The Strategies of the Subdued Constitutional Courts for Advancing the Goals of the Rulers

(Russian, Kyrgyz, and Georgian Stories)

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Abstract

The research aimed to identify the strategies of already subdued constitutional justice institutions for advancing the goals of the political leadership based on the jurisprudence of Russian, Kyrgyz, and Georgian Constitutional Courts/Chamber.

The recent decisions of the Russian Constitutional Court (hereafter RCC) have revealed that under the "pragmatic" approach, the RCC is ready to put Putin's political objectives above the text of the Constitution. At the same time, the RCC regularly makes quite progressive decisions regarding individual rights complaints, which helped the RCC create the image of credible institutions before society. The credibility of RCC can be beneficial also for Putin's regime.

The recent judgments of the Kyrgyz Constitutional Chamber suggest that it is actively pursuing the interests of the political leadership and is able to do so through constitutional interpretations tailored to the interests of the regime. Unlike Russia, the Kyrgyz Constitutional Chamber has not been able to find a legal area in which the Chamber would be more autonomous. The attempt of political leadership to use the Constitutional Chamber's performance as Russia does in the nearest future will not be surprising.

Unlike Russia and Kyrgyzstan, the Georgian Constitutional Court (hereafter GCC) plays a passive role in the advancing of the ruler's objectives. It avoids deciding cases of high political interest through stretching the time. Similar to Russia, GCC found a legal area where it was enabled to render comparably progressive decisions. The credibility obtained through these judgments may be used by the GCC itself and political leadership to demonstrate the independence of that institution before domestic actors and international partners. The GCC's future strategy will largely depend on who will occupy the position of chairman of the Constitutional Court from the summer of 2020.

Introduction

The institutions with the mandate of constitutional review often become the target of the rulers' direct and indirect attacks in illiberal and authoritarian regimes. Being subdued, the Constitutional Courts, in most cases, are continuing its performance but are pressured to serve the interests of the political leadership.

The research aims to identify the strategies of already subdued constitutional courts for advancing the goals of the political leadership inspired by the experience of the Georgian Constitutional Court. In 2015, rulings of the Georgian Constitutional Court (GCC), on politically sensitive cases, put the "reform" of GCC on the agenda of the new political regime. The tools used by the political leadership against the GCC dramatically impacted its efficiency and resulted in unreasonable prolongation of proceedings concerning issues of high political importance.

The thesis intends to focus under the comparative "functionalism"[1] approach on examining the performance of the Georgian, Kyrgyz, and Russian Constitutional Courts/Chamber. Of the comparable legal systems, in Kyrgyzstan, constitutional review is implemented by a Constitutional Chamber established within the Supreme Court. However, as its competencies are similar to Russian and Georgian Constitutional Courts, for this document, it can be considered as an equivalent institution of the Constitutional Courts of Georgia and Russia.[2]

The selection of the respective comparable jurisdictions is based on the "most similar cases"[3] logic. All three jurisdictions began to exist after the collapse of the Soviet Union with

[1] V.C, Jackson, Comparative Constitutional Law: Methodologies, in: M. Rosenfeld and A. Sajo (eds), (The Oxford Handbook of Comparative Constitutional Law, 2012), 58.
[2] *See* Constitution of Georgia Article 60, Constitution of Russia Article 125, Constitution of Kyrgyzstan Article 97.
[3] R. Hirschl, The Question of Case Selection in Comparative Constitutional Law, (The American Journal of Comparative Law, Vol.53, No.1, 2005), 133-134.

a new Constitutional Court. Since then, each regime in power was trying to subordinate the respective Constitutional Courts while using different methods. Systematic attacks under the guise of the legislative reform, usage of the flawed disciplinary and dismissal system against the disobedient judges, and informal communications between the institution and the political regime can be observed in the reality of the respective jurisdictions.

The key methodological instrument of comparative research is the analysis of the recent practices of the respective institutions. In particular, it examines the cases from the relevant jurisdiction that have been strategically important to political leadership.

In response to the stated objective, the first chapter aims to develop a conceptual framework for studying the transformation of the Russian, Kyrgyz, and Georgian Constitutional Courts/Chamber. The second, third, and fourth chapters, country by country style, begin with the overview of tools passed to subdue the respective institutions and continue the discussion with the analyses of the constitutional complaints/decisions of high political interests taking into account the political context of the country. Moreover, the country-based chapters aim to reveal the legal space where the respective institutions were enabled to maintain some autonomy and credibility in the public eye. Finally, Chapter five, based on the analyses provided in the previous sections, illustrates the main patterns and draws distinctions between the respective jurisdictions.

1. Setting the Theoretical Framework

The informal and formal tools used by the political leadership against constitutional justice institutions have a dramatic impact on their further performance.[4] To develop a conceptual framework for studying the transformation of the Russian, Kyrgyz and Georgian Constitutional Courts/Chamber, the chapter discusses scholarship on approaches developed by subdued constitutional justice institutions in response to the interference with their independence and impartiality.

1.1. Constitutional Court in the Service of the Ruler's Insidious Objectives

Constitutional justice institutions enforce constitutional constrains against "anti-democratic groups" and "self-aggrandizing rulers."[5] This, in turn, implies the ability of those bodies to define the boundaries of constitutional democracy, to intervene and restrain the rulers' powers.[6] These institutions do play the role of "democratic safeguards".[7]

The idea of preserving the role of "constitutional guardianship" for the Constitutional Courts goes back to *Kelsen's* work from 1931 and stands for empowering the constitutional courts with the mandate to control the constitutionality of the legislation and "high-level executive actions" as well as the power to repeal acts deemed unconstitutional.[8]

Kelsen's idea of creating specialized constitutional courts became especially accepted in the "post-totalitarian constitutions".[9] *Issacharoff* argues that one of the features of the newly

[4] *See for instance*, Ginsburg, Moustafa, Rule by Law: The Politics of Courts in Authoritarian Regimes, (Cambridge University Press, 2008); Landau, Dixon, Abusive Judicial Review: Courts against Democracy, 53 (UC Davis Law Review, 2020); Trochev, Solomon, Jr., Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state, (Communist and Post-Communist Studies 51, 2018).
[5] S. Issacharoff, Fragile Democracies, Contested Power in the Era of Constitutional Courts, (Cambridge University Press, 2015), 9.
[6] *Ibid, 9.*
[7] *Ibid, 14.*
[8] L. Vinx, (Ed.), The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law, (Cambridge University Press, 2015), 5.
[9] A. Sajó, R. Uitz, The Constitution of Freedom: An Introduction to Legal Constitutionalism, (Oxford University Press, 2017), 334.

created democracies is the formation of the Constitutional Court.[10] He believes that the Constitutional Courts are of particular importance to the "modern fragile democracies", which have inherited political power as a result of the collapse of the authoritarian regime, and have to resist the growing social discord and controversy.[11] *Issacharoff* believes that in "fragile democracies", constitutional courts have two leading roles: first, to oversee any intervention aimed at removing the individual or political party from the political arena[12] and serve as a "constraint to on the exercise of consolidated power".[13]

However, fulfilling these roles by the constitutional court is not always in the interest of political leadership. In illiberal and authoritarian regimes, the rulers use legal tools and even constitutional provisions to achieve their insidious goals, and in the process, need the constitutional court to be on their side.

The political leadership have "informal" or "formal" tools at their disposal to achieve the subordination of the constitutional justice institutions.[14] The choice between implementing various measures largely depends on the regime's political goals, particularly for what purposes it is going to use the constitutional justice institution.[15] In principle, the political leadership can even terminate the functioning of the constitutional justice institution. However, in most cases, political leadership does not consider such a step necessary since it sees benefits from the performance of a properly subdued constitutional court.

When discussing the role of courts[16] in authoritarian regimes, *Moustafa and Ginsburg* show that the subdued courts are used by the political leadership for removing political

[10] Supra note 5, 10-11.
[11] *Ibid, 10-11.*
[12] *Ibid, 12-13.*
[13] *Ibid, 13.*
[14] D. Landau, R. Dixon, Abusive Judicial Review: Courts against Democracy, (53 UC Davis Law Review 1313, 2020), 1338.
[15] *Ibid, 1343.*
[16] The General term “Courts” in this article covers the constitutional justice institutions, as the decisions of the respective institutions are used to support the claim of the authors.

opponents from the political domain,[17] as well as to boost their questioned legitimacy.[18] Authoritarian regimes are also inclined to delegate the controversial decisions and policies to the judicial institutions to remove the political responsibility from the regime.[19]

1.2. The Impact of Systematic Attacks on Subdued Constitutional Courts

The implementation of such informal or formal instruments for the subordination of the constitutional justice institutions has a dramatic impact on their proceedings and results in advancing the ruler's objectives. *Dixon and Landau* argue that the subordination of the respective institutions leads to the development of "abusive judicial review".[20] Under this concept, the courts and the judges are seen as "agents" of the political leadership, who assist the rulers in achieving their anti-democratic ambitions instead of resisting the attempts undermining constitutional democracy .[21] Following in the footsteps of *Landau's* earlier work on abusive constitutionalism,[22] the authors call constitutional review "abusive" when the judicial decisions "intentionally attack the minimum core of electoral democracy."[23]

