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## *Post-Soviet Political and Legal Transformations: Institutional Design of Constitutional Justice in the Commonwealth of Independent States (CIS)*

Transformaciones políticas y jurídicas postsoviéticas:  
diseño institucional de la justicia constitucional  
en la Comunidad de Estados Independientes (CEI)

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*ABSTRACT: After examining the manner in which constitutional justice bodies are formed in the Commonwealth of Independent States (CIS) and the scope of their powers, the author analyzes constitutional justice models of Moldova and Ukraine. These are later compared with the Russian model, with a focus on Russia's 2020 constitutional reform. The author concludes by pointing out an innate contradiction in the institution of constitutional justice – the fact that it is, generally, extremely difficult to decouple it from the “political”. In the CIS countries the degree to which constitutional justice is entangled with politics is greater than anywhere else. This is explained by the conditions of political transit and the phenomenon of neopatrimonialism.*

**RESUMEN:** Después de examinar la manera de que los órganos de justicia constitucional están formados en la Comunidad de Estados Independientes (CEI) y el alcance de sus poderes, el autor analiza los modelos de justicia constitucional de Moldova y Ucrania. Éstos se comparan más tarde con el modelo ruso, con un enfoque en la reforma constitucional en Rusia de 2020. El autor señala una contradicción innata en la institución de la justicia constitucional: el hecho de que, es extremadamente difícil disociarla de lo “político”. En la CEI el grado en que la justicia constitucional está entrelazada con la política es mayor que en ningún otro lugar. Esto se explica por las condiciones del tránsito político y el fenómeno del neopatrimonialismo.

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SUMMARY: I. *Introduction.* II. *Democratic potential of CIS Constitutions.* III. *Constitutional justice bodies in CIS states: formation and powers.* IV. *Constitutional Courts as part of political transit (cases of Moldova and Ukraine).* V. *The Russian model of constitutional justice and the 2020 constitutional amendments.* VI. *Conclusion.* VII. *Bibliography.*

The state, existing as a social reality independent of law, creates the law and then subjects itself to it, voluntarily as it were. Only then is it a state governed by law, a Rechtsstaat.

(Hans Kelsen. *Pure Theory of Law*)

## I. INTRODUCTION

In 1991, following the collapse of the Soviet Union, the Commonwealth of Independent States was established.<sup>1</sup> By the time they gained independence, the former Soviet republics that formed the CIS already had some experience of state-building. However, since this experience was a product of the Soviet times, a need arose to forge an institutional framework for the new system of relations between the republics. With the rejection of the socialist model, the construction of new state systems was accompanied by an influx of Western ideas and expertise of constitutional development into the CIS, including the principle of separation of powers, the idea of political and ideological diversity, and the notion that rule of law invariably requires the creation of a body responsible for constitutional justice (Becerra Ramirez, 1992). In shaping the institutional design of a new state, a major challenge has always been – and still remains – to find a proper

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<sup>1</sup> At present, the CIS has ten member-states: Russia, Kazakhstan, Belarus, Armenia, Moldova, Kyrgyzstan, Uzbekistan, Tajikistan, Azerbaijan and Turkmenistan. While officially not a member of the alliance as it has not ratified the CIS Charter, Ukraine remains a Founding State and an associate member of the CIS (the eleventh member).

balance between constitutional mechanisms that protect individual human rights and the interest of the general public. The critical nature of this issue is well illustrated in the works of prominent Mexican and other academics that analyze the Latin American experience (Ferrer Mac-Gregor, 2009; Hachem, 2011; Viciano Pastor y Martínez Dalmau, 2012; Tavares, 2012; Ferrajoli, 2018; Uribe Arzate, 2019).

Almost all CIS countries have adopted the European model of constitutional justice, establishing specialized independent judicial (Russia, Moldova, Armenia, Ukraine, Kyrgyzstan, Uzbekistan, Belarus, Azerbaijan, Tajikistan) or quasi-judicial (Kazakhstan) bodies to deal with matters of constitutional control. The only exception is Turkmenistan, where the Parliament exercises non-judicial constitutional control.

This paper attempts a comparative study of the models represented by the CIS states and, based on that, answer the following questions: does the process by which this institution is established affect its ability to carry out independent decision-making? Which of the powers exercised by constitutional justice bodies drive their increased involvement in politics? How effective is constitutional control exercised in the context of political transit? Can constitutional justice ensure the construction of an independent democratic state with a stable rule of law in a world undergoing globalization? What aspects of legal and political culture have the greatest influence on the formation of post-Soviet institutional design of judicial review?

These questions have long preoccupied the scientific community (Bellamy, 2007; Albert, 2019). Legal professionals explore the effectiveness of the separation of powers doctrine and analyze the experience of individual countries. Based on that research, they conclude that, in practical terms, there are multiple different models of the separation of powers (Corvalan, 2015; Olivares, 2018). Since recently, experts have turned to the idea that a formal legal approach is insufficient with respect to constitutional studies, because the mere existence of a court decision on a constitutional justice issue does not ensure by itself that the state will move along a democratic path and uphold the rule of law (Nino, 1996; Barak, 2002; Mendes, 2013). What is more, the experiences of post-Soviet states often indicate that the contrary is true – for example, in Moldova (in 2018 and 2021) and Ukraine (in 2010 and 2020) some of the decisions made by constitutional justice bodies actually exacerbated the existing political crises.

Around the world, there is discourse about democracy being in deep crisis, generally described as “the erosion of democracy”, “the rejection of democracy”, “democratic fatigue”, or “democracy by force” (Criado de Diego, 2012; Ginsburg and Huq, 2018; Przeworski, 2019). The new challenges of modernity intensify these contradictions, raising the very issue of the legitimacy of constitutional justice (Gargarella, 2014; Levitski y Zibblatt, 2018; Mounk, 2018). Hungarian experts Sajó András and Uitz Renáta write that judges deprive people of their right to self-government, as law-making is the monopoly of the legislature, judicial legislation is simply a usurpation of power: judges are not elected and do not have the necessary legitimacy to overrule legislation (Sajó and Uitz, 2017, p. 453).

