles and rules. How did they do this? Whenever they interpreted a particular provision of the Constitution, they were not doing it in

[1208] *Id.*
[1209] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 627 (2007).
[1210] Impeachment of the President (Park Geun-hye) case, Constitutional Court [Const.Ct], 2016 Hun-Na1,Mar. 10,2017, (KCCR,605) (S.Kor.). Impeachment of the President (Roh Moo-hyun) case, Constitutional Court[Const.Ct], 2004Hun-Na1,May14,2004,(2004 16-1 KCCR,609) (S.Kor.). Yuan Cheh Tzu [Judicial Yuan] Interpretation No 627 (2007).

total isolation with the powers of political branches in question. Instead, both courts invited those branches into play and encouraged them to counter-balance each other,[1211] thus activating the system of checks and balances.

For instance, in South Korea in the first impeachment case the Court found that president Roh violated the Constitution and the laws, the KCC emphasized that it was not acceptable for a president to behave this way. The KCC have confirmed that parliament was right in its assessment of the actions of the President, this way KCC invited the parliament into play and stressed the importance of parliament`s power in checking the president. However, at the same time the KCC rejected the motion for impeachment claiming that the violations were not grave enough for president`s removal from office. By doing this the KCC also invited the president into play and enabled him to stay and serve until the next presidential elections, meanwhile emphasizing that the Constitution matters and if in future such actions continue, the president would be risking getting impeached.[1212] This approach of the Court was later confirmed in the case of Impeachment of President Park 13 years later.[1213]

In the presidential immunities case of Taiwan, the Judicial Yuan used the same tactic and strategy. The Court invited both parties into play via activating certain provisions of the Constitution and asked them to counter-balance each other. In the issue on presidential immunity, the Court allowed Parliament some investigatory actions against the President, meanwhile enabling the President to use his state secret privilege.[1214] Most importantly, the decision-making power on identifying the procedures of the investigation against the President and the

[1211] *Id.*
[1212] Impeachment of the President (Roh Moo-hyun) case, Constitutional Court[Const.Ct], 2004Hun-Na1,May14,2004,(2004 16-1 KCCR,609) (S.Kor.).
[1213] Impeachment of the President (Park Geun-hye) case, Constitutional Court [Const.Ct], 2016 Hun-Na1,Mar. 10,2017, (KCCR,605) (S.Kor.).
[1214] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 627 (2007).

classification of state secret was primarily given to the Parliament, not to the judiciary. Such a position enabled the court to escape any backlash and legitimacy deficit.

Interestingly in 2014 the Kyrgyz Constitutional Chamber in the case involving the powers of the Prosecutor`s Office[1215] tried to apply this strategy of making the text of the Constitution matter. The Chamber emphasized the expressed nature of the provision and invited the Parliament to counter-balance the President and tried to activate the system of checks and balances laid down in the text of the new 2010 Constitution and direct the path towards parliamentarism. However, it did not work out. Parliament instead of using this opportunity went along with the President and actively criticized the Chamber. This move of the Parliament further led to the de facto consolidation of power by the President that pushed the Constitutional Chamber back to the times of its predecessor, the former Constitutional Court.

Finally, the tamed courts of Kyrgyzstan and Kazakhstan irrespective of the text of the Constitution and its provisions: ambiguous or expressed they were using the text to advance super-presidentialism. The outcome of the decisions was always predictable most of the times it was pro-president. However, it was never possible to predict the reasoning of the Court and its approach to the text of the Constitution. When the text contained an express provision as the fixed presidential term or a detailed procedure of amendments to the Constitution, the tamed courts chose to ignore the text like in the case of Kyrgyz CC in 1998 decision on the Presidential term[1216], or the case involving the Interim President[1217], or 1995[1218] and 2016[1219] decisions on

[1215] Reshenie Konstitusionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitusionnosti stat`I 34 UKRKR [The Decision of the Constitutional Chamber of the Supreme Court of the KR on case involving the constitutionality of Article 34 of the CPCRK] Jan.13, 2014

[1216] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 13 iulya 1998 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Jul. 13, 1998], Jul. 13, 1998

[1217] Zakluchenie Konstitucionnogo Suda KR po proektu zakona o vnisenii izmeneniy v Konstitisiu Kyrgyzskoi Respubliki vnesennogo Prezidentom KR na rassmotrenie JK [The Conclusion of the Constitutional Court of the KR

constitutional amendments. Sometimes the tamed courts chose to make up things that were never in the text of the constitution like the Kazakh Constitutional Court annulling the entire Parliamentary Election and dissolving the Parliament.[1220] In circumstances of extreme necessity, the tamed courts, especially the Kyrgyz Court invalidated the whole Constitution.[1221] Such a diverse, inconsistent and selective approach to the text of the Constitution did not facilitate the dialogue among President and Parliament, instead it exacerbated the backlash between them and created two camps President and the Court on the one hand and the Parliament on the other. These courts were not neutral decision-makers, they were adapting their arguments and reasoning to the political agenda of the President while leaving undecided the most contentious parts of the disputes before the constitution. This selective and inconsistent approach to the Constitution and the pro-presidential prerogativist strategy of constitutional courts did not make the text of the Constitution matter. Instead, it promoted a total absence of constitutionalism and distrust of the of the Parliament and the society to the constitutional court, thus undermining the legitimacy and credibility of the Court itself.

Another pattern that can be observed is the reaction of political actors in all five jurisdictions to decisions of Courts. In Taiwan and Korea political actors reacted to Judicial Yuan and Constitutional Court within the constitutional framework, they have obeyed the decisions. While in Central Asia and Mongolia reactions of political actors came in the form of

on the draft law on introducing amendments to the constitution proposed by the President for a review of the Supreme Council of the KR] Jan.21, 2010

[1218] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 9 noyabrya 1995 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Nov. 9, 1995], Nov. 1995

[1219] Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016

[1220] Postanovlenie Konstitusionnogo Suda RK ot 6 marta 1995 g. po isku Kvyatkovkoi [Ruling of the Constitutional Court of the Republic of Kazakhstan of March 6,1995], Kazakhstan skaya Pravda March 16, 1995

[1221] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 14 sentyabrya 2007 goda [The Decision of the Constitutional Court of the Kyrgyz Republic] Sep. 14, 2007

constitutional amendments.[1222] In Mongolia the aggressive approach of the Court, namely continuous judicial domination to impose its own interpretation of the Constitution without mediating between political actors prompted the parliament to amend the Constitution. In Central Asia CCs were used by presidents to legitimize constitutional amendments. This contrast is particularly evident if we compare Mongolia[1223] and Kyrgyzstan[1224] in cases where the CCs provided advisory opinions on constitutionality of constitutional amendments.

The courts emphasized procedural rules in both cases. Mongolia was using stretched and "tortured" interpretation of the vague constitutional provision to create space for itself to make the decision,[1225] while the Kyrgyz Constitutional Court was using the text of the annulled Constitution to invalidate the existing Constitution.[1226] However yet, there is a striking difference: in Kyrgyzstan the Court was advancing the president`s interests and his goals to bring back the super-presidential constitution. The Court has lost its relevance long time ago; it was there just to serve the president. However, in Mongolia the Court was not protecting the president from the intrusion of the parliament. Rather it looked more like a hysteric attempt to preserve its own legitimacy, relevance and authority vis-à-vis the parliament.

It could also lead us to a conclusion that facilitative and meditative courts (Taiwan and Korea) seem to preserve the legitimacy of the Constitution, whereas aggressive (Mongolia) and tamed courts particularly (Kyrgyzstan and Kazakhstan) appear to have contributed to the demise of the Constitution. However, there is still a big difference between Mongolia and Central Asia. In Central Asia courts have directly contributed to building formal constitutional rules in support

[1222] For more information, see chapter 3.
[1223] Decision of the Constitutional Court (Tsets) of Mongolia as of November 24,1998.
[1224] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 14 sentyabrya 2007 goda [The Decision of the Constitutional Court of the Kyrgyz Republic] Sep. 14, 2007.
[1225] Decision of the Constitutional Court (Tsets) of Mongolia as of November 24,1998.
[1226] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 14 sentyabrya 2007 goda [The Decision of the Constitutional Court of the Kyrgyz Republic] Sep. 14, 2007.

of super-presidentialism. Constant constitutional amendments became daily politics in this region and Courts played a key role in turning constitutional amendments into daily politics thus substantially harming the legitimacy of the Constitution. Mongolian case is an intermediary between tamed courts and mediating courts.

Another common pattern is that Central Asian presidents at the end of the day appear not to trust the words of the Courts they tamed. In Kazakhstan Nazarbayev dissolved the Court and created a Council[1227] with completely new members, in Kyrgyzstan Akayev several times was cautious of asking advisory opinion on constitutional amendments. Instead they seemed to be more comfortable with establishing some extra-constitutional presidential assembly on the side and keep these new, extra-constitutional bodies as a backup plan.[1228]

Furthermore, another shared pattern in cases involving inter-branch disputes is that the principled decision reasoned and grounded within boundaries of the constitutional text or, in case of silence, within the boundaries of constitutional principles has higher chances to be accepted by political actors and to facilitate the dialogue among branches and eventually to be enforced.[1229]

Finally, based on the Kyrgyz Constitutional Chamber case on the 2016 constitutional amendment, one can conclude that a Constitution can create the terms for institutional dialogue bending over backwards. However, if the political branches are not willing to play, the Constitution cannot do much. The Chamber tried to decide the *2016 amendment case* in a

[1227] Postanovlenie Verhovnogo Soveta RK o priostanovlenii deyatel`nosti Konstitusionnogo Suda RK [The Decree of the Supreme Soviet of RK on Suspending the activities of the Constitutional Court] March 11,1995.
[1228] Ukaz Prezidenta RK ob Obrazovanii Assamblei Narodov Kazakhstan a [The Order of the President of RK on Establishment of the Assembly of Peoples of Kazakhstan] March 1, 1995
[1229] Enforcement record of judicial decisions is also used as a tool to measure success of the court by some political scientists. For more information, see Jack Knight, Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 Law and Society Review 85-87 (1996). Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (New York, NY: Free Press, 1964).

principled manner as it was doing in cases involving mega politics discussed in Chapter 2. However, in the 2016 decision, the Chamber fell back to old ways of the previous Constitutional Court, because political branches were not willing to play by the rules of the Constitution.

1.3.Patterns in Cases on Fundamental Rights

For a study of transformation through judicial review in the fundamental rights domain, Chapter 4 explored relatively recent cases from the South Korean Consitutional Court (KCC), the Judicial Yuan of Taiwan, and one case from the Kyrgyz Constitutional Chamber. The cases were politically sensitive and involved interaction with the political branches. The case selection was designed to see how the idea on incremental transformation[1230] and political branches willingness to become agents of transition holds in fundamental rights issues that are politically sensitive. After gradual transformation in mega politics and institutional conflict cases, KCC and Judicial Yuan would take a more active role in fundamental rights cases affecting politically sensitive topics. This is a somewhat surprising development as East Asian CCs are famous for their timid jurisprudence in rights cases.

The KCC`s *Conscientious objection* judgement and the Judicial Yuan`s *Same-Sex marriage* judgement shed some light on the attempt taken by both CCs toward the transformative constitutionalism in the domain of fundamental rights. These two cases represent the willingness of these courts to continue their own legacy in rights related disputes as well. The CCs efforts towards transformational constitutionalism were reflected in the judicial methodology and technique adopted by these courts. The methodology was strikingly different from the usual

[1230] Theunis Roux, The Politico-Legal Dynamics of Judicial Review: a Comparative Analysis, 297 (Cambridge: Cambridge University Press, 2018)

judicial style that these courts use: in both *Conscientious objection* and *Same-Sex marriage* cases, CCs resorted to non-legal sources to justify their reasoning.

The South Korean KCC heavily relied on on the actual social and practical impact of the applicant`s claim in light of the existing rules and conditions. Furthermore, the KCC substantially grounded its decision and reasoning based on specific numbers on the social impacts of the laws. Namely, it examined the potential effect of the introduction of alternative service system on the national defense force of Korea based on a *Defense White Paper*.[1231] It is important to highlight that even if the KCC used the extra-legal source in its reasoning, the numbers came from official sources. Thus the approach adopted by the KCC can be considered pretty deferential towards the government even if even they had an extra-legal source at play. As a remedy, the KCC obliged the Government to introduce alternative service system

In Taiwan the Judicial Yuan constructed its reasoning based on scientific evidences and reports on physical and psychological aspects of homosexuals. The Judicial Yuan stated that sexual orientation is an "*immutable characteristic that is resistant to change*".[1232] To support the argument the Judicial Yuan cited to reports of the WHO, Pan American Health Organization, World Psychiatric Association and the US Supreme Court case *Obergefell v. Hodges*.[1233] Furthermore, the Judicial Yuan set the a rather aggressive remedy stating that in case if Legislative Yuan fail to amend respective laws in two-year remedial period, the Court stated that the current marriage provisions of the *Civil Code* will be extended to same-sex couples automatically, by virtue of the judgement of the Judicial Yuan.

[1231] Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).
[1232] Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
[1233] These sources were cited by the Judicial Yuan: The World Health Organization, *The Tenth Revisioin of the International Statistical Classification of Diseases and Related Health Problems*, ICD-10 (2016). The Pan American Health Organization, Cures for an Illness that does not exist, https://www.paho.org/hq/dmdocuments/2012/Conversion-Therapies-EN.pdf (last visited March 9,2019).

It is hard to judge to what extent this shift on transformative constitutionalism will succeed in the domain of fundamental rights. The success ultimately will depend on CCs ability to mediate between law and politics. For instance, in the context of Taiwan as it was evident from Chapter 4 the decision of the Judicial Yuan was received by public negatively which later poured into the expression of direct democracy (referendum). There are now two conflicting views of scholars on this issue, some view it as the beginning of a new era of judicial activism in the field of fundamental rights protection in Taiwan. Others question the inability of the Judicial Yuan to be successful in fundamental rights cases as it was so far in separation of powers cases.[1234] Some argue that the "*Judicial Yuan needs to tread carefully in its capacity as the defender of constitutional principles when its decision does not always speak to popular feelings in the new era*."[1235] It is particularly important taking into consideration recent judicial reforms in Taiwan[1236] which from 2022 will empower the Judicial Yuan to review the decisions of ordinary courts including the Supreme Court. This means that in the context of rights protection cases, besides political actors, Judicial Yuan also have to come up with strategic tools mediating with the judiciary as well.

Accordinly, both judgments required further legislative action for their implementation. The aftermath of these cases demonstrated that political institutions acted within the constitutional framework and undertook the required actions even though these remain the politically sensitive issues. In South Korea, the legislation is on its way, and in Taiwan, they have passed the required law.

[1234] Tzu-Yi Lin, Ming-Sung Kuo, Hui-Wen-Chen, Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape, 48 Hong Kong Law Journal, 995 (2018).
[1235] Tzu-Yi Lin, Ming-Sung Kuo, Hui-Wen-Chen, *Seventy Years On: The Taiwan Constitutional Court And Judicial Activism In a Changing Constitutional Landscape*, 48 Hong Kong Law Journal, 1022-1025 (2018).
[1236] It was mentioned in Chapter 1, the adoption of the new Constitutional Litigation Act that will enter into force in 2022.

Thus, the experience of KCC and Judicial Yuan in fundamental rights issues that are politically sensitive holds on with the idea on incremental transformation, and political branches` willingness to become agents of transition. In both countries, the transformational constitutionalism efforts succeeded, or at least were enforced mainly because of the willingness and desire of political branches to become the agents of transition in the fundamental rights domain.

The experience of Kyrgyz Chamber in the *Biometric Registration case* was a complete opposite. The desire of the Chamber to act as the agent of constitutional transformation in Kyrgyzstan in the fundamental rights domain led to a backlash with political branches and eventually firing the Judge Sooronkulova. The removal of Judge Sooronkulova served as a sign or taming instrument for other judges of the Chamber. Under this political context, the Chamber had to decide the case in complete opposite to its draft decision. The case demonstrated that political branches in Kyrgyzstan were not willing to become agents of transition, thus hindering the Chamber`s attempts in the constitutional transformation in the fundamental rights domain.

2. Contribution of a Study of Central Asian Constitutional Courts to Global Constitutional Scholarship

This part of the chapter is returning to one of the main inspirations and research questions of the dissertation and investigates the added value of the comparative study of Central Asian constitutional courts to the existing global discourse on judicial review. Following the exploration of the comparative chapters, there are three major, genuine contributions emerging from the study of Central Asian CCs. First, the study of Central Asian CCs contributes to the existing discourse on the place of international materials in constitutional jurisprudence. Second,

it contributes to the study of illiberalism and authoritarian constitutionalism. Finally, it contributes to the issues involving the impact of Islamization in constitutionalism.

2.1.Place of International Materials in Constitutional Jurisprudence

This section of the chapter will reveal that in the Central Asian region the willingness of CCs to use international and comparative materials is not simply a matter for judicial creativity, but depends on the prevailing understanding of the status of international law in domestic law. The latter appears to depend on geopolitical considerations. It is essential to emphasize two underlining observations that this section reseals. Due to extreme legalism in these countries, Central Asian CCs` references to international sources in their reasonings/decisions seem to reflect a matter of formal hierarchy of sources of international and domestic law. Furthermore, the reluctance of Central Asian CCs to treat references to international and foreign sources as a matter of "normal" judicial interpretation and the rise of a sovereigntist approach in formal, legal rules means that the ability of constitutional courts is severely undermined in the region when it comes to reviewing new legal restrictions on fundamental rights that are inspired and promoted by Russia.

The exploration of Central Asian early and current foreign policy choices discussed in Chapter 1 and the analysis of fundamental rights cases in Chapter 4 revealed an interesting pattern emerging among Central Asian CCs with regard to the relationship between domestic and international law. This pattern is strikingly different from the approach taken by Taiwanese or South Korean CCs. If in Taiwan and South Korea CCs while adjudicating fundamental rights cases are taking more convergence approach and incorporating norms of international law in

human rights and decisions of human rights committee into their domestic systems,[1237] Central Asian CCs seemed to be departing from this approach towards more divergence. The cases covered in chapter 4, particularly in the context of Central Asia has unique added value to the question of convergence and divergence of international law with domestic constitutional law systems, especially taking into consideration the challenges that the concept of sovereignty is currently facing.

In international law the relationship between international and domestic law is usually explained by two opposing theories: dualism and monism.[1238] Dualism assumes distinct characteristics of both systems and claims that these two systems cannot alter one another. In case of a conflict between domestic law and international law dualism claims that domestic law prevails.[1239] Monism on the other hand presumes that these two systems constitute one single legal order[1240] and in case of a conflict, the norms of international law prevails.[1241] However, there is also a growing scholarship suggesting that dualism and monism cannot fully reflect the global picture of the relationship between domestic and international law. Thus, scholars as Crawford advocate a pluralist approach which suggests looking at nuances and practices of both domestic and international courts avoiding overgeneralization.[1242] The rights related jurisprudence of Central Asian CCs revealed that in the context of the relationship between

[1237] Wen-Chen Chang, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36.3 North Carolina Journal of International Law and Commercial Regulation, 594 (2011).
[1238] For information on these theories see Malanczuk Peter, Akehurst's Modern Introduction to International Law, (London: Routledge, 1997). Hilary Charlesworth, Madelaine Chiam, Devika Hovell, George Williams, The Fluid State: International Law and National Legal Systems, (Sydney, Australia: Federation Press, 2005).
[1239] Jane Nijmann, Andre Nollkaemper, *New Perspectives on the Divide between National and International Law*, (Oxford: Oxford University Press, 2007). Rosalyn Higgins, Problems and Process: International Law and How We Use It, (Oxford: Clarendon Press, 1994).
[1240] Paul Gragl, Legal Monism: Law, Philosophy and Politics, 19-30 (Oxford University Press, 2018).
[1241] Hans Kelsen, General Theory of Law and State, (1945). Luigi Ferrari-Bravo, *International and Municipal Law: The Complementarity of Legal Systems*, in R. S. J. Macdonald, Douglas M. Johnston, The Structure and Process of International Law, (The Netherlands: Martinus Nijhoff, 1983).
[1242] James Crawford, Brownlie's Principles of Public International Law 8th ed., (Oxford: Oxford University Press, 2012).

norms of international human rights law and domestic law these states are shifting from monism to dualism. While applying pluralistic approach in the context of the relationship between the norms of regional organizations and domestic law such as Eurasian Economic Union. This is an alarming tendency and the discussion of this issue is vital and has an important added value for the global discourse on judicial review. In order to comprehend the degree of the problem it is important to contextualize these courts into a broader geopolitical context, namely the external influence of Russia and China.

2.1.1. Geopolitics and External Influence as a Hidden Factor of Decision-Making in Central Asian Constitutional Courts

The *concept of sovereignty* since the famous sentence from the *Lotus* decision that claimed "*restrictions upon the independence of states cannot be presumed*" [1243] has been experiencing dramatic changes. Different states and scholars depending on the circumstances have argued for the strict positivist interpretation of *Lotus*, others have claimed more normative interpretation. It has been particularly evident in a divided ICJ decision on arrest warrant case.[1244] Martti Koskenniemi in his book *From Apology to Utopia* argues that states and their claim to sovereignty is always approached from two perspectives: Apology (subjective interest) and Utopia (object/normative). Koskenniemi claims that the only way for the survival of international or global legal order is constantly balancing between these two ends "*from emphasizing concreteness to emphasizing normativity and vice versa*".[1245] Recent developments on human rights law, humanitarian law, international criminal law and the emergence or such

[1243] *The Case of the S.S. Lotus, (France v. Turkey),* Permenant Court of International Justice (PCJ) 1927.
[1244] *The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* International Court of Justice (ICJ) 2002.
[1245] Martti Koskenniemi, From Apology to Utopia: the structure of International Legal argument, 65 (Cambridge University Press, 2009).

concepts as humanitarian intervention, R2P and the emphasis on the rights of people for self-determination have complicated the issue of sovereignty even more. The wave of the global constitutionalism that departed from the traditional majority rule understanding of democracy to a concept more focused on human rights, created a tendency within the texts of constitutions the adoption of the monistic approach on the relationship between international law and domestic law.[1246]

Central Asia`s bond with Russia remains still strong due to historical ties and strategic considerations as well from the perspectives of security and terrorism threats. With the establishment of Eurasian Economic Union, Russia is also trying to dominate the trade and economic policies in the region.[1247] However, Russian influence does not only extend to foreign affairs, but also substantially influences internal political dynamics in these states as well.[1248] For instance, whatever law the Russian Federation adopts, it later has a chilling effect on Central Asia. Since 2012 Russian domestic and foreign policy started emphasizing territorial integrity, sovereignty and non-interference and it was reflected in the adoption of number of laws. In 2012 Russia adopted the so called *Foreign Agents Law* which tightened the regulation of activities of NGOs.[1249] Then, in 2016 Russian Parliament passed the so called *Yarovaya Law* that tightened

[1246] Matthias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State*, In J. L. Dunoff and J. P. Trachtman (Eds.), Ruling the World? International Law, Global Governance, Constitutionalism, 258-98 (Cambridge : Cambridge University Press, 2009). Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law, (Oxford : Oxford University Press, 2010). Anne Peters, *The Globalization of State Constitutions*, In J. Nijman and A. Nollkaemper (eds.), New Perspectives on the Divide between National and International Law, 253-98 (Oxford : Oxford University Press, 2007).

[1247] Zhenis Kembayev, The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration? *Review of Central and East European Law* 342-367 (2016)

[1248] Sean P. Roberts, Converging party systems in Russia and Central Asia: A case of authoritarian norm diffusion? *Communist and Post-Communist Studies*, p. 147-157 (2015)

[1249] Federalniy Zakon ot 20 Iulya 2012 goda N.121-F3 O vnesenii izmeneniy v otdelnye akty Rossiyskoi Federacii v chasti regulirovania deyatelnosti nekommercheskih organizacoi, vypolnyaushih funksii inostrannogo agenta [Federal Law as of Jule 20, 2012 on Introducing Amendments to certain Laws of the Russian Federation on Regulation of the Activities of Non governmental Organizations, functioning as Foreign Agents], July 20, 2012, No.121-F3

regulations on extremism (including the religious), counter-terrorism and surveillance.[1250] In 2019 the Russian Parliament adopted two more controversial laws: "*on banning fake news and insulting the state*"[1251] and the law on "*sovereign internet*".[1252]

Once this trend toward sovereignty, security and counter-terrorism appeared in Russia, shortly after a wave of analogues laws started appearing in Central Asia. Tajikistan[1253], Uzbekistan[1254] and Kazakhstan[1255] amended laws on NGOs that incorporated the elements of the foreign agent concept. Extremism and Mass Media Laws were severely tightened in Tajikistan.[1256] The Kyrgyz Parliament attempted to adopt a foreign agent law and amend the *Mass Media law* accordingly, however under the pressure of the civil society, the bills were shut

[1250] Federalniy Zakon ot 6 iulya 2016 goda № 375-ФЗ o vnisenii izmeneniy s Ugolovniy Kodeks Rossiyskoi Federacii I Ugolovno-Processualniy Kodeks Rossiyskoi Federasii v chasti ustanovlenia dopolnitelnyh mer protivodeistvia terrorizmu I obespechenia obshestvennoi bezopasnosti [Federal Law as of July 6, 2016 No. 375-F3 on Introducing Amendments to the Criminal Code and Criminal Procedural Code of the Russian Federation in parts Related to the Counter-Terrorism and maintenance of Public Order] July 6, 2016, No.375-F3. Federalniy Zakon ot 6 iulya 2016 goda № 374-ФЗ o vnisenii izmeneniy v Federalniy Zakon o Protivodeistviu Terrorizmu I Otdelnye Zakonodatelnye Akty Rossiyskoi Federasii v Chasti Ustanovlenia Dopolnitelnyh Mer Protivodeistvya Terrorizmu I Obespechenia Obshestvennoi Bezopasnosti. [Federal Law on Introducing Amendments to the Federal Law on Counter-terrorism and to other acts of the Russian Federation in relation to the establishment of additional measures to counter terrorism and maintain the Public Order] July 6, 2016, No. 374-F3.

[1251] Federalniy Zakon ot 18 Marta 2019 goda No.31-F3 O Vnesenii Izmeneniy v Stat`u 15.3 Federalnogo Zakona Ob Informacii, Informasionnyh Tehnologiah I O Zashite Informacii [Federal Law as of March 18, 2019 No. 31-F3 on Introducing Changes to Article 15.3 of the Federal Law on Communications, Information, Information Technolofies and on Protection of Informaion] March 18, 2019 No. 31-F3.

[1252] Federalniy Zakon ot 1 Maya 2019 goda No. 90-F3 O Vnesenii Izmeneniy v Federalniy Zakon o Svyazi I Federalniy Zakon ob Informacii, Informasionnyh Tehnologiah I o Zashite Inforsii [Federal Law as of May 1, 2019 No. 90-F3 on Introducing Changes to the Federal Law on Communications, Federal Law on Information, Information Technologies and Protection of the Information] May 1, 2019 No. 90-F3.

[1253] Zakon Respubliki Tadjikistan o Vnesenii Izmeneniy v Zakon ob Obshetvennyh Obiedineniy [Law of the Republic of Tajikistan on Introducing Amendments to the Law on Public Associations] November 23, 2015, № 1242.

[1254] Zakon Respubliki Uzbekistan o Vnesenii Izmeneniy I Dopolneniy v Nekotorye Zakonadatelnye Akty Respubliki Uzbekistan v svyazi s dalneishim sovershenstvovaniem deyatelnosti negosudarstvennyh kommercheskih organizaciy [Law of the Republic of Uzbekistan on Introducing Amendments to certain Acts of the Republic of Uzbekistan in connection with the further improvement of the activities of non-profit organizations] 2014, № 12.

[1255] Zakon Respubliki Kazakhstan o Vnesenii Izmeneniy I dopolneniy v nekotorye zakonodatelnye akty respubliki Kazakhstan po voprosam deyatelnosti nepravitelstvennyh organizaciy [Law of the Republic of Kazakhstan on introducing Amendments to certain acts of the Republic of Kazakhstan on the activities of non-governmental organizations] December 2, 2015 № 429-V.

[1256] More analysis of these laws and their implications see recent concluding observation of the CCPR: UN Human Rights Committee (HRC), *Concluding observations on the third periodic report of Tajikistan*, 25 July 2019, CCPR/C/TJK/3

down.[1257] Despite this fact, from time to time this bill tends to re-appear into the agenda again. Considering recent laws in Russia on sovereign internet and the law on banning fake news, experts are claiming about the possibility of the adoption of analogous laws in Central Asia in the nearest future.[1258] If it happens, most likely the constitutionality of these laws will be reviewed by Constitutional Courts.

Furthermore, as discussed in earlier chapters, a wave of constitutional amendments took place in Kazakhstan, Kyrgyzstan, Tajikistan and incremental changes are happening in Uzbekistan.[1259] These reforms were presented as a project of democratization, modernization and parliamentarism, yet from the perspectives of fundamental rights and freedoms these amendments reflected one common pattern: constitutional amendments have re-emphasized the importance of sovereignty and security and created a possibility for citizenship revocation.[1260] Furthermore, there is a tendency of reconsidering[1261] the place of international treaties and norms in the hierarchy of domestic legal system.[1262] This shift can be placed into a broader context of

[1257] *Disputed 'foreign agent' law shot down by Kyrgyzstan's parliament*, The Guardian (May 12, 2016) https://www.theguardian.com/world/2016/may/12/foreign-agent-law-shot-down-by-kyrgyzstan-parliament (last visited May, 2019).

[1258] Henry Ridgwell, *Russia's Foreign Agent Law Has Chilling Effect On Civil Society Groups, NGOs*, Voice of America, (January 24, 2018).

[1259] Zakon Kyrgyzskoi Respubliki o naznachenii referenduma po proektu po proektu zakona Kyrgyzskoi Respubliki ot 2 noyabrya 2016 goda [Law of the Kyrgyz Republic on calling the referendum on introduced amendments to the Constitution of the KR] November 2, 2016. Zakon Respubliki Kazakhstan o Vnesenii Izmeneniy I Dopolneniy v Konstituciu Respubliki Kazakhstan [Law of the Republic of Kazakhstan on Introducing Amendments to the Constitution of the Republic of Kazakhstan] March 10 2017, № 51-VI. Zakon Respubliki Uzbekistan o vnisenii izmineniy v otdelnye stat`i Konstitucii Respubliki Uzbekistan [The Law of the Republic of Uzbekistan on introducing amendments to certain Articles of the Constitution of the Republic of Uzbekistan] May 27, 2017.

[1260] *Id.*

[1261] For instance before this tendency the relationship between domestic law and international law in Russia reflected the monist approach. For more information on this issue see Willaim E. Butler, International Law and the Russian Legal System, chapter 4 (Eleven International Publishing, 2007).

[1262] Zakon Kyrgyzskoi Respubliki o naznachenii referenduma po proektu po proektu zakona Kyrgyzskoi Respubliki ot 2 noyabrya 2016 goda [Law of the Kyrgyz Republic on calling the referendum on introduced amendments to the Constitution of the KR] November 2, 2016. Zakon Respubliki Kazakhstan o Vnesenii Izmeneniy I Dopolneniy v Konstituciu Respubliki Kazakhstan [Law of the Republic of Kazakhstan on Introducing Amendments to the Constitution of the Republic of Kazakhstan] March 10 2017, № 51-VI. Zakon Respubliki Uzbekistan o vnisenii

emerging scholarship which suggests that there is an emerging Russian approach to international law[1263] and its relationship with international organizations and bodies.[1264]

Some Russian and Western scholars argue that the failure of the post-Cold War international system to integrate Russia into the Western world caused these political events and current implications to the international law with rapidly emerging idea of Russian approaches to international law.[1265] Sakwa argues that against the expectations of Russia to become part of the "Greater West", NATO, EU and "historical west" assumed all victory of the cold war and established an international legal order predominantly based on western values that did not included Russia.[1266] Such an approach is argued to be the reason of aggressive Russian behavior that led to the annexation of Crimea, the invasion of Ukraine by Russian and a move towards the East.[1267] Thus, Russian foreign policy experienced a certain shift that led to the current unprecedentedly friendly Sino-Russian relationship.[1268] Furthermore, scholars also claim that

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izmineniy v otdelnye stat`i Konstitucii Respubliki Uzbekistan [The Law of the Republic of Uzbekistan on introducing amendments to certain Articles of the Constitution of the Republic of Uzbekistan] May 27, 2017.

[1263] Lauri Mälksoo, Russian Approaches to International Law, (Oxford: Oxford University Press, 2015). Lauri Mälksoo, *International Legal eory in Russia: A Civilizational Perspective, or Can Individuals Be Subjects of International Law?*, *in* The Oxford Handbook on the Theory of International Law 257 (Anne Orford & Florian Ho mann eds., 2016). Lauri Mälksoo, *International Law in Russian Textbooks: What's in the Doctrinal Pluralism?*, 2 Göttingen J. Int'l L. 279, 281 (2009).

[1264] Lauri Mälksoo, Russian Approaches to International Law, (Oxford: Oxford University Press, 2015). Charles E. Ziegler, *Great powers, civil society and authoritarian diffusion in Central Asia*, Central Asian Survey, 549-569 (2016)

[1265] The junior partner, *How Vladimir Putin's embrace of China weakens Russia*, The Economist, (July 25, 2019) https://www.economist.com/briefing/2019/07/25/how-vladimir-putins-embrace-of-china-weakens-russia (last visited July 25, 2019).