Dixon and Landau argue that the "core of electoral democracy" should not be construed narrowly, using a definition of democracy that encompasses the principles of separation of powers, the rule of law, protection of individuals rights and freedoms, conduction of fair elections and prevention of the arbitrariness of the executive.[24] Moreover, the effect of a judicial decision should be analysed in light of the existing context in the respective jurisdictions and connection with the ongoing developments.[25] As for the "intentionality," the authors believe that it is typical for "captured" or "coerced" courts and therefore emphasize the

[17] T. Ginsburg, T. Moustafa, Rule by Law: The Politics of Courts in Authoritarian Regimes, (Cambridge University Press, 2008), 4.
[18] *Ibid,4.*
[19] *Ibid,4.*
[20] Supra note 14, 1322.
[21] *Ibid, 1313.*
[22] D. Landau, Abusive Constitutionalism, (47 UC Davis Law Review 189, 2013), 195-200.
[23] Supra note 14, 1326.
[24] *Ibid, 1323.*
[25] *Ibid, 1324.*

importance of finding evidence that independence and impartiality of the judges are undermined.[26] However, they admit that it is "trickier" to determine the "intent."[27]

While Dixon and Landau see judges engaging in abusive constitutional review as part of the ruling regime, writing a decade earlier, *Moustafa and Ginsburg* focused on the insecure condition of "reform-oriented judges" in the authoritarian states.[28] Although these judges may have a desire to oppose the political leadership, they prefer to wait for regime change and try not to contradict the "core interests" of the political regime considering the risks of the usage of punitive mechanisms against them.[29]

The "core interest" of the regime is similar to the first element of the concept proposed by *Landau and Dixon*. Both can be linked to the mechanisms by which the political leadership seeks to strengthen and maintain power.[30] However, Moustafa and Ginsburg do not rule out the possibility of delivering the relatively progressive decisions [31] by these same judges, but only on matters that do not include the "core interest" of the existing regime. [32]

On the one hand, the judges' subjective desire under the "judicial self-restraint" to maintain their status and judicial privileges is understandable. On the other hand, it is alarming that such an approach by the judges allows the political leadership to carry out its anti-democratic plans without hindrance.

Moreover, the "duality" of the political regime and the measures passed to influence the constitutional court may lead to developing judicial "pragmatism". While talking about Russia, *Trochev and Solomon Jr*. claim that "dual state" is one of the features of Putin's regime and the

[26] *Ibid, 1331.*
[27] *Ibid, 1329.*
[28] Supra note 17, 14.
[29] *Ibid, 14.*
[30] *Ibid, 14.*
[31] As an example of a progressive decision, Moustafa and Ginsburg refer to the decisions of the Supreme Constitutional Court of Egypt that attempted to expand the scope of protection of fundamental rights.
[32] Supra note 17, 15.

Russian Constitutional Court.[33] The concept of the "Dual State," introduced by *Fraenkel* in 1941 to describe the nature of the Nazi state, claimed the co-existence of two states within national-socialist Germany.[34] The first element of this concept comprises of the "normative state," which is safeguarded by the legal order established by the legislative framework and decisions of the courts and administrative bodies.[35] As for the second element, the "prerogative state," it is governed by the political leadership and is unconstrained by the legal safeguards.[36]

According to *Trochev and Solomon Jr.,* "duality" in the context of the constitutional adjudication means that the same court can decide to follow the law or set is aside, depending on the political context.[37] They argue Russian constitutional judges follow a "pragmatic approach": they see the need for flexibility for adjusting their decisions to the existing context.[38] In doing so, the Russian Constitutional Court tries to demonstrate the loyalty towards the Putin regime[39] and supports the implementation of his insidious goals. As a result of loyalty, the judges protect their personal status from the further attempts of Putin to "reform" the institution and even may receive "organizational and personal rewards."[40] "The pragmatic approach" of the Russian Constitutional Court seems similar to the concept of "judicial self-restraint" proposed by *Moustafa and Ginsburg* since, in both cases, the judges see the need to take into account the presented context, and political interests of the political leadership for the survival of their judicial status.

Similar to the concept of "judicial self-restraint" acting "pragmatically" does not preclude the possibility of progressive decisions from the same judges in areas where the interest of the

[33] A. Trochev, P. H. Solomon, Jr. Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state, (Communist and Post-Communist Studies 51, 2018), 202.
[34] E. Fraenkel, J. Meierhenrich, The Dual State: A Contribution to the Theory of Dictatorship, (Oxford Scholarship Online, 2017), Abstract.
[35] *Ibid, Abstract.*
[36] *Ibid, Abstract.*
[37] Supra note 33, 202.
[38] *Ibid, 202.*
[39] *Ibid, 204.*
[40] *Ibid, 204.*

political leadership is less represented.[41] Such progressive decisions contribute to the credibility of the constitutional court in society. Furthermore, the regime also benefits from this credibility, and if and where appropriate, it may exploit the image of that institution to legitimize its anti-democratic objectives.

1.3.The Strategy or Going with the Flow?

In light of the above, the question arises as to whether subdued constitutional courts accept the existing political context and follow a strategy - or simply go with the flow.

From the approaches reviewed in the previous subheadings, it was evident that in response to the methods used to subdue the constitutional court, the institution and the individual judge are faced with the need not to run counter to the interests of the regime within the process of constitutional adjudication. The concepts introduced by scholarship on "judicial self-restraint" and on "judicial pragmatism" suggest strategic choices of judges with long term perspectives in mind.

The strategy itself may entail overt or artistically hidden support for political leadership, which also does not preclude the attempt to maintain the *status quo* of the institution and individual judges. The fate of both the institution and the single judge depends on the political will of the regime. It is directly related to whether the performance of said institution "successfully" serves political leadership.

The setting of the strategy on how to serve the functions imposed by the authoritarian and illiberal regimes can become one of the catalyze of informal agreements between the constitutional court and the political leadership.

Besides, it should not be ruled out that the adoption of relatively progressive decisions by the same constitutional courts and creating an image of a credible institution can be a part of an informal agreement or even a task imposed by the regime on the constitutional courts.

[41] *Ibid, 210.*

1.4.The Main Take Away to Analyse the Subdued Constitutional Courts

Research aiming to reveal the strategies of subdued constitutional justice institutions for advancing the rulers' goals should be developed in two main directions:

First, the paper examines whether a particular regime used formal or informal methods to interfere with, and ultimately to subdue the Constitutional Courts/Chamber. Second, through the analysis of the recent cases, the paper examines the impact the interference by the political leadership had on constitutional jurisprudence, focusing on whether the interference led constitutional judges to advance the regime's objectives. In the course of the analysis, concepts of "judicial self-restraint" and "pragmatism" assist with assessing whether a Constitutional Court/Chamber has been able to find a legal area to make relatively progressive decisions that may promote the image and legitimacy of the rulers.

2. The "Pragmatic Approach" of the Russian Constitutional Court

After the collapse of the Soviet Union, the Russian Constitutional Court working in 1991, ended tragically because of a conflict with President Yeltsin.[42] The disagreement prompted Valery Zorkin's dismissal from the post of the Chairman of the Constitutional Court and then suspending the work of the Constitutional Court based on a presidential decree.[43] The new Constitution, adopted in 1993, entrusted the mandate of constitutional review to a newly established Constitutional Court.[44] Valery Zorkin remained Chairman of the reconstituted Constitutional Court and has led the Court through a number of conflicts with the political branches. *Trochev and Solomon Jr.* claim that the "duality" of Putin's regime also affected the performance of the Constitutional Court and contributed to the development of the "pragmatic" approach.[45]

The analysis of the decisions on issues of particular interest to the political leadership illustrates what is behind the "pragmatic" strategy of the Russian Constitutional Court (hereafter RCC). Besides, similarly to Georgia and Kyrgyzstan, this chapter seeks to determine whether the Russian Constitutional Court has been able to identify an area where it was enabled to resolve issues with some autonomy.

2.1. The Tools Passed to Subdue the Russian Constitutional Court

The first sub-section reviews the tools used by the political leadership to increase the dependence of the Constitutional Court on the existing political context.

