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CONSTITUTION WITHOUT CONSTITUTIONALISM? CHALLENGES TO CONSTITUTIONALISM IN THE KYRGYZ REPUBLIC

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Abstract

Application of basic principles revolving around the constitutionalism into third wave democracies, produced such phenomenon as constitutions “without constitutionalism”. This paper will revisit and discuss this issue in the context of the Kyrgyz Republic. Main argument and thesis of the paper is following: Where a viable balance of power exists, a constitutional court acquires importance as a key element of that order, thus promoting the constitutionalism. If no such balance exists, the constitutional court will soon become a tool of the more dominant powers and thus lose its relevance for a genuine constitutional order. The abovementioned thesis will be demonstrated by the example of the work of Constitutional Court of the Kyrgyz Republic. Mainly it first aims at providing a proper foundation and basic understanding of constitutionalism, further revisiting this concept in the context of Former Soviet Union and finally will discuss the development of constitutionalism in Kyrgyzstan along with challenges faced by the court.

Keywords: Constitutional Court, Constitutional Review, Constitutionalism, Kyrgyzstan, Separation of Powers.

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I. THEORETICAL BACKGROUND: THE NOTION OF CONSTITUTIONAL REVIEW AND CONSTITUTIONALISM

The scholarship of comparative constitutional law has experienced a vibrant growth over the past decade,¹ especially the issues revolving around the constitutional review and the role of courts in maintaining and consolidating the process of democratization.² 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.”³ The review of the current contemporary scholarship reveals emerging trends in the field of comparative constitutional law that is evolving both thematically and geographically. Substantial boom in literature is being observed outside of the western world from Latin America to Africa⁴ and from Former Soviet Union⁵ to Asia.⁶ These regions are also being consumed by emerging trends in comparative constitutional law as abusive constitutionalism,⁷ sham constitutions, constitutions without constitutionalism,⁸ failing constitutionalism.⁹

The global trend towards “juristocracy”¹⁰ has greatly complemented to a new convergence of the overall role and functions of constitutional courts. The

¹ 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).

² Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013).

³ Martin Shapiro, “Courts in Authoritarian Regimes” in Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008), 326.

⁴ Douglas Greenberg Vice President et al., *Constitutionalism and Democracy: Transitions in the Contemporary World: Transitions in the Contemporary World* (USA: Oxford University Press, 1993).

⁵ 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).

⁶ Jiunn-rong Yeh, *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).

⁷ David Landau, “Abusive Constitutionalism,” *UCDL Rev.* 47 (2013): 189.

⁸ H. W. O. Okoth-Ogendo, “Constitutions without Constitutionalism: An African Political Paradox,” in *Constitutionalism and Democracy: Transitions in The Contemporary World*, ed. Douglas Greenberg, S. N. Kartz, B. Oliviero and S. C. Wheatley (1993), 65- 80.

⁹ Armen Mazmanyan, “Failing Constitutionalism: From Political Legalism to Defective Empowerment,” *Global Constitutionalism* 1, no. 02 (July 2012): 313–33.

¹⁰ Ran Hirschl, *Towards juristocracy: The Origins and Consequences of the New Constitutionalism*, (Harvard University Press, 2004). 3.

mere understanding of basic phenomenon of constitutional courts is now being deeply rooted in the notion of constitutionalism. As Ran Hirschl emphasized “sweeping worldwide convergence to constitutionalism ... entails far more than a mere adherence to majority rule”.¹¹ Due to shifting nature of constitutionalism, 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”.¹² 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 Sajó “constitutionalism is closely linked to traditional nineteenth century liberalism, which always escaped textbook definitions and resisted positive description”.¹³ However, existing scholarly literature in the field of constitutionalism share common traits that constitutionalism is a set of principles, ideals and values revolving around the organizational structure of government.¹⁴ Reviewing the works of scholars as Andras Sajó, Giovanni Sartori, Michel Rosenfeld and Louis Henkin one can blueprint such principles of limited nature of government, respect for individual rights and rule of law as core values associated with constitutionalism.¹⁵ One may ask what the limited government means. The primary understanding of limited government lays on written nature of constitution. As Chief Justice Marshall emphasized in *Marbury vs. Madison*, the entire purpose of writing the US constitution was to limit the government, not to empower it.¹⁶ Existing scholarly literature in deliberative democracy highlights basic role of judicial review as a complementary tool in

¹¹ *Ibid.*, 2.