[1266] Richard Sakwa, Russia against the Rest: The Post-Cold War Crisis of World Order (Cambridge: Cambridge University Press, 2017)

[1267] Understanding Russian Politics by Stephen White . Cambridge : Cambridge University Press ,2011

[1268] Ukaz Prezidenta RF ob Utverjdenii Konsepcii Vneshnei Politiki Rossiyskoi Federacii [Decree of the President of the RF on adoption of the Concept of the Foreign Policy of RF] November 30, 2016 No.640. Recent joint Russian-Chinese military activities in the claimed South Korean territory is also indicative. For more information see Associated Press in Seoul, *South Korea jets 'fire warning shots' in claim disputed by Russia*, The Guardian, (July 23, 2019) https://www.theguardian.com/world/2019/jul/23/south-korean-jets-fire-warning-shots-at-russian-planes-after-airspace-violation?CMP=fb_gu&utm_medium=Social&utm_source=Facebook&fbclid=IwAR2Ood7IidSckmnuZbEyhwWFCCUM4761ltfQg0BHh5zw1vY3JZ60_dtmI-I#Echobox=1563887861 (last visited July 23, 2019).

Russia is now forming and advocating its own approach to international law which is grounded first on classical and strong notion of State sovereignty; second, views international community relatively weak; third, denies cosmopolitan, liberal constitutionalism ideas of international law.[1269] Finally, it is important to note that these events have a tremendous impact on Central Asia as well, because after the annexation of Crimea, Russia actively started building various regional economic, security and other unions that are claimed to be mimicking the western institutions as EU and NATO in the post-soviet world.[1270]

One of those institutions are Eurasian Economic Union (EAEU) that currently consists of Russia, Belarus, Kazakhstan, Kyrgyzstan and Armenia and it is expected to include all Central Asian states.[1271] Although the benefits of these unions for Central Asian states are highly contested[1272], the abovementioned states joined the union. Russia targeted Kazakhstan, Kyrgyzstan and Tajikistan by providing stabilization grants and loans, securing extension of military facilities for these states and providing benefit for labor migrants from Central Asia in Russia, since Kyrgyzstan and Tajikistan`s economies substantially depend on remittances of migrants from Russia.[1273]

Finally, just as Russia is developing its own approach to international law which is grounded on strong state sovereignty, China also has its own approach to international law. It is mostly reflected in the writings of the Chinese scholars and rarely can be noticed in the dominant

[1269] Lauri Mälksoo, Russian Approaches to International Law (Oxford: Oxford University Press, 2015).
[1270] Alexander Cooley, *Ordering Eurasia: The Rise and Decline of Liberal Internationalism in the Post-Communist Space*, 28.3 Security Studies, 588-613 (2019).
[1271] Treaty on the Establishment of the Eurasian Economic Community, (October 10, 2000) 2212 UNTS 309.
[1272] Evgeny Vinokurov, *Eurasian Economic Union: Current State and Preliminary Results*, 3.1 Russian Journal of Economics, 54 (2017). Aidos Alimbekov, Eldar Madumarov, Gerald Pech, *Sequencing in Customs Union Formation: Theory and Application to the Eurasian Economic Union*, 32.1 Journal of Economic Integration, 65 (2017). Azimzhan Khitakhuranov, Bulat Mukhamedieyev, Richard Pomfret, Eurasian Economic Union: Present and Future Perspectives, 50.1 Economic Change and Reconstructing, 59 (2017). EDB, *Eurasian Economic Integration 2017*, EDB Centre for Integration Studies, Eurasian Development Bank (2017).
[1273] Pomfret Richard, The Central Asian Economies in the 21st Century, 250 (Princeton University Press, 2019).

western international law literature. It is argued that China, from the very beginning, denied the Westphalian system of international law and the notion of self-determination as a persistent objector. Instead, China insisted on a historical system, particularly in relation to border delimitation.[1274] Roughly speaking, the logic of this approach is as follows: all territories are agreed between the powers on the historical principle[1275], and agreements on territorial division occur "*at the expense of other nations sandwiched between them*."[1276]

Furthermore, scholars suggest that before the emergence of different fields of international law as WTO and other economic laws, China was cautious about this system[1277] and used to be less active, however now in the context of international economic law[1278] "China is eager to participate in its formulation in order help realize her vision for the global order".[1279] This specific approach of China to international law might affect Central Asia, moreover some signs of it are already emerging. For instance Tajikistan[1280]ceded its part of a territory to China as a debt recovery in 2011[1281] and main narrative of Tajik government was that it was justified

[1274] Anonymous, China and the Principle of Self-Determination of Peoples, 6.1 St Antony's International Review 6, 83 (2010). (authors of this Article wished to remain anonymous)
[1275] Peter C. Perdue, China Marches West: The Qing Conquest of Central Eurasia (Cambridge, MA: Harvard University Press, 2005).
[1276] Anonymous, China and the Principle of Self-Determination of Peoples, 6.1 St Antony's International Review 6, 84 (2010). (authors of this Article wished to remain anonymous)
[1277] Tim Rühlig, *How China approaches international law: Implications for Europe*, EU-Asia at a Glance, (May 2018).
[1278] I. Storey, China's Bilateral and Multilateral Diplomacy in the South China Sea. In P. Cronin (Ed.) Cooperation from Strength. The United States, China and the South China Sea. Washington D.C.: Center for a New American Security. 36 International Crisis Group (2012). Stirring Up the South China Sea (I), Asia Report N°223, Brussels, International Crisis Group (2012). Hameiri, S., Jones, L. *Rising Powers and State Transformation: The Case of China*, 22.1 European Journal of International Relations, 86-89 (2016).
[1279] Aarshi Tirkey, *Charting China's approach to International Law,* Observer Research Foundation, (May 23, 2018) https://www.orfonline.org/expert-speak/charting-chinas-approach-to-international-law/ (last visited March 2019).
[1280] Catherine Putz, *China in Tajikistan: New Report Claims Chinese Troops Patrol Large Swaths of the Afghan-Tajik Border*, The Diplomat, (June 18,2019).
[1281] *Tajikistan: Report confirms significant Chinese security presence in Pamirs*, Eurasianet, (February 19,2019) https://eurasianet.org/tajikistan-report-confirms-significant-chinese-security-presence-in-pamirs (last visited June 2019).

by pre-existing historical agreement.[1282] Furthermore, China is actively investing and supporting such activities as "joint archeological exploration" and it is not clear for what specific purposes, yet Central Asian states must be cautious about it and constitutional courts must also take into consideration this geopolitical context while adjudicating cases on the relationship between international law and domestic law.[1283]

Anthea Roberts in her book *Is International Law International* argues that there is a an existing western parochialism in international law that causes a threat to the existing system of international law.[1284] She urges that there is a need to diversify perspectives, diversify networks and stop looking from blinders when discussing issues of international law.[1285] The main argument of Roberts is that during the Cold War the international world was living under the bipolar power. Post-cold war period created something called unipolar power, namely universal international law. However, now we live in the competitive world order that have established the multipolar era. She emphasizes that currently there is a strong challenge to international law from such states as Russia and China. The international legal order according to Roberts is divided into to parallel worlds, where same international issues have different narratives from the global law point of view and where no equal and reasonable exchange of dialogue is happening.

Central Asian states, particularly constitutional courts should keep these challenges in mind when they use international norms to justify their decisions in the context of rights

[1282] Svetlana Glushkovo, Tadjikistan peredal chast zemli Kitau [Tajikistan ceded part of the territory to China], Radio Azattyk (October 6, 2011).
[1283] Wang Kaihao, *Archaeologists dig deep on overseas projects*, ChinaDaily (January 9, 2019). https://www.chinadailyhk.com/Articles/249/33/183/1547010194466.html (last visited May 2019). Rustam Halilov, Kyrgyzstan poluchit ot Kitaya 86 millionov dollarov granta na stroitelstvo dorog i arheologicheskie raskopki [Kyrgyzstan will receive from China the grant in the amount of 86 million USD for the construction of road and archeological exploration.] Kloop, June 13, 2019, https://kloop.kg/blog/2019/06/13/153383/ (last visited July, 2019).
[1284] Anthea Roberts, Is International Law International, (Oxford University Press, 2017). Also see Bruno Macaes, *The Secret Sources of Populism*, Foreign Policy, (June 18, 2019).
[1285] Anthea Roberts, Is International Law International (Oxford University Press, 2017). Also see Bruno Macaes, *The Secret Sources of Populism*, Foreign Policy, (June 18, 2019).

protection.[1286] The effective implementation of the decisions of the UN Human Rights Committee on the territory of these states before and after amendments depended mostly on the goodwill of its authorities. And the implementation of these decisions beyond its borders has never been associated with constitutions. Thus, applying pluralistic approach in the context of regional organizations on security, economics, counter-terrorism where these norms prevail over domestic norms and at the same time applying dualistic approach in the context of international human rights norms, where the priority is given to national norms, these courts are risking of pushing the entire region to be absorbed by Russian and Chinese approaches to international law.

Thus, in light of recent legal changes in Central Asia affecting the position of international law in national constitutional orders, there is little hope that references to international law will reinvigorate constitutional jurisprudence on fundamental rights in Central Asia. Moreover, Central Asian CCs are very likely to meet new laws limiting fundamental rights emanating from Russia, particularly in the context of the laws regulating security, anti-terrorism, and foreign agents. However, due to local political power dynamics and the emerging sovereigntist turn it is not likely the CCs will find these laws unconstitutional, no matter how much international condemnation is made by such international human rights institutions as the UN Human Rights Committee.

2.2.The Experience of Central Asian Constitutional Courts in the Context of the Illeberalism

There is ample proof that authoritarian/illiberal regimes benefit from the tamed CCs. Instead of abolishing them, these regimes continue to use CCs for regime legitimization

[1286] Andre Nollkaemper, National Courts and International Rule of Law (Oxford University Press, 2011).

purposes.[1287] Therefore as it was mentioned in chapters 1 and 2, in the context of authoritarian regimes, these courts shall be taken seriously for a study of constitutional review. Thus it makes sense to study tamed CCs to understand the making of illiberal and authoritarian regimes.

It is important to highlight that Uzbekistan is now experiencing a massive scale of legal reforms, in part involving the extension of powers of the Constitutional Court.[1288] The international community highly praises these reforms.[1289] However, it is also important to analyze these reforms in the context of the political realities of Uzbekistan. Ginsburg and Moustafa in their book on authoritarian regimes claim that "*courts are often used to advance the interests of authoritarian regimes*"[1290] and to substantiate their argument they have presented five functions of the courts existing in the authoritarian context. One of the functions is to "*facilitate trade and investment*".[1291] A close look at recent reforms in Uzbekistan somewhat confirms the proposition of Ginsburg and Moustafa. After the death of Islam Karimov (former President of Uzbekistan) in 2016 President Mirziyoev was elected and since then massive legal reforms have been carried out[1292] in the field of monetary liberalization,[1293] privatization of

[1287] Tom Ginsburg, Tamir Moustafa (eds.), *Introduction*, Rule by Law: The Politics of Courts in Authoritarian Regimes, 2 (Cambridge University Press, 2008).
[1288] Zakon Respubliki Uzbekistan o vnisenii izmineniy v otdelnye stat`i Konstitucii Respubliki Uzbekistan [The Law of the Republic of Uzbekistan on introducing amendments to certain Articles of the Constitution of the Republic of Uzbekistan] May 27, 2017
[1289] Edward Schatz, *How Western Disengagement Enabled Uzbekistan's "Spring" and How to Keep it Going*, PonarsEurasia (June 2018) http://www.ponarseurasia.org/memo/how-western-disengagement-enabled-uzbekistans-spring-and-how-keep-it-going (last visited May 2019).
[1290] Tom Ginsburg, Tamir Moustafa (eds.), *Introduction*, Rule by Law: The Politics of Courts in Authoritarian Regimes, 2 (Cambridge University Press, 2008).
[1291] *Id*. p. 3
[1292] Catherine Putz, Central Asia's Democratic Backslide Continues, Except for Uzbekistan, The Diplomat (April 11, 2018) https://thediplomat.com/2018/04/central-asias-democratic-backslide-continues-except-for-uzbekistan/ (last visited October 2018).
[1293] Ukaz Prezidenta RU o Pervoocherednyh merah po liberalizacii valutnoi politiki [Decree of the President of Uzbekistan on primary means of liberalization of monetary policy] September 2, 2017, №УП-5177

previously state-owned properties,[1294] tax reforms,[1295] administrative reforms,[1296] defense,[1297] security,[1298] constitutional reforms,[1299] reforms in the field of human rights[1300] and corruption.[1301]

Furthermore, Uzbekistan is now actively negotiating the process[1302] of joining to the WTO.[1303] Another wave of reforms can be observed in economic field.[1304] development of private entrepreneurship.[1305] Market relations and competition was designed to decentralize the government system with the transfer of a wider range of functions and powers to regional level.[1306] It is still not clear how far Mirziyoev is ready to go on with reforms, whether these reforms will create a viable opposition and political plurality or it will become a façade

[1294] *Id*

[1295] Zakon Respubliki Uzbekistan o Vnisenii Izmineniy v acty nalogovogo zakonadatelstva [Law of the Republic of Uzbekistan on introducing changes to acts on tax legislation] June 13, 2017, № ЗРУ–436

[1296] Ukaz Presidenta Respubliki Uzbekistan ob utverjdenii koncepcii administrativnoi reformy v Respublike Uzbekistan [Decree of the President of Uzbekistan on approval of the concept on administrative reforms in the Republic of Uzbekistan] September 8, 2017

[1297] Zakon Respubliki Uzbekistan ob oboronnoi doctrine Respubliki Uzbekistan [The law of the Republic of Uzbekistan on Defense Doctrine of Uzbekistan] January 9, 2018

[1298] Zakon Respubliki Uzbekistan o slujbe gosudarstvennoi bezopasponosti Respubliki Uzbekistan [The Law of the RU on Governmental Security Service of the Republic of Uzbekistan] March 29,2018

[1299] Zakon Respubliki Uzbekistan o vnisenii izmineniy v otdelnye stat`i Konstitucii Respubliki Uzbekistan [The Law of the Republic of Uzbekistan on introducing amendments to certain Articles of the Constitution of the Republic of Uzbekistan] May 27, 2017

[1300] Ukaz Prezidenta RU ob uchrejdenii instituta Upolnomochennogo pri Prezidente RU po zashite prav I zakonnyh interesov sub`ektov predprinimatel`stva [Decree of the President On the establishment of the institution of the Ombudsman under the President of the Republic of Uzbekistan for the protection of the rights and legitimate interests of business entities] May 5, 2017

[1301] Zakon Respubliki Uzbekistan o Protivodeistvii Korupsii [Law of the RK on Corruption] Nov. 24, 2016

[1302] Press Reliz Ministerstva Inostrannyh Del Respubliki Uzbekistan o vstreche s generalnym derektorom VTO [Press Release of the Ministry of Foreing Affairs of The Republic of Uzbekistan on meeting with the General Director of the WTO], July 23, 2019.

[1303] Farkhod Mirzabaev, *Uzbekistan's WTO Aspirations: a Genuine Goal or Just Another "Right Signal",* Central Asian Bureau for Analytical Reporting, (May 6, 2019).

[1304] Postanovlenie Prezidenta Respubliki Uzbekistan o Merah po Sovershenstvovaniu sistemy Upravlenia Gosudrastvennymi Aktivami [Resolution of President of RU on measures of advancing the system of governance over governmental assets] May 14, 2018

[1305] Postanovlenie Prezidenta Respubliki Uzbekistan o pervoocherednyh merah gosudarstvennoi podderjki bazovoi otroslevoi ekonomiki v usloviyah liberalizacii valutnogo rynka [Resolution of the President of RU On priority measures of state support of basic sectors of the economy in the context of liberalization of the foreign exchange market] September 4, 2017

[1306] Postanovlenie Prezidenta Respubliki Uzbekistan o dopolnitelnyh merah po sovershenstvovaniu mehanizmov vnedrenia innovaciy v otrasli s sfery ekonomiki [Resolution of the President of RU About additional measures to improve the mechanisms for introducing innovations in the industry and economic sphere] May 7, 2018

constitutional reform that Kazakhstan experienced in 2017.[1307] Even though it is too early to make a prognosis, the existing *de facto* political landscape in Uzbekistan shows that these reforms are made to attract investment and foster trade,[1308] rather than genuine commitments to democratic transition. If this is the case, then propositions of Ginsburg on CCs in authoritarian context holds in the context of recent Uzbekistan`s legal and constitutional reforms as well.

There is currently ample literature that addresses the global trend toward illiberalism and deficiencies of liberal constitutions to provide proper remedies against this threat. Various new concepts are emerging and mushrooming revolving around the global crisis of democracy; just to mention few, abusive constitutionalism, [1309] democratic backsliding, [1310] constitutional retrogression, [1311] populist constitutionalism, [1312] unconstitutional constitutional amendment, [1313]

[1307] Zakon Respubliki Kazakhstan o vnisenii izmineiy v Konstituciu Respubliki Kazakhstan [Law of the RK on introducing amendments to the Constitution of the Republic of Kazakhstan] March 13, 2017 For more explanation on constitutional history of super-presidentialism in Kazakhstan please see D. Nurumov & V. Vashcankha, *Constitutional Development of Independent Kazakhstan* in R. Elgie, S. Moestrup, Semi-Presidentialism in the Caucasus and Central Asia 146-150 (2016). Pistan Carna, Constitutional Reform in Kazakhstan: increasing democracy without political pluralism?, *CONSTITUIONNET (2017)*, http://www.constitutionnet.org/news/2017-constitutional-reform-kazakhstan-increasing-democracy-without-political-pluralism (last visited March 24, 2019).

[1308] Bernardo Teles Fazendeiro, *Soft power under Mirziyoyev: Change and continuity in Uzbekistan's foreign policy*, Open Democracy, (July 9, 2018) https://www.opendemocracy.net/en/odr/soft-power-under-mirziyoyev/ (last visited May 2019). Adbuzhalil Abryrasulov, *Zachem Uzbekskomu Prezidentu Liberalnye Reformy* [Why Uzbek President need Liberal Reforms], BBC (September, 2018) https://www.bbc.com/russian/features-41269455 (last visited March 2019).

[1309] David Landau, *Abusive Constitutionalism*, 47 UC Davis Law Review ,189, (2013). Rosalind Dixon, David Landau, *1989–2019: From democratic to abusive constitutional borrowing*, 17.2 International Journal of Constitutional Law, 489(2019).

[1310] Nancy Bermeo, *On Democratic Backsliding*, 27.1 Journal of Democracy 5, (2016). Larry Diamond, Marc F. Plattner, Christopher Walker, Authoritarianism Goes Global: The Challenge to Democracy (John Hopkins University Press, 2016).

[1311] Aziz Z. Huq, Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA Law Review, 95(2018).

[1312] David Landau, *Populist Constitutions*, 85 The University of Chicago Law Review (2018). Paul Blokker, *Populist Constitutionalism*, International Journal of Constitutional Law Blog, 4 May 2017, http://www.iconnectblog.com/2017/05/populist-constitutionalism/ (last visited May 2019). Paul Blokker, *Varieties of populist constitutionalism: The transnational dimension*, 20.3 German Law Journal, 332 (2019) Dixon, Rosalind: *Populist Constitutionalism and the Democratic Minimum Core*, VerfBlog, 26 April 2017, https://verfassungsblog.de/populist-constitutionalism-and-the-democratic-minimum-core/ (last visited May 2019).

[1313] Richard Albert, *Constitutional Amendment and Dismemberment*, 43 Yale Journal of International Law (2018). Yaniv Roznai**,** Unconstitutional Constitutional Amendments – The Limits of Amendment Powers (Oxford University Press, 2017). Yaniv Roznai, *Constitutional Amendment and "Fundamendment": A Response to Professor Richard Albert*, Yale Journal of International Law Forum (February 27, 2018). PO JEN YAP, *The conundrum of unconstitutional constitutional amendments*, 4.1, Global Constitutionalism 114, (2015).

tiered constitutional design,[1314] constitutional capture,[1315] and other scholarship[1316] in the field of global crisis of democracy.[1317] In the context of these trends the experience of Central Asian CCs also confirm that available tools in constitutional democracies are not fully able to protect constitutional democracies from threats as authoritarianism or illiberalism.

For instance, one of the tools available in liberal constitutions is the system of is tiered constitutional design. However, in Kyrgyzstan this tool did not stop Atambyaev from succeeding with 2016 constitutional amendments. The amendment threshold in Kyrgyzstan after 2010 events was extremely high, the Constitution even set a moratorium for any amendments until 2020. Furthermore, Article 114 stipulated high procedural requirements for the initiating and eventually amending the constitution. Namely, 2/3 of Parliament, 300000 voter's initiative and referendum. Despite these requirements, with all possible procedural violations the amendments were passed via referendum. [1318] The Chamber instead of using an opportunity of "unconstitutional constitutional amendment", did not mention anything about Article 114 (procedure of introducing amendments to the constitution) in its judgement. Instead of starting

[1314] Rosalind Dixon, David Landau, *Tiered Constitutional Design*, 86.2 The George Washington Law Review, 439(2018). Tom Ginsburg, James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 International Journal of Constitutional Law, 686 (2015).

[1315] Jan-Werner Müller, *Protecting the Rule of Law and Democracy in the EU: The Idea of a Copenhagen Commission*, in C Closa, D Kochenov, Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press, 2016).

[1316] Challenges on existing remedies was discussed in the context of Hungary as well see Renata Uitz, *Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary*, 13.1 International Journal of Constitutional Law, 279 (2015).

[1317] Tom Ginsburg, Aziz Z. Huq, Mila Versteeg, *Coming Demise of Liberal Constitutionalism?*, 85 University of Chicago Law Review 239, (2018).
Mark A. Graber, Sanford Levinson, Mark Tushnet (eds), Constitutional Democracy in Crisis? (Oxford University Press, 2018). Samuel Issacharoff, *Democracy's Deficits*, 85 The University of Chicago Law Review, 485, (2018). Steven Levitsky, Daniel Ziblatt, How Democracies Die: What History Reveals About Our Future (Penguin UK, 2018). Yascha Mounk, The People Versus Democracy: The Rise of Undemocratic Liberalism and the Threat of Illiberal Democracy (Harvard University Press, 2018). Aziz Z. Huq, Tom Ginsburg, How to Save a Constitutional Democracy (University of Chicago Press, 2018). Democracy in Crisis. Freedom in the World 2018.

[1318] Konstitusionniy Zakon KR o Referendume Kyrgyzskoi Respubliki [The Constitutional Law of the KR on Referendum of the Kyrgyz Republic] Oct.31, 2016, No. 173

from procedural rules, the Chamber chose to directly jump into the substantive analysis of the proposed amendments.[1319] Thus, the concept of unconstitutional constitutional amendment was also not an effective protection against threats to illiberal/authoritarian constitutions.

Another available tool is something called *Eternity Clause* or unamendable clauses of the constitution. The concept of the unamendable constitutional core is normally used by constitutional courts to stop constitutional amendments. In Central Asia, it has become a tool in the hands of presidents to further their own powers, even after they step down, via formal constitutional amendments. The experience of Central Asia shows that there is an emerging trend at least in Kazakhstan and Tajikistan where this tool is being actively used by incumbent presidents to legitimate their regimes and moreover to use it as *ex ante* tool for the purposes of creating lifelong constitutional guarantees after their resignation. For instance, in in Kazakhstan the status of first President of the Republic of Kazakhstan – *Elbasy*[1320] was also included into the eternity clause. The Constitutional Council approved these amendments by justifying that it constitutionally confirms the historic mission of Nursultan Nazarbayev as the *Founder* of the new independent state of Kazakhstan. Later using this extended eternity clause, the Capital city renaming from Astana to Nursultan was found constitutional, even though procedural requirements on amendments were violated. Most likely Tajikistan will take this path as well, taking into consideration that the status of the siting president as the *founder of peace and leader*

[1319] Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016

[1320] Konstitucionniy Zakon RK o Pervom Prezidente RK Elbasy [Constitutional Law of the RK on First President of the RK- Elbasy] July 20, 200 No. 83-II.

of nation had been legally entrenched into the constitution, thus obtaining a constitutional status.[1321]

In Taiwan on the other hand Judicial Yuan in *Interpretation No. 499* stated that amendments cannot alter and change such principles as democratic republic, sovereignty of people, fundamental rights and freedoms, checks and balances constitute the "*most critical and fundamental tenets of the Constitution as a whole*".[1322] Thus, any amendment aimed at altering these tenants shall be considered void. This decision of the Judicial Yuan resembles the concept that is actively used in India called the "*basic structure doctrine*" [1323] and the "*constitutional replacement doctrine*" of the Colombian Constitutional Court.[1324] At the same time, this approach was not followed by the Central Asian CCs. A close look at the jurisprudence of Central Asian CCs enables one to see that when these courts talk about high constitutional principles, they talk about unique features of the state, not the Constitution.[1325] Thus, they end up contributing to super-presidentialism in an authoritarian fashion.

Furthermore, Central Asia provides ample examples of legal formalism in constitutional adjudication, where the CCs are used as an important tool in the toolkit of authoritarian presidents. One of the distinguishing features that can be observed while reviewing the

[1321] Konstitucionniy Zakon Respubliki Tajikistan ob Osnovatele mira I nacionalnogo edinstva- Lidera nacii [Constitutional Law of the Republic of Tajikistan on Founder of peace, National Unity- Leader of Nation] November 8, 2016 No. 1356. Konstitucionniy Zakon RK o Pervom Prezidente RK Elbasy [Constitutional Law of the RK on First President of the RK- Elbasy] July 20, 2000, No. 83-II.
[1322] Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 499 (2000).
[1323] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225: AIR 1973 SC 1461.2
[1324] Carlos Bernal, *Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine*, 11.2 International Journal of Constitutional Law, 339-357 (2013).
[1325] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017. Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 14 sentyabrya 2007 goda [The Decision of the Constitutional Court of the Kyrgyz Republic] Sep. 14, 2007

jurisprudence of Central Asian CCs on politically sensitive cases is the evolution of soviet legal tradition with high procedural formalism and legalism into two-fold or selective formalism in Central Asia. It is reflected in somewhat two contradictory ways. On the one hand, there is a formalistic approach to constitutional reasoning; on the other hand, there is a tendency of turning to CC as a formality. However, as earlier chapters demonstrated, Central Asian CCs is about excessive selective legal formalism.

The CCs of Central Asia frequently disregarded procedural rules in their decisions and their adherence to procedural formality was situational. One cannot but notice that these courts in the context of Central Asian power dynamics became part of a check-list of "formality" under authoritarian presidents to legitimate certain constitutional amendment or the adoption of the law. Otherwise stated, the decisions of these courts from legal account, namely from the perspectives of legal tradition were not principled. Thus, in issues involving mega politics Central Asian CCs were not able to succeed on legal grounds, which gradually turned these courts into façade courts on political ground. However, the new Constitutional Chamber of Kyrgyzstan substantially stands out among these courts. The Chamber is continuously attempting to integrate new doctrines and to transform the constitutionalism. However, these attempts are being met with push backs both from political and legal actors, thus causing difficulties for the Chamber in its efforts of building a vibrant constitutionalism in Kyrgyzstan. Having the theoretical framework in mind, the section will proceed with revisiting the jurisprudence of Central Asian CCs on politically sensitive cases.

As discussed in Chapter 2, in the *Islamic renaissance Party Case*[1326] Tajik CC delivered a confusing decision from procedural point of view. The Court found the challenged law constitutional and yet did not accept the complaint of the applicant. This approach is fundamentally against the formalistic legal tradition common for Tajik courts. On substantive grounds, the Court did not provide a well reasoned and justified opinion as well. The same approach was taken in the *2016 Constitutional Amendment Case*.[1327] There was no clear test or approach used in evaluating the constitutionality of the amendments. Rather the reasoning contained some abstract thoughts with no specific analysis whatsoever. Furthermore, the Court avoided evaluating each proposed amendment, which is required by the procedural rules, rather it used a chapeau general justification and broadly applied to all amendments. In both cases the Court was used a façade tool by the president to legitimate his regime and to fully consolidate power while getting rid of one of the most influential opposition parties in Tajikistan. Similar observations can be made about Uzbekistan[1328] in cases involving with regional hokims.[1329]

Similarly, the CC of Kazakhstan did not adhere to required procedural and substantive rules in cases involving *2017 Constitutional Amendments*[1330] and *Security Council Law*.[1331] In

[1326] Reshenie Verhovnogo Suda Respubliki Tajikistan ob obyasvlenii Partiu Islamskogo Vozrojdenia Tadjikistana ekstremistko-terroristicheskoi organizaciey [Decision of the Supreme Court of the Republic of Tajikistan on declaring the Islamic Renaissance Party of Tajikistan as extremist terrorist organization] Sep.19, 2015

[1327] Postanovlenie Konstitucionnogo Suda Respubliki Tadjikistan po predstavleniu Madjlisa nemoyandan Oli Respubliki Tajikistan ob Opredelenii sootvestvia proekta izmeneniy I dopolneniy vnosimyh v Konstituciu Respubliki Tadjikistan [Ruling of the Constitutional Court of the Republic of Tajikistan upon the referral of Parliament on reviewing the constitutionality of proposed amendments to the Constitution of the Republic of Tajikistan] February 4, 2016.

[1328] Postanovlenie Konstitucionnogo Suda Respubliki Uzbekistan po delu o proverke Konstitucionnosti polojenia ot 11 Noyabrya 1996 goda prinyatogo resheniem Hokimiata Horezmskoi Oblasti [Ruling of the Constitutional Court of the Republic of Uzbekistan on case involving the review of the constitutionality of regulation as of November 11, 1996 adopted by the decision of the Hokimiyat of the Khorezm Region] February 25, 1997.

[1329] Postanovlenie Konstitucionnogo Suda Respubliki Uzbekistan po delu o proverke Konstitucionnosti rasporyajenia Hokima Surhandarinskoi Oblasti [Ruling of the Constitutional Court of the Republic of Uzbekistan on case involving the review of the constitutionality of order of the Hokim of the Surhandariya Region] August 15, 1996 No. 164.

[1330] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan

both cases no analysis was made as to conformity of the law with main principles of rule of law, democracy and separation of powers. There was an absence of one consistent methodology, approach or test used by the Constitutional Council while reviewing the constitutionality of proposed bills. In the *Capital City Renaming case* the amendments were approved by the Constitutional Council,[1332] despite the explicit prohibition in the text of the Constitution for an interim president to propose amendments.

2.3.The Impact of Islamization

Besides geopolitical challenges, terrorism threats, [1333] ecological problems, [1334] corruption,[1335] clientelism[1336] and nationalism,[1337] Central Asia is currently facing the problem of Islamization. Chapter 1 revealed that the root causes of this problem arise from the historical

[Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017.

[1331] Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan o proverke na sootvetsvie Konstitucii RK Zakona RK o Sovete Bezopasnosti RK I Zakona o Vnesenii Izmeneniy I Dopolneniy v nekotorye Zakonodatelnye akty Respubliki Kazakhstan [Normative Resolution of the Constitutional Council of the Republic of Kazakhstan on reviewing the constitutionality of the law on Security Council and proposed drafts to certain legal acts of the Republic of Kazakhstan] June 28, 2018 No.4.

[1332] Zakluchenie Konstitucionnogo Soveta Respubliki Kazakhstan o proverke proekta zakona Respubliki Kazakhstan o vnesenii izmeneniy v konstituciu Respubliki Kazakhstan na sootvestvie Konstitucii Kazaksthana [Conclusion of the Constitutional Council of RK on reviewing the constitutionality of the draft law on introducing changes to the Constitution of the RK] March 20, 2019 No.2.

[1333] Edward Lemon, *Assessing the Terrorist Threat In and From Central Asia*, *Voices on Central Asia* (October 18,2018) https://voicesoncentralasia.org/assessing-the-terrorist-threat-in-and-from-central-asia/ (last visited February 2019).

[1334] Khamza Sharifzoda, Climate Change: An Omitted Security Threat in Central Asia, The Diplomat, (July 22,2019) https://thediplomat.com/2019/07/climate-change-an-omitted-security-threat-in-central-asia/ (last visited August 1, 2019).

[1335] Eastern Europe and Central Asia: Weak Checks and Balances Threaten Anti-Corruption Efforts, Transperancy International (January 29. 2019) https://www.transparency.org/news/feature/weak_checks_and_balances_threaten_anti_corruption_efforts_across_eastern_eu (last visited March 10, 2019). Kelly M. McMann, Corruption as a last resort: adapting to the market in Central Asia (Cornell University Press, 2014).

[1336] Pomfret Richard, The Central Asian Economies in the 21st Century, 180 (Princeton University Press, 2019).

[1337] Yuliy Usupov, Perspektivy Demokratizasii Stran Centralnoi Azii [The Perspectives of Democratic Development of Central Asian States] Central Asian Bureau for Analytical Reporting (May 7,2019) https://cabar.asia/ru/perspektivy-demokratizatsii-stran-tsentralnoj-azii-ili-kak-razbudit-spyashhie-instituty/ (last visited June 2, 2019).

context. The Soviet regime, driven by the fear of Pan-Islamism, tightly controlled the practice of Islam in Central Asia. However, during the occupation of Afghanistan, Soviet Union intentionally used the Muslim population *"to penetrate the Arab-Islam world*,"[1338] facilitating the formation of Islamic movements and particularly the politicization of Islam in Central Asia.