Although the law on the Constitutional Court, adopted in 1994, was not amended under the Yeltsin's rule,[46] under the presidency of Putin and Medvedev, it underwent 15 changes in

[42] H. Hausmaninger, Towards a New Russian Constitutional Court, (Cornell International Law, 1995, Journal: Vol. 28), 350.
[43] *Ibid, 351.*
[44] *Ibid, 351.*
[45] Supra note 33, 204.
[46] *Ibid, 204.*

2001-2016.[47] Importantly, the authority to appoint the Constitutional Court's Chairman, and the power for application of disciplinary measures against the judges were transferred to the political branches.[48] Besides, the regime was inclined to influence RCC's composition through "playing" with the retirement age and term of office for judges. [49] In the second phase, one of the Ruler's main goals was keeping Mr. Zorkin at the post of the Chairman and strengthening the mandate of the already subdued RCC.[50] The strengthening of RCC's role was achieved by adding new competencies and increasing the binding force of its judgments.[51]

Keeping Zorkin in place ensures the successful cooperation between the RCC and the Putin's regime.[52] The need for informal communication between Zorkin and the Russian authoritarian regime was prompted by the intimidation used against the Constitutional Court as an institution, in particular, the regular threats that the Putin would resort to merging of the Constitutional Court to the Supreme Court. [53] However, these mechanisms have not guaranteed the subordination of RCC's full composition to Putin's interest and raised the need to punish the critical thinking judges.[54]

2.2.Green Lighting the Non-execution of the ECHR judgments

The application of RCC by the political leadership for the initiation of controversial reforms is particularly evident from the judgment of 2015 when RCC ruled that the judgments of European Court of Human Rights (hereafter ECtHR) in specific cases might not be subject to enforcement by the relevant Russian authorities.[55]

[47] *Ibid, 204.*
[48] *Ibid, 205.*
[49] *Ibid, 205.*
[50] *Ibid, 205.*
[51] *Ibid, 205.*
[52] *Ibid, 202.*
[53] *Ibid, 207.*
[54] *Ibid, 206.*
[55] Decision of the Russian Constitutional Court of July 14, 2015, 17, [http://doc.ksrf.ru/decision/KSRFDecision201896.pdf, last visited: 05.05.2020]

Relations between the Constitutional Court, Putin's leadership, and the ECtHR were strained back in 2011 when ECtHR overruled the Constitutional Court's decision in *Markin v. Russia* and ruled in favour of a Russian military serviceman who sought paternity leave (an option not available under Russian law).[56] Back in 2011, Chairman Zorkin publicly stated that Russia should have the "defence mechanisms" against ECtHR's rulings, which tend to interfere in Russia's sovereignty.[57] Ultimately, this led to an RCC judgment in 2015 proclaiming that Russian authorities may refuse the enforcement of ECtHR judgments in specific cases.[58]

In its judgment, RCC emphasized the primacy of the Russian Constitution over decisions taken by international organizations, noting that the unconditional enforcement of those decisions by Russia could undermine the values and principles guaranteed by the Constitution.[59] Besides, the Constitutional Court took the mandate to examine the collision between the judgments of the ECtHR and the Russian Constitution.[60] The Constitutional Court also proposed to the legislature to adopt the relevant legislative framework and ensure the granting of that mandate to the Constitutional Court.[61]

The Law on the Constitutional Court was amended in December 2015, which reflected the findings of the Constitutional Court's decision of 14 July 2015.[62] These legislative changes have been the subject of evaluation by the Venice Commission upon the request of the Parliamentary Assembly of the Council of Europe.[63] In its opinion, the Venice Commission

[56] W. Pomeranz, Uneasy Partners: Russia and the European Court of Human Rights, (Human Rights Brief 19, no. 3, 2012), 17.
[57] A. Padskocimaite, Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania, (Heidelberg Journal of International law, 77, 2017), 673.
[58] Decision of the Russian Constitutional Court of July 14, 2015, 17, [http://doc.ksrf.ru/decision/KSRFDecision201896.pdf, last visited: 05.05.2020]
[59] *Ibid, 15.*
[60] *Ibid, 25.*
[61] *Ibid, 34.*
[62] Federal Law No. 7-ФКЗ of 14 December 2015 "On Amendments to the Federal Constitutional Law on the Constitutional Court", [https://rg.ru/2015/12/15/ks-site-dok.html, last visited: 25.03.2020]
[63] Venice Commission, Interim Opinion on the Amendments to the Federal Constitutional Law, (2016), ¶1, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)005-e, last visited: 25.03.2020]

stressed that the proposed amendments contradict Article 46 of the Convention, which obliges the Contracting States to abide by the decisions and interpretations of the ECtHR in the respective cases.[64]

The critical conclusion of the Venice Commission did not stand in the way of Russia's political leadership, and nothing is surprising in light of Russia's reality. Within its newly acquired mandate, the Constitutional Court can effectively reduce the burden on the Putin's regime to enforce undesirable and politically sensitive judgments.[65] For instance, in 2017, within the framework of this mandate, the Constitutional Court released Russia from paying EUR 1.8 million as compensation in the *Yukos's* case, which was considered one of the "catalysts" of the newly acquired mandate of the Constitutional Court.[66]

The rate of non-execution of the ECtHR judgments by Russia was alarming already in 2015.[67] Moreover, in 2018, Russia refused to pay the membership fee to the Council of Europe.[68] The ruling of the Constitutional Court and subsequent legislative changes further opened the way for the Russian regime to disregard the European Court of Human Rights' judgments and further aggravate the relationships with the Council of Europe.

2.3. The Examination of the Recent Constitutional Reform

Another decision that demonstrates the readiness of the RCC to adjust its approach to the needs of the political leadership and increase its legitimacy concerns the examination of the much-criticized 2020 constitutional reform.

[64] *Ibid*, ¶*99.*
[65] Supra note 57, 675-679.
[66] I. Nuzov, Russia's Constitutional Court Declares Judgment of the European Court "Impossible" to Enforce, (2016), ¶5, [http://www.iconnectblog.com/2016/05/russias-constitutional-court-declares-judgment-of-the-european-court-impossible-to-enforce/, last visited: 25.03.2020]
[67] Parliamentary Assembly, Implementation of judgments of the ECtHR, (2015), 9, [http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMjAwNSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIyMDA1, last visited: 25.03.2020]
[68] M. Bushuev, M. Ostapchuk, Russia Withholds Payments to the Council of Europe, (2018), ¶1-2, [https://www.dw.com/en/russia-withholds-payments-to-the-council-of-europe/a-42792673, last visited: 05.06.2020]

One of the most critical initiatives under the 2020 constitutional reform will allow President Putin to stay in office until 2036. It is noteworthy that formally, the idea of granting President Putin the opportunity to run in the next two presidential elections came from one of the Duma members.[69] While presenting his reservations before the members of Duma, Putin agreed to consider this proposal if the RCC gave a positive conclusion on its constitutionality.[70]

The readiness of RCC to examine the constitutionality of the proposed amendments based on Putin's request is particularly alarming, as, in 2014, RCC declined to examine the constitutionality of a constitutional amendment on the abolition of the Supreme Arbitrazh Court, pointing to the absence of a relevant mandate as the main ground for refusal and stressing that the challenged amendments had already been adopted. [71] Although the 2020 constitutional amendments have not yet been adopted, two considerations should be noted. First, the Constitution still does not provide for the participation of the Constitutional Court in the process of constitutional reform.[72] Besides, the Constitutional Court's opinion on the constitutionality of constitutional amendments was drafted after President Putin signed the amendments.[73] Consequently, if not the new procedure invented by Putin himself, the adoption of the constitutional amendments would be in line with the procedure foreseen by the existing Constitution and ready to be incorporated into the Constitution.[74]

The Constitutional Court admits in its conclusion that the current Constitution does not provide for the participation of the Constitutional Court in the process of constitutional

[69] The State Duma, President of the Russian Federation spoke at the meeting of the State Duma, (2020), ¶ 330, [http://duma.gov.ru/news/47996/, last visited: 31.05.2020]
[70] *Ibid, ¶ 35-36.*
[71] Decision of the Russian Constitutional Court, of 17 July 2014, 5, [http://doc.ksrf.ru/decision/KSRFDecision168181.pdf, last visited: 25.03.2020]
[72] Constitution of Russian Federation, Chapter 9 on the Constitutional Amendments and the Revision of the Constitution.
[73] The Straits Times, Putin signs Russia's constitutional reform law, (2020), ¶1, 3, [https://www.straitstimes.com/world/europe/putin-signs-russias-constitutional-reform-law, last visited: 25.03.2020]
[74] Supra note 72.

revision.[75] However, the Constitutional Court explains that the constitutionality of the initiated amendments with respect to the provisions taken as fundamental principles should be examined within the constitutional control exercised by the Constitutional Court.[76] The Constitutional Court has deemed the constitutional changes to be in line with the Constitution, including the most critically assessed amendment, which will allow Putin to stay as the President until 2036.[77]

President Putin could have easily achieved the successful adoption of the amendments without the involvement of the Constitutional Court. Therefore, the question may arise, why was President Putin keen to involve the Constitutional Court in this process. Increasing the legitimacy of constitutional amendments may be one of the reasons behind this move. Moreover, the conclusion of the Constitutional Court on the constitutionality of the controversial provisions, particularly in terms of the presidential term limits, can protect the current political leadership from further constitutional complaints on the same issues.

2.4. Last Resort for Protection of Individual Rights

Although the performance of the Russian Constitutional Court in politically sensitive cases provides a basis for public criticism towards the Court, the Constitutional Court is still regarded as an institution for the protection of individual rights for individual applicants.[78]

Statistical data for 2000-2012 demonstrates an increasing number of individual complaints submitted before RCC.[79] Although the Constitutional Court considerably filters the individual claims brought before it and decides on merits only for a small portion of cases,[80]

[75] Conclusion of the Russian Constitutional Court on the Amendments to the Constitution, 16 March, 2020, 6, [http://doc.ksrf.ru/decision/KSRFDecision459904.pdf, last visited: 25.03.2020]
[76] *Ibid, 6-7.*
[77] *Ibid, 43.*
[78] A. Dzmitryieva, Case Selection in the Russian Constitutional Court, (2017), 1 [https://www.venice.coe.int/cocentre/Aryna_Dzmitryeva_Case_Selection_in_the_Russian_Constitutional_Court.pdf, last visited: 28.03.2020]
[79] *Ibid, 2.*
[80] *Ibid, 1.*

the data reflecting the outcome of the proceedings is noteworthy. Specifically, between 2010 to 2015, out of 50 complaints concerning personal rights violations, 30 were decided in favour of the complainant.[81] As to cases involving issues related to political rights, out of 19 judgments, 12 were handed in support of the complainant.[82] Finally, concerning the claims on social rights, over the same time, 40 out of the 70 decisions ended up with the winning of claimants.[83] Such an approach toward the complaints on the violation of individual rights is a part of the "pragmatic approach," as RCC knows when it is allowed to render more progressive judgments.