¹² *Ibid.*, 2.

¹³ Andras Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999). 9-13.

¹⁴ Cass R. Sunstein, “Constitutionalism after the new deal,” *Harvard Law Review* 101, no. 2 (December 1987): 421-423; Bruce Akerman, “The Rise of World Constitutionalism,” *Virginia Law Review* 83, no. 4 (1997): 788-791.

¹⁵ Andras Sajó, *Limiting Government*, 9-13; Giovanni Sartori, “Constitutionalism: A Preliminary Discussion,” *American Political Science Review* 56: 853-859; Michel Rosenfeld, *Constitutionalism, identity, difference and legitimacy: theoretical perspective* (Duke University Press, 1994), 5-10; Louis Henkin, “A New Birth of Constitutionalism: Genetic Influence and Genetic Defects” in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspective*, ed. Michel Rosenfeld, 40-42.

¹⁶ *Marbury V. Madison*, 5 U.S. 137 (1803), 177.

ensuring the limited nature of government.¹⁷ Application of basic principles revolving around the constitutionalism into third wave democracies, namely African/Asian and Former Soviet Union countries produces an interesting paradox. Namely, range of constitutions “without constitutionalism”¹⁸ and “sham constitutions”.¹⁹ As Mazmanyán highlighted the constitutionalism in former Soviet Union States “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.”²⁰

II. DISCUSSION

2.1 Hardships Faced by FSU Courts: from Shut Down to Major Institutional Reconfiguration

At the end of the twentieth century, along with precipitous collapse of communist regimes across the East and Central Europe, culminating in the disappearance of the Soviet Union itself in 1991, the broad transformational trend toward democratization included dutiful processes of constitution-making and, as part of it, establishment of constitutional courts. These newly emerging democracies became active producers of constitutional courts²¹ and late 1980's turned into the period of “the great constitutional borrowings.”²²

¹⁷ Hans Kelsen, “Pure Theory of Law” German edition by Max Knight Published. Gloucester, Mass. ; Peter Smith, 1967, 1989; Michel Rosenfeld, “The Rule of Law and the Legitimacy of Constitutional Democracy,” *Southern California Law Review*: 1307-1351; Nino, Carlos Santiago, *The Constitution of Deliberative Democracy* (Yale University Press, 1996); Chapter VII: Judicial Review in a Deliberative Democracy, 187-216; John Hart Ely, *Democracy and distrust* (1980), 73-104; Alexander Bickel, *The Least Dangerous Branch* (1986), 1-29; Aharon Barak “The Judge in a Democracy” part 1 the Role of the Judge 1- 88.

¹⁸ H. W. O. Okoth-Ogendo, “Constitutions without Constitutionalism”.

¹⁹ David S. Law, Mila Versteeg, “Sham Constitutions,” *101 California Law Review* (2013): 865-911, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=4207&context=californialawreview>.

²⁰ Armen Mazmanyán, “Failing Constitutionalism: from Political Legalism to Defective Empowerment,” *Global Constitutionalism* (2012): 313-333. <https://doi.org/10.1017/S2045381711000128>.

²¹ Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2005), 3; Radoslav Prochazka, *Mission Accomplished on Founding Constitutional Adjudication in Central Europe* (Budapest: Central European University Press, 2002), 16; 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,” *University of Pennsylvania Law Review* 154: 1757-2006; Wojciech Sadurski, “Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective,” *Kluwer Law International*, (2002).