The sooner or later this issue will appear before constitutional courts in the context of principle of secularism. Islamization in Central Asia is a very complex and complicated topic, yet it plays an important role in the issue of democratic landscape.[1339] After the fall of the Soviet Union political actors tried to play with different cards to pursue their political agenda such as ethnicity card, nationalism card and religious card.[1340]

The Constitutions of Kazakhstan, Kyrgyzstan, Tajikistan expressly proclaim themselves to be secular States.[1341] The Uzbek Constitution does not expressly say that it is a secular State[1342], however Article 61 of the Constitution says that religious organizations shall be separated from the state.[1343] Common problem of all constitutional frameworks is the absence of clear understanding of what does secular mean? What is the constitutional model of state and religion relationship? Who should define it? Parliament? Constitutional Courts? These issues on constitutional level is silent. Therefore, whenever there is sign of convergence or divergence of religion and state such as Presidential speech of Jeenbekov on support of Islamization[1344] or

[1338] Lena Johnson, Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam, 45-55 (I.B. Tauris& Co Ltd., 2006).
[1339] For more information on Islam in Central Asia see Paolo Sartori, Visions of Justice: Sharia and Cultural Change in Russian Central Asia (Leiden: Brill, 2016).
[1340] Dilshod Achilov, *Islamic Revival and Civil Society in Kazakhstan*, in Charles E. Ziegler, Civil Society and Politics in Central Asia, 81-90 (The University Press of Kentucky, 2015).
[1341] Article 1 of the Constitution of Kazakhstan (amended 2017), Article 1 of the Constitution of Kyrgyzstan (amended 2016), Article 1 of the Constitution of Tajikistan (amended 2008).
[1342] M. Kuleshevkiy, Uzbekistan: Vozmojno li Svetskaya Alternativa? [Uzbekistan: Is it possible to have a secular alternative?] Fergana (March, 2014) https://www.fergananews.com/Articles/8091 (last visited September 2018).
[1343] Article 61 of the Constitution of Uzbekistan (amended 2017)
[1344] Prezident Kirgizii vyskazalsya v podderjku mechetei [President of Kyrgyzstan expressed his support for mosques], NewsAsia (August 23, 2019) http://www.news-asia.ru/view/politics/11515 (last visited July 6, 2019).

former President`s Atambayev`s concern on the Islamization[1345], building prayer rooms in the Parliament of Kyrgyzstan and attempting to propose law on extending lunch break hours for prayer purposes[1346] or the adoption of the law on prohibition of headscarves and beards in Tajikistan.[1347] For now all these issues remain open and unresolved thus creating precedents or customs that later might greatly influence the decision making or crystallization in the law.

Furthermore, due to the ambiguity in the law and constitution the issue of the relationship between state and religion is becoming more and more politically charged and sensitive in Central Asia, especially in Kyrgyzstan, that none of the branches of government are willing to take responsibility on regulating it. Because any attempt is being met by either of the parties (secular v. religious) personally, it is creating a big loophole in the legal framework which is negatively affecting daily politics as well. For instance, during the 2017 Presidential elections Jeenbekov was actively supported by Kyrgyzstan`s former chief Mufti and the leader of Muslims, even though it is expressly prohibited by the Electoral Code. However, the Central Election Commission did not issue even a warning on this case.[1348] Chubak ajy (the former chief Mufti) is a very influential figure in Kyrgyzstan, he has his own YouTube channel[1349] which is very popular among Muslims in Kyrgyzstan. Whenever there is a draft law or any initiative related to the advancement of Islam (extending lunch break hours for prayer purposes) he openly discusses

[1345] Kyrgyz Women Warned Of Dangers Of Islamic Dress, RFE/RL (Jul.29,2016), https://www.rferl.org/a/kyrgyzstan-islam-hijab-women/27888178.html (last visited June 8, 2019).
[1346] Kyrgyzstan: Islam and Secularism Clash Again, *IWPR Reporting Central Asia of Kyrgyzstan, (*Jun. 23, 2016) https://cabar.asia/en/kyrgyzstan-islam-and-secularism-clash-again/ (last visited June 8, 2019).
[1347] Zakon o vnisenii izmineiy I dopolneniy v Zakon Respubliki Tajikistan Ob uporyadochenii tradiciy, torjestv I obryadov v Respublike Tajikistan, [Law on introducing changes to the Law of the Republic of Tajikistan On streamlining traditions, celebrations and rites in the Republic of Tajikistan] July 11, 2017
[1348] Michal Romanowski, *Why the first peaceful transfer of power in Kyrgyzstan may not mean much for its democracy*, The Scroll.in (October 14,2017). https://scroll.in/Article/853897/why-the-first-peaceful-transfer-of-power-in-kyrgyzstan-may-not-mean-much-for-its-democracy (last visited May 8,2019).
[1349] Timur Toktonaliev, *Kyrgyzstan's Islamic TV Revolution*, The Institute for War and Peace Reporting (August 19, 2017) https://iwpr.net/global-voices/kyrgyzstans-islamic-tv-revolution (last visited June 9, 2019).

them and publicly blames and shames certain MPs who voted against those initiatives.[1350] Moreover, in his YouTube channel he can sometimes openly incite men to beat women or encourage polygamy (it is prohibited by the *Kyrgyz Criminal Code*). Governmental officials did not investigate this case properly because of sensitivity and the high profile of Chubak Ajy.

Rapid Islamization in Central Asia is also due to external influences,[1351] particularly from Saudi Arabia.[1352] In addition to substantial funding on building mosques and providing scholarship for Central Asian students to study, Saudi Arabia is actively advancing its grand plan on entrenching the principles of Islamic financing into the legal systems of these states. The project first started with the introduction of Islamic banking.[1353] Currently besides Islamic banking, Kyrgyzstan[1354] and Kazakhstan[1355] had incorporated entire chapters on Islamic Finance into their *Civil Codes*. Uzbekistan is also considering incorporating Islamic financing into its *Civil Code*.[1356] Since these changes were introduced recently, courts did have cases on these issues yet. However, the incorporation of Islamic principles into secular civil codes might potentially create a big challenge for ordinary courts of Kyrgyzstan, Kazakhstan and - if adopted- Uzbekistan because in order to settle the dispute they would have to refer to sharia law. This

[1350] Radicalization in Kyrgyzstan is no Myth, 24.kg (June 23, 2016) https://24.kg/archive/en/bigtiraj/180942-news24.html/ (last visited April 9, 2019).
[1351] Vyacheslav Belokrenitsky, *Islamic Radicalism in Central Asia: The Influence of Pakistan and Afghanistan,* in Boris Rumer (ed.), Central Asia at the end of the Transition 152 (M.E.Sharpe, Inc, 2005).
[1352] Arne C. Seifert, Political Islam in Central Asia – Opponent or Democratic Partner?, 25 CORE Working Paper (November, 2012)
[1353] Alexander Wolters, "Islamic Finance in the States of Central Asia: Strategies, Institutions, First Experiences" Forschungspapiere Research Papers | 2013/01
[1354] Entire chapter on Islamic financing principles were introduced to the Civil Code of the KR by adopting the following law: Zakon Kyrgyzskoi Respubliki o vvedenii v deistvie Zakona KR o nacionalnom banke KR, bankah o bankovskoi deyatelnosti [Law of the KR on entering into force the law on National Bank, banks and bank activities in the Kyrgyz Republic] Dec.16,2016
[1355] Zakon Respubliki Kazakhstan o vnisenii izmeneniy I dopolneniy v nekotorye zakonodatelnye akty Respubliki Kazakhstan po voprosam strahovania i islamskogo finansirovania [Law of the RK On making changes and amendments to some legislative acts of Republic of Kazakhstan on insurance and Islamic finance] Nov. 24, 2015
[1356] Bernardo Vizcaino, *Uzbekistan to develop Islamic finance in bid to tap foreign markets*, The Reuters (July 23, 2018).

again raises concerns on principles of secularism and whether these courts are competent to resolve these issues. If they are not, does it mean that Central Asian courts might establish sharia courts?

Regarding Islamization, Tajikistan is rather on the other side. There is currently an extreme fight with radicalization and Islamization expressed by the adoption of laws on banning heads raves, hijab and beards.[1357] The Supreme Court of Tajikistan declared the *Islamic Renaissance Party* of Tajikistan[1358] a terrorist organization and thus banned its operation in Tajikistan. However, it is important to note that *Islamic Renaissance Party* of Tajikistan among the United Tajik opposition was a key player during the 1992-1997 Civil War in Tajikistan. As a result of the peace agreement in 1997 which led to the adoption of the compromise Constitution of Tajikistan, the *Islamic Renaissance Party* became the second largest party in Tajikistan. Furthermore, by the Constitution the formation of political parties on religious grounds was allowed.[1359] Thus, for a long time *Islamic Renaissance Party* was an active opposition in Tajikistan. President Rahmonov by consolidating power around himself and changing the constitution[1360] slowly had been targeting his efforts against the *Islamic Renaissance Party* thus finally succeeding in 2015 and completely banning the *Islamic Renaissance Party*. Therefore, the fight against religious extremism in Tajikistan is much more nuanced and rather a camouflaging of governmental efforts to get rid of the opposition.

[1357] Zakon o vnisenii izmineiy I dopolneniy v Zakon Respubliki Tajikistan Ob uporyadochenii tradiciy, torjestv I obryadov v Respublike Tajikistan, [Law on introducing changes to the Law of the Republic of Tajikistan On streamlining traditions, celebrations and rites in the Republic of Tajikistan] July 11, 2017

[1358] Reshenie Verhovnogo Suda Respubliki Tajikistan ob obyasvlenii Partiu Islamskogo Vozrojdenia Tadjikistana ekstremistko-terroristicheskoi organizaciey [Decision of the Supreme Court of the Republic of Tajikistan on declaring the Islamic Renaissance Party of Tajikistan as extremist terrorist organization] Sep.19, 2015

[1359] Konstituciia Respubliki Tajikistan [Konst.RT] [Constitution of Republic of Tajikistan] November 6, 1994, Article 8.

[1360] Konstituciia Respubliki Tajikistan [Konst.RT] [Constitution of Republic of Tajikistan] November 6, 1994, (after 2016 amendments). Article 8.

Finally, scholars suggest that there is a new face of political Islam in Central Asia.[1361] There is a second generation of Islamists Bakir Uulu in Kyrgyzstan, Muhiddin Kabiri (leader of the IRPT) in Tajikistan and Bekbolat Tleukhan (former member of the Nur Otan) in Kazakhstan who disassociated themselves with conflict and violence but rather used Islam as a compromise and a peaceful tool to advance their political agenda and as "*a tool to manipulate with the minds of the population*".[1362] This "*new face of political Islam in Central Asia"*[1363] potentially might follow the model of Turkey`s *Justice and Development Party* under Erdogan[1364] as a model of convergence between Islam and parliamentary democracy where political pluralism coexists with Islamic values[1365]. Therefore, it is essentially important especially for Central Asian states to stop delaying or avoiding the constitutional debate on secularism but find a way to come up with balanced and proportionate framework, before it is not too late.

Based on the abovementioned, one cannot but notice that most likely political actors will shift responsibility from political branches to the judiciary as a general tactic used by politicians to avoid decision-making on sensitive issues.[1366] Threfore once this issue reaches constitutional courts they are going to face tremendous challenges in resolving this constitutional dispute. As the comparative analysis of Central Asian CCs revealed, these courts will not be able to stop political leaders from making constitutional changes on the role of Islam. The CCs are less likely

[1361] Emmanuel Karagiannis, *The New Political Islam in Central Asia: From Radicalism to the Ballot Box*?, 19.1 Brown Journal of World Affairs, 72-76 (2012).
[1362] E. Karagiannis, The New Face of Political Islam in Central Asia: The Rise of Islamo-democrats, *Journal of Muslim Minority Affairs*, 267-281 (2016)
[1363] E. Karagiannis, The New Face of Political Islam in Central Asia: The Rise of Islamo-democrats, *Journal of Muslim Minority Affairs*, 268, (2016)
[1364] Toni Aleksi Alaranta, *Political Parties and the Production of an Islamist–Secularist Cleavage in Turkey*. 4.2 Approaching Religion, 113-120 (2014).
[1365] Kathleen Collins, Erica Owen, Islamic Religiosity and Regime Preferences: Explaining Support for Democracy and Political Islam in Central Asia and the Caucasus, *Political Research Quarterly*, Vol. 65, No. 3, pp. 499-515 (2012)
[1366] Carlo Guarnieri and Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy (Oxford University Press, Incorporated, 2002).

be able to activate constitutional constraints on their own in a lasting fashion, without the support of political actors, because the strong decision will make them targets for political attacks. At the same time, in case if constitutional courts decide to defer the case to political branches, most likely it will lead to a referendum. The dissertation showed that in the context of Central Asia the referendum is never a good idea and in terms of this particularly issue it might lead to the scenario of Malaysia, where the principle of secularism was replaced with the principles of shariah law.[1367] It is also important to note that it would not help if these courts decide to make secularism part of the unamendable constitutional core, as the notion of unamendable core/eternity clauses is already used in the region by presidents to cement their own powers even further by formal constitutional amendments. Therefore in the context of the impact of Islamization in Central Asian constitutionalism, the primary propositions of Roux about incrementality of change and the willingness of political actors to serve as agents of transition hold on firmly as well.

3. Conclusion

As the experience of Central Asia demonstrated this region is still in transit towards democratization and is currently facing various challenges grounded on history, political economy and geopolitics. Some states as Kyrgyzstan experienced several waves of regime transition and experimented different forms of governance from semi-presidentialism and move towards parliamentarism.[1368] All these experiments have also influenced the constitutional review mechanism and as dissertation showed current Constitutional Chamber substantially

[1367] For more information on how the issue of constitution and religion evolved in Malasyia and Indonesia see Dian Shah, Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Shri Lanka, (Cambridge Univesrity Press, 2017).
[1368] Matteo Fumagalli, *Semi-presidentialism in Kyrgyzstan* 181-183 in R. Elgie, S. Moestrup, Semi-Presidentialism in the Caucasus and Central Asia 146-150 (2016)

stands out among its peer CCs of Central Asia. Sooner or later waves of transition will start in Tajikistan, Uzbekistan and Kazakhstan and the jurisprudence of Kyrgyz Constitutional Chamber with its ups and downs can be a good lesson for these courts. However, the dissertation also demonstrated that constitutional transformation does not happen as a big bang, rather it happens incrementally and gradually even when surpassed by the constitutional review. The role of CCs as agents of constitutional transformation was analyzed in the context of mega politics, ordinary politics and in fundamental rights domain. In all three aspects, it was confirmed that without generating a genuine political pluralism, without willingness of legal and political actors to foster the transition and without constitutional court`s efforts to make the text of the constitution matter while smartly facilitating the dialogue between different political actors, any reforms and amendments risk to remain as façade and lip serviceto democratic transition.

Conclusion

This thesis aimed to show that research on constitutional courts should involve a holistic approach. These courts do not exist in a bubble or vacuum and to better understand and have a comprehensive picture of their work, constitutional courts must be placed in a broader legal, political, geopolitical, historical and economic context. The central premise of the dissertation was that these broader factors and contexts in line with constitutional design and architecture have a direct impact on the success or failure of constitutional review in new democracies. With these premises in mind, Central Asian constitutional courts were contrasted with East Asian constitutional courts that have been accepted by constitutional scholars as successful actors of constitutional transformation in Taiwan and South Korea. Furthermore, the dissertation aimed to answer the following key **research questions**. *First, what constitutional and extra-constitutional frameworks and factors caused the failure of constitutional review in Central Asia? Second, how to strengthen the potential of these courts towards success? Third, what is the added value of the comparative study of Central Asian and East Asian constitutional courts for the existing global discourse on judicial review?*

The structure of the dissertation was designed in such a way as to address these research questions following a certain logic. Chapter 1 offered an institutional analysis of these courts to identify the origin and reasons behind the establishment of judicial review in Central Asia and it explored how those reasons shaped institutional designs of these courts. Chapter 2 reviewed the jurisprudence of CCs on issues of mega politics and politically sensitive cases by placing them into their broader socio-political context. Chapter 3 analyzed cases involving institutional confrontations among branches and the role of these courts in facilitating the dialogue between different political actors in cases involving institutional conflicts. Chapter 4 reviewed the

fundamental rights jurisprudence of CCs with elements of external and internal factors and power dynamics. Finally, Chamber 5 synthesized all previous chapters and placed the experience of Central Asian and East Asian CCs into the framework of a global discourse on judicial review.

The dissertation showed that existing theories, particularly the insurance theory cannot fully and comprehensively explain the initial origin of constitutional courts in Central Asia. Rather, such factors as the historical past (Soviet rule, Pan-Turkism and Pan-Islamism), the process of early transition in Central Asia (top-down approach to transition driven by former soviet elites) and political economy shaped the internal and external political and economic landscapes of these states that directly impacted the origin and institutional design of CCs in Central Asia. Due to lack of resources and materials Kyrgyzstan was not in a position of extracting and exporting natural resources on its own, it pushed Kyrgyzstan to the adoption of one of the most liberal economic systems in Central Asia, and to the liberalization of domestic law. Thus, it also impacted to the establishment of one of the most empowered Constitutional Courts with expansive institutional design and competencies. In contrast, Kazakhstan was rich for such resources as oil and gas, however it also lacked resources to extract them, thus needed liberalize its economic systems. Accordingly, just like Kyrgyzstan, Kazakhstan established a Constitutional Court with substantially broad and wide powers and competencies. However, gradually with the increase of oil prices Kazakhstan enjoyed energy driven booms that led to the consolidation and strengthening of the Nazarbayev`s regime which led to a tremendous adjustment of the Constitutional Court into less powerful and more façade like Constitutional Council. Being the biggest supplier of cotton during Soviet Regime enabled Uzbekistan to retain this industry after the collapse of the Soviet Union. Since the cotton production did not require attraction of foreign investors, Uzbekistan developed the least liberal economic system and opted

to retain the state command economy. This enabled Uzbekistan to escape the process of liberalization and adoption of various liberal laws. Thus, it also impacted the institutional design of the Constitutional Court. Among all Central Asian states Uzbekistan established the least powerful and the least empowered Constitutional Court. The institutional design of the Tajik Constitutional Court can be placed into the medium of this spectrum and the main reason behind it was the civil war that erupted once it emerged as an independent state. Furthermore, during the early period of the formation of these courts one important political event, namely the Russian forced parliamentary dissolution caused a wave of parliamentary dissolutions in Central Asia that later paved the way for Central Asian Presidents to tame CCs that had a long-term impact on CCs as institution.

Second, a study of Central Asian CCs confirms that the process of constitutional transformation happens gradually and transformative constitutionalism substantially depends on willingness and desire of political actors, legal community and society as a whole. It was particularly observed in the analysis of jurisprudence of Central Asian and East Asian CCs on politically sensitive issues. In the context of Central Asia failure of CCs to foster transition and establish constitutionalism was due to the unwillingness of political actors and due to retaining the soviet legal tradition. Moreover, one can observe the evolution of soviet legal tradition with high procedural formalism and legalism into a two-fold or selective formalism in Central Asia where the decisions of CCs became part of a "formal" requirement of authoritarian presidents to legitimate certain constitutional amendment or the adoption of the law. In Kyrgyzstan any attempts of CC to integrate new doctrines and to transform the constitutionalism is being met with push backs both from the political and legal actors. The experience of CCs of South Korea and Taiwan on mega politics is the opposite example. These courts gradually, depending on the

readiness and willingness of other legal and political actors, were able strike a fair balance between law and politics divide and deliver principled decisions that were acceptable both on legal and political accounts.

Third, following the proposition of incremental change in mega politics, the experience of Central Asian CCs in cases involving institutional conflicts confirms the same. Namely, a Constitution can create the terms for institutional dialogue bending over backwards. However, if the political branches are not willing to play, the Constitution cannot do much. At the same time, the the experience of East Asian CCs demonstrated that in such disputes the role of CCs is crucial and if they adopt a principled decision reasoned and grounded within boundaries of the constitutional text, such decisions have higher chances to be accepted by political actors and ultimately to facilitate the dialogue among branches and eventually to be enforced.

Fourth, the rights related jurisprudence of Central Asian CC revealed that in the context of the relationship between norms of international human rights law and domestic law these states are shifting from monism to dualism. While applying pluralistic approach in the context of the relationship between the norms of regional organizations and domestic law such as Eurasian Economic Union. Broader study of these decisions in the context of geopolitics and the influence of Russia and China on Central Asia revealed that the willingness of CCs to use international and comparative materials is not simply a matter for judicial creativity, but seemed to depend on geopolitical considerations. In light of recent legal changes in Central Asia affecting the position of international law in national constitutional orders, there is little hope that references to international law will reinvigorate constitutional jurisprudence on fundamental rights in Central Asia. Moreover, based on the analysis of Central Asian CCs, one can conclude that CCs are unlikely to be able to stand in the way of illiberal/authoritarian legal reforms emerging from

Russia. Because Central Asian CCs are hardly in a position to push their presidents away from where the presidents want to go. Current foreign policy and geopolitical choices of Central Asian presidents demonstrate that they are not willing to depart from the authoritarian path and become agents of transition.

Fifth, the experience of Central Asian CCs confirmed the existing theories in the literature on the role of CCs in authoritarian regimes and on illiberalism in generally. Moreover, Central Asia shows another alarming emerging trend that reveals the fragility of democratic constitutions and this trend can be incorporated into a broader literature on illiberalism. The idea of an unamendable constitutional core/eternity clauses is being used as a tool by incumbent presidents to legitimate their regimes and moreover to use it as *ex ante* tool for the purposes of creating lifelong constitutional guarantees after their resignation. Titles as *Leader of Nation, Founder of Peace, Elbasy* are being granted to sitting presidents and these titles are being integrated into the eternity clauses of the constitution to cement authoritarian rule by constitutional means.

Finally, there is one pressing research outcome that emerges from this dissertation, and that can be extrapolated to other regions and to the global discourse on judicial review. Namely, the research landscape on CCs should be substantially broadened to include political, geopolitical, political economy contexts. The dissertation showed that the success of CCs does not purely depend on legal regulation, such as the text of the constitution, institutional design, or legal norms regulating these courts. All the decisions of CCs throughout the dissertation revealed that in order to have a comprehensive picture about CCs, the methodology on assessing the work of these courts should involve the combination of contextual analysis grounded on internal peculiarities and characteristics of each state in line with external, regional, geopolitical and

political economy factors. Otherwise, if the research landscape will be limited only to the legal account on the success of judicial review, existing scholarship on CCs is risking of falling short of providing proper remedies against the threats that constitutional democracies are currently facing.

Bibliography

Books, Book Chapters, Journal Articles

1. Andrew Harding, Penelope Nicholson, New Courts in Asia (Routledge, 2010).
2. Andrew Harding, Albert H.Y. Chen (eds.), Constitutional Courts in Asia: a Comparative Perspective (Cambridge University Press 2018).
3. Andrew Wilson, Virtual Politics: Faking Democracy in the Post-Soviet World, (Yale University Press, New Haven, CT, 2005).
4. Albert H. Y. Chen, Constitutionalism in Asia in the Early Twenty-First Century (Cambridge University Press, 2014).
5. Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012).
6. Andrei Medushevsky, Russian Constitutionalism: Historical and Contemporary Development 203 (Routledge, 2006).
7. Alec Stone Sweet, *Constitutional Courts*, in The Oxford Handbook of Comparative Constitutional Law, ed. Michel Rosenfeld and Sajo Andras (Oxford University Press, 2012).
8. Alec Stone, The Birth of Judicial Politics in France: the Constitutional Council in comparative perspective, 220 (Oxford University Press, New York, 1992).
9. Alexei Trochev, Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006 (Cambridge University Press, 2008).
10. Alexei Trochev, *Fragmentation? Defection? Legitimacy? Explaining Judicial Roles in post-communist colored revolutions*, in Diana Kapiszewski (eds.) Consequential Courts: judicial roles in global perspective, (Cambridge University Press, 2013).
11. Alexei Trochev, Rachel Ellett, *Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance*, 2.1 Journal of Law and Courts, 75 (2014).
12. Alexandra George, Journey into Kazakhstan: the True Face of the Nazarbayev Regime 47 (University Press of America 2001).
13. Aharon Barak, The Judge in a Democracy (Princeton University Press, 2008).
14. Akayev Askar, Diplomatia Shelkovogo Puti: Doktrina Prezidenta Kyrgyzstakoi Respubliki [The Silk Road Diplomacy: The Doctrine of the President of the Kyrgyz Republic], (Bishkek, 1999).
15. Adrian Buzo, The Making of Modern Korea, (Routledge, 2nd ed. 2007).
16. Antonio Nicita, Simona Benedettini, *Towards the Economics of Comparative Law: The Doing Business Debate, in* Pier Guiseppe Monateri (ed.) Methods of Comparative Law, 291 (Edward Elgar Publishing, 2012).
17. Andras Sajo, Limiting government: an introduction to constitutionalism, (Central European University Press, 1999).
18. Andras Sajo, Renata Uitz, The Constitutions of Freedom: An Introduction to Legal constitutionalism (Oxford University Press, 2017).
19. Alexander Bickel, The least dangerous branch, (Yale University Press, 1986).
20. Anthea Roberts Is International Law International, (Oxford University Press, 2017).
21. Alisher Taksanov, Regionalnye Elity, korrupcia I nelegalniy bizness v Uzbekistane [Regional Elite, corruption and illegal business in Uzbekistan], (Tashkent, Elit 2012).

22. Armen Mazmanyan, *Failing constitutionalism: from political legalism to defective empowerment*, 1.2 Global Constitutionalism, (2012).
23. Armen Mazmanyan, *Constrained, pragmatic pro-democratic apprising constitutional review courts in post-Soviet politics*, Communist and Post-Communist studies, (2010).
24. Armen Mazmanyan, *Constitutional Courts,* in Pippa Norris, Alessandro Nai, Election Watchdogs: Transparency, Accountability and Integrity (eds), (Oxford University Press, 2017).
25. Armen Grigoryan, *Political Crisis Underlines Need for Constitutional Reform in Armenia,*16.81 Eurasia Daily Monitor Volume, (2019).
26. A. Kotov, Konstitucionnaya Reforma- Nachalo Politicheskoi Modernizacii Obshestva [Constitutional Reform- Beginning of the Political Modernization of Society], 8 Mysl, 2 (2006).
27. Anastassia Obydenkova, Alexander Libman, Athoritarian Regionalism in the World of International Organizations: Global Perspective and the Eurasian Enigma (Oxford University Press, 2019).
28. Aziz Z. Huq, Tom Ginsburg, *How to Lose a Constitutional Democracy,* 65 UCLA Law Review, (2018).
29. Aidos Alimbekov, Eldar Madumarov, Gerald Pech, *Sequencing in Customs Union Formation: Theory and Application to the Eurasian Economic Union*, 32.1 Journal of Economic Integration, (2017).
30. Azimzhan Khitakhuranov, Bulat Mukhamedieyev, Richard Pomfret, *Eurasian Economic Union: Present and Future Perspectives,* 50.1 Economic Change and Reconstructing, 59 (2017).
31. Alexander Cooley and John Heathershaw *Kyrgyzstan`s prince Maxim and the Switzerland of the East* in Dictators without borders power and money in Central Asia (Yale University Press 2017).
32. Arjomand, S.A, *Law, Political Reconstruction and Constitutional Politics*, 18.1 International Sociology, (2003).
33. Andre Nollkaemper, National Courts and International Rule of Law, (Oxford University Press, 2011).
34. Amanda Farrant, Mission Impossible: The Politico-geographic Engineering of Soviet Central Asia`s Republican Boundaries, 25 Central Asian Survey, 61 (2006).
35. Aziz Z. Huq, Tom Ginsburg, How to Save a Constitutional Democracy (University of Chicago Press, 2018).
36. A. Seibert-Fohr (eds.), Judicial independence in transition–strengthening the rule of law in the OSCE region, Max Plank Institute's series on comparative and International law, (Heidelberg: Springer, 2012).
37. Anne Peters, *The Globalization of State Constitutions,* In J. Nijman and A. Nollkaemper (eds.), New Perspectives on the Divide between National and International Law, (Oxford : Oxford University Press, 2007).
38. Alisher Ilkhanov, *The Limits of Centralization: Regional Challenges in Uzbekistan*, in Pauline Jones Luong, The transformation of Central Asia: state and societies from soviet rule to independence (Cornell University Press, 2004).
39. A. Sharshenova, G. Crawford, Undermining Western democracy promotion in Central Asia: China's countervailing influences, powers and impact, *Central Asian Survey*(2017).

40. Anonymous, China and the Principle of Self-Determination of Peoples, 6.1 St Antony's International Review 6, 83 (2010). (authors of this Article wished to remain anonymous).
41. Anne Mauwsee, Mila Versteed, *Quantitative Methods for Comparative Constitutional Law*, *in* Maurice Adams, Jacco Bonhoff (eds), Practice and Theory in Comparative Law. (Cambridge University Press, 2012).
42. Anita Sengupta, The Formation of the Uzbek Nation-State: a study in Transition, (Lexington Books, 2003).
43. Alexander Cooley, *Ordering Eurasia: The Rise and Decline of Liberal Internationalism in the Post-Communist Space*, 28.3 Security Studies, (2019).
44. Alexander N. Domrin, The Limits of Russian Democratisation: Emergency powers and states of emergency, (New York: Routledge, 2006).
45. Alexander Vereschagin, Judicial Law-Making in Post-Soviet Russia, (New York: Routledge, 2007).
46. Amanda E. Wooden, Christoph H. Stefes (eds.) The Politics of Transition in Central Asia and the Caucasus: Enduring Legacies and Emerging Challenges, 226-238 (New York: Routledge, 2009).
47. Ashford, D. E., *Historical context and policy studies*, in D.E. Ashford, History and Context in Comparative Public Policy, 27–38 (Pittsburgh, Pa.: University of Pittsburgh Press, 1992).
48. Austin John, The Province of Jurisprudence Determined. (London: John Murray, 1832).
49. Aurel Croissant, *Electoral Politics in South Korea*, in Aurel Croissant (ed.) Electoral Politics in Southeast and East Asia, 233 (Friedrich Ebert-Stiftrung, 2002).
50. Benedikt Goderis, Mila Versteeg, *The Transnational Origins of Constitutions: Evidence from a New Global Data Set on Constitutional Rights*, CentER Discussion Paper (2013).
51. Boyron Sophie, The Constitution of France: contextual analysis, 150 (Oxford, Hart, 2013).
52. Bell, John, French Constitutional law, 120 (Oxford University Press, 1992).
53. Bell, John, Judiciaries within Europe (Cambridge: Cambridge University Press, 2006).
54. Bruno Macaes, *The Secret Sources of Populism*, Foreign Policy, (June 18, 2019).
55. Brad Epperly, *The Provision of Insurance? Judicial Independence and the Post-Tenure Fate of Leaders*, 1 Journal of Law and Courts, (2013).
56. Bunce Valerie, *Rethinking Recent Democratization: Lessons from Post communist Experience*, 55.2 World Politics, 168-85 (2003).
57. Bjorn Dressel, The Judicialization of Politics in Asia, (New York, Routledge, 2012).
58. Byun J., Lewis L. (eds), The 1980 Kwangju Uprising after 20 years: The Unhealed Wounds of the Victims, (Seoul: Dahae Publishers, 2000).
59. Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91.6 Boston University Law Review, (2011).
60. Barry R. Weingast, Donald A. Wittman, *Overview of Political Economy*, the Reach of Political Economy in Robert E.Goodin, The Oxford Handbook of Political Science (Oxford University Press, 2011).
61. Bohr Annette, Uzbekistan: Politics and Foreign Policy (Royal Institute of International Affairs Press, 1998).
62. Beer L, W, *Introduction: Constitutionalism in Asia and the United States*, in L.W. Beer (ed.). Constitutional Systems in Late Twentieth Century Asia, 1-54 (Seattle: University of Washington Press, 1992).