Conclusion

The Russian Constitutional Court became of the main pillars of Putin's regime. The formal and informal tools used towards the RCC prompted the Court to pursue this status. The decisions of RCC discussed in the preceding sub-sections illustrate that RCC is ready to assume the responsibility for resolving the most sensitive issues for the political leadership, even in the absence of a mandate provided by the legislation. Although the Constitutional Court's decisions on issues relevant to the regime remain the basis of public criticism, the Court still retains the image of a credible institution in the eyes of individual plaintiffs claiming on the violations of personal, political, and social rights.

Shaping the image of a relatively independent institution is beneficial to both the Constitutional Court and Putin's interests. Public confidence towards the Constitutional Court is especially handy when Putin delegates to the Constitutional Court the implementation of the most controversial initiatives (such as defiance towards the ECtHR) and tries to increase the legitimacy of disputed changes with the participation of a relatively credible institution.

[81] Supra note, 33, 211.
[82] *Ibid.*
[83] *Ibid.*

3. The Constitutional Chamber of Kyrgyzstan at the Mercy of the Rulers

After the establishment of the Kyrgyz Constitutional Court, under the influence of the political leaderships and especially the Presidents, the Constitutional Court has become a source of legitimacy to increase presidential powers.[84] 2010 was a particularly dramatic year for the Constitutional Court. During the second revolution, the old Constitutional Court was abolished and replaced by the Constitutional Chamber established within the Supreme Court.[85] In the beginning, the new Chamber's performance left an impression of the relatively independent and impartial body.[86] However, after the successful attempts of political leaders to subdue the Chamber, by now, it seems to be deciding cases that favour the regime's interest at the expense of upholding the Constitution.

The following sub-sections aim to review and analyse the methods used by the regime to subdue the Kyrgyz Constitutional Chamber and to reveal the impact of those attacks on the recent performance of the Chamber in matters of high political interest. This part will also assess whether the Constitutional Chamber has been able or was allowed to identify a legal area where it can operate with greater autonomy and maintain credibility in the public eye through handling relatively progressive decisions.

3.1. The Tools Passed to Subdue the Kyrgyz Constitutional Chamber

A relatively independent and impartial constitutional justice institution has once again become the target of political attacks through the 2016 constitutional reform, as it was predicted by local scholars.[87] Although only part of the changes initially proposed by the regime were reflected in the Constitution, the assessment of *Freedom House* emphasized that the political leadership still managed to increase its control over the Constitutional Chamber.[88] This

[84] Dzhuraev, Toktogazieva and others, The Law and Politics of Keeping a Constitutional Order: Kyrgyzstan's Cautionary Story, (Hague Journal on the Rule of Law, 2015), 272.
[85] *Ibid, footnote 41.*
[86] *Ibid, 276.*
[87] *Ibid, 278.*
[88] Freedom House, Strengthening the Vertical: Kyrgyzstan's 2016 Constitutional Referendum, (2017), 1,

accusation should be linked to constitutional amendments, according to which a judge of the Constitutional Chamber shall be appointed and dismissed by the Parliament based on the proposal of the President.[89] Such excessive participation of the President and the Parliament in the early release of a constitutional judge jeopardizes the judicial independence and impartiality. Besides, it enables the political leadership to remove a judge who does not share the interests of the political regime. This danger is particularly evident after the developments surrounding the Constitutional Chamber in 2015, when the President, through his influence over the judges, succeeded in the removal of a disobedient judge by the hands of her colleagues[90] who recommended her dismissal to the members of the Parliament.[91]

3.2. The Examination of the 2016 Constitutional Reform

Tailoring constitutional interpretation to the interest of the political leadership is particularly evident in the Chamber's decision on the 2016 constitutional amendments.

The draft of the constitutional amendments received a great deal of criticism from opposition forces and local organizations, addressing both procedural and substantive issues.[92] The harsh criticism toward the implementation of constitutional reform was based on a moratorium verified by a referendum in 2010 that banned constitutional changes until September 2020.[93] According to the conspiracy theory spread in public, the purpose behind the

[https://freedomhouse.org/sites/default/files/NIT_Briefs_April262017_kyrgyzstan_brief_FINALv.pdf, last visited: 24.03.2020]

[89] The Constitutional Amendments of 26 December, (2016), §15, §23. [http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru, last visited: 24.03.2020]

[90] A. Yalovkina, Kyrgyzstan Judge's Dismissal Looks Like Government Interference, (2015), ¶3, https://iwpr.net/global-voices/kyrgyzstan-judges-dismissal-looks-government, last visited: 24.03.2020]

[91] M. Bayaz, Parliament dismissed the Judge of the Constitutional Chamber, (2015), ¶1, [https://kloop.kg/blog/2015/06/30/parlament-uvolil-sudyu-sooronkulovu-s-tretego-raza/, last visited: 24.03.2020]

[92] M. Meldon, Kyrgyzstan's Constitutional Referendum: Steering populism toward securing vested interests?, (2016), ¶7, [available at: http://constitutionnet.org/news/kyrgyzstans-constitutional-referendum-steering-populism-toward-securing-vested-interests, last visited: 01.06.2020].

[93] Law on the adoption of the 2010 Kyrgyz Constitution, Article 4, [http://cbd.minjust.gov.kg/act/view/ru-ru/202914?cl=ru-ru, last visited: 24.03.2020]

respective constitutional reform was to play the Putin-Medvedev game - the incumbent President was going to become Prime Minister after the expiry of his presidential term.[94]

Acting under its constitutional mandate,[95] despite the procedural and substantive criticism of the amendments in public, the Constitutional Chamber recognized the draft law as constitutional.[96] The majority decision does not mention the moratorium on amending the Constitution until 2020. In contrast, a dissenting judge took a different approach and focused primarily on procedural violations by the constitutional reform,[97] finding that the implementation of constitutional reform before 2020 violated the moratorium envisioned in 2010.[98]

3.3. Compulsory Registration of Biometric Data

Another case that demonstrates how the Constitutional Chamber serves the interest of the political leadership concerns the constitutionality of the law on mandatory registration of biometric data, which in turn is a prerequisite for citizens' right to vote.[99] According to the law, a person is obliged to provide the relevant state body with his personal information, and refusal may lead to physical coercion.[100] The law was challenged by several constitutional complaints before the Constitutional Chamber, alleging that the legislative framework on the registration of biometric data was contrary to the Constitution.[101]

Judge Sooronkulova was originally the Judge Rapporteur in the case.[102] However, because she considered the challenged law unconstitutional and was not hiding her perceptions,

[94] Supra note 92, ¶7.
[95] Constitution of Kyrgyzstan, Article 97 (6).
[96] Conclusion of the Kyrgyz Constitutional Chamber, October 11, 2016, 37, [http://constpalata.kg/wp-content/uploads/2016/10/SDPK-rusk.1.pdf, last visited: 25.03.2020]
[97] *Ibid, 39-43.*
[98] *Ibid, 43.*
[99] C. Putz, Kyrgyzstan Set to Use Biometric Registration in Next Election, 2015, ¶4, [https://thediplomat.com/2015/08/kyrgyzstan-set-to-use-biometric-registration-in-next-election/, last visited: 25.03.2020]
[100] Decision of the Constitutional Chamber, of 14 September 2015, 3, [http://constpalata.kg/wp-content/uploads/2015/09/resh.-po-biomerii-1.pdf, last visited: 25.03.2020]
[101] *Ibid, 3.*
[102] Supra note 90, ¶4.

she was removed from the position of the judge with the procedural violations in an accelerated manner.[103] The interest to remove a disobedient judge as quickly as possible can be explained by the fact that the political leadership aimed to use the mandatory biometric registration already for upcoming parliamentary elections planned in October 2015.[104] Following these developments, it should not have been surprising that the Constitutional Chamber recognized the provisions regulating the compulsory registration of biometric data to be consistent with the Constitution.[105]

The Chamber's judgment fails to justify why the mandatory submission of biometric data for election purposes has no alternatives and is deemed as the only available mechanism for conducting elections safely. Moreover, notwithstanding the possible risks indicated by the plaintiffs,[106] the Chamber did not sufficiently examine whether the mechanisms for the prevention of the abusive use of database existed. This approach is particularly problematic, as according to the publicly available information, the database was used in the 2017 presidential election by the political leadership to influence the election results.[107]

3.4. Immunity of the Ex-presidents

The Constitutional Chamber became a tool for removing the political opponents from Kyrgyz politics with its judgment on the immunity of Ex-presidents.