²² Wiktor Osiatynski, “Paradoxes of Constitutional Borrowings” *International Journal of Constitutional Law* (2003): 244-268; Vlad Perju, “Constitutional transplants, borrowing and migrations” in *Oxford Handbook of comparative constitutional law*, ed. Michel Rosenfeld and Andras Sajó (Oxford University Press, 2012), 1304-1327; Vicki C. Jackson, “Comparative constitutional law: methodologies” in *Oxford Handbook of comparative constitutional law*, ed. Michel Rosenfeld and Andras Sajó (Oxford University Press, 2012), 54-74.

After the collapse of the Soviet Union majority of states were functioning through introducing amendments to previous Soviet Constitutions. It generally took from 2 up to 4 years for different states to establish constitutional courts. However, by the time of the establishment and in the process of negotiations the courts were already disciplined through reforms and major court shut downs.

This could be illustrated in the example of Russian Constitutional Court, since this particular state was the first signal upon what the entire region followed a certain constitutional pattern- namely the wave of constitutional court suspensions.²³ By the time of the final adoption of the constitution President Yeltsin was able to firmly concentrate power and furthermore to make sure that the most sympathetic draft would go into the referendum.²⁴ The constitution drafting of the first Constitution of RF was a back and force rival between president and parliament. The question about legitimacy of the court was not discussed whatsoever. However, after the popular support in referendum Eltsin gained confidence and called for a Constitutional Assembly to draft a new constitution. The draft constitution that the assembly was working was based on presidential draft however yet incorporated many elements of parliamentary draft as well.²⁵ But the Supreme Soviet refused to ratify it, because “accepting the documents that resulted from a presidential initiative was, therefore, tantamount to a surrender.”²⁶ President Eltsin issued an edict suspending the work of the legislature and existing RSFSR constitution. Supreme Soviet and Constitutional Chamber had emergency meeting both of them condemned the actions of president however both the media and army was controlled by president. He used his authority blockaded the white house and arrested certain members of the Supreme Soviet. As a result of it the constitutional court was suspended.²⁷ Referendum was called and the constitution was adopted in December 1993.

²³ Armen Mazmanyan, “Failing Constitutionalism: From Political Legalism to Defective Empowerment,” *Global Constitutionalism* 1, no. 02 (July 2012): 316.

²⁴ Jane Henderson, *The Constitution of the Russian Federation: A Contextual Analysis* (Bloomsbury Publishing, 2011), 67.

²⁵ *Ibid.*, 69.

²⁶ *Ibid.*, 76.

²⁷ *Ibid.*, 86.

According to Sadurski, Constitutional Courts of Central Asian countries along with other Former Soviet Union states attempted to acquire their legitimacy on dealing with separation of powers disputes rather than fundamental rights. Most of the Courts were strongly empowered by the constitutional arrangements to settle disputes instead of dealing with rights.²⁸ Other scholars as Mazmanyán describe the period of early constitution drafting “the pattern of constitutional romanticism”.²⁹ However, this period did not last long, romanticism ended after number of activist attempts taken by constitutional courts to deal with separation of powers issues. It started first in Russia in 1993 when President Yeltsin suspended the Constitutional Court in response to its decision, which was evidently against the will of the President. The wave of suspensions continued in Kazakhstan (1995) where President Nazarbaev substituted the Constitutional Court with new institutional named Constitutional Council that up to this date remains loyal agent of President.³⁰ It was also a response to the Courts decision on SOP, which was decided against the will of the President. Finally, Belarusian Constitutional Court in 1996 has also suffered the end of “constitutional romanticism” when President Lukashenko forced the resignation of Constitutional Court Judges and replacement of them by judges who remain loyal to Lukashenko up to this date as well. Starting as a signal from Russia this wave of suspension captured almost entire FSU region either directly or indirectly.³¹ Some states were directly influenced by it and followed the pattern of Russia by packing courts (Belarus); others were indirectly influenced by introducing constitutional amendments (Kazakhstan). In other states courts managed to survive however losing their legitimacy and becoming disciplined agents of the incumbent (Tajikistan, Uzbekistan, Azerbaijan).

What is even more paradoxical is that the courts in this region is being empowered more and more. Alexei Trochev in his book "Judging Russia" presents

²⁸ Wojciech Sadurski, *Rights before courts*.