63. Bruce Akerman, *The rise of world Constitutionalism*, 83.4 Virginia Law Review, 788-91, (1997).
64. Bruce Ackerman, We the People: Transformations, (Harvard University Press, 1991).
65. Benjamin Barber, Strong Democracy, (Berkeley, University of California Press, 1984).
66. Boris Rumer (ed.), Central Asia at the end of the Transition (M.E.Sharpe, Inc, 2005).
67. Boris Rumer (ed), Central Asia a Gathering Storm? (Armonk, N.Y. : M.E. Sharpe, 2002).
68. Beatrice F. Manz (ed.) Central Asia in historical perspective (Boulder : Westview Press, 1994).
69. Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 Int'l J. Const. L. 269–95 (2003).
70. Carlo Guarnieri and Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy (Oxford University Press, Incorporated, 2002).
71. Chaihark Hahm, *Law, culture, and the politics of Confucianism*, 16 Columbia Journal of Asian Law, (2003).
72. Chaihark Hahm, *Beyond law vs. politics in constitutional adjudication: Lessons from South Korea*, 10 International Journal of Constitutional Law, 6–34, (2012).
73. Chaihark Hahm, Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea, (Cambridge University Press, 2015).
74. Cass R. Sunstein, Designing Democracy: What Constitutions Do, (Oxford University Press, 2001).
75. Cass R. Sunstein, *Against Positive Rights: Why Social and economic rights don't belong in the new constitutions of post-communist Europe*, in Vicki C. Jackson, Mark Tushnet (eds.), Comparative Constitutional Law, 1739 (New York: Foundation Press, 2006).
76. Cheryl Saunders, *International Involvement in Constitution Making*, U of Melbourne Legal Studies Research Paper. Available at SSRN: https://ssrn.com/abstract=3414698 (July 4,2019).
77. Cass R. Sunstein, *Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe*, 2 Constitutional Political Economy, 375-85(1991).
78. Chien-Chih Lin, *The Birth and Rebirth of the Judicial Review in Taiwan - Its Establishment, Empowerment, and Evolvement*, 7/1 National Taiwan University Law Review, 178-189, (2012).
79. Chien-Chih Lin, *The Judicialization of Politics in Taiwan*, 3 Asian Journal of Law and Society, 311 (2016).
80. Chien Chin Lin, Autocracy, Democracy, and Juristocracy: The Wax and Wane of Judicial Review in the Four Asian Tigers, 48 Georgetown Journal of International Law, 1138 (2017).
81. Chang, Paul, *Candlelight Protests in South Korea: The Legacies of Authoritarianism and Democratization*, 34.1 Ewha Journal of Social Sciences (2018).
82. Claus Offe, *Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe*, 58 Social Research, 866-89 (1991).
83. Collins, Kathleen, Clans, *Pacts, and Politics in Central Asia*, 13/3 *Journal of Democracy* (2002).
84. Cho Kuk, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 Pacific Rim Law & Policy Journal, 579-83, (2007).
85. Cotton J. *From Authoritarianism to Democracy in South Korea*, 37 Political Studies, 246-55 (1989).

86. Carlo Guarnieri and Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy (Oxford University Press, Incorporated, 2002).
87. Chung C., Mesomobilization and the June Uprising: Strategic and Cultural Integration in Pro-democracy Movements in South Korea.(East Asian Social Movements, 2011).
88. Cho Kuk, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 Pacific Rim Law & Policy Journal, 582-83, (2007).
89. Clark D., The Kwangju Uprising: Shadows over the Regime in South Korea, (Boulder: Westview Press, 1988).
90. Claude Klein, András Sajó, *Constitution-Making: Process and Substance*, in Michel Rosenfeld, András Sajó (ed.) The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012).
91. Carla L. Thorson, Politics, Judicial Review, and the Russian Constitutional Court, 102-105 (Palgrave Maclillan, 2012).
92. Carlos Bernal, *Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine*, 11.2 International Journal of Constitutional Law, 339-357 (2013).
93. Cynthia Kim & Jane Chung, *Factbox: South Korean President-elect Moon's main policy pledges*, Reuters (May 2017)
94. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101.2 Harvard Law Review, 421-23 (1987).
95. Carolyn Kissane, *Education in Central Asia: transitional challenges and impacts*, in Amanda E. Wooden, Christoph H. Stefes (eds.) The Politics of Transition in Central Asia and the Caucasus: Enduring Legacies and Emerging Challenges, 226-238 (New York: Routledge, 2009).
96. Crawford James, Brownlie's Principles of Public International Law 8th ed., (Oxford: Oxford University Press, 2012).
97. Charlesworth Hilary, Madelaine Chiam, Devika Hovell, George Williams, The Fluid State: International Law and National Legal Systems, (Sydney, Australia: Federation Press, 2005).
98. Charles M. Fombad, Constitutional Adjudication in Africa, (Oxford University Press, 2017).
99. Cummings, S., M. Ryabkov, *Situating the 'Tulip Revolution*, 27.3 Central Asian Survey (2008).
100. Cummings, S. (ed), Domestic and International Perspectives on Kyrgyzstan's Tulip Revolution: Motives, Mobilizations and Meanings, (London: Routledge, 2010).
101. Charlesworth Hilary, Madelaine Chiam, Devika Hovell, George Williams, The Fluid State: International Law and National Legal Systems, (Sydney, Australia: Federation Press, 2005).
102. Charles E. Ziegler, Civil Society and Politics in Central Asia, 81-90 (The University Press of Kentucky, 2015).
103. Collins, Kathleen, Clans, *Pacts, and Politics in Central Asia*, 13/3 *Journal of Democracy* (2002).
104. Collins Kathleen, *Kyrgyzstan's Latest Revolution*, 22/3 Journal of Democracy, 22/3 (2011).

105. Charles Tilly, Robert E. Goodin, *Overview of Contextual Political Analysis it Depends*, in Robert E.Goodin, The Oxford Handbook of Political Science (Oxford University Press, 2011).
106. Dian Shah, Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Shri Lanka, (Cambridge Univesrity Press, 2017).
107. Daniel B. Maldonado, *Introduction Toward a Constitutionalism of the Global South*, in D. B. Moldonado (eds). Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Columbia (Cambridge University Press, 2013).
108. David Landau, *Institutional Failure and Intertemporal Theories of Judicial Role in the Global South*, in David Bilchitz, David Landau (eds), The Evolution of Separation of Powers Between the Global North and Global South (Edward Elgar Publishing Limited, 2018).
109. David Landau, *Abusive Constitutionalism*, 47 UC Davis Law Review , (2013).
110. David Landau, *Populist Constitutions*, 85 The University of Chicago Law Review (2018).
111. David S. Law, Mila Versteeg, *Sham Constitutions,* 101 California Law Review, (2013).
112. David Law, *Constitutions*, *in* Peter Cane, Herbert Kritzer, The Oxford Handbook of Emperical Legal Research, 376-386 (Oxford University Press, 2010).
113. David Mason, Revolution and Transition in East-Central Europe (2d ed., 1996).
114. David Law, Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. (2012).
115. David R. Cameron, Mitchell A. Orenstein, *Post-Soviet Authoritarianism: The Influence of Russia in Its "Near Abroad*," 28 Post-Soviet Aff. (2012).
116. David Bilchitz, David Landau (eds), The Evolution of Separation of Powers Between the Global North and Global South (Edward Elgar Publishing Limited, 2018).
117. David Lewis, Understanding the Authoritarian State: Neopatrimonialism in Central Asia, 19 Brown Journal of World Affairs, 115 (2012).
118. Daly Tom Gerald, The Alchemists (Cambridge University Press, 2017).
119. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013).
120. Douglas Greenberg et al. (eds.), Constitutionalism and Democracy: Transitions in the Contemporary World: (Oxford University Press, USA, 1993).
121. D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 Int'l J. Const. L. (2003).
122. Dostal, J. M, South Korean Presidential Politics Turns Liberal: Transformative Change or Business as Usual?, 88.3 *The Political Quarterly*, (2017).
123. Donald Horowitz, *Constitutional Design: Proposals versus Processes*, in Andrew Reynolds (eds.), The Architecture of Democracy, (Oxford University Press,2002).
124. Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, in Petra Dobner and Martin Loughlin (eds), The Twilight of Constitutionalism, (Oxford University Press 2010).
125. Dieter Grimm, Constitutionalism - Past, Present, and Future (Oxford University Press 2016).
126. D. Nurumov & V. Vashcankha, Constitutional Development of Independent Kazakhstan in R. Elgie, S. Moestrup, Semi-Presidentialism in the Caucasus and Central Asia, (2016).

127. Donnacha Ó Beacháin, Rob Kevlihan. *Imagined democracy? Nation-building and elections in Central Asia*, 43.3. Nationalities Papers, (2015).
128. D. Hiro, Inside Central Asia: A Political and Cultural History of Uzbekistan, Turkmenistan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkey, Iran (London, Duckworth Overlook, 2013).
129. Dmitriy Furman, Postsovetskiy Politicheskiy Regim Kazakhstan a [Post-Soviet Political Regime in Kazakhstan], (Moscow: Ogni, 2004).
130. Dagikhudo Dagiev, Regime transition in Central Asia: stateness, nationalism and political change in Tajikistan and Uzbekistan, (Routledge, Taylor & Francis Group, 2013).
131. Dante Gatmaytan, Judicial Review of Constitutional Amendments: The Insurance Theory in Post-Marcos Philippines, 1 Philippine Law and Society Review, (2011).
132. Dae Kyu Yoon, Tae-Gyu Yun, Law and Political Authority in South Korea (Westview Press, 1990).
133. Dilshod Achilov, *Islamic Revival and Civil Society in Kazakhstan*, in Charles E. Ziegler, Civil Society and Politics in Central Asia, 81-90 (The University Press of Kentucky, 2015).
134. Dzhuraev Emilbek, Saniia Toktogazieva et all, *The Law and Politics of Keeping a Constitutional Order: Kyrgyzstan`s Cautionary Story*, 7.2 Hague Journal on the Rule of Law, 263 (2015).
135. Erin F. Delaney, Rosalind Dixon, *Introduction, in* E.Delaney, R. Dixon (eds.), Comparative Judicial Review, (Edward Elgar, 2018).
136. E.Delaney, R. Dixon (eds.), Comparative Judicial Review, (Edward Elgar, 2018).
137. Evgeny Vinokurov, *Eurasian Economic Union: Current State and Preliminary Results*, 3.1 Russian Journal of Economics, (2017).
138. Eugene Huskey, Iskakova, Gulnara, *Narrowing the Sites and Moving the Targets*, 58/3 Problems of Post-Communism, (2011).
139. Edward Morgan-Jones, Constitutional Bargaining in Russia, 1990-93, 83-99 (New York: Routledge, 2010).
140. Elgie, Robert, Moestrup, Sophia (Eds.), Semi-Presidentialism in the Caucasus and Central Asia, (Palgrave Macmillan UK, 2016).
141. Ellen Frankel Paul, *Freedom of Contract and the Political Economy of Lochner v. New York*, 1 N.Y.U. J. L. & LIBERTY (2005).
142. Emmanuel Karagiannis, *The New Political Islam in Central Asia: From Radicalism to the Ballot Box*?, 19.1 Brown Journal of World Affairs (2012).
143. Emmanuel Karagiannis, The New Face of Political Islam in Central Asia: The Rise of Islamo-democrats, *Journal of Muslim Minority Affairs*, (2016).
144. Eugene Huskey, *Eurasian semi-presidentialism: the development of Kyrgyzstan`s model of government* in R.Elgie and S. Moestrup (Routledge 2007).
145. Emilian Kavalski, Stable Outside, Fragile Inside? Post-Soviet Statehood in Central Asia, (Ashgate Pub. 2010).
146. Eugene Huskey, *National Identity from Scratch: defining Kyrgyzstan`s role in World Affairs*, in Rick Frawn (ed) Ideology and National Identity in Post-Communist Foreign Policies (London 2004).
147. Ericson Richard, *The Classical Soviet-Type Economy: Nature of the System and Implications for Reform*, 5 Journal of Economic Perspectives, 11-20(1991).

148. EDB, *Eurasian Economic Integration 2017*, EDB Centre for Integration Studies, Eurasian Development Bank (2017).
149. Emmanuel Innocents Edoun & Dikgang Motsepe, Critical assessment of Highly Indebted Poor Countries (HIPIC) Initiative in Africa and the Implication of the New Partnership for Africa's Development (NEPAD) (2001-2016): a theoretical perspective, *Investment Management and Financial Innovations (2016).*
150. Edward Walker, Islam, *Islamism and Political Order in Central Asia*, in Shahram Akbarzade, Islam and Globalization: critical concepts in Islamic Studies, 223-246 (London: Routledge, 2006).
151. Ferrari-Bravo, Luigi, *International and Municipal Law: The Complementarity of Legal Systems*, in R. S. J. Macdonald, Douglas M. Johnston, The Structure and Process of International Law, (The Netherlands: Martinus Nijhoff, 1983).
152. Furman Dmitriy Postsovetskiy Politicheskiy Regim Kazakhstan a [Post Soviet Political Regime of Kazakhstan], (Izdatelstvo Osin 2004).
153. Francisco Urbina, A Critique of Proportionality and Balancing (Cambridge University Press, 2016).
154. Fa Jyh-pin, *Constitutional Developments in Taiwan: The Role of the Council of Grand Justices*, 40 International and Comparative Law Quarterly, 198 (1991).
155. George Thomas, *Recovering the Political Constitution: the Madisonian Vision*, 66.2 Review of Politics, (2004).
156. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56.4 American Political Science Review 853-55(1962).
157. Guichard Justine, Regime Transition and the Judicial Politics of Enmity: Democratic Inclusion and Exclusion in South Korean Constitutional Justice 3-4 (New York: Palgrave Macmillan US Palgrave Macmillan 2016).
158. Garoupa, N., T. Ginsburg, *Guarding the guardians: Judicial councils and judicial independence*, 57 The American Journal of Comparative Law, 103-120 (2009).
159. Gilpin Robert, The Political Economy of IR, 12-13 (Princeton University Press, 1987).
160. Gleason Gregory, The New Central Asian States, (Westview Press: Boulder,Co, 1997).
161. Gleason Gregory, Markets and Politics in Central Asia (Routledge: London, 2003).
162. Gregory Gleason, Central Asia`s New States, (Boulder, Co: Westview Press, 1997). Mark Beissinger, Nationalist Mobilization and the Collapse of the Soviet Union, 72-75 (Cambridge University Press, 2002).
163. George Schopflin, *The End of Communism in Europe*, 66 Int'l Affairs 3 (1990).
164. George Tridimas, *Constitutional Judicial Review and Political Insurance*, 29 European Journal of Law and Economics, (2009).
165. Gordon B. Smith, Soviet Politics: Continuity and Contradiction, 137–62 (London: Palgrave, 1988).
166. Gretchen Helmke and Julio Rios-Figueroa, Courts in Latin America (Cambridge University Press,2011).
167. Gunter Frankenberg, Comparative Constitutional Studies. Between Magic and Deceit. (Edward Elgar Publishing, 2018).
168. Günther Frankenberg, *Constitutional Tranfer: The IKEA Theory Revisited*, 8 INT'L J. CONST. L. (2010).
169. Gang Lin, *Taiwan's Constitutional Reform: Domestic Inspiration and External Constraints,* 125 ASIA PROGRAM SPECIAL REPORT, (2004).

170. Havard Baekken, Law and Power in Russia: Making Sense of Quasi-legal practices (Routledge, 2019). Kathryn Hendley, *Who Are the Legal Nihilists in Russia?*, 28.2Post-Soviet Affairs, 149-186 (2012).
171. Higgins Rosalyn, Problems and Process: International Law and How We Use It, (Oxford: Clarendon Press, 1994).
172. Hans Kelsen, General Theory of Law and State, (1945).
173. Hans Kelsen, Pure Theory of law, German edition by Max Knight Published Gloucester, (Mass. Peter Smith1967).
174. Hameiri, S., Jones, L. *Rising Powers and State Transformation: The Case of China*, 22.1 European Journal of International Relations, 86-89 (2016).
175. Hyun-Soo Lim, A Closer Look at the Korean Constitutional Court's Ruling on Park Geun-hye's Impeachment, *Yale Journal of International law* (May 2017).
176. Huskey Eugene, Iskakova, Gulnara, *Narrowing the Sites and Moving the Targets*, 58/3 Problems of Post-Communism, 58/3 (2011).
177. Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe, (The University of Chicago Press, Chicago London 2000).
178. Henry Hale, *Formal Constitutions in Informal Politics: Institutions and Democratization in Post-Soviet Eurasia*, 63.4 World Politics, 584-589 (2011).
179. Higgins Rosalyn, Problems and Process: International Law and How We Use It, (Oxford: Clarendon Press, 1994).
180. Helene Thibault, Transforming Tajikistan: State-building and Islam in Post-Soviet Central Asia, (London, I.B. Tauris, 2018).
181. Hart, H.L.A. *Positivism and the Separation of Law and Morals,* 71 Harvard Law Review 593, (1958).
182. Hart, H. L. A. The Concept of Law (2 ed.). (London: Oxford University Press,1994).
183. Hart, H. L. A. The Concept of Law (1961), (Oxford University Press, 2012).
184. Harvey J. Feldman, (ed.), Constitutional Reform and the Future of the Republic of China, 3-30 (New York: M.E. Sharpe, 1991).
185. Hart J. Ely, Democracy and Distrust: a theory of Judicial review, (Harvard University Pres, 1981).
186. Han S., The Failure of Democracy in South Korea (University of California Press, 1974).
187. H. W. O. Okoth-Ogendo, Constitutions without Constitutionalism: An African Political Paradox, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, (Douglas Greenberg, S. N. Kartz, B. Oliviero and S. C. Wheatley eds., 1993).
188. Hiro Dilip, Inside Central Asia: A Political and Cultural History of Uzbekistan, Turkmenistan, Kazakhstan, Kyrgyzstan Tajikistan, Turkey and Iran (London, Duckworth Overlook, 2013).
189. Herman Schwartz, *The new East European Constitutional Courts*, 13 Michigan Journal of International law, 742 (1992).
190. Harold Berman, *The Spirit of Soviet Law*, 23 Washington Law Review and State Bar Journal, 152 (1948).
191. Harold Berman, Justice in the USSR: an Interpretation of Soviet Law,(Harvard University Press, 1963).

192. Ihntaek Hwang, *Militarising national security through criminalisation of conscientious objectors to conscription in South Korea*, Critical Studies on Security, 2 (2018).
193. Iskakova Gulnara, Huskey Eugene, *Barriers to Intra-Opposition Cooperation*, 26 Post-Soviet Affairs 26 (2010).
194. Iskakova Gulnara, Vybory i Demokratiya v Kyrgyzstane [Elections and Democracy in Kyrgyzstan] (Bishkek, Kyrgyzstan: Biyiktik. 2003).
195. In Sup Han, *Kwangju and beyond: Coping with past State Atrocities in South Korea*, 27.3 Human Rights Quarterly, 998-1010 (2005).
196. Ihntaek Hwang, *Militarising national security through criminalisation of conscientious objectors to conscription in South Korea*, Critical Studies on Security, 3 (2018).
197. Imomov Ashurbay, *Razvitie Konsepsii Konstitucii Suverennoi Respubliki na opyte Tadjikistana* [The Development of the Concept of Constitution of Sovereign Republic based on the Experience of Tajikistan], 11 Sovestskoe Gosudarstvo i Pravo, 18 (1991).
198. Jack Knight, Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 Law and Society Review 85-87 (1996). Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (New York, NY: Free Press, 1964).

199. Judith Shklar, Legalism: Law, Morals, and Political Trials 140-60 (Harvard University Press, 1964).
200. John Hart Ely, Democracy and distrust, 73-90 (1980).
201. Jan-Werner Müller, *Protecting the Rule of Law and Democracy in the EU: The Idea of a Copenhagen Commission*, in C Closa, D Kochenov, Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press, 2016).
202. James Robinson, Deborah Brown, *Taiwan`s 2000 Presidential Election*, 44.4 Orbis, 599 (2000).
203. Joseph Frazier Wall, *Social Darwinism and Constitutional Law with Special Reference to Lochner v. New York*, 33 ANNALS SCI. 465 (1976).
204. Jau-Yuan Hwang, Fort Fu-Te Liao, Wen-Chen Chang, *Development of Constitutional Law and Human Rights in Taiwan Facing the New Century*, 24 IDE Asian Law Series, 90-96 (2003).
205. James Mahoney and Daniel Schensul, *Historical Context and Past Dependence* in Robert E. Goodin, Charles Tilly, The Oxford handbook of Contextual Political Analysis, (Oxford University Press, 2006).
206. Jonghyun Park, *The Judicialization of Politics in Korea*, 10.1 Asian-Pacific Law&Policy Journal, (2008).
207. Jiunn-Rong Yeh, Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59.3 The American Journal of Comparative Law, 805-820 (2011).
208. Justine Guichard, *The Role of the Constitutional Court of Korea in the Transition from Authoritarian to Democratic Rule*, In The Spirit of Korean Law. 3 Brill| Nijhoff (2016).
209. John Ishiyama, *Neopatrimonialism and the Prospects for Democratization in the Central Asian Republics* in S. Cummings, Power and Change in Central Asia p. 42-58 (2002).
210. John Ishiyama, Ryan Kennedy, *Super-Presidentialism and Political Party Development in Russia, Ukraine, Armenia and Kyrgyzstan*, 53.8 Europe-Asia Studies, 1178 (2011).

211. Jane Henderson, *The Constitution of the Russian Federation: A Contextual Analysis* (Bloomsbury Publishing, 2011).
212. John Anderson, Elections and Political Development in Central Asia, Journal of Communist and Transition Politics, p. 28-58 (1997).
213. J. Heathershaw and E. Schatz, Paradox of Power: The Logics of state weakness in Eurasia chapter 1, (University of Pittsburg Press 2017).
214. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45Duke Law Journal, 364–86(1995).
215. Justin Blount, Zachary Elkins, Tom Ginsburg, *Does the Process of Constitution-Making Matter?* in Tom Ginsburg, Comparative Constitutional Design, (Cambridge University Press,2012).
216. JT Ishiyama, R. Kennedy, *Superpresidentialism and Political Party Development in Russia, Ukraine, Armenia and Kyrgyzstan*, 53 Europe-Asia Studies, 1176 (2001).
217. John Anderson, Kyrgyzstan: Central Asia's Island of Democracy*? (* London: Routledge, 1999).
218. John Anderson, The International Politics of Central Asia (Manchester University Press, 1997).
219. John Anderson, *Constitutional Development in Central Asia*, 16.3 Central Asian Survey (1997).
220. Jodi Finkel, Judicial Reform as Political Insurance: Argentina, Peru and Mexico in the 1990s, (Notre Dame: University of Notre Dame, 2008).
221. Jiunn-Rong Yeh, *Constitutional Reform and Democratization in Taiwan, 1945-2000*, in Peter C.Y.Chow (ed.) Taiwan`s Modernization in Global Perspective, 47 (Praeger Publishers, 2002).
222. John Kie-chiang. On Korean Politics: The Quest for Democratization and Economic Development, 87–107 (Ithaca, NY: Cornell University Press,1999).
223. John Esposito (ed.), The Oxford Dictionary of Islam, (Oxford University Press, 2003).
224. Justine Guichard, Regime Transition and the Judicial Politics of Enmity: Democratic Inclusion and Exclusion in South Korean Constitutional Justice (Palgrave Macmillan, 2016).
225. Jon Elster, Constitutional-making in eastern Europe: rebuilding the boat in the open sea, 71 Public Administration, 172 (1993).
226. Jiunn-Rong Yeh, Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59.3 The American Journal of Comparative Law, 816-822 (2011).
227. Jiunn-rong Yeh, Wen-Chen Chang (eds.)Asian Courts in Context (Cambridge University Press, 2014).
228. Jiunn Rong Yeh, *Democracy-driven Transformation to Regulatory State: The Case of Taiwan*, 3.2. National Taiwan University Law Review, 33 (2008).
229. Johan Engvall, *Kyrgyzstan and the Trials of Independence* in Marlene Larvelle & Johan Engvall Kyrgyzstan beyond Democracy Island and Failing State: social and Political Changes in a Post-Soviet Society (Lexington Books 2015).
230. Jau-Yuan Hwang, Fort Fu-Te Liao, Wen-Chen Chang, *Development of Constitutional Law and Human Rights in Taiwan Facing the New Century*, 24 IDE Asian Law Series, 90-96 (2003).

231. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale Law Journal, (2006).
232. John Dewey, The Public and its Problems, 143-84 (Ohio University Press/Swallow Press, 1927).
233. Joshua Cohen, *Chapter 3: Deliberation and Democratic Legitimacy*, in James Bohman, William Rehg (eds), Deliberative Democracy (Boston: MIT Press, 1998).
234. Jurgen Habermas, Between facts and norms: contributions to a discourse theory of law and democracy, 447-48 (Cambridge, Mass: MIT Press, 1996).
235. Jurgen Habermas, *Chapter 2: Popular Sovereignty as Procedure*, in James Bohman, William Rehg (eds), Deliberative Democracy (Boston: MIT Press, 1998).
236. Jean Hampton, Hobbes and the Social Contract Tradition, 107 (Cambridge: Cambridge University Press, 1986).
237. Willaim E. Butler, International Law and the Russian Legal System, chapter 4 (Eleven International Publishing, 2007).
238. William Butler, Soviet Law (second edition), (London Butterworths, 1988).
239. Jeremy Bentham, Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution, ed. P. Schofield, C. Pease-Watkin, and C. Blamires, 317-30 (Oxford, 2002).
240. Jeremey Bentham, An Introduction to the Principles of Morals and Legislation. (New York: Hafner Publishing Co., 1948).
241. Javier A. Couso, Alexandra Huneeus, Rachel Sieder, Cultures of legality: judicialization and political activism in Latin America (Cambridge University Press, 2010).
242. Julio Rious-Figueroa, Courts in Latin America (Cambridge University Press, 2011).
243. Joseph Raz, The Authority of Law: Essays on Law and Morality, 47-50 (Oxford: Clarendon P, 1979).
244. Joseph Raz, Between Authority and Interpretation, 169 (Oxford: Oxford University Press, 2009). Joseph Raz, Ethics in the Public Domain Essays in the Morality of Law and Politics, (Oxford University Press, 1994).
245. John Rawls, Political Liberalism, (Columbia University Press, 1993).
246. Johan Engvall, *Kyrgyzstan and the Trials of Independence* 6-7 in Marlene Larvelle & Johan Engvall Kyrgyzstan beyond Democracy Island and Failing State: social and Political Changes in a Post-Soviet Society (Lexington Books 2015).
247. John Anderson, Kyrgyzstan: Central Asia's Island of Democracy*? (* London: Routledge, 1999).
248. J. Nijman and A. Nollkaemper (eds.), New Perspectives on the Divide between National and International Law, (Oxford : Oxford University Press, 2007).
249. Jou Juo Chu, *Global Constitutionalism and Judicial Activism in Taiwan*, 38.4 Journal of Contemporary Asia, 520-530 (2008).
250. Kim Lane Scheppele, *Autocratic Legalism*, 85 The University of Chicago Law Review (2018).
251. Kazimierz Grzybowski, Soviet Legal Institutions: Doctrines and Social Functions, 172 (University of Michigan Press, 1962).
252. Kumm , M, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State*, In J. L. Dunoff and J. P. Trachtman (Eds.), Ruling the World? International Law, Global Governance, Constitutionalism, 258-98 (Cambridge : Cambridge University Press, 2009).

253. Krisch,N, Beyond Constitutionalism: The Pluralist Structure of Postnational Law, (Oxford : Oxford University Press, 2010).
254. Klug, H, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, (Cambridge: Cambridge University Press, 2000).
255. Kelly M. McMann, Corruption as a last resort: adapting to the market in Central Asia (Cornell University Press, 2014).
256. Karl Loewenstein, Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in Douglas Greenberg (eds), Constitutionalism and Democracy - Transitions in the Contemporary World 3-8 (Oxford University Press 1993).
257. Kuk Cho, Conscientious Objection to Military Service in Korea: The Rocky Path from Being an Unpatriotic Crime to a Human Right, 9, OR. REV. INT'L L. 192 (2007).
258. Kwon Insook, *A Feminist Exploration of Military Conscription*, 3 (1), International Feminist Journal of Politics, 26–54 (2001).
259. Karl N. Llewellyn, The Bramble Bush: on our Law and its study, (New York: Oceana Publications, 1930).
260. Kathleen Collins, Erica Owen, Islamic Religiosity and Regime Preferences: Explaining Support for Democracy and Political Islam in Central Asia and the Caucasus, *Political Research Quarterly*, Vol. 65, No. 3, pp. 499-515 (2012).
261. Kyung Moon Hwang, A History of Korea: an episodic narrative, 228 (Pargrave, 2nd ed. 2017)
262. Kathryn Stoner, *Old Games, New Rules? Great Powers in the New Central Asia*, Book Review Roundtable, 16 Asia Policy (2013).
263. Kathleen Collins, Clan Politics and Regime Transition in Central Asia 210-215 (Cambridge University Press, 2006).
264. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, Overview of Law and Politics the Study of Law and Politics, in Robert E.Goodin, The Oxford Handbook of Political Science (Oxford University Press, 2011).
265. Karla Hoff, Joseph Stiglitz, *After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies*, 94(3) American Economic Review, 754-60(2004).
266. Kerven Carol, Sarah Robinson, Roy Behnke, Kanysh Kushenov, E.J. Milner-Gulland, *A Pastoral Frontier: From Chaos to Capitalism and the Re-Colonization of the Kazakh Rangeland*, 127 Journal of Arid Environments, 110-18 (2016)
267. Kathleen Collins, Clan Politics and Regime Transition in Central Asia 210-215 (Cambridge University Press, 2006).
268. Kirk Randazzo, Gibler Douglas, Rebecca Reid, *Examining the Development of Judicial Independence*, 69 Political Research Quarterly, 584-91, (2016).
269. Knapp, Andrew, Wright Vincent, The Government and Politics of France, 320 (Rutledge, London 2001).
270. Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models*, 1 Int'l J. Const. L. 296–324 (2003).
271. Kim Lane Scheppele, *A comparative view of the Chief Justices` Role. Guardians of the Constitution: Constitutional Court Presidents and the struggle for the rule of law in post-soviet Europe*, 154 University of Pennsylvania Law Review, 1757 (2006).
272. Kasiah Lach, Wojciech Sadurski, *Constitutional Courts of Central and Eastern Europe: between adolescence and maturity*, 3.2 Journal of Comparative Law (2008).

273. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, The Oxford Handbook of Law and Politics 88 (Oxford University Press, 2010).
274. Konstantin Syroezhkin, Russia: On the Path to Empire? In Boris Rumer (ed.), Central Asia at the end of the Transition 152 (M.E.Sharpe, Inc, 2005).
275. Konstantin Syroezhkin, *Central Asia Between the Gravitational Poles of Russia and China*, in Boris Rumer (ed), Central Asia a Gathering Storm?, 169 (Armonk, N.Y. : M.E. Sharpe, 2002).
276. Lim, J., *The History of Conscientious Objection in South Korea: Approached through the Making Process of Conscription System*, 88, Society and History, 387–422 (2010).
277. Lauri Mälksoo, Russian Approaches to International Law, (Oxford: Oxford University Press, 2015).
278. Lauri Mälksoo, *International Legal eory in Russia: A Civilizational Perspective, or Can Individuals Be Subjects of International Law?, in* The Oxford Handbook on the Theory of International Law 257 (Anne Orford & Florian Ho mann eds., 2016).
279. Lauri Mälksoo, *International Law in Russian Textbooks: What's in the Doctrinal Pluralism?*, 2 Göttingen J. Int'l L. 279, 281 (2009).
280. Larry Diamond, Marc F. Plattner, Christopher Walker, Authoritarianism Goes Global: The Challenge to Democracy (John Hopkins University Press, 2016).
281. Lena Johnson, Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam, 18.3 Journal of Islamic Studies, (2007).
282. Linda Camp Keith, *Judicial Independence and Human Rights Protection around the World*, 85 Judicature. 193-97 (2000).
283. Lena Johnson, Tajikistan in the New Central Asia: Geopolitics, Great Power Rivalry and Radical Islam, 45-55 (I.B. Tauris& Co Ltd., 2006).
284. Lisa Hilbink, Judges Beyond Politics in Dictatorship and Democracy, (Cambridge University Press, 2008).
285. Linda Chao, Ramon Myers, The First Chinese Democracy:Political Life in the Republic of China on Taiwan (The Johns Hopkins University Press, 1998).
286. Lee Epstein, Jack Knight, Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*. 35 Law & Society Review, (2001).
287. Lhamsuren Munkh-Erdene, *The Transformation of Mongolia's Political System: From Semi-parliamentary to Parliamentary?*, 50.2 Asian Survey, 311-320, (2010).
288. Louis Henkin, Elements of Constitutionalism (New York: Columbia University Press, 1994).
289. Larry Alexander, Constitutionalism: Philosophical Foundations (Cabridge University Press, 1998).
290. Linda Chao, Ramon H. Myers, The First Chinese Democracy: Political Life in the Republic of China on Taiwan (The Johns Hopkins University Press, 1998).
291. Lawrence Shao-Liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 AM.J.COMP.L. 509, 515 (1991).
292. Lee Epstein, Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 Int'l J. Const. L. 196–223 (2003).
293. Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in Michel Rosenfeld (ed.), Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, 38-41 (Duke University Press 1994).