There is truth to the vision put forward by Roberto Gargarella, who writes: “fundamental constitutional matters need to be decided, examined and re-examined through collective dialogic agreements... judicial decisions cannot reproduce or “mimic”, in any significant way, a collective conversation among the people – this is to say, a collective dialogue where the citizenry plays the central role” (Gargarella, 2021, p. 375).

The author of the paper, therefore, endeavors to examine these processes using the data and experiences of the CIS states.

## II. DEMOCRATIC POTENTIAL OF CIS’ MEMBER-STATES CONSTITUTIONS

After gaining independence in the 1990s, all CIS countries adopted new constitutions: Turkmenistan and Uzbekistan in 1992; Russia and Kyrgyzstan in 1993; Belarus, Moldova and Tajikistan in 1994; Kazakhstan, Armenia, Georgia and Azerbaijan in 1995; and Ukraine in 1996. Under these new constitutions, it is established that all the CIS countries are democratic, law-governed, secular, social states with a republican form of government. The constitutions of Turkmenistan (art. 2)<sup>2</sup> and Moldova (art. 11)<sup>3</sup> define these states as permanently neutral, something that has become a new progressive constitutional norm.

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<sup>2</sup> *Constitution of the Republic of Turkmenistan*. Available at: [https://online.zakon.kz/document/?doc\\_id=31337929#pos=319;-44](https://online.zakon.kz/document/?doc_id=31337929#pos=319;-44) (accessed on: June 11, 2021).

<sup>3</sup> *Constitution of the Republic of Moldova*. Available at: <https://presedinte.md/rus/>

However, despite all the similarities, the CIS countries vary considerably in the overall level of respect for and protection of human and civil rights and freedoms, as well as in the degree to which certain rights and freedoms are upheld, especially in the socioeconomic domain. The reasons for this include under-developed economy, corruption, political neo-patrimonialism (Erdmann and Engel, 2007; Bach, 2011), and a low level of overall legal awareness. These aspects of post-Soviet economy and political culture also helped shape the institutional design of the CIS countries. Constitutional development in these states is highly dynamic, and the numerous laws that are adopted often come into conflict with the new constitutions, contain gaps, loopholes, etc. (Abramova and Vilisov, 2020, pp. 5-6). This can be explained by the lawmakers' lack of experience in regulating a society that operates in an environment of political and ideological pluralism, general lack of knowledge in any particular area or political expediency. For these reasons, starting from 1996, many of the CIS countries have either passed constitutional amendments or had complete overhauls of their constitutions. Some of the most serious constitutional reforms took place in the period from 2001 to 2016. In 2020, Russia's Constitution received a number of important amendments. Kyrgyzstan adopted a new Constitution in 2021, which handed greater powers to the presidency.

This kind of constitutional dynamics, triggered by the political transit from socialist system to post-Soviet democratic regime, became the key objective factor motivating these states to draw from global knowledge and experience of establishing and managing constitutional justice bodies. Post-Soviet political transit has been sustaining an environment in which the democratic potential embodied in CIS Constitutions can be tapped into and developed with minimal risks only in the presence of an institution entrusted with constitutional justice. Under the Russian legal system, constitutional control is interpreted as "activities to review, identify, recognize and eliminate any inconsistencies with the nation's constitution that can be found in the legislation or in the activities of various state bodies, individuals and legal entities authorized by the state to exercise power on behalf of the state; the goal of these activities is to rectify any such inconsistencies" (Kozhevnikov, 2013, p. 61).

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### III. CONSTITUTIONAL JUSTICE BODIES IN CIS STATES: FORMATION AND POWERS

The formation and development of constitutional justice in the post-Soviet states is a long process involving several stages.

During the 1988-1990 reform of the Soviet system of government, the republics of the USSR planned to establish specialized bodies, known as Committees of Constitutional Supervision, to ensure consistency between the legislation adopted by state bodies and public organizations and the norms enshrined in the Constitution of the USSR.<sup>4</sup> These committees could issue recommendations to any such body prompting it to remove the provisions that conflicted with the Constitution. However, it was the issuing body that had the authority to amend or revoke the norm in question. Committees also had veto power over certain categories of laws and the right of legislative initiative. Due to the collapse of the Soviet Union, these Committees were short-lived.

The next stage was the adoption of new, post-Soviet Constitutions across the CIS.<sup>5</sup> It was enshrined in these documents that constitutional justice is exercised by various state bodies and officials. Currently, in most countries of the CIS, the functions of constitutional supervision are entrusted to special judicial bodies – Constitutional Courts. The only exceptions are Kazakhstan, Kyrgyzstan and Turkmenistan. In Kazakhstan, since 1996, constitutional justice has been carried out by the Constitutional Council, which replaced the Constitutional Court as a result of the political reforms of 1993. The Council is not part of the judiciary but is a state body that ensures the supremacy of the Constitution on the territory of Kazakhstan. In Kyrgyzstan, the 2013 reform replaced a separate body (the Constitutional Court) with the Constitutional Chamber of the Supreme Court, incorporating constitutional justice into the system of general jurisdiction courts.<sup>6</sup> Turkmenistan took a fundamentally different approach, entrusting

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<sup>4</sup> Law of the USSR N 974-I of December 23, 1989, “*On Constitutional Supervision in the USSR*” (enacted on January 1, 1990). Available at: <http://www.zaki.ru/pagesnew.php?id=1747> (accessed on: July 8, 2021).