²⁹ Armen Mazmanyán, "Failing Constitutionalism: From Political Legalism to Defective Empowerment," *Global Constitutionalism* 1, no. 02 (July 2012) p. 316.

³⁰ D. Nurumov & V. Vashcankha, *Constitutional Development of Independent Kazakhstan in R. Elgie, S. Moestrup, Semi-Presidentialism in the Caucasus and Central Asia* (2016).

³¹ Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago London : The University of Chicago Press, 2000).

an interesting observation on evolving nature of the constitutional review power in Russian Federation. His major concern is why the power of Russian Constitutional Court strengthens while the “Russian democracy weakens”.³² His comprehensive research suggests that it has been done on purpose, namely the empowerment of the judiciary in Russia was not based on good will of the politicians, rather it was a product of their hidden motives driven by their own self-interest and self-ambitions. Analysis of the case law of RCC made by Trochev from 1990–2006 revealed the fact that the expansion of constitutional review in Russia allowed the executive branch to expand their own power over the legislative.³³

Despite this massive process of constitutional courts suspensions, there were very few countries that somehow managed to survive this wave of suspensions and overall the influence of “post constitutional romanticism”. Among those states are Kyrgyzstan and Ukraine. To certain extent Armenia and Georgia can be included to this list as well. This was due to the fragmented nature of politics and due to political uncertainty. Existing in such conditions the courts of Ukraine and Kyrgyzstan became more of strategic courts. Furthermore, this exceptional cases demonstrate more or less smooth and objective application of insurance theory in the region. This was due to the fragmented nature of the politics which again traces us back to the main hypothesis under the insurance theory.

2.2. Kyrgyz Constitutional Court and Constant Change of Roles: From Loyal Agent of the President to the Agent of Neutrality

First democratic constitution of the Kyrgyz Republic established Constitutional Court following the German model of centralized/concentrated system of judicial review. Unlike current Constitutional Chamber the Court had power to conclude on constitutionality of election results, which gave a great opportunity for former President Akaev to use this power of the court for his own sake. From the early decisions of this institute one was able to see Court’s constant expansion of the powers of the President.

³² Alexei Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press, 2008).

³³ *Ibid.*

The constitution of the Kyrgyz Republic has been revised 8 times in the last 25 years. Then-President Akayev, between the years of 1994 and 2003, with the help of the referendum, introduced four of these eight amendments. Below is a brief description of these amendments:

- The Constitution of Independent Kyrgyzstan was adopted in 1993³⁴.
- In October 1994, as the result of a referendum, the “Jogorku Kenesh” Parliament of the Kyrgyz Republic was divided into two chambers.
- In February 1996, President Akayev called for another referendum, which resulted in a substantial increase of presidential powers under the new text of the Constitution. If the core of the 1993 Constitution was the principle of separation of powers, it was shifted to the principle of “supremacy of people”, which according to the 1996 revisions, was expressed and guaranteed by the President.
- In October 1998, another referendum took place in the Kyrgyz Republic that introduced private property rights over lands for the citizens of the Kyrgyz Republic and recalculated deputy seats in both chambers of parliament. Finally, new revisions of the constitution took away the inviolability of MPs of the parliament that were guaranteed by the previous constitution.
- The February 2003 referendum, among other things, reintroduced a one-chamber (single house) Parliament and lowered the number of Members of Parliament (MPs) from 105 to 75. Higher arbitration court was merged with the Supreme Court.
- 2006: under the pressure of the opposition the compromised constitution was adopted between Bakiev and the opposition that have decreased Presidential powers that were highly extended by Akaev.
- 2007 Bakiev used the referendum to amend the constitution that pretty much brought back the 2003 version of it.
- 2010: New text of the Constitution was adopted as a result of the April 2010 uprisings which introduced the premier-presidential form of governance.

³⁴ Konstitucia Kyrgyzskoi Respubliki [Constitution of the Republic of Kyrgyzstan], May 5, 1993, adopted by the Supreme Soviet of the Kyrgyz Republic.