The Kyrgyz Constitution allowed President Atambayev's election only for one presidential term.[108] Through the 2016 constitutional reform, he strengthened the role of the Prime Minister and indented to secure this position for himself after the 2017 presidential

[103] Supra note 91, ¶1.
[104] Z. Sydykova, Biometrics and Kyrgyzstan's 2015 Parliamentary Elections, ¶ 1, (2015), [https://www.cacianalyst.org/publications/field-reports/item/13128-biometrics-and-kyrgyzstans-2015-parliamentary-elections.html, last visited: 01.06.2020]
[105] Supra note 100, 20.
[106] *Ibid, 18.*
[107] R. Tukhvatshin, Episode 1: How Governmental Server was used to influence the Voters in the Presidential elections, (2017), ¶1-2, [https://kloop.kg/blog/2017/10/26/samara_elections_kg/, last visited: 25.03.2020]
[108] Constitution of Kyrgyzstan, Article 61.

elections.[109] Although in the 2017 presidential election, President Atambayev was using all his resources to guarantee success for Jeenbekov,[110] after the election, the relationship between the ex and incumbent presidents became strained.[111] Given this, former president Atambayev decided to stay in the political life of Kyrgyzstan in the leadership of one of the main opposition parties.[112]

Before the decision of the Constitutional Chamber, former presidents enjoyed absolute immunity under Kyrgyzstan's legislative framework.[113] Accordingly, although the name of former President Atambayev was listed in several corruption offenses, he was not criminally liable due to his absolute inviolability.[114] The situation has changed with the Constitutional Chamber ruling[115] that the absolute immunity granted to the former president runs counter to the principle of "equality."[116] Accordingly, the Chamber instructed the legislature to create a legislative framework that would enable the legislator to waive immunity for the former president in cases of serious crime.[117]

The decision does not contain the principles that the legislative amendments adopted by Parliament should be based on and grants the legislature full freedom to regulate this issue. The Chamber only argues that the procedure for deciding to lift immunity for former presidents should not be less difficult than the removal of the incumbent.[118] To implement the decision,

[109] T. Umarov, The Failure of Atambayev's Planned Power Transition, (2019), ¶3-4, [https://carnegie.ru/2019/08/23/failure-of-atambayev-s-planned-power-transition-pub-79718, last visited: 25.03.2020]
[110] Deutcshe Welle, Why the Parliament of Kyrgyzstan cancels the immunity of ex-presidents, (2018), ¶11, [http://inozpress.kg/news/view/id/53640, last visited: 25.03.2020]
[111] *Ibid, ¶10.*
[112] Supra note 109, ¶9.
[113] Decision of the Kyrgyz Constitutional Chamber, October 3, (2018), 14-15, [http://constpalata.kg/wp-content/uploads/2018/10/Toktakunova-N.A.-resh..pdf, last visited: 25.03.2020]
[114] S. Aidar, Elite Corruption under Former Kyrgyz President Almazbek Atambayev, (2018), ¶3, [https://www.opendemocracy.net/en/odr/what-we-know-about-alleged-elite-corruption-under-former-kyrgyz-president-almazbek-atambayev/, last visited: 25.03.2020]
[115] The Case before the Constitutional Chamber was brought by the Human Rights Activist Nurbek Toktakunov.
[116] Supra note, 113, 13-14.
[117] *Ibid, 15.*
[118] *Ibid, 14.*

the legislature introduced changes in the respective law[119] and prohibited the participation of former presidents in political activities.[120] In case of failure to comply with the requirement, the guarantees, including the immunity of former presidents, will be waived.[121]

At the time of the enactment of the law, two former presidents had the status of the ex-presidents in Kyrgyzstan.[122] Still, only Atambayev was considered as a target of the above-mentioned amendments.[123] The Constitutional Chamber's decision and the subsequent legislative changes allowed political leadership not only to remove Atambayev from the political arena but also to lift his immunity and initiate criminal proceedings against him.[124]

3.5. Is the Constitutional Chamber left with some autonomy?

The Kyrgyz Constitutional Chamber has begun its work with the image of a more independent and impartial institution than its predecessor.[125] Several of the Chamber's decisions in 2014-2015, became targets of the governmental criticism and fury.[126] Later in 2016, the relatively independent and impartial approach of the Chamber resulted in an additional attack of the political leadership through the constitutional reform.[127] After this event, the Chamber's approach to dealing with constitutional disputes has changed significantly.[128] At this point, it is impossible to identify the legal space where the Chamber enjoys relatively more autonomy.[129]

[119] The Amendments to the Law "On Guarantees of Activity of the President of the Kyrgyz Republic" from 14 April, 2019, [http://cbd.minjust.gov.kg/act/view/ru-ru/111909, last visited: 25.03.2020]
[120] *Ibid, §8.*
[121] *Ibid, §8.*
[122] A. Arikbaev, Can Atambayev now be deprived of immunity?, (2019), ¶3, [https://kloop.kg/blog/2019/05/17/mozhno-li-teper-lishit-atambaeva-neprikosnovennosti-obyasnyaem-novyj-zakon-o-protsedure-snyatiya-immuniteta-s-eks-prezidentov/, last visited: 25.03.2020]
[123] *Ibid, §5.*
[124] BBC, Kyrgyzstan's ex-president arrested after raids on home, (2019), ¶1 [https://www.bbc.com/news/world-asia-49273236, last visited: 25.03.2020]
[125] Supra note, 84, 276.
[126] *Ibid, 276.*
[127] Supra note 88, 1.
[128] The Conclusion was reached through a consultation with Saniia Toktogazieva.
[129] *Ibid.*

Conclusion

The developments surrounding the Kyrgyz Constitutional Chamber reveal that attempts to resolve cases relatively independently and impartially may serve as a basis for further attacks by the political leaders seeking to achieve a higher level of subordination. The recent constitutional reform and illegal dismissal of the Chamber's Judge in a pending case made a significant impact on the Chamber's performance. An analysis of the Chamber's recent decisions demonstrates that the regime can take advantage of the Chamber's performance to increase the legitimacy of the controversial legislative reforms, including the revision of the Constitution. Also, based on the decisions concerning the immunity of ex-presidents and the operation of the biometric database, the Chamber's performance can be actively used to remove political opponents from the political arena and influence election results. In short, unlike in Russia, the Kyrgyz Constitutional Chamber has not been able to find a legal area in which the Chamber would be more autonomous. Thus, at this stage, it keeps losing if it had not already lost all the credibility in public.

4. The Art of Stretching the Time by the Georgian Constitutional Court

Since the establishment of the Georgian Constitutional Court in 1995, each political party in power has sought to take control of the Constitutional Court through the appointments of the favorable candidates. Although, according to the Constitution, three out of nine judges are appointed by the President, three by the Parliament and three by the Supreme Court,[130] as all three institutions were under the control of the "National Movement,"[131] it was easily managed to staff the Constitutional Court with relatively loyal justices. Consequently, the Constitutional Court proceedings did not pose problems for political leadership, and there was no need for further efforts to subdue the Court.

However, the situation has changed dramatically after the 2012 parliamentary elections. The controversy between the Constitutional Court and the new ruling majority, the "Georgian Dream," was catalyzed by the fact that several judges appointed by the previous ruling party still held office in the Constitutional Court and were inclined to render the judgment in favor of the leaders of "National Movement." In the context of those judgments, the "reform" of the Georgian Constitutional Court was put into the political agenda of the "Georgian Dream."

The formal and informal methods used to subdue the Constitutional Court have had a significant impact on its constitutional adjudication, which is demonstrated through stretching the time of proceedings where the political interest of the "Georgian Dream" are particularly concerned.

The purpose of this Chapter is to explore the mechanisms through which the current political leadership in Georgia attempts to subdue the Constitutional Court and demonstrate the

[130] The Constitution of Georgia, Article 60 (2).
[131] From 2004-2012 the leader of the "National Movement" was at the same time the President of Georgia. The same party held the constitutional majority in the Parliament. Besides, after the forced resignation of the supreme court justices, the Supreme Court was composed of the judges loyal to the political regime. *See for instance*, Georgian Journal, Strasbourg Brought Verdict Against Saakashvili's Regime, (2011), ¶5, [https://www.georgianjournal.ge/politics/5002-strasbourg-brought-verdict-against-saakashvilis-regime-.html, last visited: 05.06.2020]

impact of these tools on the proceedings of the Constitutional Court. To reveal the strategy of the Georgian Constitutional Court in response to the tools passed to subdue the GCC, the following Chapter offers the reader the position of the Constitutional Court on resolving some of the most critical issues in Georgian political context. Moreover, the Chapter also aims to identify an area where the Constitutional Court makes decisions with relatively greater autonomy in light of an attempt to retain the authority of a credible institution in society.