<sup>5</sup> In that sense, Russia stands out among all post-Soviet republics: the Constitutional Court was formed in less than a year (December 1990 to October 1991), which means it was active before the new Constitution of the Russian Federation was adopted in 1993.

<sup>6</sup> A similar model can be observed in Costa Rica, Estonia and Taiwan, for example, where a special chamber of the Supreme Court is charged with constitutional justice.

constitutional justice to the Mejlis (the Assembly) – the lower house of the Parliament, which is responsible for assessing the compliance of laws and regulations with the article 81 of the Constitution.<sup>7</sup>

Most CIS countries adopted special laws on the constitutional court. In Moldova, Azerbaijan, Ukraine and Russia, these laws have undergone significant change over the past few years. New laws were adopted in Tajikistan and Belarus (2014), Uzbekistan (2017), and Armenia (2018). These laws hold a special status of constitutional laws in Armenia, Kyrgyzstan, Kazakhstan, Russia, Tajikistan and Uzbekistan;<sup>8</sup> in Moldova they have the status of organic laws;<sup>9</sup> and in the rest of the CIS countries these are common laws,<sup>10</sup> Moldova is the only member-state of the CIS to have a Constitutional Jurisdiction Code, which establishes the operating

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<sup>7</sup> *Constitution of the Republic of Turkmenistan*. Available at: [https://online.zakon.kz/document/?doc\\_id=31337929#pos=319;-44](https://online.zakon.kz/document/?doc_id=31337929#pos=319;-44) (accessed on: June 11, 2021).

<sup>8</sup> *Constitutional Law of the Republic of Armenia of January 17, 2018, "On the Constitutional Court"*. Available at: [https://www.concourt.am/russian/law\\_cc/index.htm#3](https://www.concourt.am/russian/law_cc/index.htm#3) (accessed on: July 8, 2021); *Constitutional Law of the Kyrgyz Republic of July 9, 2008, No. 141, "On the status of judges of the Kyrgyz Republic"*. Available at: <http://kenesh.sot.kg/post/konstitutsionnyj-zakon-kyrgyzskoj-respubliki-o-statuse-sudej-kyrgyzskoj-respubliki> (accessed on: July 8, 2021); *Constitutional Law of the Republic of Kazakhstan of December 29, 1995, No. 2737 "On the Constitutional Council of the Republic of Kazakhstan"*. Available at: <http://ksrk.gov.kz/ru/article/konstitucionnyy-zakon-rk-o-konstitucionnom-sovete-rk> (accessed on: July 8, 2021); *Constitutional Law of the Republic of Tajikistan No. 1083 of July 26, 2014 "On the Constitutional Court of the Republic of Tajikistan"*. Available at: [https://online.zakon.kz/Document/?doc\\_id=31598428](https://online.zakon.kz/Document/?doc_id=31598428) (accessed on: July 8, 2021); *Federal Constitutional Law of 21.07.1994 N 1-FKZ (09.11.2020) "On the Constitutional Court of the Russian Federation"*. Available at: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_4172/](http://www.consultant.ru/document/cons_doc_LAW_4172/) (accessed on: July 8, 2021); *Constitutional Law of the Republic of Uzbekistan of 2017, "On the Constitutional Court of the Republic of Uzbekistan"*. Available at: <https://lex.uz/docs/3221765> (accessed on: July 8, 2021).

<sup>9</sup> *Law of the Republic of Moldova No. 317-XIII of December 13, 1994, "On the Constitutional Court"*. Available at: [https://online.zakon.kz/Document/?doc\\_id=30530199](https://online.zakon.kz/Document/?doc_id=30530199) (accessed on: July 8, 2021).

<sup>10</sup> *Law of Ukraine on the Constitutional Court. Vedomosti Verkhovnoy Rady*, (2017), 35: 376. Available at: <https://zakon.rada.gov.ua/laws/show/2136-19#Text> (accessed on: July 8, 2021); *Law of the Republic of Belarus of January 8, 2014, № 124-Z, "On Constitutional Proceedings"*. Available at: <http://www.kc.gov.by/document-35203> (accessed on: July 8, 2021); *Law of the Republic of Azerbaijan of December 23, 2003, No. 561-IIQ, "On Constitutional Court"*. Available at: [https://online.zakon.kz/document/?doc\\_id=30597407](https://online.zakon.kz/document/?doc_id=30597407) (accessed on: July 8, 2021).

principles and powers of the Constitutional Court.<sup>11</sup> Given the complicated procedure for the adoption and amendment of constitutional and organic laws, it can be argued that this type of regulation of constitutional justice bodies provides an additional guarantee of their supremacy in a number of CIS states.

Special laws on Constitutional Courts in the CIS are very similar in substance, which is explained by their goals and overall nature. They clarify constitutional norms that regulate the composition and structure of these courts, the procedure of their formation, the status of constitutional judges, the guarantees provided to the courts and the powers they are entrusted with, as well as the principles of constitutional proceedings. This has to do with the influence of the European model of constitutional justice and general legal traditions.

But these laws have significant differences, too, in terms of how they are drafted. These differences largely concern whether, in these laws, substantive and procedural aspects in the functioning of constitutional courts are regulated separately or as part of a whole; the extent to which legislation on the status of judges and the judicial system are applied to them; and the role assigned to the rules of the Constitutional Court.

In terms of the powers and competencies of these bodies, they largely carry out traditional preliminary constitutional control, interpret the Constitution and assess whether established constitutional procedures for the impeachment of the president are observed in the CIS countries where these procedures are stipulated by law (Kazakhstan, Russia). The Constitutional Court of Tajikistan makes these assessments in case of high treason by the president of the country.<sup>12</sup> Not all of the CIS states have subsequent constitutional control and the institution of constitutional complaints lodged by citizens.