- 2016: Number of amendments were introduced to the 2010 text of the constitution. The most important ones are revocation of citizenship and change of the status of international treaties on human rights.

This chronology of events reflect how a constitution, the supreme law of the land, can be used by the political branches of government as a tool for their own self-empowerment and ambitions. However, this research does not aim at reflecting all those revisions and amendments. Rather, it targets recent constitutional reforms and its influence on the current conditions and future development of constitutionalism in the Kyrgyz Republic.

One of the controversial decision of the Court was the advisory opinion³⁵ on the new draft of the text of the Constitution developed based on 1994 referendum. As a result of the referendum Parliament was divided into two chambers with substantially low number of MPs instead of one house parliament as it used to be before. This strategy and constitutional move enabled President Akaev to diffuse the power of the parliament, thus making it more adoptable to presidential control. Further political developments in Kyrgyzstan reflected this specific hypothesis, namely Akaev was able to adapt Parliament to presidential control. Constitutional Court found the draft of the text in accordance with the constitution and moreover stated that such redistribution of power within the parliament ensures the protection of the constitution and the system of separation of powers.

Another heatedly debated decision of the court was on presidential elections. On July 13, 1998 constitutional court of the KR allowed³⁶ President Akaev to be re-elected for 3rd term claiming that his first presidential term (1991-1995) does not count due to the fact Kyrgyzstan had not yet adopted the constitution of the independent state back then. This decision allowed Akaev to run for another presidential term, which technically was his 3rd one, thus

³⁵ Reshenie Konstitucionnogo Suda Kyrgyzskoi Respubliki po projektu zakona KR o vnesenii izmeneniy v konstitucii KR [Decision of the Constitutional Court of the KR on draft law on introducing admentment to the Constitution], November 9, 1995.

³⁶ 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.

enabling him to overcome the constitutional limitations proscribed by Article 43 of 1993 Constitution.

Thus, in the face of political stability and certainty constitutional court chose the path which led to being a loyal agent of the president. For over 10 years President Akaev has been empowering the constitutional court for the purposes of expanding his own powers.

The uprisings of 2005 and so called “tulip revolution”, as a result of which President Akaev had to flee Kyrgyzstan, completely changed political situation. Newly elected President Bakiev had been constantly confronted by a strong opposition and he did not have a strong influence over Parliament as Akaev used to have. Various political actors have been trying to push through the new draft of the Constitution including President Bakiev. In 2006, Parliament by majority vote introduced changes to the Constitution by substantially increasing its own power. By unanimous decision Constitutional Court annulled the reforms introduced by Parliament until the new Constitution will be adopted by a way of referendum.³⁷

Another decision of the Kyrgyz CC that has been reached shortly after the previous one during the politically fragmented and uncertain times also greatly contributes to the main hypothesis. The same year after the new constitution was adopted by a mean of referendum first party-based parliamentary elections took place. As a result of the elections pro-Bakiev political party gained the majority vote. By the decision of the Central Election Commission opposition party was excluded from gaining seats in the Parliament. This was done by strict application of 5% threshold. However, constitutional court overruled the decision of the Commission and one of the strongest opposition parties were allowed to gain seats in the parliament.³⁸ This case is also a demonstration of Court’s neutrality and overall willingness to reach pro-democratic decision when political situation in State is not stable and uncertain.

³⁷ Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 14 sentyabrya 2007 goda [The Decision of the Constitutional Court of the Kyrgyz Republic] Sep. 14, 2007.

³⁸ Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 2008 goda [The Decision of the Constitutional Court of the Kyrgyz Republic], 2008.

However, this attitude of the court for being neutral and pro-democratic did not last long. Within the period of 2007-2009 President Bakiev have managed to gain a substantial control over the political situation in Kyrgyzstan. This accordingly led the Court to become a loyal agent of the President again in second time.