4.1.The Tools Passed to Subdue the Georgian Constitutional Court

The rift between the judges of the Constitutional Court appointed by the previous regime and the new ruling party was particularly strained in 2015 when the Constitutional Court ruled in favor of opposition leader Giorgi Ugulava.[132] During this period, there was only one member of the Constitutional Court appointed by the new regime who refused to sign the ruling on the *Ugulava* case.[133]

Following that judgement the reform of the Constitutional Court became part of the ruler's agenda.[134] The main target of these changes were the judges appointed by the previous regime. The particular interest of the political leadership was to limit the distribution of new cases to these judges before the expiry of their tenure.[135] Besides, to make those judges leave automatically after the expiry of their mandate without granting additional time for the completion of their ongoing cases.[136] The Venice Commission has raised several concerns

[132] Civil Georgia, Ugulava Released from Pretrial Detention, (2015), ¶1, [https://old.civil.ge/eng/article.php?id=29748, last visited: 23.03.2020]
[133] Civil Georgia, Delay in Verdict over Ugulava's Constitutional Complaint as Judge Refuses to Sign It, (2015), ¶ 1, 3, [https://civil.ge/archives/124885, last visited: 23.03.2020]
[134] Coalition for an Independent and Transparent Judiciary, The Parliament adopts legislative amendments on Constitutional Court, (2016), ¶1 [http://coalition.ge/index.php?article_id=71&clang=1, last visited: 23.03.2020]
[135] Venice Commission, Opinion on the Amendments to the Organic Law on the Constitutional Court, (2016), ¶22, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)017-e, last visited: 23.03.2020]
[136] *Ibid, ¶17-19.*

about these amendments, noting that the introduction of these changes could harm the efficiency of the institution.[137]

Legislative changes were soon followed by the appointment of two judges[138] affiliated with the "Georgian Dream" one of whom directly moved to the Constitutional Court from the post of First Vice-Speaker of the Georgian Parliament.[139] However, this was insufficient to subdue the full composition of the Court, as the two vacancies created later had to be filled by candidates nominated by the President. Because the relationship between the then-president and the "Georgian Dream" was already tensed,[140] the ruling party couldn't influence the President during the appointment of two judges with a relatively independent and impartial background.[141]

Consequently, a need to use a different approach to the judges appointed by the President and the flawed system of disciplinary proceedings came into action. Based on the publicly spread information, it became known that the critical dissent[142] co-authored by the judges appointed by the President resulted in the initiation of disciplinary proceedings against them.[143] Although no judge has been dismissed through disciplinary proceedings so far, the use of this

[137] *Ibid, ¶17-19.*
[138] Tabula, Parliamentary Majority Nominates Eva Gotsiridze as Candidate for Judge of Constitutional Court, (2017), ¶ 1,3, [https://www.tabula.ge/ge/story/127127-parlamentma-sakonstitucio-sasamartlos-mosamartled-eva-gociridze-airchia, last visited: 23.03.2020]
[139] TI Georgia, Nomination of Manana Kobakhidze as a Constitutional Court judge undermines the court's reputation, (2017), ¶3 [https://transparency.ge/en/post/general-announcement/nomination-manana-kobakhidze-constitutional-court-judge-undermines-court-s, last visited: 23.03.2020]
[140] Radio Liberty, Spat Over Who Speaks To UN Hints Of Looming Political Crisis In Georgia, (2014), ¶2, [https://www.rferl.org/a/georgia-garibashvili-margvelashvili-ivanishvili-political-crisis/26602307.html, last visited: 23.03.2020]
[141] Tabula, President Appoints New Judges to Constitutional Court, (2016), ¶2, [http://www.tabula.ge/en/story/111770-president-appoints-new-judges-to-constitutional-court, last visited: 23.03.2020]
[142] At this time, the Constitutional Court has not provided the details on disciplinary proceedings. However, we can assume that the initiation of the disciplinary actions is related to a dissenting opinion, which is discussed in the subsection on the constitutionality of law regulating the appointment of ordinary judges.
[143] IDFI, The Constitutional Court did not Disclose Information about the Judge's Disciplinary Proceedings, (2018), ¶9, [https://idfi.ge/en/constitutional_court_of_georgia_did_not_release_information_on_disciplinaty_regulations, last visited: 24.03.2020]

mechanism can be seen as a warning to both dissenting judges and the entire Constitutional Court to prevent further disobedience.

4.2. How does the Constitutional Court interprets the Timeframes set by Law?

According to the Constitution, the procedures for the constitutional proceedings are set by the "Organic Law on the Constitutional Court." [144] For this document, the provision of the legislation that sets the timeframe for constitutional proceedings is particularly noteworthy.

In particular, according to the "Organic Law on the Constitutional Court," the term for consideration of a constitutional complaint or constitutional referral should not exceed nine months.[145] However, the Constitutional Court considers that only a plenary hearing of the case is meant to be completed within nine months,[146] which gives judges an indefinite time to be spent in the deliberation room for reaching the final position.

Such an interpretation of the legislative provision by the Constitutional Court contributes to its strategy to stretch the time in consideration of disputes that concern the high political interest and gives the political leadership full freedom and time to resolve the disputed issues under the guise of the legislative and progressive reforms. It is also noteworthy that the ruling majority has never initiated the legislative amendment for defining more precise time frames for constitutional adjudication.

4.3. Constitutionality of Regulations on Appointment of Ordinary Judges

A major case where the Georgian Constitutional Court demonstrated its loyalty to the current regime through buying time concerned the appointment of ordinary judges. The current

[144] Constitution of Georgia, Article 60 (7).
[145] Organic Law on the Constitutional Court, Article 22 (1).
[146] IDFI, The Results on the Monitoring of the Constitutional Court, 2018, 13, [https://idfi.ge/public/upload/IDFI_Photos_2018/Rule_of_law/final_monitoring_results_of_the_constitutional_court_of_georgia_geo.pdf, 06.06.2020]

judicial system of Georgia has been the subject of severe criticism, both domestically[147] and internationally.[148] The practice of appointing judges is particularly problematic.[149]

As a result of the 2012 parliamentary elections, the new political leadership initially tried to advocate for the judicial reforms pursuant to the suggestions of the local NGOs[150] but based on resistance from an influential group of judges, the "Georgian Dream" was forced to settle the situation through informal communications.[151] Consequently, an influential group of judges gained the support of political leadership. One of the leaders of the ruling party explained this approach by saying that "Judges who used to do massively bad things before 2012 now do good things."[152]

Since 2012, loyalty to the interests of an influential group of judges has been a key criterion for the appointment of a judge by the High Council of Justice.[153] The High Council of Justice (hereafter Council) has repeatedly demonstrated unacceptance of former judges who publicly criticize the ongoing developments in the Judiciary through the refusal to appoint critically-minded former judges on the judicial post.[154]

Deciding on the appointments based on the secret ballot without any justification, allows the Council to promote favorable candidates for the judicial position and disqualify the

[147] Public Defender of Georgia, The Annual Report on the Situation of Human Rights and Freedoms in Georgia (2018), 78-79, [http://www.ombudsman.ge/eng/saparlamento-angarishebi, last visited: 24.03.2020]
[148] The U.S. Department of State, 2019 Country Reports on Human Rights Practices: Georgia, (2020), 12 [https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/, last visited: 24.03.2020]
[149] Coalition for an Independent and Transparent Judiciary, The Coalition evaluates the judicial selection competition, (2017), ¶3, [http://coalition.ge/index.php?article_id=127&clang=1, last visited: 24.03.2020]
[150] Coalition for an Independent and Transparent Judiciary, the Judicial System – Past Reforms and Future Perspectives, (2017), 12, [http://coalition.ge/index.php?article_id=150&clang=1, last visited: 24.03.2020]
[151] TI Georgia, Corruption Risks in Georgian Judiciary, (2018), 25 [https://www.transparency.ge/en/post/corruption-risks-georgian-judiciary, last visited: 24.03.2020]
[152] Liberali, Statement of the Speaker of the Parliament, (2019), ¶3, [http://liberali.ge/news/view/42977/adamianebi-romlebits-chadiodnen-tsud-raghatseebs-akhla-chadian-karg-raghatseebs--kobakhidze-sasamart, last visited: 24.03.2020]
[153] Coalition for an Independent and Transparent Judiciary, The Coalition is Starting "Make Courts Trustworthy" Campaign, (2018), ¶5, [http://coalition.ge/index.php?article_id=177&clang=1, last visited: 24.03.2020]
[154] *Ibid*, ¶5.

unwanted ones.[155] That is why the former judges acting as the Georgian citizens, who, according to the Georgian Constitution have a right to challenge the constitutionality of the legislation in relation to the rights and freedoms guaranteed by the Constitution,[156] have appealed against the law regulating the appointment of ordinary judges.[157]

While discussing this complaint in the Constitutional Court, the Parliament was deliberating on the amendments to the same organic law. The Constitutional Court waited for the new amendments to be enacted, and after that, as the content of the challenged norms had formally changed, rejected the claim.[158]

The decision is accompanied by the dissenting opinion of the three judges,[159] who explicitly indicate that the Court had deliberately delayed the proceeding of this case to wait before the entering into force of the amendments.[160] The dissenters highlight that stretching of the time by the Court in the present case made it possible for the legislator to amend the challenged provisions, that was subsequently used by the Court to reject the constitutional claim.[161]

The Court's inaction is particularly problematic since the amendments to the challenged provisions were tailored to the interests of the influential group of judges, allowing them to continue the vicious practice of appointing judges that is in line with the interest of the ruling majority.[162]

[155] Coalition for an Independent and Transparent Judiciary, Coalition is Challenging the Judicial Selection and Appointment Regulations at the Constitutional Court, (2016), ¶2, [http://coalition.ge/index.php?article_id=67&clang=1, last visited: 24.03.2020]
[156] Constitution of Georgia, Article 60, (4) (a).
[157] Supra note 155, ¶1.
[158] The Decision of the Georgian Constitutional Court, April 2017, Chapter III, ¶1, [https://www.constcourt.ge/ka/judicial-acts?legal=1049, last visited: 24.03.2020]
[159] One of the them was appointed before the previous regime and two of them were appointed under the Margvelashvili Presidency.
[160] *Supra note 158, ¶6.*
[161] *Ibid, Dissenting Opinion, ¶6.*
[162] Supra note, 153, §1,3.