A number of post-Soviet republics have entrusted these bodies with additional powers. Among all of the CIS states, the constitutional justice body in Moldova has the broadest powers: it confirms the results of elections and nationwide referenda, assess the constitutionality of parties,

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<sup>11</sup> *Constitutional Jurisdiction Code of Moldova* No. 502-XIII of 16.06.1995. Available at: <https://www.constcourt.md/public/files/file/Baza%20legala/CodJC.rus.pdf> (accessed on March 15, 2021).

<sup>12</sup> Art. 34 *Constitutional Law of the Republic of Tajikistan No. 1083 of July 26, 2014, "On the Constitutional Court of the Republic of Tajikistan"*. Available at: [https://online.zakon.kz/Document/?doc\\_id=31598428](https://online.zakon.kz/Document/?doc_id=31598428) (accessed on: July 8, 2021).

ascertains the circumstances justifying the dissolution of the Parliament, the removal of the President of the Republic of Moldova or the interim office of the President, as well as the impossibility of the President of the Republic of Moldova to fully exercise his/her functional duties for more than 60 days.<sup>13</sup> In Russia, in addition to its conventional powers, the Constitutional Court also considers constitutional compliance of the bills submitted by parliaments of the constituent entities of the Federation, as well as secondary legislation of the President and the Government of Russia. In Tajikistan, the Constitutional Court also has the right to verify the constitutionality of acts of the executive power and local self-government bodies, as well as to interpret the content of plenary session of the Supreme Court and the Supreme Economic Court. Furthermore, it can carry out constitutional justice of draft amendments to the Constitution of the Republic of Tajikistan, draft laws and other issues submitted to nationwide referendums, as well as disputes between state authorities regarding their powers.<sup>14</sup> The Constitutional Council of Kazakhstan is somewhat limited in its powers: in event of a dispute, it decides whether a Presidential election or a referendum are valid.<sup>15</sup>

Across the CIS, all countries share common principles of constitutional proceedings, which are collegiality, equality, and publicity.<sup>16</sup> Belarus also added the principle of competition between the parties and the presumption of constitutionality.<sup>17</sup> Courts make rulings and issue opinions.

Thus, despite a shared legal past, post-Soviet states demonstrate some diversity in terms of organizing and administering constitutional

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<sup>13</sup> Art. 4 *Law of the Republic of Moldova No. 317-XIII of December 13, 1994 "On the Constitutional Court"*. Available at: [https://online.zakon.kz/Document/?doc\\_id=30530199](https://online.zakon.kz/Document/?doc_id=30530199) (accessed on: July 8, 2021).

<sup>14</sup> Art. 34 *Constitutional Law of the Republic of Tajikistan No. 1083 of July 26, 2014, "On the Constitutional Court of the Republic of Tajikistan"*. Available at: [https://online.zakon.kz/Document/?doc\\_id=31598428](https://online.zakon.kz/Document/?doc_id=31598428) (accessed on: July 8, 2021).

<sup>15</sup> Art. 17 *Constitutional Law of the Republic of Kazakhstan of December 29, 1995, No. 2737, "On the Constitutional Council of the Republic of Kazakhstan"*. Available at: <http://ksrk.gov.kz/ru/article/konstitucionnyy-zakon-rk-o-konstitucionnom-sovete-rk> (accessed on: July 8, 2021).

<sup>16</sup> See, for example, Arts. 33-35 *Constitutional Law of the Republic of Armenia of January 17, 2018, "On the Constitutional Court"*. Available at: [https://www.concourt.am/russian/law\\_cc/index.htm](https://www.concourt.am/russian/law_cc/index.htm) (accessed on: July 8, 2021).

<sup>17</sup> Art. 8, Art. 13 *Law of the Republic of Belarus of January 8, 2014, No. 124-Z, "On Constitutional Proceedings"*. Available at: <http://www.kc.gov.by/document-35203> (accessed on: July 8, 2021).

justice. Most of the CIS countries tend towards the so-called European model of constitutional justice. In general, the post-Soviet model of constitutional justice can be described as mixed (hybrid), as it combines the characteristics of both the Austrian (Russia, Tajikistan and others) and the French (Kazakhstan) models.

The issue of appointing (electing) judges of the constitutional courts remains a critical and contentious aspect of post-Soviet institutional design. The way by which these bodies are formed directly affects the degree of their independence from other branches of power, therefore it is very important to consider the peculiarities of their development in different CIS countries.

In Belarus and Kazakhstan, the President and the Parliament are directly involved in setting up constitutional justice bodies. The Constitutional Court of Belarus consists of twelve judges: six are appointed by the President, and the rest by the upper house of the Parliament – the Council of the Republic. At the same time, the President directly participates in the formation of the upper house of the Parliament and appoints eight members of the Council of the Republic.<sup>18</sup> The Chairman of the Constitutional Court is also appointed by the President with the consent of the Council of the Republic.<sup>19</sup>

In Kazakhstan, the President appoints two members of the Constitutional Council and its Chairman.<sup>20</sup> In other words, in Belarus and Kazakhstan, the President plays a definitive role in the formation of constitutional justice bodies.

In Azerbaijan, Russia, Tajikistan and Uzbekistan, the President and the Parliament also take part in organizing Constitutional Courts. However, the role of the President in these countries is much less noticeable, as he is not authorized to independently appoint officials to positions in constitutional justice bodies. The President submits candidates for judges to the Parliament, which then votes in favor of or against the individuals proposed. The candidate that receives more than half of the votes gets the nomination. On the one hand, this method assigns the leading role

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<sup>18</sup> Art. 91 *Constitution of the Republic of Belarus*. Available at: <http://law.by/docume nt/?guid=3871&p0=V19402875e> (accessed on: June 11, 2021).