In 2009, Constitutional Court of the KR upheld the constitutionality of the reform presented by Bakiev.³⁹ The constitutional reform granted some Presidential Council that never existed before, the right to determine who will perform the duties of the President if he/she for some reason, early resigns. In this case, the decision will be taken by a majority vote of all the participants of the Council. This gesture taken by the President can be easily tied to his attempts to prepare his son Maksim Bakiev to become his successor.

Accordingly, one can see the constant shift of the roles of the court from being a loyal agent of the president to more neutral and independent decision-maker. The primary reason behind this shift lies on constant change of regime and uprisings that took place in Kyrgyzstan. In response to Bakiev's abuse of power, Kyrgyzstan experienced another *coup d'etat* in 2010 which brought tremendous changes both to our Constitution and overall institutional framework.

The constitutional reform of 2010 produced a new constitution for the Kyrgyz Republic with substantial revisions in terms of the system of separation of powers and checks and balances.⁴⁰ From a relatively strong and concentrated presidential system of governance, the Kyrgyz Republic began a premier-presidential hybrid system of government. Accordingly, this section will explore those major changes under the 2010 Constitution, including the power of the Constitutional Chamber to maintain or improve balance of power between the political branches while strengthening constitutional stability.

One of the key differences between the 2010 Constitution and all other previous versions is in the introduction of "parliamentarism". This will be the

³⁹ 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.

⁴⁰ Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 27 June 2010.

underlining basis for overview of the current constitution. In the classical parliamentary system, the president is elected not by people but by parliament. The current Constitution of the KR preserved both an elected President and Parliament. However, the powers of president have been reduced, but not eliminated. Due to the fact that this is a new constitutional design for Kyrgyzstan, and due to the collegial nature of the parliament and lack of strongly established political parties, this was a good solution to counter-balance Parliament with elected President.

The unlikely governmental toppling, the ‘second revolution’ of April 2010, materializing to the surprise of the by-then very confident regime of Bakiyev, resulted in a severe political vacuum. Overnight, there was no president, no prime minister and cabinet, no parliament, and soon enough, not even the constitutional court. As the legitimating instrument of Bakiyev’s rule, even the constitution could not be held up as any basis of authority. But even more than the collapse of nearly the entire institutional system of government, it was the relatively level field of victorious revolutionaries, about a dozen politicians, that provided for the atmosphere of indeterminacy and anarchy at the time. Taught by the bitter lesson of post-March 2005 developments, when the granting of authority to one person soon resulted in complete dominance of that person, the key political leaders in 2010 resisted any such authorization of one of them. The resulting Provisional Government⁴¹ was a group of fourteen seasoned politicians, each with supreme ambitions, each commanding significant financial and political support of their own, each with a team of power-and reward-hungry functionaries and clients behind them. If Kyrgyzstan had ever been looking for a balance of powers, that fortuitous period was its best situation of balance. What that balance lacked, obviously, was any legitimate and legal basis of power, except the unconvincing rhetoric about popular revolutionary mandate and the even less convincing “dressing” of all decisions by decrees. Due to the fact that this is a new constitutional design for Kyrgyzstan, due to collegial nature of the

⁴¹ Dekret Vremennogo Pravitel'stva Kyrgyzskoi Respubliki [The Decree of the Interim Government of the Kyrgyz Republic] Apr.7, 2007, No. 1.

parliament and lack of strongly established political parties, this was a good solution to counter-balance Parliament with elected President.

As a result of 2010 events Constitutional Court of the KR was dismissed and replaced by a Constitutional Chamber of the Supreme Court, which started functioning since 2013. One of the key differences of 2010 constitution with all other previous texts of the constitution is in the introduction of “parliamentarism”. This will be the underlining basis for overview of the current constitution. Usually in classical parliamentary system president is elected not by people but by parliament. Current Constitution of the KR reserved both elected President and Parliament. However, the powers of president have been gradually reduced yet not diminished them completely. The Constitutional Chamber of the Supreme Court is a special institution empowered to exercise constitutional review following a centralized model. Primary sources regulating the activities of the Chamber is the Constitution and Constitutional law on Constitutional Chamber and Constitutional law on status of Judges.⁴² The abovementioned legal framework empowers the Chamber to exercise both *a priori* (in concluding the constitutionality of international treaties not entered into force for Kyrgyzstan and concluding the constitutionality of amendments to current constitution) and *ex post factum* review (review the constitutionality of normative legal acts) along with the abstract review. Thus, the Chamber is a hybrid of the German and French models of constitutional review. In comparison to previous Kyrgyz Constitutions, such as the Constitution of 2007, the powers of the Chamber have been limited in terms of its involvement into political arena, namely, the Chamber can no longer review the election results. The Constitutional Chamber started its work very promisingly however it did not last long.