4.4.Reform of the Georgian Electoral System

Another example of stretching time by the GCC is demonstrated in light of the constitutional complaint concerning the constitutionality of the Georgian electoral system.

According to the transitional provisions of the current Constitution, the Georgian parliament in 2020 parliamentary elections will be selected based on a mixed electoral system: 75 out of 150 deputies will be elected by proportional and the other half by the majoritarian elections.[163] The need to move to a fully proportional system for the upcoming elections has been repeatedly emphasized by local civil society.[164]

In June 2019, amid widespread public protests, the "Georgian Dream" publicly pledged the community to initiate constitutional changes with the transition to the fully proportional electoral system.[165] Discussion of the constitutional amendments, however, showed that the election of 75 MPs by the majoritarian system is a sensitive issue for political leadership. Accordingly, the parliamentary majority has scrapped a draft of constitutional amendments.[166]

This action resulted in international pressure for further dialogue.[167] Following numerous meetings, it was agreed that 120 MPs would be elected in the next parliamentary elections by a proportional and 30 by the majoritarian elections.[168]

[163] The Transitional Provisions of the 2018 Constitutional Amendments, Article 78, [https://matsne.gov.ge/ka/document/view/4110673?publication=0, last visited: 06.06.2020]

[164] ISFED, Holding the 2020 Parliamentary Elections under Proportional System is Commendable but Abolishing the Threshold Poses Risks, (2019), ¶1, [https://csogeorgia.org/en/newsPost/23320, last visited: 24.03.2020]

[165] Radio Liberty, Georgia Ruling Party Head Announces Electoral Reform After Protests, (2019), ¶1, [https://www.rferl.org/a/georgia-2020-parliament-vote-to-be-held-under-proportional-system----ruling-party-head/30016662.html, last visited: 24.03.2020]

[166] Agenda.ge, Ruling party proposed election bill scrapped, (2019), ¶1, [https://agenda.ge/en/news/2019/3073last visited: 24.03.2020]

[167] Emerging Europe, EU, US call for dialogue as protests in Georgia continue, (2019), ¶1, [https://emerging-europe.com/news/eu-us-call-for-dialogue-as-protests-in-georgia-continue/, last visited: 24.03.2020]

[168] US Embassy, Statement of the Political Dialogue Facilitators on Agreement, (2020), ¶2, [https://ge.usembassy.gov/statement-of-the-political-dialog-facilitators-on-agreement-march-8/, last visited: 24.03.2020]

The regulations for the election of half of the MPs by majoritarian election was appealed before the Constitutional Court already in May 2016 by constitutional lawyers.[169] According to the plaintiffs, the existing majoritarian system results in the loss of the votes of the remaining electorate. It deprives them of their right to elect their representatives in the Parliament of Georgia.[170] The plaintiffs point out that the majoritarian system includes the possibility of losing a certain number of votes, however, emphasize that the Parliament of Georgia is obliged to create an electoral system in which the votes are less lost.[171]

The resolution of this dispute in favor of the plaintiffs could work as a pushing force to correct the shortcomings of the majoritarian electoral system or for reaching the political consensus on its complete abolition. However, the complaint has been put on the shelves by the Constitutional Court for more than three years. The Constitutional Court could have ruled on the case and defused civil tensions and conflicts in the country, but the Court has chosen inertia in this case as well.

In the wake of constitutional amendments[172] initiated at this stage, which will bring subsequent changes to the disputed norms of the Electoral Code, the Constitutional Court's future decision on this case will lose relevance and will result in the rejection of the claim or the automatic termination of proceedings.

[169] The Complainants appealed the regulations of the electoral code, as it provides the detailed procedures on the conduction of elections, besides, the GCC does not have a mandate to examine the constitutionality of constitutional amendments. *See*, Constitutional Complaint No. 755, [https://www.constcourt.ge/ka/judicial-acts?legal=2077, last visited: 24.03.2020]
[170] *Ibid, ¶ 5.*
[171] *Ibid, ¶ 3.*
[172] Georgia Today, What Do the Amendments to the Georgian Election Code Imply? (2020), 1, [http://georgiatoday.ge/news/19884/What-Do-the-Amendments-to-the-Georgian-Election-Code-Imply%3F, last visited: 24.03.2020]

4.5.Imprisonment of the Oppositional Leader

Opposition politicians face restrictions on their liberties, including criminal prosecution in Georgia.[173] The inability of the Constitutional Court to constraint the methods used by the ruling majority against political opponents is particularly evident in the case of *Z. Kuprava*.

The criminal case of *Z. Kuprava* creates a particularly alarming precedent for the protection of freedom of expression. He is one of the leaders of the opposition political party and also the keynote speaker of numerous mass demonstrations in 2018-2019.[174] At one of the rallies, he was arrested by administrative order.[175] During the discussion of his administrative case,[176] he spent a one-hour break in the dining room of the Court building, where he mentioned the administrative judge in a derogatory manner before law enforcement officials.[177] His words about the judge, despite the judge's absence in the same space, served as the basis for the initiation of the prosecution and sentencing him to nine months imprisonment.[178] He was sentenced under Article 366 of the Criminal Code of Georgia,[179] which involves punishments for "contempt of Court."[180]

Being under custody, Kuprava filled the constitutional complaint before the Constitutional Court[181] and challenged the normative content of the aforementioned article of the Criminal Code, that in his case criminalized an act which was committed outside of the

[173] Transparency International Georgia, Justice System Against Opponents of the Government, ¶1-3, (2020), [https://transparency.ge/en/blog/justice-system-against-opponents-government, last visited: 06.06.2020]
[174] Statement of NGOs, Sentencing Zviad Kuprava to Imprisonment is Dangerous Precedents of Restricting Freedom of Expression, (2019), ¶4, [https://idfi.ge/en/imprisonment_of_zviad_kuprava_is_a_dangerous_precedent_of_limiting_freedom_of_expression, last visited: 24.03.2020]
[175] GDI, Freedom of Expression in Georgia, (2020), 24, [https://www.gdi.ge/uploads/other/1/1091.pdf, last visited: 24.03.2020]
[176] Within the administrative proceedings he was sentenced for 14 days administrative imprisonment.
[177] Supra note 175, 24-25.
[178] *Ibid, 25.*
[179] Article 366 of the Georgian Criminal Code criminalizes disrespect of the court, manifested thought the insulting of the participant of the proceedings.
[180] Supra note 175, 25.
[181] Constitutional Complaint No. 1394, [https://www.constcourt.ge/ka/judicial-acts?legal=1431, last visited: 24.03.2020]

court room, and which did not endanger the effective administration of justice and the normal course of the proceedings.[182]

The Constitutional Court registered the constitutional complaint in January 2019. However, the Court has not delivered the decision in the present case. Although publicly available legislation do not make it possible to conclude that Constitutional Court had to deliberate on this case in a priority manner since the plaintiff was in a detention facility, two issues must be considered: 1. The plaintiff filed a motion to suspend the application of challenged law before the Constitutional Court's final decision.[183] The satisfaction of the motion would delay the enforcement of Kuprava's sentence. However, GCC refused to satisfy it.[184] 2. If not for the interpretation of the time frame set by the legislation tailored to the time-stretching strategy, the final decision on the case would be rendered within nine months after the submission of the complaint. Besides, in the case of upholding the Complaint, the decision would be used as a ground for Kurpava's early release.[185]

The Constitutional Court's inaction is particularly problematic given that the person had been in prison for nine months, and he has already served his sentence.[186] Besides, such use of the above article of the Criminal Code and the failure of the Constitutional Court to safeguard the freedom of expression has a chilling effect on the people who are critical of the judicial system and the political leadership.

4.6. The Role of the Constitutional Court in Liberalization of Drug Policy

The GCC has been more courageous to find legislation unconstitutional on issues where the political leadership was internally divided. A drug policy focused on punishment is the

[182] Supra note 175, 25.
[183] Supra note 181, 27.
[184] The information was received through the communication with his lawyer.
[185] The Criminal Procedure Code of Georgia, Article 310 (d).
[186] Interpressnews, Zviad Kuprava is Released from the Prison, (2019), ¶1, [https://www.interpressnews.ge/ka/article/573955-zviad-kupravam-gldanis-8-sasjelagsrulebis-dacesebuleba-datova/, last visited: 24.03.2020]

legacy of the "National Movement." In 2015, the Constitutional Court in the previous composition ruled that the criminal sentence for "purchasing and possessing dry cannabis up to 70 grams" was unconstitutional.[187] Since 2016, despite the cascade of direct and indirect attacks of the regime and the renewed composition of judges, the Constitutional Court has managed to maintain some autonomy in light of the liberalization of drug policy.[188]

In parallel with the Constitutional Court's consideration of the cases mentioned above, civil society has been actively advocating the liberalization of criminal norms regulating drug crime through legislative amendments.[189] However, due to the internal disagreement within the "Georgian Dream" on this issue, the Parliament of Georgia failed to adopt the legislative amendments.[190] Accordingly, the liberalization of drug policy was rested on the Constitutional Court.[191]

At this stage, it is debated whether the Constitutional Court itself has acquired the status of a progressive decision-making body on drug policy. However, it is clear that the Constitutional Court is the main credible body for achieving drug policy liberalization for local activists and NGOs.[192]

However, the existence of trust towards the Constitutional Court in civil society is also conducive to political leadership itself and allows the "Georgian Dream" to boldly use the image credible Constitutional Court in front of the domestic actors and international community.