294. Lon Fuller, *The Forms and Limits of Adjudication*, 92 Harvard Law Review, 353(1978).
295. Lutz Kleveman, The New Great Game: Blood and Oil in Central Asia, chapter on Kazakhstan 74 (New York, Grove Press, 2004).
296. Mostafa Golam, Monowar Mahmood, *Eurasian Economic Union: Evolution, Challenges and Possible Future Directions*, 9.2. *Journal of Eurasian Studies*, 163-72 (2018).
297. Mun Soo-Hyun, *An Analysis of the Debate over Conscientious Objection in Korea*, 25 Seoul Journal of Korean Studies, 271 (2012).
298. Malcom Langford (ed), Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law (Cambridge: Cambridge University Press, 2008).
299. Mun Soo-Hyun, *An Analysis of the Debate over Conscientious Objection in Korea*, 25 Seoul Journal of Korean Studies, 243-274 (2012).
300. Marlene Larvelle & Johan Engvall Kyrgyzstan beyond Democracy Island and Failing State: social and Political Changes in a Post-Soviet Society (Lexington Books 2015).
301. Mariya Y. Omelicheva, Democracy in Central Asia: competing perspectives and alternative strategies, (Lexington: University Press of Kentucky 2015).
302. Mariya Omelicheva, Lawrence Markowitz, Webs of Corruption: Trafficking and Terrorism in Central Asia (Columbia University Press, 2019).
303. Malanczuk Peter, Akehurst's Modern Introduction to International Law, (London: Routledge, 1997).
304. Martti Koskenniemi, From Apology to Utopia: the structure of International Legal argument, Cambridge University Press, 2009.
305. Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 Southern California Law Review, 1307-1351(2001).
306. Mark A. Graber, Sanford Levinson, Mark Tushnet (eds), Constitutional Democracy in Crisis? (Oxford University Press, 2018).
307. Mun Soo-Hyun, An Analysis of the Debate over Conscientious Objection in Korea, 25 Seoul Journal of Korean Studies, 243-274 (2012).
308. Mark Tushnet, *Critical Legal Studies and Constitutional law: an Essay in Deconstruction*, 36.1/2 Stanford Law Review, 623-30 (1984). Duncan Kennedy, A Critique of Adjudication, (Harvard University Press, 1997).
309. Matteo Fumagalli, *Semi-presidentialism in Kyrgyzstan* 181-183 in R. Elgie, S. Moestrup, Semi-Presidentialism in the Caucasus and Central Asia 146-150 (2016).
310. Mathias Siems, Comparative law, 31-40 (Cambridge University Press, 2014).
311. Marie Seong-Hak Kim, *Travails of Judges: Courts and Constitutional Authoritarianism in South Korea*, 63.4 The American Journal of Comparative Law , 639-41 (2015).
312. Maurice Adams, Dirk Heirbaut (eds), The Method and Culture of Comparative Law (Hart Publishing, 2014).
313. Maurice Adams,Husa, J., Oderkerk, M. (eds.), Comparative law methodology: Volumes I and II. (Cheltenham: Edward Elgar, 2017).
314. Martha Brill Olcott, Kazakhstan: Unfulfilled promise 101-102 (Washington, DC: Carnegie Endowment for International Peace 2002)
315. Martha Brill Olcott, Central Asia`s New States: Independence, Foreign Policy, and Regional Security 97 (US Institute of Peace Press, Washington D.C. 1996).
316. Mark Ramseyer, *The Puzzling Independence of Courts: A Comparative Approach*, The Journal of Legal Studies, 721 (1994).

317. Michael McFaul, *The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Post communist World*, 54.2 World Politics, 220-39 (2002).
318. Mary Volcansek, Bargaining Constitutional Design in Italy: Judicial Review as Political Insurance, 33 West European Politics, 281-95 (2010).
319. Maria Popova, Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine (Cambridge: Cambridge University Press, 2014).
320. Maria Voskobitova, Olga Shepeleva, Arkady Gutnikov, *Legal Education in Russia: Historical Overview and Current Reforms*, in Shuvro Prosun Sarker (ed.), Legal Education in Asia, 139 (Eleven International Publishing, 2014).
321. Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Claredon Press, 1989).
322. Mehmet Arslan, *The Significance of Shifting Capital of Kazakhstan from Almaty to Astana: An Evalution on the basis of Geopolitical and Demographic Developments*, 120 Procedia-Social and Behavioral Sciences, 98 (2014).
323. Mark Tushnet, Thomas Fleiner, and Cheryl Saunders, Routledge Handbook of Constitutional Law (Routledge, 2013).
324. Martin Shapiro, *The success of judicial review*, in Sally J. Kenney, William M. Reisinger and John C. Reitz. Constitutional Dialogues in Comparative perspectives, 204(Macmillan Press LTD, Great Britain, 1999).
325. Martin Shapiro, *Courts in Authoritarian Regimes* in Tom Ginsburg and Tamir Moustafa, Rule by Law: The Politics of Courts in Authoritarian Regimes, 326 (Cambridge University Press, 2008).
326. Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (New York, NY: Free Press, 1964).
327. Martin Shapiro, *The success of judicial review*, in Sally J. Kenney, William M. Reisinger and John C. Reitz. Constitutional Dialogues in Comparative perspectives, 204(Macmillan Press LTD, Great Britain, 1999).
328. Martin Spechler, *Dina Spechler, The International Political Economy of Central Asian Statehood*, in Emilian Kavalski, Stable Outside, Fragile Inside? Post-Soviet Statehood in Central Asia, (Ashgate Pub. 2010).
329. Michel Rosenfeld and András Sajó, The Oxford Handbook of Comparative Constitutional Law (OUP Oxford, 2012).
330. Mark Beissinger, Nationalist Mobilization and the Collapse of the Soviet Union, 72-75 (Cambridge University Press, 2002).
331. Murzakulova Asel, Schoeberlein John, *The Invention of Legitimacy: Struggles in Kyrgyzstan to Craft an Effective Nation-State Ideology*, 61/7 Europe-Asia Studies *(2009)*.
332. Marie Seong-Hak Kim, Constitutional Jurisprudence and the Rule of Law: Revisiting the Courts in Yusin Korea (1972–1980), 5.2 Hague Journal on the Rule of Law 5, 179-200 (2013).
333. Manuel Jose Cepeda Espinosa, David Landau, Colombian Constitutional Law: Leading cases (Oxford University Press, 2017).
334. Malanczuk Peter, Akehurst's Modern Introduction to International Law, (London: Routledge, 1997).
335. Ming-Sung Kuo, Moving *Towards a nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan`s Constitutional Politics*, 25 Pacific Rim Law and Policy Journal, 597 (2016).

336. Murzakulova Asel, Schoeberlein John, *The Invention of Legitimacy: Struggles in Kyrgyzstan to Craft an Effective Nation-State Ideology*, 61/7 Europe-Asia Studies *(2009)*.
337. Murat Ukushev, 25 Let Konstitucii Kyrgyzstana, Istoriya [25 years for the Constitution of the Kyrgyz Republic, the history] Centr Politiko Pravovyh Issledovaniy (April 23, 2018).
338. Ming-Sung Kuo, Hui-Wen Chen, *The Brown Moment in Taiwan: Making Sense of the Law on Politics of the Taiwanese same-sex Marriage Case in a Comparative Light*, 31 Columbia Journal of Asian Law, 80, (2017).
339. Marlene Laruelle (ed.) Constructing the Uzbek State: Narratives of Post-Soviet Years, (Lexington Books, 2017).
340. Nadia Urbinati, *Unpolitical Democracy*, 38.1 Political Theory, (2010).
341. Navot Suzie, *Judicial Review of the Legislative Process*, 39.2 Israel Law Review, (2006).
342. Nazarbayev N. Kazakhstan kiy Put [The Kazakhstani Way], (Karaganda 2006).
343. Nijmann Janne, Andre Nollkaemper, *New Perspectives on the Divide between National and International Law*, (Oxford: Oxford University Press, 2007).
344. Nino Carlos Santiago, *The Constitution of Deliberative Democracy*, 187-98 (Yale University Press, 1996).
345. Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (Oxford University Press, 2010).
346. Niels Petersen, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany, South Africa (Cambridge University Press, 2017).
347. Nancy Bermeo, *On Democratic Backsliding*, 27.1 Journal of Democracy 5, (2016).
348. Nurumov, Dmitry (et al.), *Constitutional Development of Independent Kazakhstan*, in Elgie, Robert, Moestrup, Sophia (Eds.), Semi-Presidentialism in the Caucasus and Central Asia, 143-172 (Palgrave Macmillan UK, 2016).
349. Nick Megoran, *The Magic of Territory: Remaking of Border Landscapes as a Spatial Manifestation of Nationalist Ideology*, in Marlene Laruelle (ed.) Constructing the Uzbek State: Narratives of Post-Soviet Years, (Lexington Books, 2017).
350. Nuno Garuopa, Veronica Grembi, Shirley Ching-ping Lin, Explaining Constitutional Review in New Democracies: The Case of Taiwan, 20.1. Pacific Rim Law and Policy Journal, (2011).
351. Otto Pfersmann, *Concrete Review as Indirect Constitutional Complaint in French Constitutional law: a Comparative Perspective*, 5 European Constitutional Law Review, 224(2010).
352. Olcott, Martha Brill, Kazakhstan: Unfulfilled promise 101-102 (Washington, DC: Carnegie Endowment for International Peace 2002).
353. Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 Brooklyn Journal of International Law, 408-412 (2007).
354. Peter C. Perdue, China Marches West: The Qing Conquest of Central Eurasia (Cambridge, MA: Harvard University Press, 2005).
355. Peter Cane, Herbert Kritzer, The Oxford Handbook of Emperical Legal Research, 376-386 (Oxford University Press, 2010).
356. Pier Guiseppe Monateri (ed.) Methods of Comparative Law, 291 (Edward Elgar Publishing, 2012).

357. Paolo Sartori, Visions of Justice: Sharia and Cultural Change in Russian Central Asia (Leiden: Brill, 2016).
358. Pauline Jones Luong, The transformation of Central Asia: state and societies from soviet rule to independence (Cornell University Press, 2004).
359. Philip Pettit, *Depoliticizing Democracy*, 17.1 Ratio Juris, 52 (2004).
360. Pauline Jones Luong, Institutional Change and Political Continuity in Post-Soviet Central Asia: Power, Perceptions, and Pacts (Cambridge University Press 2002).
361. PO JEN YAP, *The conundrum of unconstitutional constitutional amendments*, 4.1, Global Constitutionalism 114, (2015).
362. Paul Kubicek, Authoritarianism in Central Asia: Curse or Cure? *Third World Quarterly* (1998).
363. Paul Gragl, Legal Monism: Law, Philosophy and Politics, 19-30 (Oxford University Press, 2018).
364. Pomfret Richard, The Economies of Central Asia (Princeton University Press, 1995).
365. Pomfret Richard, The Central Asian Economies in the 21st Century (Princeton University Press, 2019).
366. Po Jen Yap, Courts and Democracies in Asia, 106 (Cambridge University Press, 2017).
367. Pasquale Pasquino, Francesca Billi (eds.) The Political Origins of Constitutional Courts: Italy, Germany, France, Poland, Canada, United Kingdom, (Rome, Fondazione Adriano Olivetti, 2009).
368. Pyong-Choon Hahm, The Korean Political Tradition and Law: Essays in Korean Law and Legal History (Hollym Corporation, 1987).
369. Paul Heng-chao Ch'en, Chinese Legal Tradition Under the Mongols: The Code of 1291 as Reconstructed (Princeton University Press, 1979).
370. Pippa Norris, Alessandro Nai, Election Watchdogs: Transparency, Accountability and Integrity (eds), (Oxford University Press, 2017).
371. Richard Bellamy, Political Constitutionalism, (Cambridge University Press, 2007).
372. Ronald Dworkin, Taking Rights Seriously, (Cambridge: Harvard University Press, 1977).
373. Ronald Dworkin, Justice in Robes, (Cambridge: Harvard University Press, 2006).
374. Ronald Dworkin, Law's Empire, 238-50 (Cambridge: Harvard University Press, 1986).
375. Ronald Dworkin, Freedom`s Law: The Moral Reading of the American Constitution, 82 (Harvard University Press, 1996).
376. Robert Alexy, A Theory of Constitutional Rights (Oxford University Press, 2010).
377. Richard Albert, *Constitutional Amendment and Dismemberment*, 43 Yale Journal of International Law (2018).
378. Rett R. Ludowikowski, Constitution-making in the Region of Former Soviet Dominance (Duke University Press, 1996).
379. Roger D. Kangas, Uzbekistan: the Karimov Presidency- Amir Timur Revisited, in Sally N. Cummings (ed,), Power and Change in Central Asia, 130-145 (New York: Routledge, 2002).
380. Russel Zanca, *Government, Cotton Farms, and Labor Migration from Uzbekistan*, in Marlene Laruelle (ed.) Constructing the Uzbek State: Narratives of Post-Soviet Years, 65-70 (Lexington Books, 2017).
381. Ruti Teitel, *Post-Communist Constitutionalism: a Transtitional Perspective*, 26 Columbia Human Rights Law Review, 167 (1994).

382. Robert E. Bedeski, The Transformation of South Korea: reform and reconstruction in the sixth republic under Roh Tae Woo 1987-1992, 26 (Routledge 1994).
383. Robert Sharlet, *Stalinism and Soviet Legal Culture*, in Robert C. Tucker, Stalinism: Essays in Historical Interpretation, (Transaction Publishers, 1999).
384. Rosa Kim, *Legal Education in South Korea: Challenges in Transition*, in Shuvro Prosun Sarker (ed.), Legal Education in Asia, 197 (Eleven International Publishing, 2014).
385. R. Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 Columbia Human Rights Law Review, 175-79 (1994).
386. Russel Bova, *Political Dynamics of a Postcommunist Transition: A Comparative Perspective, 44.1 World Politics*, 114-25 (1991).
387. Rosalind Dixon and Tom Ginsburg, *Constitutions as Political Insurance: Variants and Limits,* in Comparative Judicial Review, 1-4 (E.Delaney, R. Dixon ed., Edward Elgar, 2018).
388. Rosalind Dixon, Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 International Journal of Constitutional Law, 988-1012 (2017).
389. Rogoff Martin A, French Constitutional law: cases and materials, 156(Carolina Academic Press, 2011).
390. Rosalind Dixon and Tim Ginsburg, Comparative Constitutional Law in Asia (Edward Elgar Publishing, 2014).
391. Rosalind Dixon, David Landau, *Tiered Constitutional Design*, 86.2 The George Washington Law Review, 439(2018).
392. Rosalind Dixon, David Landau, *1989–2019: From democratic to abusive constitutional borrowing,* 17.2 International Journal of Constitutional Law, 489(2019).
393. Radoslav Prochazka, Mission Accomplished on founding constitutional adjudication in Central Europe, 16 (Central European University Press, Budapest New York, 2002).
394. Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2009).
395. Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law (OUP Oxford, 2014).
396. Ran Hirschl, *The Judicialization of MegaPolitics and the Rise of Political Courts*, 11 Annual Review of Political Science, 93 (2008).
397. Rett R. Ludwikowski, *Constitution-Making in the Region of Former Soviet Dominance*, 234-35 (Duke University Press, 1996).
398. Renata Uitz, *Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary*, 13.1 INT'L J. CONST. L. 279 (2015).
399. Rogowski R., Commerce and Coalitions (Princeton University Press, 1989).
400. Richard Posner, Overcoming Law, (Harvard University Press, 1995).
401. R. S. J. Macdonald, Douglas M. Johnston, The Structure and Process of International Law, (The Netherlands: Martinus Nijhoff, 1983).
402. Radnitz Scott, *What Really Happened in Kyrgyzstan?,* 17/2 Journal of Democracy (2006).
403. Radnitz Scott, *Networks, Localism and Mobilization in Aksy, Kyrgyzstan*, 24/4 Central Asian Survey (2005).
404. Radnitz Scott, Weapons of the Wealthy: Predatory Regimes and Elite-led Protests in Central Asia (Cornell University Press, 2012).

405. Roald Z. Sagdeev, Susan Eisenhower (eds.) Central Asia Conflict, Resolution, and Change, 217-225 (Maryland, CPSS Press, 1995).
406. Rama Sampath Kumar, *Aral Sea: Environmental Tragedy in Central Asia*, 37 Economic and Political Weekly, 3797 (2002).
407. Richard Sakwa, *Constitutionalism and Accountability in Contemporary Russia: The Problem of Displaced Sovereignty*, in Gordon Smithand Robert Sharlet(eds) Russia and its Constitution: Promise and Political Reality, chapter 1 (Martinus Nijhoff , Leiden , 2007).
408. Richard Sakwa, Russia against the Rest: The Post-Cold War Crisis of World Order (Cambridge: Cambridge University Press, 2017).
409. Richard Sakwa, *The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism*, 48 Studies in East European Thought, 115 (1996).
410. Robert Sharlet, Gordon Smithand (eds) Russia and its Constitution: Promise and Political Reality, chapter 1 (Martinus Nijhoff , Leiden , 2007).
411. Robert Sharlet, *Stalinism and Soviet Legal Culture*, in Robert C. Tucker, Stalinism: Essays in Historical Interpretation, (Transaction Publishers, 1999).
412. Rick Frawn (ed) Ideology and National Identity in Post-Communist Foreign Policies (London 2004).
413. Robert E. Goodin, Charles Tilly, The Oxford handbook of Contextual Political Analysis, (Oxford University Press, 2006).
414. Stephen White, Understanding Russian Politics, (Cambridge: Cambridge University Press,2011).
415. Sean P. Roberts, Converging party systems in Russia and Central Asia: A case of authoritarian norm diffusion? *Communist and Post-Communist Studies*, p. 147-157 (2015).
416. Samuel Huntington, *Chapter III: the United States*, in Huntington, Crozier, Watanuki, The Crisis of Democracy: A Report on the Governability of Democracies to the Trilateral Commission, (New York University Press, 1975).
417. Samuel Issacharoff, *Democracy's Deficits*, 85 The University of Chicago Law Review, 485, (2018).
418. Sanghyun Yoon, *South Korea's Kim Young Sam Government: Political Agendas*,36.5 Asian Survey, 514-16 (1996).
419. Sally N. Cummings, Understanding Central Asia: Politics and Contested Transformation, 61 (Routledge 2012).
420. S. Kanter, *Constitution Making in Kazakhstan*, 5 International Legal Perspectives, 64-66 (1993).
421. Sergei Gretsky, *Civil War in Tajikistan: Causes, Developments and Prospects for Peace*, in Roald Z. Sagdeev, Susan Eisenhower (eds.) Central Asia Conflict, Resolution, and Change, 217-225 (Maryland, CPSS Press, 1995).
422. Scott Newton, *Transplantation and Transition: Legality and Legitimacy in the Kazakhstan i Legislative Process*, in M. Kurkchiyan and D. Galligan, Law and Informal Practices: The Post-Communist Experience, 152-65 (Oxford University Press, 2003).
423. Scott Newton, Law and Making of the Soviet World: The Red Demiurge (Routledge, 2015).

424. Sally Cummings, *Eurasian Bridge or Murky Waters between East and West? Ideas, Identity and output in Kazakhstan `s Foreign policy* p. 139-155 in Rick Frawn (ed) Ideology and National Identity in Post-Communist Foreign Policies (London 2004).
425. Stefanus Hendrianto, Law and Politics on Constitutional Courts: Indonesia and the Search for Judicial Heroes, (New York: Routledge, 2018).
426. Simon Butt, Melissa Crouch, Rosalind Dixon, *The First Decade of Indonesia`s Constitutional Court*, 16 Australian Journal of Asian Law, 2-6, (2016).
427. Simon Butt, The Constitutional Court and Democracy in Indonesia (Leiden: Brill Nijhoff, 2015).
428. Simon Spencer Reyner Lee, *Legal Education in Korea: new law school reforms,* in Stacey Steele, Kathryn Taylor (eds.) Legal Education in Asia: Globalization, change and contexts, 169 (New York: Routledge, 2010).
429. Samuel Issacharoff, Fragile Democracies: Contested Power in the Era of Constitutional Courts (Cambridge University Press, 2015).
430. Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century, (Norman: University of Oklahoma Press, 1991).
431. Sally J. Kenney, William M. Reisinger and John C. Reitz. Constitutional Dialogues in Comparative perspectives, 204(Macmillan Press LTD, Great Britain, 1999).
432. Scott Newton, The Constitutional Systems of the Independent Central Asian States (Oxford and Portland: Hart Publishing, 2017).
433. Stephanie Balme, Michael W. Dowdle, Building Constitutionalism in China, (PalgraveMacmillan, 2009).
434. Silvia Inclan, *Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?* 62 Political Research Quarterly, 754-63, (2009).
435. Steven Levitsky, Lucan A. Way, Competitive Authoritarianism: Hybrid Regimes After the Cold War (2010).
436. Sujit Choudhry, *Method in Comparative Constitutional Law: A Comment on Law and Versteeg*, 87 N.Y.U. L. Rev. 2078 (2012).
437. Sujit Choudhry, The Migration of Constitutional Ideas, (Cambridge University Press, 2006).
438. Sally Cummings, Power and Change in Central Asia, Politics in Asia, (Routledge, 2002).
439. Sheretov, S.G. Noveishaya istoria Kazakhstana (1985-2002) [Recent history of Kazakhstan (1985-2002)], (Almaty: Jurist 2003).
440. Sujit Choudhry, *The Lochner era and comparative constitutionalism*, 2.1 International Journal of Constitutional Law, (2004).
441. Steven Levitsky, Daniel Ziblatt, How Democracies Die: What History Reveals About Our Future (Penguin UK, 2018).
442. Storey, I. China's Bilateral and Multilateral Diplomacy in the South China Sea. In P. Cronin (Ed.) Cooperation from Strength. The United States, China and the South China Sea. Washington D.C.: Center for a New American Security. 36 International Crisis Group (2012). Stirring Up the South China Sea (I), Asia Report N°223, Brussels, International Crisis Group (2012).
443. Sean P. Roberts, Converging party systems in Russia and Central Asia: A case of authoritarian norm diffusion? *Communist and Post-Communist Studies,* (2015).
444. Theunis Roux, The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis, 297 (Cambridge: Cambridge University Press, 2018).

445. Theunis Roux, The Politics of Principle: The First South African Constitutional Court, 1995-2005, (Cambridge University Press, 2013).
446. Tim Rühlig, *How China approaches international law: Implications for Europe*, EU-Asia at a Glance, (May 2018).
447. Thomas, Hobbes, *Thomas Hobbes: Leviathan*. Rogers, G. A. J., Schuhmann, Karl (A critical ed.). (London: Bloomsbury Publishing 2006).
448. Thomas Chih-hsiung Chen, *Legal Education in Taiwan: A Plural System in Transition*, in Shuvro Prosun Sarker (ed.), Legal Education in Asia, 155 (Eleven International Publishing, 2014).
449. Toni Aleksi Alaranta, *Political Parties and the Production of an Islamist–Secularist Cleavage in Turkey*. 4.2 Approaching Religion, 113-120 (2014).
450. Tzu-Yi Lin, Ming-Sung Kuo, Hui-Wen-Chen, *Seventy Years On: The Taiwan Constitutional Court And Judicial Activism In A Changing Constitutional Landscape*, 48 Hong Kong Law Journal, 1022-1025 (2018).
451. Tom Ginsburg and Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30.3 Journal of Law, Economics, and Organization, 587-622 (2014).
452. Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003).
453. Tom Ginsburg and Rosalind Dixon, Comparative Constitutional Law (Edward Elgar Publishing, 2011).
454. Tom Ginsburg, Comparative Constitutional Design, (Cambridge University Press,2012).
455. Tom Ginsburg, James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 International Journal of Constitutional Law, (2015).
456. Tom Ginsburg, *Constitutional Courts in New Democracies: Understanding Variation in East Asia*, 2.1. Global Jurist Advances (2002).
457. Tom Ginsburg, Aziz Z. Huq, Mila Versteeg, *Coming Demise of Liberal Constitutionalism?* 85 University of Chicago Law Review (2018).
458. Tom Ginsburg, Judicial Review in New Democracies Constitutional Courts in Asian Cases (Cambridge University Press. 2003).
459. Tom Ginsburg& Gombosuren Gansorig, *When Courts and Politics Collide: Mongolia`s Constitutional Crisis* in Public Law in East Asia 78, 79 (Albert H.Y. Chen, Tom Ginsburg erd., Routledge 2016).
460. Tom Ginsburg, Albert Chen, Roman Tomasic (eds.) Public Law in East Asia (Routledge, 2013).
461. Tom Ginsburg& Gombosuren Gansorig, *When Courts and Politics Collide: Mongolia`s Constitutional Crisis*, 14 CJAL. 309, 311(2001).
462. Tom Ginsburg, Tamir Moustafa (eds.), *Introduction*, Rule by Law: The Politics of Courts in Authoritarian Regimes, 2 (Cambridge University Press, 2008).
463. Tom Ginsburg& Chimid Enhbaatar, *Avoiding Rights: The Constitutional Tsets of Mongolia* in Albert Chen, Andrew Harding (eds.) Constitutional Courts in Asia: a Comparative Perspective 168, 176 (Cambridge University Press 2018).
464. Tom Ginsburg, *The Global Spread of Constitutional Review*, in Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, The Oxford Handbook of Law and Politics 88 (Oxford University Press, 2010).

465. Tom Ginsburg, Between Fire and Ice: Mongolia in 1996, 37 ASIAN SURVEY 60 (1997); Deepening Democracy: Mongolia in 1997, 38 ASIAN SURVEY (1998).
466. Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27.4. Law & Society Inquiry, (2002).
467. Tamas Gyorfi, Against New Constitutionalism, (Edward Elgar Publishing, 2016).
468. Tay-Sheng Wang, (translated by Sean Cooney), *The Development of legal education in Taiwan: an analysis of the history of law and society*, in Stacey Steele, Kathryn Taylor (eds.) Legal Education in Asia: Globalization, change and contexts, 137 (New York: Routledge, 2010).
469. Tim Epkenhans, *4 The Islamic Renaissance Party of Tajikistan: Episodes of Islamic Activism, Postconflict, Accommodation, and Political Marginalization,* 9 Brill (2018).
470. Uk Heo, Seongyi Yun, South Korea in 2017 Presidential Impeachment and Security Volatility, *Asian Survey* 58.1, 67 (2017).
471. Uurintuya Batsaikhan, Marek Dabrowski, *Central Asia- Twenty Five Years After the Breakup of the USSR*, 3.3 Russian Journal of Economics, 298 (2017).
472. Uuriintuya Batsaikhana, MarekDabrowski, Central Asia — twenty-five years after the breakup of the USSR, 3.3 Russian Journal of Economics, 296-301 (2017).
473. Vicki Jackson, Constitutional Engagement in a Transnational Era (Oxford Univ. Press, 2010).
474. Vicki Jackson, Mak Tushnet, Comparative Constitutional Law (Foundation Press, 2006).
475. Vera Axyonova, Fabrienne Bossuyt, *Mapping the substance of the EU's civil society support in Central Asia: From neo-liberal to state-led civil society,* 49.3 Communist and Post-Communist Studies, 207-17 (2016.
476. Vera Axyonova, F.Bossuyt, Mapping the substance of the EU's civil society support in Central Asia : from neo-liberal to state-led civil society, *Communist and Post-Communist Studies,* (2017).
477. Vyacheslav Belokrenitsky, *Islamic Radicalism in Central Asia: The Influence of Pakistan and Afghanistan*, in Boris Rumer (ed.), Central Asia at the end of the Transition 152 (M.E.Sharpe, Inc, 2005).
478. Wojciech Sadurski, Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective (Springer Science & Business Media, 2002).
479. Wojciech Sadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (Springer Science & Business Media, 2005).
480. Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 Int'l J. Const. L. 244–68 (2003).
481. Wojciech Sadurski, Postcommunist Constitutional Courts in search of political legitimacy, European University Institute working paper, 17 (2001).
482. Wade Shepard, *Why the China-Europe "Silk-Road" Rail Network Is Growing Fast,* Forbes, 251 (January 28, 2016).
483. Wen-Chen Chang, *Strategic judicial responses in politically charged cases: East Asian experiences*, 8 ICON.887, 891 (2010)
484. Wen-Chen Chang, Li-ann Thio, Kevin YL Tan, Jiunn-rong Yeh, Constitutionalism in Asia: Cases and Materials, (Hart Publishing, 2014).

485. Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracies*, 2 ASIA L.REV. 73-82(2005).
486. Wen-Chen Chang, *Chapter 7 Comparative Discourse in Constitution Making: An Analysis on Constitutional Framers as Dialectic Agent*, in Lo, Chang-fa, Li, Nigel, Lin, Tsai-yu (eds.) Legal Thoughts between the East and the West in the Multilevel Legal Order, (Springer, 2016).
487. Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3.2 National Taiwan University Law Review, 115, (2008).
488. Wen-Chen Chang, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36.3 North Carolina Journal of International Law and Commercial Regulation, 594 (2011).
489. William A. Hayes, *Do Springs of Democracy lead to Falls of Justice? State–Civil Contests for Political Accountability in South Korea*, 4.2 Journal of Human Rights, 257-262(2005).
490. William Stueck, The Korean War: An International History (Princeton University Press, 1995).
491. West James M., *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 Pacific Rim Law & Policy Journal, 87 (1997).
492. William Shaw, Human Rigths in Korea: Historical and Policy Perspectives, (Harvard University Press, 1991).
493. William Butler, *Jus and Lex in Russian Law*, in Denis J Galliganand Marina Kurkchiyan (eds.), Law and Informal Practices: the Post-Communist Experience 50-60 (Oxford University Press, 2003).
494. Yaniv Roznai**,** Unconstitutional Constitutional Amendments – The Limits of Amendment Powers (Oxford University Press, 2017).
495. Yaniv Roznai, *Constitutional Amendment and "Fundamendment": A Response to Professor Richard Albert*, Yale Journal of International Law Forum (February 27, 2018).
496. Yascha Mounk, The People Versus Democracy: The Rise of Undemocratic Liberalism and the Threat of Illiberal Democracy (Harvard University Press, 2018).
497. YOUNGJAE LEE *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 Am. J. Comp. L. (2005).
498. Yi-Li Lee, *The Korean Constitutional Court and Kwangju Massacre: Note on the Special Act concerning the May Democratization Movement Case*, 4 NTU L. Rev. 227 (2009).
499. Yuriy Kulchik, Andrey Fadin, Viktor Sergeev, Central Asia After the Empire, 2-4 (Pluto Press, 1999). Peter Roudik, The History of the Central Asian Republics, (2007).
500. Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 Int'l J. Const. L. 224–43 (2003).
501. Yoomin Won, *The Role of International Human Rights law in South Korean constitutional Court practice: An empirical study of decisions from 1988 to 2015*, 16.2 International Journal of Constitutional Law, 596 (2018).
502. Zhang Qianfan, The Constitution of China: A Contextual Analysis (Oxford: Hart Publishing, 2012).
503. Zhenis Kembayev, The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration? *Review of Central and East European Law* 342-367 (2016).

504. Zhenis Kembayev, *The Rise of Presidentialism in Post-Soviet Central Asia: The Example of Kazakhstan*, in: R. Grote and T. Röder (eds), Constitutionalism in Islamic Countries: Between Upheavel and Continuity , 431-435(New York: Oxford University Press 2011).
505. Zimanov, S.Z. *Parlament Kazakhstana v trudnye gody provozglasheniya nezavisimosti* [Kazakhstan's parliament in the difficult years of proclaiming independence], (Almaty 2011).
506. Zhenis Kembyaev, *Recent Constitutional Reforms in Kazakhstan: A Move Towards Democratic Transition?*, 42 Review of Central and East European Law, (2017).
507. Zhenis Kembayev, Regional Integration in Eurasia: The Legal and Political Framework, 41.2 Review of Central and East European Law, 117-53 (2016).
508. Zhenis Kembayev, *The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration?*, 41 Review of Central and East European Law, (2016).

Constitutions, National Legislation and International Legal Instruments (hard and soft)

1. Constitutional Court Act, December 30, 2014, Act No. 12897, (S. Kor.), *translated* in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.)
2. Constitutional Interpretation Procedure Act, February 3, 1993, (Taiwan). https://www.judicial.gov.tw/FYDownload/en/p07_2.asp?lawno=73 (lasted visited May 7,2019).
3. Collective Security Treaty, Collective Security Treaty Organization, May 15,1992.
4. Constitution of Mongolia [Mongolia], 13 January 1992.
5. Charter of the Collective Security Treaty Organization, Collective Security Treaty Organization, Oct. 7, 2002.
6. *Constitution of Mongolia* [Mongolia], 13 January 1992.
7. Constitutional Court Act, December 30, 2014, Act No. 12897, art.2 (S. Kor.), *translated* in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.). Daehanminkuk Hunbeob [Hunbeob][Constitution] (S.Kor.).
8. Daehanminkuk Hunbeob [Hunbeob][Constitution] (S.Kor.).
9. Declaration on the Establishment of the Shanghai Cooperation Organization, June 15, 2001.
10. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 12 avgusta 2010 goda o Nacionalizacii 13.21 procenta akciy otkrytogo akcionernogo obshestva Kantskiy Cementniy Zavod [The Decree of the Interim Government on nationalization of the 13.21% of the shares of open joint stock company Kant Cement Factory] August 12,2010 No. 121
11. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20 maya 2010 goda No. 48 o Nacionalizacii zemel`nogo uchastka I obektov obshestva s ogranichennoi otvetstvennost`u Pansionat Vityaz [The Decree of the Interim Government on nationalization of the land plot and the objects of the limited liability company Vityaz Resort] May 20,2010 No. 48
12. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 19 iulya 2010 goda No. 99 o nacionalizacii obektov ozdorovitelno-turisticheskogo kompleksa Avrora Grin [The Decree of the Interim Government on nationalization of the objects of touristic complex Aurora Green] July 19,2010 No. 99.

13. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 43 o nacionalizacii zemelnogo uchastka I letinogo zhilogo kompleksa Avrora Plus [The Decree of the Interim Government on nationalization of land plot Aurora Plus] 20.05.2010 No. 43.
14. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 44 o nacionalizacii 49% aksiy ZAO Alfa Telekom [The Decree of the Interim Government on nationalization of 49% shares of closed joint stock company Alfa Telekom] 20.05.2010 No. 44.
15. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 45 o nacionalizacii zemelnogo uchastka OsOO Tera Nova [The Decree of the Interim Government on nationalization of land plot of the LLC Tera Nova] 20.05.2010 No. 45.
16. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 47 o nacionalizacii zemelnogo uchastka OsOO Sanvei [The Decree of the Interim Government on nationalization of land plot of the LLC Sanvei] 20.05.2010 No. 47.
17. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 48 o nacionalizacii zemelnogo uchastka pansionat Vityaz [The Decree of the Interim Government on nationalization of land plot of the Vityaz Resort] 20.05.2010 No. 48.
18. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 20.05.2010 No. 49 o nacionalizacii administrativnogo zdania, nahodyashegosya po adresu Bishkek bulvar Erkindik 39A [The Decree of the Interim Government on nationalization of administrative building located in Bishkek boulevard Erkindik 39A] 20.05.2010 No. 49.
19. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 7 aprelya 2010 goda No. 1 o Vremennom Pravitel`stve KR 8 [The Decree of the Interim Government on the establishment of Interim Government of the KR] April 7, 2010, No. 7
20. Doklad Akyikatchy [Report of the Ombudsman of the Kyrgyz Republic. Evaluation of the independent Comission of Ombudsman of the Kyrgyz Republic on tragic events in June 2010 that took place in Osh, Jalal-Abad regions and on protection of rights and freedoms of invididuals and citizens of the Kyrgyz Republic in 2010], Bishekek 2011.
21. Zakon Kyrgyzskoi Respubliki o Normativno Pravovyh Aktah Kyrgyzskoi Respubliki [The Law of the KR on Normative Legal Acts of the Kyrgyz Republic] July 20, 2009 No. 241
22. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 7 aprelya 2010 goda No. 1 o Vremennom Pravitel`stve KR 8 [The Decree of the Interim Government on the establishment of Interim Government of the KR] April 7, 2010
23. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 26 aprelya 2010 goda No. 30 o lishenii K.Bakieva statusa neprikosnovennosti. [The Decree of the Interim Government on lifting the immunity of K.Bakiev] April 26, 2010
24. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 3 iunya 2010 goda No.146 o Nacionalizacii zemel`nogo uchastka I nezhilogo pomeshenia, raspolojennyh po adresu: gorod Dzhalal-Abad, ul.Kurmanbeka,8 [The Decree of the Interim Government on Nationalization of the Land Plot and non-residential premises located in Dzhalal-Abad city Kurmanbeka street 8] June 3, 2010, No. 146
25. Dekret Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ot 3 iunya 2010 goda No.60 o Nacionalizacii obshestva s ogranichennoi otvetstvennost`u Tashkomyr [The Decree of the Interim Government on Nationalization of the Limited Liability Company Tashkomyr] June 3, 2010 No. 60

26. Daehanminkuk Hunbeob [Hunbeob][Constitution] art.65 (S.Kor.).
27. Federalniy Zakon ot 20 Iulya 2012 goda N.121-F3 O vnesenii izmeneniy v otdelnye akty Rossiyskoi Federacii v chasti regulirovania deyatelnosti nekommercheskih organizacoi, vypolnyaushih funksii inostrannogo agenta [Federal Law as of Jule 20, 2012 on Introducing Amendments to certain Laws of the Russian Federation on Regulation of the Activities of Non governmental Organizations, functioning as Foreign Agents], July 20, 2012, No.121-F3
28. Federalniy Zakon ot 6 iulya 2016 goda № 375-ФЗ o vnisenii izmeneniy s Ugolovniy Kodeks Rossiyskoi Federacii I Ugolovno-Processualniy Kodeks Rossiyskoi Federasii v chasti ustanovlenia dopolnitelnyh mer protivodeistvia terrorizmu I obespechenia obshestvennoi bezopasnosti [Federal Law as of July 6, 2016 No. 375-F3 on Introducing Amendments to the Criminal Code and Criminal Procedural Code of the Russian Federation in parts Related to the Counter-Terrorism and maintenance of Public Order] July 6, 2016, No.375-F3.
29. Federalniy Zakon ot 6 iulya 2016 goda № 374-ФЗ o vnisenii izmeneniy v Federalniy Zakon o Protivodeistviu Terrorizmu I Otdelnye Zakonodatelnye Akty Rossiyskoi Federasii v Chasti Ustanovlenia Dopolnitelnyh Mer Protivodeistvya Terrorizmu I Obespechenia Obshestvennoi Bezopasnosti. [Federal Law on Introducing Amendments to the Federal Law on Counter-terrorism and to other acts of the Russian Federation in relation to the establishment of additional measures to counter terrorism and maintain the Public Order] July 6, 2016, No. 374-F3.
30. Federalniy Zakon ot 18 Marta 2019 goda No.31-F3 O Vnesenii Izmeneniy v Stat`u 15.3 Federalnogo Zakona Ob Informacii, Informasionnyh Tehnologiah I O Zashite Informacii [Federal Law as of March 18, 2019 No. 31-F3 on Introducing Changes to Article 15.3 of the Federal Law on Communications, Information, Information Technolofies and on Protection of Informaion] March 18, 2019 No. 31-F3.
31. Federalniy Zakon ot 1 Maya 2019 goda No. 90-F3 O Vnesenii Izmeneniy v Federalniy Zakon o Svyazi I Federalniy Zakon ob Informacii, Informasionnyh Tehnologiah I o Zashite Inforsii [Federal Law as of May 1, 2019 No. 90-F3 on Introducing Changes to the Federal Law on Communications, Federal Law on Information, Information Technologies and Protection of the Information] May 1, 2019 No. 90-F3.
32. Konstitucionniy Zakon Respubliki Tajikistan ob Osnovatele mira I nacionalnogo edinstva- Lidera nacii [Constitutional Law of the Republic of Tajikistan on Founder of peace, National Unity- Leader of Nation] November 8, 2016 No. 1356. Konstitucionniy Zakon RK o Pervom Prezidente RK Elbasy [Constitutional Law of the RK on First President of the RK- Elbasy] July 20, 200 No. 83-II.
33. Konstitucionniy Zakon Respubliki Tajikistan ob Osnovatele mira I nacionalnogo edinstva- Lidera nacii [Constitutional Law of the Republic of Tajikistan on Founder of peace, National Unity- Leader of Nation] November 8, 2016 No. 1356.
34. Konstitucionnuj zakon Respubliki Tajikistan o Konstitucionnom Sude Respubliki Tajikistan [Constitutional Law on the Republic of Tajikistan on Constitutional Court] November 3, 1995, No. 84, Articles 34.
35. Konstitucionnuj zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Constitutional Law on the Republic of Uzbekistan on Constitutional Court] May 27, 2017, No. ЗРУ-431.

36. Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnom Sude [Constitutional Law on the Constitutional Court of the Kyrgyz Republic] December 18, 1993, No. 1335-XII 37, Article 13.
37. Konstitucionnuj zakon Respubliki Kazakhstan o Konstitucionnom Sovete Respubliki Kazakhstan [Constitutional Law on the Republic of Kazakhstan on Constitutional Council] December 29, 1995, No. 2737.
38. Konstitucionnuj zakon Respubliki Tajikistan o Konstitucionnom Sude Respubliki Tajikistan [Constitutional Law on the Republic of Tajikistan on Constitutional Court] November 3, 1995, No. 84.
39. Konstitucionnuj zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Constitutional Law on the Republic of Uzbekistan on Constitutional Court] May 27, 2017, No. ЗРУ-431.
40. Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011, No. 37.
41. Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011.
42. Konstitucionnogo zakona RT o vyborah v Madjilisi Ori [The Constitutional Law of the RT on Elections to Parliament] December 10, 1999, No.856.
43. Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 27 June 2010.
44. Konstitucionnuj zakon Kyrgyzskoj Respubliki o statuse sudej Kyrgyzskoj Respubliki [Constitutional Law on the Status of Judges in the Kyrgyz Republic] July 9, 2008, No. 141.
45. Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 5 May 1993.
46. Konstituciya Rossiyskoi Federacii [Constitution of the Russian Federation] 12 December 1993.
47. Konstituciya Respubliki Azerbaijan [Constitution of Azerbaijan] 1996.
48. Konstitucia Respubliki Kazakhstan [Constitution of the Republic of Kazakhstan] January 28,1993.
49. Konstituciya Respubliki Tadzhikistan [Constitution of Tajikistan] 1994.
50. Konstituciya Respubliki Armenia [Constitution of Armenia] 1995.
51. Konstituciya Gruzii [Constitution of Georgia] 1995.
52. Konstituciia Respubliki Uzbekistan [Constitution of the Republic of Uzbekistan] 1992.
53. Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011, No. 37.
54. Konstituciya Ukrainy [Constitution of Uktaine] 28 June 1996.
55. Konsepsia Vneshnei Politiki Kazakhstan a [The Concept of the External Policy of Kazakhstan] 1995, adopted by the President of the Republic of Kazakhstan.
56. Konstitusionniy Zakon KR o Referendume Kyrgyzskoi Respubliki [The Constitutional Law of the KR on Referendum of the Kyrgyz Republic] Oct.31, 2016, No. 173.
57. Konstitucionniy Zakon RK o Pervom Prezidente Respubliki Kazakhstan - Lidere Nacii [Constitutional Law of the RK on First President of the Republic of Kazakhstan- Leader of Nation] July 20, 200 No. 83-II.

58. Konstitucionniy Zakon RK o Pervom Prezidente RK Elbasy [Constitutional Law of the RK on First President of the RK- Elbasy] July 20, 200 No. 83-II.
59. Military Service Act, 1949, art 8, (S.Kor.), *translated in Statutes of the Republic of Korea* (Korea Legislation Research Inst.)
60. Minguo Xiandfa, Constitution of the Republic of China (1947), (Taiwan).
61. National Human Rights Commission Act, art. 25(1), May 24, 2001, Act No. 6481 (S. Korea).
62. National Security Act during the Period of National Mobilization of Suppression of the Communist Rebellion, 1978, (Taiwan).
63. Osenka Nezavisimoi Komissii Ombudsmena (Akiykatchy) Kyrgyzskoi Respubliki po trigicheskim sobytiam v iune 2010 goda, proizoshedshih v Oshkoi, Jalal-Abadskoi oblastyah i v gorode Osh. O sobludenii prav i svobod cheloveka i grazhdanina v Kyrgyzskoi Respublike v 2010 godu.
64. Otchet Vremennoi Deputatskoi komissii Jogorku Kenesha Kyrgyzskoi Respubliki po vyiavleniu i rassledovaniu obstoyatelstv i usloviy, privedshih k tragicheskim sobytiam, proizoshedshim v respublike v aprele-iune 2010 goda, i dache im politicheskoi ocenki [Report of the interim Deputy Comission of the Jogorku Kenesh (Parliament) of the Kyrgyz Republic on defining and investigating the circumstances and reasons of the tragic events that took place in the Republic within the period of April-June 2010 and providing a political eveluation for these events] June 9, 2011.
65. Prikaz Hokima Surkhandarisnkoi Obralist [order of the hokim of the Surkhandarya region] August 15, 1996 No. 164.
66. Postanovlenie Sentralnoi Izbiratelnoi Komissii Kyrgyzskoi Respubliki ob opredelenii rezoltatov vyborov Prezidenta Kyrgyzskoi Respubliki ot 30 oktyabrya 2011 goda [Resolution of the Central Election Commission of the Kyrgyz Republic on results of the Presidential Elections of the Kyrgyz Republic] October 30, 2011.
67. Postanovlenie Zakonadatel`nogo Sobrania Jogorku Kenesh KR ob Obrasheniah inisiativnyh grupp po provedeniu Referenduma o prodlenii polnomochiy Prezidenta KR do Oktyabrya 2001 goda [The Regulation of the Legislative Chamber of Jogorku Kenesh of the KR on requests of the initiative group on holding a Referendum on extension of Presidential term till October 2001], Sep.20, 1995 No.198-1
68. Proekt Zakona Kyrgyzskoi Respubliki o Vnisenii izmeneniy v Konstitusiu Kyrgyzskoi Respubliki [The Proposed Draft Law of the KR on Introducing Changes to the Constitution of the Kyrgyz Republic] Jan. 3, 1996
69. Public Official Election Act, Mar. 16, 1994 Act No. 4739 (S. Kor.), translated in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.)
70. Postanovlenie Vremennogo Pravitel`stva Kyrgyzskoi Respubliki ob obrazovanii konstitucionnogo soveshania [The Decree of the Interim Government of the Kyrgyz Republic on establishment of the Constitutional Assembly] April 30, 2010 No. 29.
71. Postanovlenie Pravitelstva Kyrgyzskoi Respubliki ob utverzhdenii polojenia o poryadke rassmotrenia obrasheniy bychshih sobstvennikov imushestva, nacionalizirovannogo v sootvetsvii s dekretemai vremennogo pravitel`stva Kyrgyzskoi Respubliki v 2010 godu, o vosstanovlenii imushestvennyh prav ot 25 Dekabrya 2018 goda No. 619 [Resolution of Government of the Kyrgyz Republic on adoption of the regulation on complaint procedure for restoration of property rights of former property holders whose assets were

nationalized by the decrees of the Interim Government in 2010] December 25, 2018 No. 619.
72. Postanovlenie Prezidenta Respubliki Uzbekistan o Merah po Sovershenstvovaniu sistemy Upravlenia Gosudrastvennymi Aktivami [Resolution of President of RU on measures of advancing the system of governance over governmental assets] May 14, 2018
73. Postanovlenie Prezidenta Respubliki Uzbekistan o pervoocherednyh merah gosudarstvennoi podderjki bazovoi otroslevoi ekonomiki v usloviyah liberalizacii valutnogo rynka [Resolution of the President of RU On priority measures of state support of basic sectors of the economy in the context of liberalization of the foreign exchange market] September 4, 2017.
74. Postanovlenie Prezidenta Respubliki Uzbekistan o dopolnitelnyh merah po sovershenstvovaniu mehanizmov vnedrenia innovaciy v otrasli s sfery ekonomiki [Resolution of the President of RU About additional measures to improve the mechanisms for introducing innovations in the industry and economic sphere] May 7, 2018
75. Postanovlenie Pravitel`stva Kyrgyzskoi Respubliki ob agenstve po reorganizacii bankov i rekonstruksii dolgov pri Ministertste Finansov Kyrgyzskoi Respubliki [Regulation of the Government of the Kyrgyz Republic about the Agency for the Reorganization of Banks and Restructuring debt with the Ministry of Finance of the Kyrgyz Republic], February 19, 2002, No. 87.
76. Postanovlenie Pravitelstva Kyrgyzskoi Respubliki o merah po demonopolizacii ekonomiki i podderjski predprenimatelstva v Respublike Kyrgyzstan [Resolution of the Government of the Kyrgyz Republic on On measures to demonopolize the economy and support entrepreneurship in the Republic of Kyrgyzstan], August 25,1992, No. 421.
77. Postanovlenie Verhovnogo Soveta Respubliki Kyrgyzstan o sozdanii rabochei gruppy po podgotovke proekta novoi Konstitucii [Resolution of the Supreme Soviet of the Republic of Kyrgyzstan on establishment of the constitutional assembly to develop a text of the new Constitution], May 15,1991.
78. Postanovlenie Verhovnogo Soveta Respubliki Kazakhstan ob obrazovanii konstitucionnoi kommussii [Resolution of the Supreme Soviet of the Republic of Kazakhstan on establishment of the Constitutional Assembly], December 15, 1990.
79. Postanovlenie Verhovnogo Soveta Respubliki Kazakhstan o naznachenii Nazarbayeva N.A. Predsedatelem Konsticionnoi Kommissii [Resolution of the Supreme Soviet of the Republic of Kazakhstan on appointment of Nazarbayev N.A. as the chairman of the Constitutional Assembly] December 15,1991.
80. Postanovlenie Sentralnoi Izbiratelnoi Komissii Kyrgyzskoi Respubliki o resultatah referenduma KR ot 11 dekabrya 2016 goda [Resolution of the Central Election Commission of the Kyrgyz Republic on results of the referendum of the Kyrgyz Republic on constitutional amendments] 11 December 2016
81. Postonovlenie SIK on Instruksii o poryadke ucheta postuplenia I rashodovania denejnyh sredstv izbiratelnyh fondov kandidatov, politicheskih partiy, izbiratelnyh blokov [The Resolution of the Central Election Commission on Instructions on the procedure for recording income and expenditure of the funds of candidates 'electoral funds, political parties, election blocs], Nov.9, 1999, No. 162
82. Polojenie SIK o Lingvisticheskoi Kommissii po ustanovleniu vladenia gosudarstvennym yazykom KR kandidatom na doljnost` Prezidenta KR [The Regulation of the Central

Election Commission on the establishment of the Linguistic Commission on the proficiency in the Kyrgyz language by candidates for the post of President Kyrgyz Republic] Jun.28, 2000, No. 333.
83. Proekt Zakona Kyrgyzskoi Respubliki o Vnisenii izmeneniy v Konstitusiu Kyrgyzskoi Respubliki [The Proposed Draft Law of the KR on Introducing Changes to the Constitution of the Kyrgyz Republic] Oct. 1, 1998 No. 292
84. Postanovlenie Jogorku Kenesh o lishenii statusa eks-prezidenta Kyrgyzskoi Respubliki A.Atambyaeva [Resolution of the Jogorku Kenesh of the KR on lifting the status of eks-president of the KR A. Atambayev] June 26, 2019.
85. Postanovlenie Centralnoi Izbiratelnoi Komissii KR ob opredelenii resultatov vyborov Prezidenta Kyrgyzskoi Respubliki ot 15 oktyabrya, 2017 goda [Resolution of the Central Election Commission of the Kyrgyz Republic on results of the Presidential elections of Kyrgyzstan] October 15, 2017 No. 526.
86. Postanovlenie Verhovnogo Soveta RK o priostanovlenii deyatel`nosti Konstitusionnogo Suda RK [The Decree of the Supreme Soviet of RK on Suspending the activities of the Constitutional Court] March 11,1995.
87. Polojenie ob Assamblei Narodov Kazakhstan a [Regulation on the Assembly of Peoples of Kazakhstan] March 1, 1995
88. Postanovlenie Bolshoi Kollegii Suda Evraziyskogo Ekonomicheskogo Soobshestva po Delu Yuzhnogo Kuzbasa [Regulation of the Grand Chamber of the Eurasian Economic Community Court on Yuzhniy Kuzbas] April 8, 2013.
89. Rasporyazhenie Prezidenta RK o vsenarodnom obsujdenii proekta zakona RK o vnesenii izmeneniy I dopolneniy v Konstituciu Respubliki Kazakhstan [The Presidential Order of the RK on public hearing of the draft law on introducing amendments to the Constitution of the Republic of Kazakhstan] January 25,2017.
90. Statut Suda Evraziyskogo Ekonomocheskogo Soiuza [The Statute of the Court of the Eurasian Economic Union], May 29, 2014.
91. Statut Suda Evraziyskogo Ekonomocheskogo Soiuza [The Statute of the Court of the Eurasian Economic Union], May 29, 2014.
92. Strategia Stanovlenia I Razvitia Kazakhstan a kak suverennogo gosudarvsta [Strategy of the establishment and Development of Kazakhstan as Sovereign State] May 16, 1992, adopted by the President of the Republic of Kazakhstan .
93. Special Act Concerning the 18 May Democratization Movement, December 21, 1995, Act No. 5029, (S.Kor.), translated in 18 statutes of the Republic of Korea (Korean Legislation Research Inst.).
94. State Public Officials Act, Act No. 7796, Dec. 29, 2005, art. 33, 31 (3) (S.Kor.), *translated in Statutes of the Republic of Korea* (Korea Legislation Research Inst.)
95. The Additional Articles of the Constitution of the Republic of China (Taiwan) art. 2, https://www.judicial.gov.tw/FYDownload/en/p07_2.asp?lawno=98 (last visited May 16, 2019)
96. Treaty on the Establishment of the Eurasian Economic Community, (October 10, 2000) 2212 UNTS 309.
97. The United Nations Commission on Human Rights Resolution No. 59 of 1989, recognition of the right to conscientious as provided for in Article 18 of the ICCPR. In its Resolution No. 77 of 1998.

98. Ukaz Prezidenta RK ob ispolnenii polnomochiy Prezidenta Respubliki Kazakhstan [Decree of the President of RK on execution of Presidential powers of the President of the Republic of Kazakhstan] March 19,2019, №887.
99. Ukaz Prezidenta Respubliki Kyrgyzstan ob osobennostyah razgosudarstvlenia i privatizacii sovhozov I drugih gosudarstvennyh, kommunalnyh, selskohozyastvennyh predpriyatiy v Respubliki Kyrgyzstan [Decree of the President of the Kyrgyz Republic on the peculiarities of the privatization of state farms and other state (communal) agricultural enterprises in the Republic of Kyrgyzstan], January 13, 1992, No. УП-10.
100. Ukaz Prezidenta Kyrgyzskoi Respubliki o razrabotke ekonomicheskoi strategii razvitia Kyrgyzskoi Respubliki na period do 2005 goda I indakativnogo socialno-ekonomicheskogo plana na 1996-1996 gody [Decree of the President of the Kyrgyz Republic on the development of an economic development strategy of the Kyrgyz Republic up to 2005 and an indicative social and economic plan for 1996-1998] December 29,1995.
101. Ukaz Prezidenta RK o naznachenii o Vneocherednyh vyborov Prezidenta Respubliki Kazakhstan [Decree of the President of RK on announcing early presidential elections of the Republic of Kyrgyzstan] April 9, 2019.
102. Ukaz Presidenta Respubliki Uzbekistan ob utverjdenii koncepcii administrativnoi reformy v Respublike Uzbekistan [Decree of the President of Uzbekistan on approval of the concept on administrative reforms in the Republic of Uzbekistan] September 8, 2017.
103. Ukaz Prezidenta RK ob Obrazovanii Assamblei Narodov Kazakhstan a [The Order of the President of RK on Establishment of the Assembly of Peoples of Kazakhstan] March 1, 1995.
104. Ukaz Prezidenta KR o Referendume v Kyrgyzskoi Respublike 17 oktyabrya 1998 goda [The Order of the President on Referendum in the Kyrgyz Republic on Oct.17,1998] Oct.1,1998.
105. Ukaz Presidenta Rossiyskoi Federacii o Poetapnoi Konstitusionnoi Reforme v Rossiskoi Federasii [The Decree of the President of the Russian Federation on Gradual Constitutional Reform of the Russian Federation] September 21, 1993 No.1400.
106. Ukaz Prezidenta RU o Pervoocherednyh merah po liberalizacii valutnoi politiki [Decree of the President of Uzbekistan on primary means of liberalization of monetary policy] September 2, 2017, №УП-5177.
107. Ukaz Prezidenta RU ob uchrejdenii instituta Upolnomochennogo pri Prezidente RU po zashite prav I zakonnyh interesov sub`ektov predprinimatel`stva [Decree of the President On the establishment of the institution of the Ombudsman under the President of the Republic of Uzbekistan for the protection of the rights and legitimate interests of business entities] May 5, 2017.
108. Ukaz Prezidenta RK ob ispolnenii polnomochiy Prezidenta Respubliki Kazakhstan [Decree of the President of RK on execution of Presidential powers of the President of the Republic of Kazakhstan] March 19,2019, №887
109. Ukaz Prezidenta KR ob ispolnyashem obyatannosti Prem`er-ministra Kyrgyzskoi Respubliki [The Order of the President on acting Prime-Minister of the Kyrgyz Republic] Apr.11, 2015 the resignation of Sariev was accepted by President Atambayev
110. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 24 June 2019],

111. UN Human Rights Committee (HRC), *Concluding observations of the Human Rights Committee: Korea, South*, 28 November 2006, CCPR/C/KOR/CO/3
112. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 24 June 2019].
113. UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: https://www.refworld.org/docid/453883fb22.html [accessed 24 June 2019].
114. Ukaz Prezidenta RF ob Utverjdenii Konsepcii Vneshnei Politiki Rossiyskoi Federacii [Decree of the President of the RF on adoption of the Concept of the Foreign Policy of RF] November 30, 2016 No.640. Recent joint Russian-Chinese military activities in the claimed South Korean territory is also indicative.
115. Ugolovno-processualniy Kodeks Kyrgyzskoi Respubliki [Criminal Procedural Code of the Republic of Kyrgyzstan] February 2, 2017, No. 20.
116. Ukaz Prezidenta RK ob Obrazovanii Assamblei Narodov Kazakhstan a [The Order of the President of RK on Establishment of the Assembly of Peoples of Kazakhstan] March 1, 1995.
117. Vozrajenie Prezidenta RK na Reshenie Konstitusionnogo Suda RK [Objection of the President to the Decision of the Constitutional Court of the RK] March 10,1995.
118. Zakon Respubliki Uzbekistan ob oboronnoi doctrine Respubliki Uzbekistan [The law of the Republic of Uzbekistan on Defense Doctrine of Uzbekistan] January 9, 2018.
119. Zakon Respubliki Uzbekistan o slujbe gosudarstvennoi bezopasponosti Respubliki Uzbekistan [The Law of the RU on Governmental Security Service of the Republic of Uzbekistan] March 29,2018.
120. Zakon Respubliki Uzbekistan o Vnisenii Izmineniy v acty nalogovogo zakonadatelstva [Law of the Republic of Uzbekistan on introducing changes to acts on tax legislation] June 13, 2017, № ЗРУ–436.
121. Zakon Respubliki Kazakhstan o vnesenii izmeniy I dopolneniy v Konstituciu Respubliki Kazakhstan [The Law of the Republic of Kazakhstan on introducing amendments to the Constitution of the Republic of Kazakhstan] May 21, 2007, No. 254-3.
122. Zakon o vnisenii izmineiy I dopolneniy v Zakon Respubliki Tajikistan Ob uporyadochenii tradiciy, torjestv I obryadov v Respublike Tajikistan, [Law on introducing changes to the Law of the Republic of Tajikistan On streamlining traditions, celebrations and rites in the Republic of Tajikistan] July 11, 2017.
123. Zakon Respubliki Uzbekistan o Poryadke vvedenia v deitstvie Konstitucii Respubliki Uzbekistan [Law of the Republic of Uzbekistan on entering into force of the Constitution of the Republic of Uzbekistan], December 8. 1992 No.725.
124. Zakon Respubliki Uzbekistan o vnisenii izmineniy v otdelnye stat`i Konstitucii Respubliki Uzbekistan [The Law of the Republic of Uzbekistan on introducing amendments to certain Articles of the Constitution of the Republic of Uzbekistan] May 27, 2017.
125. Zakon Respubliki Uzbekistan o Protivodeistvii Korupsii [Law of the RK on Corruption] Nov. 24, 2016
126. Zakon Kyrgyzskoi Respubliki o Garantiah deyatel`nosti Prezidenta Kyrgyzskoi Respubliki [Law of the KR on the Guarantees of the Work of the President of the Kyrgyz Republic] July 18, 2003 No. 152

127. Zakon o vnisenii izmineiy I dopolneniy v Zakon Respubliki Tajikistan Ob uporyadochenii tradiciy, torjestv I obryadov v Respublike Tajikistan, [Law on introducing changes to the Law of the Republic of Tajikistan On streamlining traditions, celebrations and rites in the Republic of Tajikistan] July 11, 2017
128. Zakon RSFSR O Konstitucionnom Sude [The Law of the Russian Federal Socialist Republic on Constitutional Court], October 30,1991.
129. Zakon Respubliki Uzbekistan o Konstitucionnom Sude Respubliki Uzbekistan [Law of the Republic of Uzbekistan on Constitutional Court of the Republic of Uzbekistan] August 30, 1996, #103.1.
130. Zakon KR o vnisenii izmenenia i dopolnenia v Zakon KR o municipalnoi sobstvennosti na imushestvo [The Law of the KR on introducing changes to the law of the KR on Municipal property] November 22, 2006 No. 184.
131. Zakon o svobode sovesti I o religioznyh organizaciah [Law on freedom of conscience and religious organizations May 5, 2009.
132. Zakon Kyrgyzskoi Respubliki o ratifikacii mezhdunarodniy dogovorov po prisoedineiu Kyrgyzskoi Respubliki k Dogovoru o Evraziyskom Ekonomicheskom Souze ot 29 maya 2014 goda No. 111 [Law of the Kyrgyz Republic on ratification of international treaties on accession of the Kyrgyz Republic to the agreement on Eurasian Economic Union] May 29, 2014
133. Zakon Kyrgyzskoi Respubliki o vnesenii izmeniy v zakon KR o garantiah deyatelnosti Prezidenta Kyrgyzskoi Respubliki [The Law of the Kyrgyz Republic on introducing amendments to the law on guarantess of the President of the KR] May 15, 2019 No. 61.
134. Zakon Kyrgyzskoi Respubliki o naznachenii referenduma po proektu po proektu zakona Kyrgyzskoi Respubliki ot 2 noyabrya 2016 goda [Law of the Kyrgyz Republic on calling the referendum on introduced amendments to the Constitution of the KR] November 2, 2016
135. Zakon Respubliki Kazakhstan o Vnesenii Izmeneniy I Dopolneniy v Konstituciu Respubliki Kazakhstan [Law of the Republic of Kazakhstan on Introducing Amendments to the Constitution of the Republic of Kazakhstan] March 10 2017, № 51-VI.
136. Zakon Respubliki Kazakhstan o Sovete Bezopasnosti Respubliki Kazastan, Zakon Respublilki Kazakhstan o Vnesenii izmeneniy i dopolneniy v nekotorye zakonodatelnye akty Respubliki Kazakhstan po voprosam deyatelnosti Soveta Bezopasponosti Respubliki Kazakhstan [Law of the RK on Security Council of the Republic of Kazakhstan , Law of the RK on introducing amendments to some legislative acts of the RK on issues related to Security Council of the Republic of Kazakhstan] May 31,2018
137. Zakon Respubliki Kazakhstan o vremennom delegirovanii Prezidentu Respubliki Kazakhstan I glavam mestnyh administraciy dopolnitel`nyh polnomochiy [The Law of the Republic of Kazakhstan on ad hoc delegation of additional powers to the President of the Republic of Kazakhstan and to Heads of local administrations] Dec. 10, 1993, No.2576-XII.
138. Zakon Respubliki Kazakhstan o vremennom delegirovanii Prezidentu Respubliki Kazakhstan I glavam mestnyh administraciy dopolnitel`nyh polnomochiy [The Law of the Republic of Kazakhstan on ad hoc delegation of additional powers to the President of the Republic of Kazakhstan and to Heads of local administrations] Dec. 10, 1993, No.2576-XII.

139. Zakon Respubliki Kazakhstan o vnesenii izmeneniy v konstituciu Respubliki Kazakhstan [The law of the RK on introducing changes to the Constitution of the RK] March 23, 2019 No. 238-VI ЗРК.
140. Zakon Respubliki Kazakhstan o vnisenii izmineiy v Konstituciu Respubliki Kazakhstan [Law of the RK on introducing amendments to the Constitution of the Republic of Kazakhstan] March 13, 2017.
141. Zakon Kyrgyzskoi Respubliki o vvedenii v deistvie Zakona KR o nacionalnom banke KR, bankah o bankovskoi deyatelnosti [Law of the KR on entering into force the law on National Bank, banks and bank activities in the Kyrgyz Republic] Dec.16,2016.
142. Zakon Respubliki Kazakhstan o vnisenii izmeneniy I dopolneniy v nekotorye zakonodatelnye akty Respubliki Kazakhstan po voprosam strahovania i islamskogo finansirovania [Law of the RK On making changes and amendments to some legislative acts of Republic of Kazakhstan on insurance and Islamic finance] Nov. 24, 2015.
143. Zakon Kyrgyzskoi Respubliki o naznachenii referenduma po proektu po proektu zakona Kyrgyzskoi Respubliki ot 2 noyabrya 2016 goda [Law of the Kyrgyz Republic on calling the referendum on introduced amendments to the Constitution of the KR] November 2, 2016
144. Zakon o vnisenii izmineiy I dopolneniy v Zakon Respubliki Tajikistan Ob uporyadochenii tradiciy, torjestv I obryadov v Respublike Tajikistan, [Law on introducing changes to the Law of the Republic of Tajikistan On streamlining traditions, celebrations and rites in the Republic of Tajikistan] July 11, 2017
145. Zakon Kyrgyzskoi Respubliki o Biometricheskoi Registracii grazhdan Kyrgyzskoi Respubliki [Law of the Kyrgyz Republic on Biometric Registration of the Citizens of the Kyrgyz Republic], No.136, July 14,2014
146. Zakon Respubliki Kazakhstan o vremennom delegirovanii Prezidentu Respubliki Kazakhstan I glavam mestnyh administraciy dopolnitel`nyh polnomochiy [The Law of the Republic of Kazakhstan on ad hoc delegation of additional powers to the President of the Republic of Kazakhstan and to Heads of local administrations] Dec. 10, 1993, No.2576-XII.
147. Zakon RK o Konstitucionnom Sudoproizvodstve v Respublike Kazakhstan [The Law of the RK on Constitutional Adjudication in the Republic of Kazakhstan], June 5, 1992 No.2550, Article 14
148. Zapros Prezidenta RK v Konstitusionniy Sud RK o Pravovyh Posledstviyah Postanovlenia Konstitusionnogo Suda ot 6 marta 1995 goda [Referral of the President of RK to the Constitutional Court of RK on clarifying legal consequences of the Ruling of the Constitutional Court of March 6 1995] March 11,1995
149. Zakon Kyrgyzskoi Respubliki o vnisenii dopolneniy v Zakon KR o Reglamente Jogorku Kenesh KR [The Law of the KR on introducing additional provisions to the law on Internal Regulations of the Jogorku Kenesh of the Kyrgyz Republic] Jogorku Kenesh Kyrgyzskoi Respubliki [JKKR][The Supreme Council of the KR, Parliament] Nov. 8, 2006
150. Zakon KR o vzaimodeistvii Gosudarstvennyh Organov v sfere vneshnei politiki Kyrgyzskoi Respubliki [The Law of the KR on Coordination of the Governmanetal bodies in the field of foreign policy of the Kyrgyz Republic] Jul. 4, 2012. No. 96.
151. Zakon Kyrgyzskoi Respubliki ob informacii personalnogo haraktera [The Law of the Kyrgyz Republic on the information of personal character], April 14, 2008 No. 58.