<sup>19</sup> Art. 84 *Constitution of the Republic of Belarus*. Available at: <http://law.by/docume nt/?guid=3871&p0=V19402875e> (accessed on: June 11, 2021).

<sup>20</sup> Arts. 58, 59 *Constitution of the Republic of Kazakhstan*. Available at: [http://www. akorda.kz/en/official\\_documents/constitution](http://www. akorda.kz/en/official_documents/constitution) (accessed on: June 11, 2021).

to the representative body, which can either approve or dismiss the proposed candidate – on the other hand, the parliament cannot independently select and appoint an official to the Constitutional Court. This procedure applies to judges, Chairman and Deputy Chairman of the Constitutional Courts in Tajikistan<sup>21</sup> and Russia.<sup>22</sup> In Azerbaijan, the President appoints the Chairman and Deputy Chairman of the Constitutional Court, which reinforces his role of in the shaping of the constitutional justice body.<sup>23</sup> Overall, in the models described above, the head of state plays the leading role in the process of forming the bodies responsible for constitutional supervision.

The model of Kyrgyzstan has to be discussed separately, as it stands out among all CIS countries. Constitutional justice in Kyrgyzstan is exercised by the Constitutional Chamber of the Supreme Court, which is comprised of eleven judges.<sup>24</sup> Judges are voted in by the Parliament from candidates nominated by the President, with gender representation being one of the factors – no more than seventy percent of judges can be of the same sex. The President makes his nominations based on the results of a special competition held by the Council for the Selection of Judges.<sup>25</sup> Constitutional Chamber judges are elected for the first time for a term of seven years, and after that – until they reach the age limit established by the Constitution.<sup>26</sup> From among its judges, the Constitutional Chamber elects a Chairman and a Deputy Chairman for a term of three years.<sup>27</sup>

<sup>21</sup> Art. 6 *Constitution of the Republic of Tajikistan*. Available at: <https://www.mfa.tj/ru/main/tadzhikistan/konstitutsiya> (accessed on: June 13, 2021).

<sup>22</sup> Art. 102 *Constitution of the Russian Federation*. Available at: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_28399/97ecab658ead741720b5999f905a4e0cb20c024a/](http://www.consultant.ru/document/cons_doc_LAW_28399/97ecab658ead741720b5999f905a4e0cb20c024a/) (accessed on June 11, 2021).

<sup>23</sup> Art. 109 *Constitution of the Republic of Azerbaijan*. Available at: <https://static.president.az/media/W1siZiIsIjIwMTkvMTIvMDQvNjdvbm8wNTJ2bF9rb25zdHV0aXN5YV9ydXNfdXBkYXRILnBkZiJdXQ?sha=6f0a333c8a816eee> (accessed on: June 11, 2021).

<sup>24</sup> Art. 95 *Constitution of the Republic of Kyrgyzstan*. Available at: <https://www.gov.kg/ru/p/constitution> (accessed on: June 11, 2021).

<sup>25</sup> Art. 15 *Constitutional Law of the Kyrgyz Republic of July 9, 2008, No. 141 “On the Status of Judges of the Kyrgyz Republic”*. Available at: <http://kenesh.sot.kg/post/konstitutsionnyj-zakon-kyrgyzskoj-respubliki-o-statuse-sudej-kyrgyzskoj-respubliki> (accessed on: July 8, 2021).

<sup>26</sup> *Ibidem*.

<sup>27</sup> Art. 97 *Constitution of the Republic of Kyrgyzstan*. Available at: <https://www.gov.kg/ru/p/constitution> (accessed on: June 11, 2021).

It should be noted that seven members of the Constitutional Court of Uzbekistan, while elected by the upper house of the Parliament by a majority vote after being nominated by the President from among political and legal experts, are recommended by the Supreme Judicial Council of Uzbekistan (including a quota for a representative from the Republic of Karakalpakstan).<sup>28</sup> The judges are appointed for a term of five years. Like in Kyrgyzstan, the Constitutional Court of Uzbekistan has the right to elect its Chairman and Deputy Chairman independently.

Therefore, unlike in the models of Azerbaijan, Russia and Tajikistan, in Kyrgyzstan and Uzbekistan, the President's right to nominate candidates for office in the constitutional justice body is limited through involvement of the legal community, and these institutions can elect their own leadership. It appears that this approach to forming constitutional justice bodies introduces new democratic practices to the institutional design observed in the nations of the former Soviet Union. However, does this guaranteed independence in the decision-making of the judges?

In Moldova and Ukraine, representatives of the judiciary are also involved – not on the basis of competency, but through quotas. For example, the Constitutional Court of Moldova consists of six judges appointed for six-year terms: two are appointed by the Parliament, another two by the Government, and the final two by the Superior Council of Magistrates.<sup>29</sup> The latter is an independent self-regulating body for the judiciary of Moldova; it facilitates effective organization and functioning of the judiciary and guarantees independence of the judiciary.<sup>30</sup> Judges of the Constitutional Court of Moldova elect the President of the court by secret ballot.

The Constitutional Court of Ukraine, consisting of eighteen judges, is formed in a similar manner. The President of Ukraine, the Parliament and the Congress of Judges appoint six judges (for nine-year terms) without

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<sup>28</sup> Art. 108 *Constitution of the Republic of Uzbekistan*. Available at: <https://constitution.uz/ru/clause/index#section23> (accessed on: June 11, 2021). Karakalpakstan is a sovereign republic within Uzbekistan which has the right to secede from the Republic of Uzbekistan on the basis of a nationwide referendum held by the people of Karakalpakstan,

<sup>29</sup> Art. 136 *Constitution of the Republic of Moldova*. Available at: <https://presedinte.md/rus/titul5> (accessed on: June 11, 2021).