[187] EMC, Drug Policy in Georgia, (2019), 9, [https://emc.org.ge/uploads/products/pdf/Drugpolicy_-_ENG_1563267629.pdf last visited: 28.03.2020]
[188] *Ibid, 19.*
[189] *Ibid, 15.*
[190] *Ibid, 15.*
[191] *Ibid, 19.*
[192] *Ibid, 19.*

Conclusion

The analyse reveals that increasing political influence over the work of the Constitutional Court has been one of the priorities of the "Georgian Dream" in the recent past. The political leadership has achieved this aim through legislative attacks, the appointment of judges affiliated with the ruling political party, and the use of a system of disciplinary liability against disobedient judges.

The use of these mechanisms has significantly undermined the effectiveness of the Constitutional Court. Freedom of expression, independence of the judiciary, and the electoral system are the most pressing and hot topics in Georgia's political life. An analysis of the constitutional complaints filed on these issues and the Constitutional Court's inaction leads to the conclusion that the Constitutional Court is trying to maximize the timing of litigation and to avoid ruling on the gravest issues in Georgia's reality. This approach subsequently gives the rulers additional time to solve the most critical issues without the involvement of the Constitutional Court.

Nevertheless, the Georgian Constitution Court still seeks to preserve the image of a credible institution in the public eye, and it does so in cases on drug liberalization. However, the image of a credible institution can be beneficial to both the Court itself and the ruling majority.

5. Comparison of Strategies developed by the Russian, Kyrgyz and Georgian Constitutional Courts/Chamber

Constitutional Courts/Chamber in Russia, Kyrgyzstan, and Georgia operate under the pervasive influence of the political leadership as a result of informal and formal tools at the disposal of the rulers.

A close examination of recent judgments on politically sensitive issues provides insight that in the relevant jurisdictions, the rulers imposed particular roles on the Constitutional Courts/ Chamber to serve their interests, and pressured the development of its jurisprudence accordingly.

The recent decisions of the Russian Constitutional Court (hereafter RCC) have revealed that under the "pragmatic" approach, the RCC is ready to put the ruler's political objectives above the text of the Constitution. Particularly, RCC is pressured to take the political responsibility to initiate or rubberstamp the controversial legislative amendments and, at the same time, is ready to increase the legitimacy of the highly controversial constitutional reform while having no power to participate in this process. At the same time, the analysis also revealed that the Russian Constitutional Court regularly makes quite progressive decisions regarding individual rights complaints, which helped the RCC create the image of credible institutions before society. The credibility gained from individual rights cases also benefits the Ruler.

The recent decisions of the Kyrgyz Constitutional Chamber suggest that it is actively pursuing the interests of the political leadership and is able to do so through constitutional interpretations tailored to the interests of the regime. Unlike Russia, so far, the Kyrgyz Constitutional Chamber has not been pressured to resolve the issues in favor of the rulers that are not formally within its competence. However, the analysis shows that the regime can take advantage of the Chamber's performance to increase the legitimacy of the disputed legislative

reforms, including the revision of the Constitution. Also, based on the decisions concerning the immunity of ex-presidents and the operation of the biometric database, the Chamber's performance can be actively used to remove political opponents from the political arena and influence election results. Unlike in Russia, the Kyrgyz Constitutional Chamber has not been able to find a legal area in which the Chamber would be more autonomous. Thus, at this stage, it loses or already lost all the credibility in society's eyes. But the Russian and Georgian experience can become a motivator even for rulers to support the finding of this space and use the gained credibility beneficial to the regime.

The Georgian Constitutional Court (hereafter GCC) avoids deciding cases of high political interest through stretching time. The delay enables the political leadership to resolve issues disputed before the GCC under the guise of democratic reforms. Compared to the Constitutional Court/Chamber of Russia and Kyrgyzstan, the GCC plays a passive role in the advancing of the ruler's objectives. Still, it cannot restrain the intentions of the regime.

Georgia's foreign affairs can explain the difference between the Georgian approach compared to the respective jurisdictions. In particular, Georgia's publicly stated goal is the integration into the European Union,[193] while the United States is deemed as Georgia's closest strategic partner.[194] Thus, Georgia is subject to particular international scrutiny. The independence of the judiciary and of the Constitutional Court is one of the priorities of the EU-funded projects.[195] Thus, the appearance of a credible institution obtained through the progressive decisions on the liberalization of the drug crimes may be used by the GCC itself

[193] Parliament of Georgia, Statement of the Speaker, (2018), ¶1 [https://bit.ly/2XGWHl8last visited: 28.05.2020]

[194] US Embassy in Georgia, U.S. Georgia Charter on Strategic Partnership, ¶1, [https://ge.usembassy.gov/our-relationship/policy-history/u-s-georgia-charter-strategic-partnership/ last visited: 28.05.2020]

[195] EU Assistance, Georgia: Support for the Independence, Accountability and Efficiency of the Judiciary in Georgia, (2018), ¶1, [https://www.irz.de/en/projects/62-georgien-eu-projekte/1145-ukraine-support-for-the-independence-accountability-and-efficiency-of-the-judiciary-in-georgia last visited: 28.05.2020]

and rulers to demonstrate the independence of that institution before domestic actors and international partners.

The dependence on the assessment of international partners is less typical of Russia, as it sets its own rules in the international community. Russia itself is deemed as Kyrgyzstan's most influential strategic partner.[196] Since Kyrgyzstan already demonstrated within the 2016 constitutional reform, the intention to replicate the Russian experience, the attempt of rulers to use the Constitutional Chamber's performance as Russia does in the nearest future will not be surprising.

In contrast, the radical change in the *status quo* of the Georgian Constitutional Court, given the goal of European integration, is less likely to be expected shortly. Nevertheless, the GCC's future strategy will largely depend on who will occupy the position of chairman of the Constitutional Court from the summer of 2020.[197] As the Russian experience has demonstrated that the personality of the President (Chief Justice) of the Constitutional Court is of great importance in the development of informal agreements and negotiations between the Constitutional Court and the political leadership.

[196] R. Zverev, I. Savin, The Relationship between Russia and Kyrgyzstan, (2018), 106, [https://www.imemo.ru/files/File/magazines/rossia_i_novay/2018_01/Zverev_106-125.pdf last visited: 29.05.2020]

[197] The term of the current chairman expires on June 15, 2020.

Conclusion

Constitutional Courts/Chamber in Russia, Kyrgyzstan, and Georgia operate under the pervasive influence of political leadership as a result of informal and formal tools at the disposal of the rulers.

A close examination of recent judgments on politically sensitive issues provides insight that in the relevant jurisdictions, the rulers imposed particular roles on the Constitutional Courts/Chamber to serve their interests, and pressured the development of its jurisprudence accordingly.

The recent decisions of the Russian Constitutional Court (hereafter RCC) have revealed that under the "pragmatic" approach, the RCC is ready to put Putin's political objectives above the text of the Constitution. At the same time, the RCC regularly makes quite progressive decisions regarding individual rights complaints, which helped the RCC create the image of credible institutions before society. The credibility gained from individual rights cases also benefits the Ruler.

The recent judgments of the Kyrgyz Constitutional Chamber suggest that it is actively pursuing the interests of the political leadership and is able to do so through constitutional interpretations tailored to the interests of the regime. Unlike Russia, so far, the Kyrgyz Constitutional Chamber has not been pressured to resolve such issues in favor of the rulers that are not formally within its competence. Besides, the Kyrgyz Constitutional Chamber has not been able to find a legal area in which the Chamber would be more autonomous. Since Kyrgyzstan already demonstrated within the 2016 constitutional reform the intention to replicate the Russian experience of switching the Prime Minister and President, the attempt of rulers to use the Constitutional Chamber's performance as Russia does in the nearest future will not be surprising.

Unlike Russia and Kyrgyzstan, the Georgian Constitutional Court (hereafter GCC) avoids deciding cases of high political interest through stretching time. The delay enables the rulers to resolve issues disputed before the GCC under the guise of democratic reforms.

Compared to the Constitutional Court/Chamber of Russia and Kyrgyzstan, the GCC plays a passive role in the advancing of the ruler's objectives. Still, it cannot restrain the intentions of the regime. Similar to Russia, GCC found a legal area where it was enabled to render comparably progressive decisions. The credibility obtained through these judgments may be used by the CC itself and rulers to demonstrate the independence of that institution before domestic actors and international partners.

The radical change in the *status quo* of the Georgian Constitutional Court, given the goal of European integration, is less likely to be expected shortly. Nevertheless, the GCC's future strategy will largely depend on who will occupy the position of chairman of the Constitutional Court from the summer of 2020.

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