The Chamber’s decision regarding the mandate of the Prosecutor General’s office gave rise to criticism that was indicative.⁴³ Influential deputies of the

⁴² Konstitucionnuy 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. Konstitucionnuy zakon Kyrgyzskoj Respubliki o statute sudej Kyrgyzskoj Respubliki [Constitutional Law on the Status of Judges in the Kyrgyz Republic] July 9, 2008, No. 141.

⁴³ Reshenie Konstitusionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitusionnosti stat’l 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.

parliament as well as representatives of the presidential office—and the president himself at a later point—greeted the decision with disapproving surprise, public denunciations of the court and its judges, and eventually even with proposals to cut down the eleven-judge court to nine (that is, to forego filling the two vacant seats, thereby opening a precedent for later modifications of the Constitutional Chamber’s legal foundations). The fact that the court issued a reconciliatory follow-up explanation of its decision, where it said that the decision had no retroactive effect and all business conducted differently from the decision till now would remain valid, was a worrisome symptom.

Furthermore, there were number of further decisions of constitutional chamber that could greatly demonstrate severe challenges to the establishment of constitutionalism in Kyrgyzstan. However, there were worrisome signs that changes might be coming, including unequivocal speeches of President Atambayev to that extent and later the actual referendum of 2016 took place with all possible procedural and substantive violations of the norms of the constitution and the legislation on referendum, the regulation of the Parliament and other laws. However, the scenario might have been different if Constitutional Chamber continued to issue persuasive, even if not always favorable, decisions that reaffirmed the spirit of the balanced framework, there might be some robust achievements to boast. However, at certain point, particularly after the Judgment on Biometric registration⁴⁴ when President showed certain pressure on the Chamber, they have become too cautious and self-restraint. Thus, just like for other presidents (Akaev and Bakiev) it was now easier for Atambaev to make the constitutional referendum and pass the amendments and also receive the support of the Constitutional Chamber.⁴⁵

Primary challenges for Kyrgyzstan for constitutional implementation predominantly were the failure to establish the state based on Constitutionalism.

⁴⁴ 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.

⁴⁵ Zakon Kyrgyzskoi Respubliki o naznachenii referendumu 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.

Thus, producing a “constitution without constitutionalism”. This further led to the 2016 constitutional amendments and substantial weakening of the work of the Constitutional Chamber and furthermore the weakening of the viable balance of power.

III. CONCLUSION

Application of basic principles revolving around the constitutionalism into third wave democracies, produced such phenomenon as constitutions “without constitutionalism”. This paper revisited and discussed this issue in the context of the Kyrgyz Republic. Main argument and thesis of the paper was following: Where a viable balance of power exists, a constitutional court acquires importance as a key element of that order, thus promoting the constitutionalism. If no such balance exists, the constitutional court will soon become a tool of the more dominant powers and thus lose its relevance for a genuine constitutional order. The abovementioned thesis was demonstrated by the example of the Kyrgyz Republic. It first provided a proper foundation and basic understanding of constitutionalism, further revisited this concept in the context of Former Soviet Union and finally discussed the development of constitutionalism in Kyrgyzstan along with challenges faced by the constitutional review mechanism.

Thus, primary challenges for Kyrgyzstan for constitutional implementation predominantly were the failure to establish the state based on Constitutionalism. Thus, producing a “constitution without constitutionalism”. This further led to the 2016 constitutional amendments and substantial weakening of the work of the Constitutional Chamber and furthermore the weakening of the viable balance of power.

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