152. Zakluchenoe Nacionalnoi Komissii po vsestoronnemu izucheniu prichin, posledstviy i vyrabotke rekommendaciy po tragicheskim sobytiam, proizoshedshim na uge respubliki v Iune 2010 goda [Conclusion of the National Comission on eveluation of the root causes and consequences and recommendations regarding the tragic events that took place in the Southern part of the Republic in June 2010] 2011.
153. Zakon o vnesenii Izmeneiy v nekotorye zakonodatelnye akty Respubliki Kazakhstan [Law of the RK on introducing amendments to certain legal acts of the Republic of Kazakhstan] December 24, 2015 No. 421-V.
154. Zakon Respubliki Tadjikistan o Vnesenii Izmeneniy v Zakon ob Obshetvennyh Obiedineniy [Law of the Republic of Tajikistan on Introducing Amendments to the Law on Public Associations] November 23, 2015, № 1242.
155. Zakon Respubliki Uzbekistan o Vnesenii Izmeneniy I Dopolneniy v Nekotorye Zakonadatelnye Akty Respubliki Uzbekistan v svyazi s dalneishim sovershenstvovaniem deyatelnosti negosudarstvennyh kommercheskih organizaciy [Law of the Republic of Uzbekistan on Introducing Amendments to certain Acts of the Republic of Uzbekistan in connection with the further improvement of the activities of non-profit organizations] 2014, № 12.
156. Zakon Respubliki Kazakhstan o Vnesenii Izmeneniy I dopolneniy v nekotorye zakonodatelnye akty respubliki Kazakhstan po voprosam deyatelnosti nepravitelstvennyh organizaciy [Law of the Republic of Kazakhstan on introducing Amendments to certain acts of the Republic of Kazakhstan on the activities of non-governmental organizations] December 2, 2015 № 429-V.
157. Zakon Kyrgyzskoi Respubliki o naznachenii referenduma po proektu po proektu zakona Kyrgyzskoi Respubliki ot 2 noyabrya 2016 goda [Law of the Kyrgyz Republic on calling the referendum on introduced amendments to the Constitution of the KR] November 2, 2016.
158. Zakon Respubliki Kazakhstan o Vnesenii Izmeneniy I Dopolneniy v Konstituciu Respubliki Kazakhstan [Law of the Republic of Kazakhstan on Introducing Amendments to the Constitution of the Republic of Kazakhstan] March 10 2017, № 51-VI.
159. Zakon Respubliki Uzbekistan o vnisenii izmineniy v otdelnye stat`i Konstitucii Respubliki Uzbekistan [The Law of the Republic of Uzbekistan on introducing amendments to certain Articles of the Constitution of the Republic of Uzbekistan] May 27, 2017.

Judicial Decisions

1. Baker v. Carr, 369 U.S. 186 (1962)
2. Constitutional Court [Const. Ct.], 2017 Hun-Ba127, Apr. 11, 2019, (KCCR, 141) (S.Kor.).
3. Constitutional Court [Const. Ct.], 88Hun-Ma22, Sept. 4, 1989, (KCCR, 176) (S. Kor.)
4. Constitutional Court [Const. Ct.], 89Hun-Ma160, Apr. 1, 1991, (KCCR ,149) (S. Kor.).
5. Constitutional Court [Const. Ct.], 98Hun-Ma363, Dec. 23, 1999, (KCCR ,770) (S. Kor.).
6. Constitutional Court [Const. Ct.], 97Hun-Ka12, Aug. 31, 2000, (KCCR ,52) (S. Kor.).
7. Constitutional Court [Const. Ct.], 2002Hun-Ma193, Nov. 27, 2003, (KCCR, 242) (S. Kor.).
8. Constitutional Court [Const. Ct.], 2000Hun-Ma138, Sept. 23, 2004, (KCCR75) (S. Kor.).
9. Constitutional Court [Const. Ct.], 2002Hun-Ma478, Dec. 16, 2004, (KCCR 206) (S. Kor.).

10. Constitutional Court [Const.Ct.], 1995 Hun-Ma246, January 20, 1995, (KCCR,15) (S.Kor.).
11. Constitutional Court [Const.Ct.], 1995 Hun-Ma221, December 15, 1995, (KCCR,697) (S.Kor.).
12. Constitutional Court [Const.Ct.], 1996 Hun-Ka2, February 16, 1996, (KCCR,51) (S.Kor.).
13. Constitutional Court [Const. Ct.], 2002Hun-Ka1, Aug. 26, 2004, (2004 KCCR, 141) (S.Kor.).
14. Constitutional Court [Const. Ct.], 2011Hun-Ba379 et al., Jun.28, 2018 (2018 KCCR) (S.Kor.).
15. Constitutional Court [Const.Ct], 2004Hun-Na1, May14,2004, (2004 16-1 KCCR,609) (S.Kor.).
16. Delo o proverke konstitucionnosti zakona RSFSR ot 22 noyabrya 1991 goda o vnesenii izmeneniy I dopolneniy v statu 3 o zakona RSFSR o konkuretsii I ogranichenii monopolisticheskoi deyatelnosti na tovarnyh rynkah [Decision of the Russian Constitutional Court on the constitutionality of the law of the RSFSR as of November 22,1991 on introducing amednments to Article 3 of the law of the RSFSR on competition and limitation of monopolistic activities on trademarks] May 20, 1992.
17. Delo o proverki normativno pravovyh aktov kasaushihsya opredelenia I razgranichenia polnomochiy predstavitelskih I ispolnitelnyh organov vlasti goroda Moskvy [Decision of the Constitutional Court of the Russian Federation on constitutionality of certain normative legal acts related to the work of representative and executive bodies of the city of Moscow] April 2, 1993.
18. Delo o proverki konstitucionnosti ukazov presidenta Rossiyskoi Federasii ot 23 Avgusta 1991 goda o priostanovlenii deyatelnosti kommunisticheskoi partii RSFSR I ot 6 Noyabrya 1991 goda o deyatelnosti KPSS I KP RSFSR a takje o proverke konstitusionnosti KPSS I KP RSFSR [Decision of the Constitutional Court of the Russian Federation on constitutionality of the decrees of the President of the Russian Federation as of August 23,1991 on suspension of the activities of the Communist Party of the RSFSR as of November 6, 1991 and on activities of the KPSS and KP RSFSR and also on reviewing constitutionality of the KPSS and KP RSFRS] November 30, 1992.
19. Delo o proverke konstitusionnosti Ukaza Prezidenta RSFSR ot 19 Dekabrya 1991 Goda No. 289 ob Obrazovanii Ministerstva Bezopasnosti I Vnutrennih del RSFSR [Decision of the Russian Constitutional Court on Constitutionality of the Decree of the President of the RSFSR as of December 19, 1991 on the establishment of the Ministry of Security and Internal Affairs] 1993.
20. Decision of the Constitutional Tsets of Mongolia as of July 17, 1996
21. Decision of the Constitutional Tsets of Mongolia as of September 7, 1996
22. Decision of the Constitutional Court (Tsets) of Mongolia as of November 24,1998.
23. Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225: AIR 1973 SC 1461.2.
24. Kulov v. Kyrgyzstan, Comm. 1369/2005, U.N. No. CCPR/C/99/D/1369/2005.
25. Lochner v. New York, 198 U.S. 45 (1905).
26. Marbury v. Madison, 5 U.S. 137 (1803).
27. Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan ot 9 Marta 2017 goda No.1 o proverke zakona Respubliki Kazakhstan o vnesenii izmeneniy I dopolneniy v Konstitusiu Respubliki Kazakhstan [Normative Regulation of Constitutional Council of the Republic of Kazakhstan as of March 9, 2017 No. 1 on

reviewing the constitutionality of the law on introducing amendments to the Constitution of the Republic of Kazakhstan] March 9, 2017.
28. Normativnoe postanovlenie Konstitusionnogo Soveta Respubliki Kazakhstan o proverke na sootvetsvie Konstitucii RK Zakona RK o Sovete Bezopasnosti RK I Zakona o Vnesenii Izmeneniy I Dopolneniy v nekotorye Zakonodatelnye akty Respubliki Kazakhstan [Normative Resolution of the Constitutional Council of the Republic of Kazakhstan on reviewing the constitutionality of the law on Security Council and proposed drafts to certain legal acts of the Republic of Kazakhstan] June 28, 2018 No.4.
29. Normativnoe Postanovlenie Konstitucionnogo Soveta Respubliki Kazakhstan ob oficialnom tolkovanii puncta 3 stati 42 Konstitucii Respubliki Kazakhstan [Normative Resolution of the Constitutional Council of the Republic of Kazakhstan on official interpretation of paragraph 3 Article 42 of the Constitution of Republic of Kazakhstan] February 15,2019.
30. Normativnoe postanovlenie Konstitucionnogo Soveta RK ob ofisialnom tolkovanii punkta 2 stati 41 Konstitucii Respubliki Kazakhstan [Normative regulation of the Constitutional Council of the RK on official interpretation of the paragraph 2 Article 41 of the Constitution of the RK], April 25, 2019 No.4.
31. Normativnoe Postanovlenie Konstitucionnogo Soveta RK ot 11 aprelya 2019 goda o vnesenii izmeneniy I dopolneniy v Reglament Konstitucionnogo Suda RK [The Normative Ruling of the Constitutional Council as of April 11, 2019 on introducing amendments to the Reglament of the Constitutional Council of the RK] April 11, 2019 No. 3.
32. Opredelenie Konstitusionnogo Suda RK o vozrajenii Prezidenta RK Nazarbayeva I vozrajenii predsedatelya Verhovnogo Soveta RK Kekilbaeva na Postanovlenie Konstitucionnogo Suda RK ot 6 Marta 1995 goda po isku Kvyatkovskoi [Ruling of the Constitutional Court of RK to the objections of President Nazarbayev and Speaker of the Supreme Soviet Kekilbaeva to the ruling of the Constitutional Court of March 6 1996] March 16, 1995.
33. Opredelenie Konstitucionnogo Suda Kyrgyzskoi Respubliki on 21 sentyabrya 2004 goda [The Ruling of the Constitutional Court of the Kyrgyz Republic as of Sep.21,2004], Sep.21, 2001.
34. Prigovor Jalal-Abadskogo gorodskogo suda v otnoshenii K.Batyrova ot 28 oktyabrya 2011 goda [Sentencing decision of the Jalal-Abad city Court in relation to K.Batyrov] October 28,2011.
35. Postanovlenie Konstitucionnogo Suda Respubliki Tajikistan po hodataistvu Partii islamskogo vozrojdenia Tajikistana ob opredelenii sootvetsvia stati 57 Konstitucionnogo zakona o vyborah v Madjilis o postanovlenia CIK state 49 Konstitucii Respubliki Tajikistan [Ruling of the Constitutional Court of the Republic of Tajikistan on the complaint of the IRPT on reviewing the constitutionality of Article 57 of the Constitutional Law on Elections to Parliament and resolution of the Central Election Commission] December 8, 2009.
36. Prigovor Pervomaiskogo Rayonnogo Suda goroda Bishkek v otnoshenii M. Bakieva I drugih ot 7 maya 2016 goda [Sentencing decision of the Pervomaiskiy District Court of Bishkek in relation to M.Bakiev and others] May 7,2016

37. Prigovor Voennogo Suda Bishkekskogo garnizona po sobytiam 7 aprelya 2010 goda ot 21 iulya 2014 goda [Sentencing decision of the Military Court of Bishkek Garnizon on the events of April 7th, 2010] July 21, 2014
38. Postanovlenie Verhovnogo Suda Kyrgyzskoi Respubliki po sobytiam 7 aprelya 2010 goda ot 29 iulya 2016 goda [Resolution of the Supreme Court of the Kyrgyz Republic on the events of 7th April 2010] July 29, 2016
39. Prigovor Pervomaiskogo Rayonnogo Suda goroda Bishkek v otnoshenii M. Bakieva I drugih ot 7 maya 2016 goda [Sentencing decision of the Pervomaiskiy District Court of Bishkek in relation to M.Bakiev and others] May 7,2016.
40. Postanovlenie Konstitucionnogo Suda Respubliki Tadjikistan po predstavleniu Madjlisa nemoyandan Oli Respubliki Tajikistan ob Opredelenii sootvestvia proekta izmeneniy I dopolneniy vnosimyh v Konstituciu Respubliki Tadjikistan [Ruling of the Constitutional Court of the Republic of Tajikistan upon the referral of Parliament on reviewing the constitutionality of proposed amendments to the Constitution of the Republic of Tajikistan] February 4, 2016.
41. Postanovlenie Konstitucionnogo Suda Respubliki Uzbekistan po delu o proverke Konstitucionnosti rasporyajenia Hokima Surhandarinskoi Oblasti [Ruling of the Constitutional Court of the Republic of Uzbekistan on case involving the review of the constitutionality of order of the Hokim of the Surhandariya Region] August 15, 1996 No. 164.
42. Postanovlenie Konstitucionnogo Suda Respubliki Uzbekistan po delu o proverke Konstitucionnosti polojenia ot 11 Noyabrya 1996 goda prinyatogo resheniem Hokimiata Horezmskoi Oblasti [Ruling of the Constitutional Court of the Republic of Uzbekistan on case involving the review of the constitutionality of regulation as of November 11, 1996 adopted by the decision of the Hokimiyat of the Khorezm Region] February 25, 1997.
43. Postanovlenie Konstitusionnogo Suda RK ot 6 marta 1995 g. po isku Kvyatkovkoi [Ruling of the Constitutional Court of the Republic of Kazakhstan of March 6,1995], Kazakhstan skaya Pravda March 16, 1995.
44. Postanovlenie Konstitucionnogo Suda Respubliki Tadjikistan po predstavleniu Madjlisa nemoyandan Oli Respubliki Tajikistan ob Opredelenii sootvestvia proekta izmeneniy I dopolneniy vnosimyh v Konstituciu Respubliki Tadjikistan [Ruling of the Constitutional Court of the Republic of Tajikistan upon the referral of Parliament on reviewing the constitutionality of proposed amendments to the Constitution of the Republic of Tajikistan] February 4, 2016.
45. Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 13 iulya 1998 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Jul. 13, 1998], Jul. 13, 1998
46. Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 14 sentyabrya 2007 goda [The Decision of the Constitutional Court of the Kyrgyz Republic] Sep. 14, 2007
47. Reshenie Verhovnogo Suda Respubliki Tajikistan ob obyasvlenii Partiu Islamskogo Vozrojdenia Tadjikistana ekstremistko-terroristicheskoi organizaciey [Decision of the Supreme Court of the Republic of Tajikistan on declaring the Islamic Renaissance Party of Tajikistan as extremist terrorist organization] Sep.19, 2015.
48. Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 14 sentyabrya 2007 goda [The Decision of the Constitutional Court of the Kyrgyz Republic] Sep. 14, 2007

49. Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitucionnosti zakona o biometricheskoi registracii grazhdan Kyrgyzskoi Respubliki [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on constitutionality of the law on biometric registration of the citizens of the Kyrgyz Republic] September 14, 2015 No.
50. Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverki konstitucionnosti dekretov Vremennogo Pravitelstva KR o nacionalizasii ot 11 iulya 2014 goda [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on case involving the constitutionality of decrees of Interim Government of the Kyrgyz Republic on nationalization] July 11, 2014.
51. Reshenie Konstitucionnoi Palaty po delu o proverke constitucionnosti stati 12 Zakona o Garantiah Prezidenta KR [Decision of Constitutional Chamber on reviewing the constitutionality of Article 12 of the law on Guarantees of the Presidents] October 3, 2018.
52. Reshenie Verhovnogo Suda Respubliki Tajikistan ob obyasvlenii Partiu Islamskogo Vozrojdenia Tadjikistana ekstremistko-terroristicheskoi organizaciey [Decision of the Supreme Court of the Republic of Tajikistan on declaring the Islamic Renaissance Party of Tajikistan as extremist terrorist organization] Sep.19, 2015.
53. Reshenie Konstitusionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitusionnosti stat`I 34 UKRKR [The Decision of the Constitutional Chamber of the Supreme Court of the KR on case involving the constitutionality of Article 34 of the CPCRK] Jan.13, 2014
54. Reshenie Verhovnogo Suda Respubliki Tajikistan ob obyasvlenii Partiu Islamskogo Vozrojdenia Tadjikistana ekstremistko-terroristicheskoi organizaciey [Decision of the Supreme Court of the Republic of Tajikistan on declaring the Islamic Renaissance Party of Tajikistan as extremist terrorist organization] Sep.19, 2015
55. Razyasnenie Konstitusionnogo Suda RK po zaprosu Prezidenta RK ot 11 marta 1995 goda [Explanation of the Constitutional Court on the referral of the President of RK] March 11,1995
56. Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 9 noyabrya 1995 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Nov. 9, 1995], Nov. 1995
57. Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 13 iulya 1998 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Jul. 13, 1998], Jul. 13, 1998
58. Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki po Resultatom vyborov Prezidenta KR 24 dekabrya 1995 goda [The Decision of the Constitutional Court of the Kyrgyz Republic on the results of the Presidential elections of Dec.25, 1995], Dec. 28, 1995.
59. Supreme Court [S.Ct.], 65Do894, Dec. 21, 1955 (S.Kor.).
60. Supreme Court [S.Ct.], 69Do934, Jul. 22, 1969 (S.Kor.).
61. Supreme Court [S.Ct.], 85Do1094, Jul. 23, 1985 (S.Kor.).
62. Supreme Court [S.Ct.], 92Do1534, Sept. 14,1992 (S.Kor.).
63. Supreme Court [S.Ct.], Do2965, Jul. 15, 2004 (S.Kor.).
64. *The Case of the S.S. Lotus, (France v. Turkey),* Permenant Court of International Justice (PCJ) 1927.

65. *The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ) 2002.
66. UN Human Rights Committee (HRC), 23 January 2007, available at: https://www.refworld.org/cases,HRC,48abd57dd.html [accessed 24 June 2019]
67. UN Human Rights Committee, *Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2231/2012*, CCPR/C/116/D/2231/2012, 21 April 2016.
68. *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, CCPR/C/88/D/1321-1322/2004.
69. Yuan Cheh Tzu [Judicial Yuan] Interpretation No 509 (2000).
70. Yuan Cheh Tzu [Judicial Yuan] Interpretation No 365 (1994).
71. Yuan Cheh Tzu [Judicial Yuan] Interpretation No 509 (2000),
72. Yuan Cheh Tzu [Judicial Yuan] Interpretation No 603 (2005).
73. Yuan Cheh Tzu [Judicial Yuan] Interpretation No 452 (1998).
74. Yuan Cheh Tzu [Judicial Yuan] Interpretation No 445 (1998).
75. Yuan Cheh Tzu [Judicial Yuan] Interpretation No 644 (2008).
76. Yuan Cheh Tzu [Judicial Yuan] Interpretation No 748 (2017).
77. Yuan Cheh Tzu [Judicial Yuan] Interpretation No.371 (1995).
78. Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 272 (1991).
79. Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 261 (1990).
80. Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 31 (1954).
81. Yuan Cheh Tzu [Judicial Yuan] Interpretation No. 261 (1990).
82. Zhonghua Minguo Xianfa art. 52 [Constitution of the Republic of China, ROC] (1947) (Taiwan)
83. Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016.
84. Zakluchenie Konstitucionnogo Suda KR po proektu zakona o vnisenii izmeneniy v Konstitisiu Kyrgyzskoi Respubliki vnesennogo Prezidentom KR na rassmotrenie JK [The Conclusion of the Constitutional Court of the KR on the draft law on introducing amendments to the constitution proposed by the President for a review of the Supreme Council of the KR] Jan.21, 2010.
85. Zakluchenie Konstitusionnoi Palaty Verhovnogo Suda KR po proektu zakona o vnesenii izmenenii v Konstitusiu KR [The Conclusion of the Constitutional Chamber of the Supreme Court of the KR on draft law on introducing changes to the Constitution] Oct.11, 2016.
86. Zakluchenie Konstitucionnogo Suda Rossiskoi Federacii o Sootvetstvii Konstitucii Rossiskoi Federacii deistviy I resheniy Prezidenta Rossiyskoi Federacii B.N. Eltsina svyazannyh s ego Ukazom o poetapnoi konstitucionnoi reforme ot 21 Sentyabrya 1993 goda No.1400 [Conclusion of the Constitutional Court of the Russian Federation on Constitutionality of the actions and decisions of the President of the RF B.N. Yeltsin with regard his Presidential Edict on Gradual Constitutional Reform of the Russian Federation as of September 21,1993 No.1400], September 21, 1993.
87. Zakluchenie Konstitucionnogo Soveta Respubliki Kazakhstan o proverke proekta zakona Respubliki Kazakhstan o vnesenii izmeneniy v konstituciu Respubliki Kazakhstan na

sootvestvie Konstitucii Kazaksthana [Conclusion of the Constitutional Council of RK on reviewing the constitutionality of the draft law on introducing changes to the Constitution of the RK] March 20, 2019 No.2.

Reports of NGOs, International Organizations, Press Releases of State Bodies, news, working papers, blogs and other sources

1. Amnesty Int`l, *Will there be Justice? Kyrgyzstan`s Failure to Investigate June 2010 Violence and its aftermath*, EUR 58/001/2013, (June 11, 2013).
2. Amnesty Int`l, *South Korea must immediately release all conscientious objectors and introduce alternative to military service,* ASA 25/006/2011 (May 15,2011), Amnesty Int`l, *South Korea: Amnesty International`s submission to the UN Human Rights Committee, 115th session (19 October-6 November),* ASA 25/2372/2015 (October 1, 2015)
3. Anthony Faiola, *Crisis Widens for S. Korea Leader: Aides' Arrest in Bribery Scandal is Latest in Roh's Brief Tenure*, Wash. Post (Oct. 24, 2003), Roh's *Former Top Aide Arrested*, Korea Times (Oct. 16, 2003)
4. Anthony Faiola, *South Korean President Calls for Vote: Roh Offers to Quit If Referendum Goes Against Him*, Wash. Post (Oct. 13, 2003)
5. Alexis Daden, *Revolution by Candlelight: How South Koreans Toppled a Government*, Dissent Magazine (Fall 2017)
6. Amnesty International, *Kazakhstan: Thousands Detained Across the Country Following Disputed Presidential Elections*, EUR 57/0504/2019 (June 11, 2019). Amnesty International, *KAZAKHSTAN: FUNDAMENTAL FREEDOMS UNDER PRESSURE: AMNESTY INTERNATIONAL SUBMISSION FOR THE UN UNIVERSAL PERIODIC REVIEW, 34TH SESSION OF THE UPR WORKING GROUP, NOVEMBER 2019*, EUR 57/0502/2019 (June 11, 2019).
7. Anna Klevcova, *Smehotvorno Zloveshaya Kazakhstan skaya Demokratia* [Ridiculously ominous Kazakhstan`s democracy], Radio Azattyq (May 18,2019) https://rus.azattyq.org/a/kazakhstan-in-the-foreign-media-review-2019-05-18/29949299.html?fbclid=IwAR0I8p6XfGPKsARNdHUH0WN4EDnl0rPE-_49fe-PIttBWmkGMdsFRiYU2CE (last visited in May 20, 2019).
8. Anton Morozov, *Konstitucionnaya Reforma v Kazakhstan e: prodoljenie Sleduet* [Constitutional Reform in Kazakhstan continued], Rhythm Eurasia (March 16,2017) https://www.ritmeurasia.org/news--2017-03-16--konstitucionnaja-reforma-v-kazahstane.-prodolzhenie-sleduet-28978 (last visited December 2018).
9. Anna Yalovkina, *Kyrgyzstan Judge's Dismissal Looks Like Government Interference*, Institute for War and Peace Reporting, (June 26, 2015).
10. Atambayev ischez iz rukovodstva v Baze Dannyh Minusta [Atambayev`s name disappeared from the leadership of the SDPK Party in the data of the Mininstry of Justice] Kloop, (April 18. 2019) https://kloop.kg/blog/2019/04/18/minyust-ukazal-rukovoditelem-sdpk-sagynbeka-abdrahmanova-v-partii-eto-nazvali-davleniem-vlastej-na-vedomstvo/ (last visited in May 7, 2019).
11. Andrew Pollack, *New Korean Leader Agrees to Pardon of 2 Ex-Dictators*, The New York Times, (December 21, 1997) https://www.nytimes.com/1997/12/21/world/new-korean-leader-agrees-to-pardon-of-2-ex-dictators.html (last visited January 27, 2019).

12. Adbuzhalil Abryrasulov, Zachem Uzbekskomu Prezidentu Liberalnye Reformy [Why Uzbek President need Liberal Reforms], BBC (September, 2018) https://www.bbc.com/russian/features-41269455 (last visited March 2019).
13. Aarshi Tirkey, *Charting China's approach to International Law,* Observer Research Foundation, (May 23, 2018) https://www.orfonline.org/expert-speak/charting-chinas-approach-to-international-law/ (last visited March 2019).
14. Arne C. Seifert, Political Islam in Central Asia – Opponent or Democratic Partner?, 25 CORE Working Paper (November, 2012)
15. Alexander Wolters, "Islamic Finance in the States of Central Asia: Strategies, Institutions, First Experiences" Forschungspapiere Research Papers | 2013/01
16. Aslan Nurzhanov, *Nuclear Power Prospects of Kazakhstan,* Central Asian Bureau for Analytical Reporting, (May 15, 2019).
17. Annette Bohr, Uzbekistan: domestic and regional policy, *Royal Institute of International Affairs*, 1998.
18. Aigul Kantoro Kyzy, *Does the Large Number of Universities in Kyrgyzstan Reflect the Quality of Higher Education?,* Central Asian Bureau for Analytical reporting, (July 10, 2019).
19. Bahtrier Sobiri, *S Shiroko Zakrytymi Glazami: Dolgoe Eho Grazhdanskoi Voiny v Tajikistane* [With eyes wide shut down: Long Echo of the Civil War in Tajikistan], Open Democracy (June 22, 2017) https://www.opendemocracy.net/ru/exo-grazhdanskoi-voiny-tadzhikistan/ (last visited March, 2019).
20. Bruce Panier, Kyrgyzstan*: Battle Over The New Constitution Continues To Rage,* RFE/RL, December 2006 https://www.rferl.org/a/1073747.html
21. Bruce Pannnier, *Kyrgyzstan's Embattled Ex-President Scores, With An Assist From Putin*, RadioFreeLiberty, (July 25,2019).
22. Bayt Asanov, Neprikosnovennost eks-prezidenta. Chem reshenie suda vizmutilo Jogorku Kenesh [Immunity of Ex-President. How the Chamber outraged Jogorku Kenesh], Radio Azattyk (December 18, 2018) https://rus.azattyk.org/a/kyrgyzstan-ex-president-parliament/29664302.html (last visited January 2019).
23. Bahtrier Sobiri, *S Shiroko Zakrytymi Glazami: Dolgoe Eho Grazhdanskoi Voiny v Tajikistane* [With eyes wide shut down: Long Echo of the Civil War in Tajikistan], Open Democracy (June 22, 2017) https://www.opendemocracy.net/ru/exo-grazhdanskoi-voiny-tadzhikistan/ (last visited March, 2019).
24. Bakhodyr Muradov, Alisher Ilkhamov, *Uzbekistan's Cotton Sector: Financial Flows and Distribution of Resources*, Open Society Eurasia Program Working Paper (October 2014).
25. Bahtrier Sobiri, *S Shiroko Zakrytymi Glazami: Dolgoe Eho Grazhdanskoi Voiny v Tajikistane* [With eyes wide shut down: Long Echo of the Civil War in Tajikistan], Open Democracy (June 22, 2017) https://www.opendemocracy.net/ru/exo-grazhdanskoi-voiny-tadzhikistan/ (last visited March, 2019).
26. Bernardo Teles Fazendeiro, Soft power under Mirziyoyev: Change and continuity in Uzbekistan's foreign policy, Open Democracy, (July 9, 2018) https://www.opendemocracy.net/en/odr/soft-power-under-mirziyoyev/ (last visited May 2019).
27. *Communists In Mongolia Are Toppled After 70 Years*, N.Y. TIMES (Jul. 3. 1996), https://www.nytimes.com/1996/07/03/world/communists-in-mongolia-are-toppled-after-70-years.html

28. Centrberkom Tadjikistana ofisialno otkazal PIVT vystavit novogo kandidata v parlament strany vmesto svoego duhovnogo lidera [The Central Election Commission of Tajikistan officially refused the IRPT to nominate a new candidate for parliament instead of its spiritual leader] AsiaPlus (May 26, 2009) http://www.asiaplus.tj/tj/node/96584 (last visited February 9, 2019).
29. Carna Pistan, *2017 Constitutional Reform in Kazakhstan: increasing democracy without political pluralism?*, Constitutionnet (March 28,2017) http://constitutionnet.org/news/2017-constitutional-reform-kazakhstan-increasing-democracy-without-political-pluralism (last visited December 2018).
30. CDL-AD(2007)045 OPINION ON THE CONSTITUTIONAL SITUATION IN THE KYRGYZ REPUBLIC Adopted by the Commission at its 73rd plenary session (Venice, 14-15 December 2007).
31. CRS Report for Congress, Kyrgyzstan`s Constitutional Crisis: Context and its implications for US Interests, 2-3 (Jan. 5 2007)
32. CDL(2005)077 DRAFT OPINION ON THE DRAFT AMENDMENTS TO THE CONSTITUTION OF THE KYRGYZ REPUBLIC, October 7, 2005
33. Catherine Putz, Defiant Atambayev Refuses Second Subpoena, The Diplomat, (July 11, 2019).
34. Catherine Putz, *Atambayev Loses Immunity, Supporters Gather to Resist*, The Diplomat (June 27, 2019).
35. Catherine Putz, *Kyrgyz Judge Removed, Another Reprimanded: Fingerprints, the right to vote, a Supreme Court scandal and a brewing constitutional crisis*, The Diplomat (June 27, 2015).
36. Case Statistics of the Constitutional Court of Korea, South Korean Constitutional Court, http://english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do (last visited May 2019).
37. *Chun Doo-hwan regime lied to justify military suppression of protesters*, Hankyoreh (August 21, 2018) http://english.hani.co.kr/arti/english_edition/e_national/858586.html (last visited November 2018).
38. Commission on Security and Cooperation in Europe, Report on the March 7, 1994 Parliamentary Election in Kazakhstan (Washington, D.C.: U.S. Government Printing Office, March 1994).
39. Catherine Putz, *China in Tajikistan: New Report Claims Chinese Troops Patrol Large Swaths of the Afghan-Tajik Border*, The Diplomat, (June 18,2019).
40. Catherine Putz, Central Asia's Democratic Backslide Continues, Except for Uzbekistan, The Diplomat (April 11, 2018) https://thediplomat.com/2018/04/central-asias-democratic-backslide-continues-except-for-uzbekistan/ (last visited October 2018).
41. Catherine Putz, South Korean President Moon Travels Across Central Asia, The Diplomat (April 24, 2019) https://thediplomat.com/2019/04/south-korean-president-moon-travels-across-central-asia/ (last visited May 10, 2019).
42. Catherine Putz, *Kyrgyzstan Hunt for Power Plant Corruption Continues*, the Diplomat, (June 28, 2018). Andrew Higgins, *A Power Plant Fiasco Highlights China's Growing Clout in Central Asia,* The New York Times, (July 6, 2019). Thomas Grove, *A Spy Case Exposes China's Power Play in Central Asia,* The Wall Street Journal, (July 10, 2019).
43. CRS Report for Congress, Kyrgyzstan`s Constitutional Crisis: Context and its implications for US Interests, 2-3 (Jan. 5 2007)

44. *CEC passes review of same-sex marriage referendum proposals*, Focus Taiwan, April 18, 2018, http://focustaiwan.tw/news/asoc/201804180011.aspx (last visited March 9, 2019), *Taiwan votes down same-sex marriage as China welcomes midterm results*, The Guardian, November 25, 2018, https://www.theguardian.com/world/2018/nov/24/anti-gay-marriage-groups-win-taiwan-referendum-battle (last visited May 8, 2019), Hsu, Elizabeth, *Taiwanese vote against gay marriage, back 6 other referendum questions*, Focus Taiwan News Channel, November 25, 2018, http://focustaiwan.tw/news/aipl/201811250002.aspx (last visited Mar 9, 2019).
45. *Disputed 'foreign agent' law shot down by Kyrgyzstan's parliament*, The Guardian (May 12, 2016) https://www.theguardian.com/world/2016/may/12/foreign-agent-law-shot-down-by-kyrgyzstan-parliament (last visited May, 2019).
46. Daniel Kadyrbekov, *Atambayev ubil Konstitucionniy Liberalism v Kyrgyzstane* [Atambayev destroyed the constitutional liberalism in Kyrgyzstan], RFE/RL (Jan. 2017).
47. Dilip Hiro, *Kyrgyzstan`s Second Tulip Revolution*, The Guardian (April 2007) https://www.theguardian.com/commentisfree/2010/apr/08/kyrgyzstan-second-tulip-revolution
48. Danil Usmanov, *Kyrgyzstan: Operation to capture Atambayev descends into chaos*, The Eurasianet, (August 7, 2019) https://eurasianet.org/kyrgyzstan-operation-to-capture-atambayev-descends-into-chaos (last visited August 7,2019).
49. Delo Batukaeva: Hronologia Zaderjania podozrevaemyh v nezakonnom osvobojdenii krimavtoriteta [The Case of Batukaev: The Chronology of Arrests of Suspects involved in the illegal release of the Crime Lord], Kloop, (June 5, 2019) https://kloop.kg/blog/2019/06/05/delo-batukaeva-hronologiya-zaderzhaniya-podozrevaemyh-v-nezakonnom-osvobozhdenii-krimavtoriteta/ (last visited July 5,2019).
50. Democracy in Crisis. Freedom in the World 2018.
51. Erica Marat, *Bakiev Maneuvers to Stay on Top in Kyrgyzstan*, Eurasia Daily Monitor Volume: 4 Issue: 13 (Jan. 2007)
52. Erica Marat, *Moscow Condemns the HIPC Initiative in Kyrgyzstan*, Eurasia Daily Monitor Volume: 4 Issue: 19 (Jan. 2007) https://jamestown.org/program/moscow-condemns-hipc-initiative-in-kyrgyzstan/
53. Erica Marat, With Kulov Gone, Bakiev dumps the HIPC Initiative, *Eurasia Daily Monitor Volume: 4 Issue: 38*, Feb. 2007.
54. Eugene Huskey, *Kyrgyzstan Weakens Legal and Social Guarantees for Ex-Presidents amid Continuing Confrontation Between the Current and Former President*, Presidential Power (May 20, 2019) http://presidential-power.com/?p=9590&fbclid=IwAR1EdpBhf9_VSg2YYVz3YR_atehhQ91AmsVUAU8htCUTElWtoIwnYsLNtyw (last visited June 2019).
55. Ex-President Officialdom Obyavil chto Pereshel v oppozisiu k Deistvuishemu Prezidentu [Ex-President Officially announced that his Party became an Opposition to the Current Government], The Currentime, (March 18, 2019).
56. Eleri Bititkchi, Begimai Abisheva, Politicheskoe Aktivirovanie Regionalnoi Identichnosti Sever-Ug u Kyrgyzov [Political Activization of Regionalism Identity of North-South in Kyrgyzstan], Akipress, (January 24,2014) http://kghistory.akipress.org/unews/un_post:1967?fbclid=IwAR3oruGIxmBFxAi4tGdoiJmb5HaEg2dab796WquojFUk3bFh2XERqOu9Jbs (last visited May 6, 2019).