<sup>30</sup> Art. 122, 123 *Constitution of the Republic of Moldova*. Available at: <https://presedinte.md/rus/titul5> (accessed on: June 11, 2021).

the right of reappointment.<sup>31</sup> Judges cannot be members of political parties and are appointed on a competitive basis. The Chairman of the Constitutional Court of Ukraine is elected for a single three-year term. A secret ballot is held at a meeting of the Court, and the candidate who wins a simple majority of votes from the judges takes the position of Chairman.<sup>32</sup>

Similar participation of the community of judges can also be observed in Hungary, Poland, Peru, Slovakia, Germany and Latvia.

In 2015, with the adoption of the new Constitution, Armenia changed the procedure of appointment to the Constitutional Court. Now it also involves Armenia's community of judges, the legislative and the executive branches, as well as the President. The Constitutional Court of Armenia consists of nine judges, three of whom are elected from candidates nominated by the President, another three are chosen by the Government, and the final three are selected by the General Assembly of Judges.<sup>33</sup> Judges of the Constitutional Court are elected (for a term of twelve years) by the National Assembly by at least three-fifths of the votes from all deputies. The President of the Constitutional Court is elected by the judges themselves, who are prohibited from engaging in political activities and who are required to exercise political restraint and maintain neutrality in all public statements.<sup>34</sup> The norms and requirements regulating the roles and status of judges in Armenia are quite unusual. For example, judges "must not accept gifts... and must endeavour that his or her family members residing with him or her refrain from such actions... the concept of «gift» shall imply any advantage related to property interests".<sup>35</sup> The same article describes what kinds of gifts a judge can accept. In the procedures by which the Constitutional Court is filled, the Armenian model involves representatives of all branches of government. Only future will tell whether this would guarantee further democratization of Armenia's politics.

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<sup>31</sup> Art. 148 *Constitution of the Republic of Ukraine*. Available at: <https://www.president.gov.ua/ua/documents/constitution/konstytuciya-ukrayini-rozdil-xii>. (Accessed on: June 11, 2021).

<sup>32</sup> *Ibidem*.

<sup>33</sup> Art. 166 *Constitution of the Republic of Armenia*. Available at: <http://www.parliament.am/parliament.php?id=constitution&lang=rus#7> (accessed on: June 11, 2021).

<sup>34</sup> Art. 4 *Constitutional Law of the Republic of Armenia on the Constitutional Court*. Available at: [https://www.concourt.am/russian/law\\_cc/index.htm#3](https://www.concourt.am/russian/law_cc/index.htm#3) (accessed on: July 8, 2021).

<sup>35</sup> *Ibidem*, Art. 15.

As mentioned above, Turkmenistan has a special model for the formation of the constitutional justice body. It formally involves all citizens of the country with voting rights, as there is no separate specialized body of constitutional control, and its powers are given to the Mejlis – the lower house of the Parliament whose members are elected by the population. In terms of purely legal evaluation, one could argue that this model is the most democratic, since it is formed indirectly by all the voters in the country. But it is quite clear that effective constitutional control can only be exercised by professionally trained legal experts, and not members of parliament. It is no coincidence that all the CIS republics have special requirements to become judge of the Constitutional Court: age of 35 to 45 years, legal experience of over 15 years, and a strong track record and authority within the scientific community.

A number of Russian experts consider the method which involves all branches of power as the most preferable. They believe this helps create a politically neutral and independent body of constitutional justice (Alexandrova, 2017, p. 78; Nechkin, 2018, p. 80; Maslovskaya, 2018, p. 58).

But as will be discussed below, it was the Constitutional Courts of Moldova and Ukraine that became deeply involved in their respective country's political matters, playing the crucial role in the escalation of constitutional and political crises in these countries in 2014-2021. As Hungarian lawyers András Sajó and Renáta Uitz rightly point out: “Let's have no illusions: appointments to supreme courts are often politically biased and riven with conflicts of interests” (Sajó and Uitz, 2017, p. 433). In terms of ensuring independence of the bodies of constitutional justice, a lack of term limits for judges has a much greater potential – and in the cases of Moldova and Ukraine, these terms of office are limited.

#### IV. CONSTITUTIONAL COURTS AS PART OF POLITICAL TRANSIT (CASES OF MOLDOVA AND UKRAINE)

The modern practice of constitutionalism reveals continuous attempts by politically affiliated groups to use the bodies of constitutional review to address their issues or achieve certain political goals. This is done through different mechanisms, including: the use of political influence to affect the composition of the constitutional court by appointing judges; submitting of issues to the constitutional court that are not directly related

to or identified in the constitution; exerting political pressure by businesses, and removing various officials from power, including the president. The consequences of such politicization and rejection of basic constitutional principles are devastating to statehood and can have irreversible consequences.

The events of recent years clearly demonstrate the trend of the political establishment of Moldova exploiting the Constitutional Court. The Constitutional Court of Ukraine consistently generates conflicts, as well, as its activities are influenced by institutional and informal political actors and networks (Shevtsov, 2018, pp. 20-23).

The Constitutional Court of Moldova has the widest scope of powers among all CIS countries. In addition to the general functions of constitutional control (reviewing the constitutionality of laws and decrees of the President, decisions and ordinances of the Government, as well as over international treaties to which the Republic of Moldova is a party; interpretation of the Constitution), the Constitutional Court of Moldova also has a number of political functions. The Constitutional Court: confirms the results of republican referenda; confirms the results of parliamentary and presidential elections; ascertains the circumstances justifying the dissolution of the Parliament, the removal of the President of the Republic of Moldova or the interim office of the President, as well as the impossibility of the President of the Republic of Moldova to fully exercise his/her functional duties for more than 60 days; decides over matters dealing with the constitutionality of a party.<sup>36</sup> Although it is specifically stipulated that the Constitutional Court decides matters of law exclusively, it is clear from the list above that many of its powers are directly related to politics.

For example, in 2018, the Constitutional Court decided to relieve the then President of Moldova Igor Dodon of his duties because of his refusal to promulgate five laws which were considered and passed by the Parliament.<sup>37</sup> By that time, it was the fifth decision of this kind: first it happened in October of 2017, when the President refused to sign a decree appointing a new Minister of Defense (Rosenko, 2019, p. 86). In 2018,

<sup>36</sup> Art. 4 *Constitutional Jurisdiction Code No. 502-XIII of 16.06.1995*. Available at: <https://www.constcourt.md/public/files/file/Baza%20legala/CodJC.rus.pdf> (accessed on: March 15, 2021).

<sup>37</sup> The Constitutional Court of Moldova violated everything that could be violated, *Komsomolskaya Pravda*, 24.06.2019. Available at: <https://www.kp.md/online/news/3323356/> (accessed on: March 16, 2021).

five controversial bills related to the sale of the Republican Stadium site to the United States, renaming May 9 Victory Day to ‘Europe Day’, introduction of a new audiovisual code, and a law establishing Carabinieri Troops under the command of the Parliament. After Igor Dodon’s removal from power, the new laws were signed by the President of the Parliament Andrian Candu.

So, throughout 2017-2018, the Constitutional Court of Moldova has repeatedly removed the lawfully elected President from office for the purpose of signing decrees and laws by certain new *institutions* (any third parties). Temporarily, the powers of presidency were transferred to either the President of the Parliament or the Prime Minister, after which the Constitutional Court returned the powers back to the President. This decision was formalized as a “Judicial opinion on ascertaining the circumstances justifying an interim office of the President of the Republic of Moldova for fulfillment of the constitutional obligation to promulgate the law or appoint officials.” Essentially, the Constitutional Court made a decision: “To declare that an *institution* now acts as the President of the Republic of Moldova and can carry out the constitutional duties...”<sup>38</sup>

In other words, an opinion of six judges who were given the right to declare their assessment of legal norms, mechanisms and procedures regulating the exercise of public power, can override all democratic procedures in the state. These judges can, at their own discretion, replace the popularly elected President with a separate *institution* entrusted with presidential powers, but lacking a mandate from the people. How is this *institution* held accountable for its decision to sign a law? How are the judges of the Constitutional Court held accountable for the decision they took in the form of their judicial opinion? They bear neither personal nor collegial responsibility to the citizens of Moldova. The legitimate President, who answers to the electorate and is the Guarantor of people’s rights and freedoms, is removed from office until certain laws are signed.

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<sup>38</sup> *Judicial opinion No. 2 of 05.01.2018 on ascertaining the circumstances justifying the removal of the President of the Republic of Moldova for the fulfillment of the constitutional obligation to promulgate the law* (Note 1f/2018). Available at: <http://constcourt.md/ccdocview.php?tip=avize&docid=61&l=ro> (accessed on March 16, 2021); *Judicial opinion No. 1 om 02.01.2018 on ascertaining the circumstances justifying an interim office of the President of the Republic of Moldova for the fulfillment of the constitutional obligation to appoint member of the Parliament* (Note 176f/2017). Available at: <http://constcourt.md/ccdocview.php?tip=avize&docid=62&l=ro> (accessed on: March 16, 2021).

Not only does this discredit the presidency, but it also calls into question the institution of constitutional justice, undermines the foundations of constitutional order and set a dangerous precedent when public policy decisions are made by substituting state institutions and manipulating concepts. Vice President of the Inter-American Court of Human Rights Eduardo Ferrer Mac-Gregor published the scientific investigation made by experts of UNAM pointing out the danger of Constitutional justice transforming into a mechanism of anti-democratic public administration (El juez constitucional en siglo XXI, 2009).

Moldova's Constitutional Court continues to follow the same trend. For instance, on May 7, 2020, it issued a ruling that declared the intergovernmental agreement to borrow unconstitutional a 200 million euro state loan from Russia, as it does not conform to Moldova's Constitution and goes against its national interests. Representatives of pro-European opposition parties who attended the Constitutional Court's meeting insisted on this decision.<sup>39</sup> Thus, the decisions of the constitutional justice body extend as far as international relations, which further politicizes Moldova's model of constitutional control.

The entanglement of the Constitutional Court of Moldova in politics resulted in a serious crisis in the summer of 2020, when the judges themselves admitted that they had made a number of questionable decisions aimed at the removing the powers of President Igor Dodon, pressured by the leader of the former ruling Democratic Party, oligarch Vladimir Plahotniuc. After Plahotniuc fled the country, they reversed their decisions and submitted letters of resignation.<sup>40</sup>

Judge Domnica Manole was elected as the new President of the Constitutional Court,<sup>41</sup> but not long after that, the Court was embroiled in a new controversy. This time, it was a dispute about the official language, which is an extremely sensitive topic for Moldova due to its complicated

<sup>39</sup> Moldova's Constitutional Court rules the 200-million-euro loan agreement with Russia unconstitutional, *Komsomolskaya Pravda*, 08.05.2020. Available at: <https://www.kp.ru/online/news/3863843/> (accessed on: March 16, 2021).

<sup>40</sup> *The Constitutional Court of Moldova suspends loan agreement with Russia* 23.04.2020. Available at: <https://tass.ru/mezhdunarodnaya-panorama/8320397> (accessed on: March 16, 2021).