57. European Commission for Democracy through Law (Venice Commission), Opinion on the Draft Amendments to the Constitutional Law on the Status Of Judges Of Kyrgyzstan, Opinion no. 480/2008, CDL-AD(2008)039, p.4 [available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)039-e (last accessed on September 24, 2014)].
58. Edward Schatz, How Western Disengagement Enabled Uzbekistan's "Spring" and How to Keep it Going, PonarsEurasia (June 2018) http://www.ponarseurasia.org/memo/how-western-disengagement-enabled-uzbekistans-spring-and-how-keep-it-going (last visited May 2019).
59. Emily Rauhala, *In Historic Decision, Taiwanese Court Rules in Favor of Same-Sex Marriage*, WASH. POST, (May 24, 2017). Geoffrey Yeung, *First in Asia – Taiwan's Marriage Equality Ruling in Comparative and Queer Perspectives*, OXHRH BLOG, (July 6, 2017), http://ohrh.law.ox.ac.uk/first-in-asia-taiwans-marriage-equality-ruling-in-comparative-and-queer-perspectives (last visited March 30, 2019).
60. Edward Lemon, *Assessing the Terrorist Threat In and From Central Asia*, *Voices on Central Asia* (October 18,2018) https://voicesoncentralasia.org/assessing-the-terrorist-threat-in-and-from-central-asia/ (last visited February 2019).
61. Elena Ustyuzhanina, *The Eurasian Union and global value chains*, 17.1 European Politics and Society,35-45(2016). Paul Vandenberg, Khan Kikkawa, *Global Value Chains along the New Silk Road*, ADBI Policy Brief (May, 2015).
62. Eastern Europe and Central Asia: Weak Checks and Balances Threaten Anti-Corruption Efforts, Transperancy International (January 29. 2019) https://www.transparency.org/news/feature/weak_checks_and_balances_threaten_anti_corruption_efforts_across_eastern_eu (last visited March 10, 2019).
63. Elite Forces Try, and Fail, to Arrest a Former President of Kyrgyzstan, The New York Times, (August 8, 2019) https://www.nytimes.com/2019/08/07/world/asia/former-president-kyrgyzstan-arrest.html (last visited August 8,2019).
64. *Elections in Kyrgyzstan 2017- Exposing Samara, a Fraudulent Voter Management System*, Quirium Media, Foundation, https://www.qurium.org/alerts/kyrgyzstan/kyrgyzstan-election (last visited April 10,2019)
65. Farangis Najibullah, *Kyrgyz Referendum seeks to Prevent same-sex marriage* RFE/RL (Dec. 2016).
66. Former Communist party wins parliamentary elections in Mongolia, BBC Monitoring Former Soviet Union Political Supplied by BBC Worldwide Monitoring, July 2, 2000, Sunday available in LexisNexis Academic
67. Farkhod Mirzabaev, *Uzbekistan's WTO Aspirations: a Genuine Goal or Just Another "Right Signal",* Central Asian Bureau for Analytical Reporting, (May 6, 2019).
68. Glava Konstitucionnoi Palaty Poluchil Preduprejdenie ot Dissiplinarnoi Kommissii [The Chairman of the Constitutional Chamber received warning from the disciplinary commission], Vesti.kg (May 24,2019).
69. Henry Ridgwell, *Russia's Foreign Agent Law Has Chilling Effect On Civil Society Groups, NGOs*, Voice of America, (January 24, 2018).
70. Hwang Jang-jin, *Post-Election Crisis Deepens in Ruling Party: Roh Supporters, Old Guards Face Off Over Creation of New Party*, Korea Herald (Apr. 30, 2003).
71. Human Rights Watch, *Protesters Detained in Kazakhstan, 11 May 2018*, available at: https://www.refworld.org/docid/5b39f32d6.html (last visited July 2019).

72. Human Rights in China, *China: Minority Exclusion, Marginalization and Rising Tensions*, Minority Rights Group International (2007). Linda Benson, The Ili Rebellion: The Moslem Challenge to Chinese Authority in Xinjiang, 1944-1949 (London: M. E. Sharpe, 1990).
73. Hronika Nasilia: sobytia iunya 2010 goda na uge Kyrgyzstana (oshskiy region) [The Cronicles of violence: June 2010 events in the South of Kyrgyzstan (Osh region)] Norwegian Helsinki Committee, Memorial Human Rights Center, Freedom House (2012).
74. Isaac Scarborough, Economic Causes of Strife in Tajikistan, Voices on Central Asia (March 20, 2018) https://voicesoncentralasia.org/economic-causes-of-strife-in-tajikistan/ (last visited January 2019).
75. Isaac Scarborough, Economic Causes of Strife in Tajikistan, Voices on Central Asia (March 20, 2018) https://voicesoncentralasia.org/economic-causes-of-strife-in-tajikistan/ (last visited January 2019).
76. International Crisis Group, *The Curse of Cotton: Central Asia`s Destructive Monoculture*, 93 Europe and Central Asia (2005).
77. Jim Nichol, The April 2010 Coup in Kyrgyzstan and its Aftermath: Context and Implications for U.S. Interests (CRS Report for Congress), Congressional Research Service (June 15,2010).
78. Jeenbekov: Vopros ob etnicheskih menshinstvah v Kitae – vnutrenee delo KNR [Jeenbekov: The question of ethnic minorities in China is the internal affair of China], Radio Azattyk (June 13,2019). https://rus.azattyk.org/a/29996739.html (last visited July 2019).
79. *Kyrgyzstan, Presidential Election, 15 October 2017: Final Report*, Organization for Security and Cooperation in Europe, (March 8,2018) https://www.osce.org/odihr/elections/kyrgyzstan/374740 (last visited May 2019).
80. Kyrgyz Opposition Leader Tekebaev Handed Eight-Year Prison Sentence, RFE/RL (Aug.16,2017).
81. Kazak Ruling Party nominates Tokayev for Presidency, The Aljazeera, (April 23, 2019) https://www.aljazeera.com/news/2019/04/kazakh-ruling-party-nominates-tokayev-presidency-190423071300116.html (last visited April 30, 2019).
82. Kazakh President Appoints New Prime Minister, RadioFreeLiberty (February 25, 2019) https://www.rferl.org/a/Nazarbayev-appoints-mamin-kazakhstan-prime-minister/29789292.html (last visited March 1, 2019).
83. Kyrgyzstan detains Atambayev after deadly skirmish, Aljazeera, (August 9, 2019) https://www.aljazeera.com/news/2019/08/kyrgyzstan-detains-atambayev-deadly-skirmish-190809041505695.html (last visited August 10, 2019).
84. Kanymgul Elkeeva, Polovinchatoe Reshenie Konstitucionnoi Palaty Kyrgyzstana [Half-faced decision of the Constitutional Chamber of the Kyrgyz Republic] Radio Azattyk, (October 19, 2018) https://rus.azattyk.org/a/kyrgyzstan-constitution-law-president/29551986.html (February 2019).
85. Kratkiy Pravovoi Analiz reshenia Konstitucionnoi palaty Verhovnogo Suda Kyrgyzskoi Respubliki ot 11 iulya 2014 goda po delu o proverke konstitucionnosti Dekretov Vremennogo Pravitel`stva KR [Legal Analysis of the decision of the Constitutional Chamber of the KR as of July 11, 2014 on reviewing the constitutionality of decrees of Provisional Government], (Bishkek: Legal Clinic Adilet, 2014).

86. Khamza Sharifzoda, Climate Change: An Omitted Security Threat in Central Asia, The Diplomat, (July 22,2019) https://thediplomat.com/2019/07/climate-change-an-omitted-security-threat-in-central-asia/ (last visited August 1, 2019).
87. Kyrgyz Women Warned Of Dangers Of Islamic Dress, RFE/RL (Jul.29,2016) available at https://www.rferl.org/a/kyrgyzstan-islam-hijab-women/27888178.html
88. Kyrgyzstan: Islam and Secularism Clash Again, *IWPR Reporting Central Asia of Kyrgyzstan*, Jun. 23, 2016 available at https://cabar.asia/en/kyrgyzstan-islam-and-secularism-clash-again/
89. Kyrgyz Opposition Leader Tekebaev Handed Eight-Year Prison Sentence, RFE/RL (Aug.16,2017).
90. Kyrgyzstan: Prominent Uzbek community leader's appeal hearing adjourned, *Radio Free Europe/Radio Liberty*, 22 December 2011, https://www.refworld.org/docid/4f1431dc1e.html (last visited February 17, 2019).
91. Kyrgyz Lawmakers Approve Bill To Strip Ex-Presidents' Immunity, RadioFreeLiberty, (December 14, 2018) https://www.rferl.org/a/kyrgyz-lawmakers-approve-bill-to-strip-ex-presidents-immunity/29656084.html (last visited January 8, 2019).
92. Lee Joo-hee, *Ruling Party Splits Today: About 40 Pro-Roh Lawmakers to Form New Party*, Korea Herald (Sept. 20, 2003); *New Party Changes Name to "Uri Party", Korea* Times (Oct. 24, 2003).
93. Legal Resources Centre for Moldova, *Brief account of latest developments in Moldova*, June 11, 2019.
94. Lider Partii Islamskogo Vozrajdenia Tajikistana snyal s sebya detupatskie polnomochia[The Leader of the Islamic Renaissance Party gave up his deputy mandate], Islamnews (April 15, 2009) https://islamnews.ru/news-Lider-Partii-islamskogo-vozrozhdeniya-Tadzhikistana-snyal-s-sebya-deputatskie-polnomochiya (last visited March 2019).
95. Lider Partii Dvijenia SDPK bez Atambayeva obyavil o nachale processa obnovlenia Partii [The Leader of the Movement SDPK without Atambayev announced about the beginning of the renewal of the Party] RadioAzattyk (April 3. 2019).
96. Letter from the 10th Extraordinary Congress of People's Deputies of the Russian Federation headed "To Parliaments, Presidents and Government Presidents of the Commonwealth of Independent States."
97. Ming-Sung Kuo, Hui-Wen Chen, *Responsibility and Judgment in a Muted 3-D Dialogue: A Primer on the Same-Sex Marriage Case in Taiwan*, INT'L J. CONST. L. BLOG (May 26, 2017), http://www.iconnectblog.com/2017/05/responsibility-and-judgment-in-a-muted-3-d-dialogue-a-primer-on-the-samesex-marriage-case-in-taiwan/ (last visited March 23, 2019).
98. Ministry of Justice Letter 83-Fa-Lu-Jue-17359 (August 11,1994), Ministry of Justice Letter Fa-Lu-10000043630(January 2, 2012), Ministry of Justice Letter Fa-Lu-10203506180 (May 31, 2013).
99. Margarita Meldon, *Kyrgyzstan's Constitutional Referendum: Steering populism toward securing vested interests?*, Constitutionnet (October 28,2016). http://constitutionnet.org/news/kyrgyzstans-constitutional-referendum-steering-populism-toward-securing-vested-interests (last visited January 2019).
100. *MPs now allowed to sit in parliament and be cabinet members*, BBC Summary of World Broadcasts January 21, 1998, Wednesday, available in LexisNexis Academic

101. *Merger of state and private banks announced* BBC Summary of World Broadcasts June 10, 1998, Wednesday, available in LexisNexis Academic
102. Moncey Cage, *Kazakhstan`s Police are cracking down protestors as political activism keeps rising*, Washington Post, (June 20, 2019).
103. Margarita Meldon, Kyrgyzstan's Constitutional Referendum: Steering populism toward securing vested interests?, The Constitutionnet, (October 28,2016) http://constitutionnet.org/news/kyrgyzstans-constitutional-referendum-steering-populism-toward-securing-vested-interests (last visited December 20, 2018).
104. Mongolia: Incumbent president re-elected for second term, BBC Monitoring Asia Pacific – Political Supplied by BBC Worldwide Monitoring, May 21, 2001, Monday, available in LexisNexis Academic.
105. Murat Ukushev, Ternistiy Put` Parlamentarizma v Kyrgyzstane: dvuhpalatniy Jogorku Kenesh [Thorny Path of Parliamentarism in Kyrgyzstan: bicameral Jogorku Kenesh], 2009 http://www.pr.kg/gazeta/number441/781/
106. M. Kuleshevkiy, Uzbekistan: Vozmojno li Svetskaya Alternativa? [Uzbekistan: Is it possible to have a secular alternative?] Fergana (March, 2014) https://www.fergananews.com/Articles/8091 (last visited September 2018).
107. MONGOLIA'S ECONOMIC SITUATION WORSENS - RUSSIAN AGENCY, BBC Monitoring Asia Pacific – Political Supplied by BBC Worldwide Monitoring, September 9, 1998, Wednesday available in LexisNexis Academic.
108. Nazarbayev Fires Kazakh Government Over Low Living Standards, Economic Failures, RadioFreeLiberty (February 21,2019) https://www.rferl.org/a/kazakh-government-resigns-Nazarbayev/29783173.html (last visited February 25, 2019).
109. Nurjamal Djanibekova, Kyrgyzstan: Embattled ex-president flies to Russia, Eurasianet (July 24, 2019) https://eurasianet.org/kyrgyzstan-embattled-ex-president-flies-to-russia (last visited July 30, 2019).
110. Nicholas D. Kristof, *Scandal Shows Deep Roots in Korean Politics*, The New York Times, (November 12, 1995) https://www.nytimes.com/1995/11/12/world/scandal-shows-deep-roots-in-korean-politics.html (last visited March 8, 2019).
111. Nicholas D. Kristoff, Ex-President of South Korea is Arrested and Apologizes in a Huge Bribery Scandal, The New York Times(November 17,1995) https://www.nytimes.com/1995/11/17/world/ex-president-of-south-korea-is-arrested-and-apologizes-in-a-hugebribery-scandal.html (last visited February 9, 2019).
112. Nazarbayev prizval ne shumet v svyazi s ego obrasheniem v Konstitucionniy Sovet [Nazarbayev urged "not to make noise" in connection with his appeal to the Constitutional Council] Radio Azattyq (February 5, 2019) https://rus.azattyq.org/a/29752324.html (last visited February 20, 2019).
113. Nick Kennedy, *Kazakhstan: Are the Upcoming Democratic Elections Merely a Facade?*, International Policy Digest, (May 15, 2019).
114. Nursultan Nazarbayev's daughter of appointed Speaker of Parliament, AsiaNews (March 21, 2019)http://www.asianews.it/news-en/Nursultan-Nazarbayevs-daughter-of-appointed-Speaker-of-Parliament-46560.html (last visited April 1, 2019).
115. *Opposition calls on government to resign over state bank merger*, BBC Summary of World Broadcasts July 11, 1998, Saturday available in LexisNexis Academic
116. Obrashenie Prezidenta RK N.A. Nazarbayeva ob ofisialnom tolkovanii puncta 3 statyi 42 Konstitusii RK [Referral of the President of the Republic of Kazakhstan N.A.

Nazarbayev on official interpretation of paragraph 3 of Article 42 of the Constitution of RK] February 4,2019
117. OSCE, Kyrgyzstan, Presidential Election, 29 October 2000: Final Report (Jan.15, 2001)
118. OSCE, Kyrgyzstan, Parliamentary Elections, 27 February and 13 March 2005: Final Report (May 20,2005).
119. Parlament otstratil Sud`u Konstitucionnoi Palaty [Parliament recalled the Judge of the Constitutional Chamber] Central Asian Bureau for Analytical Reporting (June 20, 2015).
120. *President Akayev seeks wider powers*, BBC Summary of World Broadcasts, January 8, 1996, Monday, available at available in LexisNexis Academic.
121. Party urges progress on selection of premier, ministerial post issue, BBC Summary of World Broadcasts, December 2, 1998, Wednesday.
122. Press Preliz po Zayavleniam otdelnyh Deputatov Jogroku Kenesh otnositelno deyatelnosti Konstitucionnoi Palaty [Press Release concerning the statements of certain deputies of Jogorku Kenesh regarding the work of the Constitutional Chamber] Constitutional Chamber of the KR (December 18, 2018) http://constpalata.kg/ru/news/press-reliz-po-zayavleniyam-otdel-ny-h-deputatov-zhogorku-kenesha-otnositel-no-deyatel-nosti-konstitutsionnoj-palaty/ (last visited December 20, 2018).
123. Press Preliz po Zayavleniam otdelnyh Deputatov Jogroku Kenesh otnositelno deyatelnosti Konstitucionnoi Palaty [Press Release concerning the statements of certain deputies of Jogorku Kenesh regarding the work of the Constitutional Chamber] Constitutional Chamber of the KR (December 18, 2018) http://constpalata.kg/ru/news/press-reliz-po-zayavleniyam-otdel-ny-h-deputatov-zhogorku-kenesha-otnositel-no-deyatel-nosti-konstitutsionnoj-palaty/ (last visited December 20, 2018).
124. Prokuratura Kyrgyzstana vozobnovilo delo bejavshego iz SIZO v Chechnu vora v Zakone [The Prosecutor`s Office of Kyrgyzstan resumed the case of the crime lord that escaped from Prison to Chechnya], Fergana News, (April 17, 2019).
125. Pistan Carna, 2017 Constitutional Reform in Kazakhstan: increasing democracy without political pluralism?, *CONSTITUIONNET (2017)*, available at http://www.constitutionnet.org/news/2017-constitutional-reform-kazakhstan-increasing-democracy-without-political-pluralism
126. Paul Blokker, *Populist Constitutionalism*, International Journal of Constitutional Law Blog, 4 May 2017, http://www.iconnectblog.com/2017/05/populist-constitutionalism/ (last visited May 2019).
127. Paul Blokker, *Varieties of populist constitutionalism: The transnational dimension*, 20.3 German Law Journal, 332 (2019) Dixon, Rosalind: *Populist Constitutionalism and the Democratic Minimum Core*, VerfBlog, 26 April 2017, https://verfassungsblog.de/populist-constitutionalism-and-the-democratic-minimum-core/ (last visited May 2019).
128. Postanovlenie Jogorku Kenesha Respubliki Kyrgyzstan o zayavlenii Prezidenta KR A.A. Akayeva o dosrochnom slojenii prezidentskih polnomochiy [Resolution of the Parliament of the KR on application of the President of the KR A.Akayev on resignation] April 11,2005, N 133-III

129. Press Reliz Ministerstva Inostrannyh Del Respubliki Uzbekistan o vstreche s generalnym derektorom VTO [Press Release of the Ministry of Foreing Affairs of The Republic of Uzbekistan on meeting with the General Director of the WTO], July 23, 2019.
130. *President of Kyrgyzstan: Our foreign policy doctrine is the Great Silk Road*, EIR Volume 26, Number 15, April 9, 1999, available athttps://larouchepub.com/eiw/public/1999/eirv26n15-19990409/eirv26n15-19990409_049 president_of_kyrgyzstan_our_fore.pdf
131. Rinat Tuhvatshin, Samarageit epizod 1. Kak server pravitel`stva Kyrgyzstana ispolzovali dlya popytki vliyania na prezidenskie vybory, [Samagate episode 1: how governmental server of Kyrgyzstan was used to attempt to influence the presidential election?], *Kloop*, Oct.26,2017, https://kloop.kg/blog/2017/10/26/samara_elections_kg/(last visited April 8,2019).
132. Ralph Jennings, *It's Official: Same-Sex Marriage Is Legal in Taiwan*, The Diplomat, (May 17, 2019). https://thediplomat.com/2019/05/its-official-same-sex-marriage-is-legal-in-taiwan/ (last visited May 25, 2019).
133. Rustam Halilov, Kyrgyzstan poluchit ot Kitaya 86 millionov dollarov granta na stroitelstvo dorog i arheologicheskie raskopki [Kyrgyzstan will receive from China the grant in the amount of 86 million USD for the construction of road and archeological exploration.] Kloop, June 13, 2019, https://kloop.kg/blog/2019/06/13/153383/ (last visited July, 2019).
134. Ryan Drillsma, *Judicial Yuan SG: Constitutional Court ruling on same-sex marriage cannot be overridden by referendum*s, Taiwan News, (November 29, 2018). https://www.taiwannews.com.tw/en/news/3585861 (last visited May 2019).
135. *Reportery bez granic prizvali Tokayaeva otkazatsya ot repressivnyh metodov ego predshestvennika* ["Reporters Without Borders urged Tokaev to abandon the "repressive methods" of his predecessor], Radio Azattyq, (May 10, 2019) https://rus.azattyq.org/a/29931988.html (last visited May 19, 2019).
136. Robert E. Bedeski, The Transformation of South Korea: reform and reconstruction in the sixth republic under Roh Tae Woo 1987-1992, 26 (Routledge 1994), Park got dictatorial powers with Yushin Constitution in 1972, *The Korea Times*, http://www.koreatimes.co.kr/www/news/nation/2010/10/116_75537.html (last visited February 2019).
137. Spisok podpisannyh dokumentov na sessii soveta Kollektivnoi Bezopasnosti ODKB 23 dekabrya 2014 goda Moskva [List of signed documents on the session of the Council of Collective Security of CSTO as of December 23, 2014 Moscow], Dec. 23,2014, https://en.odkb-csto.org/documents/documents/spisok_podpisannykh_dokumentov_na_sessii_soveta_kollektivnoy_bezopasnosti_odkb_23_dekabrya_2014_goda/ (last visited March 2, 2019)
138. Saurav Jung Thapa, *Pro-Equality Candidate Triumphs in Taiwanese Presidential Elections*, Human Rights Campaign, Jan. 20, 2016, https://www.hrc.org/blog/pro-equality-candidate-triumphs-in-taiwanese-presidential-elections (last visited January 20, 2019)
139. Saniia Toktogazieva, Deputaty v. Konstitucionnaya Palata: Chto govorit Urist [Deputies v. Constitutional Chamber: what lawyer has to say?] AkiPress (May 29, 2019) https://kg.akipress.org/news:1549077 (last visited June 2019).

140. Sozdana Specialnaya Komissia dlya dachi zakluchenia po voprosu vydvejenia obvinenia protiv eks-prezidenta KR A. Atambayeva dlya lishenia ego statusa eks-presidenta. [A special commission has been created to give an opinion on the issue of bringing charges against the ex-president of the Kyrgyz Republic A. Atambayev to deprive him of his status] press release Jogorku Kenesh, (June 13, 2019).
141. *South Korean President's Party Suffers in Regional Election*, The New York Times, June 29, 1995.
142. Svetlana Glushkovo, Tadjikistan peredal chast zemli Kitau [Tajikistan ceded part of the territory to China], Radio Azattyk (October 6, 2011).
143. South Korean government panel announces findings on 1980 pro-democracy uprising, BBC Monitoring Asia Pacific – Political Supplied by BBC Worldwide Monitoring, July 24, 2007, available in LexisNexis Academic.
144. Spotlight: Ambassadors from 37 countries issue joint letter to support China on its human rights achievements, Xinhuanet, (July 13, 2019) http://www.xinhuanet.com/english/2019-07/13/c_138222183.htm (last visited July 16, 2019).
145. The junior partner, *How Vladimir Putin's embrace of China weakens Russia*, The Economist, (July 25, 2019) https://www.economist.com/briefing/2019/07/25/how-vladimir-putins-embrace-of-china-weakens-russia (last visited July 25, 2019).
146. Taiwan: Draft law to allow same-sex marriage is a huge step forward for human rights, Amnesty International (February 21, 2019). https://www.amnesty.org/en/latest/news/2019/02/taiwan-draft-law-to-allow-same-sex-marriage-is-a-huge-step-forward-for-human-rights/ (last visited May 10, 2019).
147. Tae-jun Kang, *Controversy Swells Over South Korea's Conscientious Objectors*, The Diplomat, Jan. 12, 2019, https://thediplomat.com/2019/01/controversy-swells-over-south-koreas-conscientious-objectors/ (last visited Apr. 14,2019)
148. Tragic Fire In Astana Gives Kazakh Mothers' Protests New Momentum, RadioFreeLiberty (February 12, 2019) https://www.rferl.org/a/tragic-fire-in-astana-gives-kazakh-mothers-protests-new-momentum/29765930.html (last visited February 15, 2019).
149. *The Soviet Insider, the Gold, and Kyrgyzstan`s Political Innocents*, Financial Times, Jan.28, 1994, https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=lzfk0212
150. *Tajikistan: Report confirms significant Chinese security presence in Pamirs*, Eurasianet, (February 19,2019) https://eurasianet.org/tajikistan-report-confirms-significant-chinese-security-presence-in-pamirs (last visited June 2019).
151. Timur Toktonaliev, Constitutional Tinkering in Kyrgyzstan, Institute for War and Peace Reporting, (May 14, 2015). https://iwpr.net/global-voices/constitutional-tinkering-kyrgyzstan (last visited October 8, 2018).
152. The State Council Information Office of the People's Republic of China, *China's National Defense in the New Era*, (Foreign Languages Press Co. Ltd., Beijing, China, 2019.
153. *Taiwan court jails former president for corruption*, the Guardian (Sep.2009) https://www.theguardian.com/world/2009/sep/11/taiwan-jails-former-president-corruption
154. UNDP, *The Role of the Constitution of Mongolia in Consolidating Democracy: an Analysis*, 18-19, 2015

155. UN Human Rights Office calls on Kazakhstan to respect freedoms of peaceful assembly, expression and right to political participation, (June 12, 2019) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24691&LangID=E (last visited June 20, 2019).
156. UN: Unprecedented Joint Call for China to End Xinjiang Abuses, Human Rights Watch (July 10, 2019) https://www.hrw.org/news/2019/07/10/un-unprecedented-joint-call-china-end-xinjiang-abuses (last visited July 15,2019).
157. U.S. Department of State, *"Kazakhstan," Country Reports on Human Rights Practices for 1993* (Washington, 26 D.C.: U.S. Government Printing Office, February 1994), p. 937.
158. U.S. Commission on Security and Cooperation in Europe. 1994. The parliamentary elections in Kazakhstan—March 7, 1994, Washington, DC.
159. U.S. Department of Justice, *PROFILE SERIES KAZAKHSTAN POLITICAL CONDITIONS IN THE POST-SOVIET ERA (*Washington, September 1994*).*
160. Vlasti zayavili o bolshih problemah v ohrane biometricheskih dannyh [State Officials announced about big problems on the protection of biometric data] Kloop, (March 30, 2015), https://kloop.kg/blog/2015/03/30/vlasti-zayavili-o-bolshih-problemah-v-ohrane-biometricheskih-dannyh/ (last visisted March 15, 2019).
161. Verhovniy Sud Opravdal Feliksa Kulova [The Supreme Court acquitted Felix Kulov], RFE/RL, April 6, 2005.
162. Verhovniy sud ne udovletvoril zhalobu PIVT na reshenoe Centrsberkoma [RT Supreme Court did not satisfy the IRPT complaint against the decision of the Central Election Commission], (June 1, 2009)
163. Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2163/2012, CCPR, 28 July 2017.
164. V Konstitucionnoi Palate sostayalas vstrecha s Jurnalistami [Constitutional Chamber held a meeting with Journalists] Constitutional Chamber of the KR (February 22, 2019) http://constpalata.kg/ru/news/russkij-v-konstitutsionnoj-palate-sostoyalas-vstrecha-s-zhurnalistami/ (last visited February 25, 2019).
165. Vice Ministr: Na Sozdanie Kancelyarii Nazarbayeva Potratyat Milliard Tenge [For the Establishment of Secretariat of Nazarbayev 1 billion tenge will be spent], Radio Azattyq (April 3, 2019) https://rus.azattyq.org/a/29858156.html (last visited May 17, 2019).
166. World Bank, *Belt and Road Economics: Opportunities and Risks of Transport Corridors*, Advance Edition. (World Bank, Washington, DC. 2019).
167. Where is the Justice?: Interethnic Violence in Southern Kyrgyzstan and its Aftermath, *Human Rights Watch*, August 16, 2010.
168. White Gold, The True Cost of Cotton: Uzbekistan Cotton and the Crushing of a Nation, *Environmental Justice Foundation* (2005).
169. Wang Kaihao, *Archaeologists dig deep on overseas projects*, ChinaDaily (January 9, 2019). https://www.chinadailyhk.com/Articles/249/33/183/1547010194466.html (last visited May 2019).
170. Wilder Alejandro *Sanchez, Central Asia in 2018: What's the Future of the C5+1?,* Geopolitical Monitor (July 11,2018) https://www.geopoliticalmonitor.com/central-asia-in-2018-whats-the-future-of-the-c51/ (last visited January 2019).
171. World Bank, *Belt and Road Economics: Opportunities and Risks of Transport Corridors*, Advance Edition. (World Bank, Washington, DC. 2019).

172. Wilder Alejandro *Sanchez, Central Asia in 2018: What's the Future of the C5+1?,* Geopolitical Monitor (July 11,2018) https://www.geopoliticalmonitor.com/central-asia-in-2018-whats-the-future-of-the-c51/ (last visited January 2019). Catherine Putz, Azimjan Askarov Headed for a second retrial in Kyrgyzstan, The Diplomat (July 19,2019) https://thediplomat.com/category/crossroads-asia (last visited July 20,2019).
173. Yuliy Usupov, Perspektivy Demokratizasii Stran Centralnoi Azii [The Perspectives of Democratic Development of Central Asian States] Central Asian Bureau for Analytical Reporting (May 7,2019) https://cabar.asia/ru/perspektivy-demokratizatsii-stran-tsentralnoj-azii-ili-kak-razbudit-spyashhie-instituty/ (last visited June 2, 2019).
174. Zachem Uzbekistanu I Centralnoi Azii Atomnaya Elektrostansia? [Why do Uzbekistan and Central Asia need Nuclear Power Plant?] Central Asian Analytical Network (CAAN) https://caa-network.org/archives/13297?fbclid=IwAR2IN55nVAnUQrwWEdHFJRDT1VWcEJEcWMfpHBBJ5z_CCwYqx4qA2nn8bnw (last visited June 2019).