<sup>41</sup> *President of the Constitutional Court of Moldova*. Available at: <https://www.constcourt.md/tabview.php?l=en&idc=17&t=/Composition-and-organization/President/President-of-the-Constitutional-Court/> (accessed on: March 19, 2021).

relations with Romania. On January 21, 2021, the Constitutional Court of Moldova declared the December 16, 2020, Law “On the Functioning of Languages in the Territory of Moldova”<sup>42</sup> as unconstitutional. The Law had previously restored the status of the Russian language as a language of interethnic communication, which obligated state bodies and officials to provide citizens with information in Russian, as well.<sup>43</sup> President of the Constitutional Court Domnica Manole commented that the Constitution of Moldova does not contain the concept of “language of interethnic communication”, and that the December 16, 2020, Law gave the Russian language the status similar to that of the official language, so the Court’s January decision was final and entered into force at the time of announcement.<sup>44</sup> This decision was clearly politicized, as it deprived the Russian-speaking population of Moldova of the right to use their native language. The Venice Commission has repeatedly criticized similar laws passed in Ukraine.<sup>45</sup>

Another notable example is Ukraine, where the Constitutional Court has long been used for political purposes. Back in 2004, as a result of the constitutional reform, a situation was created in which top public officials (the President and the Prime Minister) became political opponents, receiving maximum opportunities to block each other’s actions, but lacking

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<sup>42</sup> *Decision no. 4 on the constitutional review of Law no. 234 of 16 December 2020 on the usage of languages spoken on the territory of the Republic of Moldova* (applications no. 207a / 2020 and no. 213a / 2020) Available at: <https://www.constcourt.md/libview.php?l=en&idc=7&id=2067&t=/Media/News/The-Court-examined-the-constitutionality-of-the-Law-on-the-Usage-of-Languages-Spoken-on-the-Territory-of-the-Republic-of-Moldova> (accessed on: March 19, 2021).

<sup>43</sup> In 2018, the Russian language lost its status in Moldova as a language of communication between ethnic communities, after the Constitutional Court, at the request of the Liberal Party members of Parliament (who advocate for unification with Romania), declared the 1989 law “On the Functioning of Languages on the Territory of the Moldovan SSR” as obsolete.

<sup>44</sup> The Constitutional Court of Moldova Refuses to Recognize Russian as a Language of Interethnic Communication. *Rossiyskaya Gazeta*, 21.01.2021. Available at: <https://rg.ru/2021/01/21/ks-moldavii-otkazalsia-priznavat-russkij-kak-iazyk-mezhnacionalnogo-obshcheniia.html> (accessed on: July 9, 2021)

<sup>45</sup> *CDL-AD (2017) 030-e Ukraine - Opinion on the provisions of the Law on Education of 5 September 2017*, which concern the use of the State Language and Minority and other Languages in Education, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017). Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)030-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)030-e) (accessed on: March 19, 2021).

enough resources to gain a decisive advantage (Rosenko, 2016, p. 18). The confrontation between different branches of power concentrated around the Constitutional Court, and quite literally so: both sides gathered their supporters outside its walls, and on May 23-24, 2007, President Viktor Yushchenko declared the Constitutional Court as illegitimate, while the Parliament blocked the appointment of new judges using its quota.

For almost a year, the Constitutional Court of Ukraine did not operate because the judges could not take the oath, for which they were later dismissed. All this led to a protracted systemic crisis, shutting down of numerous state institutions, and resulted in a revision of the constitutional reform of 2004. As a consequence, in 2010, the reform was ruled illegal by the Court, as it uncovered violations in its procedure.<sup>46</sup> However, four years later, in 2014, this particular 2010 decision of the Constitutional Court was declared illegal, and an older version of the Constitution of Ukraine (that of 2004) was restored.

These developments show how the shortcomings of the post-Soviet political and legal institutional design were exploited, and how the strongest political elites of Ukraine (at that time) tailored and reshaped the Constitution to suit their interests using the Constitutional Court.

For almost four years, the Constitutional Court could not exercise the powers entrusted to it. Only by 2018, the President of the Constitutional Court was elected, the Rules were approved. The Court was full formed by the end of 2018, when President Petro Poroshenko finally (after four years in power) chose two judges to nominate using his presidential quota. However, the Court currently consists of only fifteen judges<sup>47</sup> – even though, under the law, their number must be eighteen.

Under President Vladimir Zelensky, controversies involving the Constitutional Court continued, now also affecting the fight against corruption. In October 2020, the Court ruled unconstitutional Ukraine's legislation about criminal responsibility of officials for declaring false information about their income. After that, the President submitted a bill to the Parliament about early termination of the powers of Constitutional Court judges

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<sup>46</sup> *Rulings of the Constitutional Court of Ukraine September 30, 2010, No. 20-rp/2010 Case № 145/2010.* Available at: <http://zakon3.rada.gov.ua/laws/show/v020p710-10> (accessed on: March 16, 2021).

<sup>47</sup> *Information about the Constitutional Court of Ukraine.* Available at: <https://ccu.gov.ua/en/storinka/information-about-court> (accessed on: March 19, 2021).

and the recognition of their decision as negligible. He also involved the European Commission for Democracy through Law (also known as the Venice Commission) in the matter. As a result, a compromise version of the law was adopted in December 2020, and the President prepared a decree to dissolve the Court.<sup>48</sup> Later, however, he narrowed it down to suspending Chairman of the Court Oleksandr Tupytskyi for a period of two months.<sup>49</sup>

The case of Ukraine demonstrates that, despite all the transformations, and despite forming institutional bodies that are progressive and democratic, a state that has lost its sovereignty and independent agency will eventually see its machinery influenced by informal structures and radical groups that bear no political responsibility for their actions but have a strong impact on public life and political figures. This undermines the foundations of constitutional order and leads to the archaization of politics, since, under these conditions, neither state authorities nor the Constitution itself can play a defining role in policymaking. Decision-making then shifts to the aforementioned institutions, informal structures and foreign consultants. As the authors of the ‘Export of Democracy’ study point out, “Intervention networks not only transmit propaganda, but also form propagandists to be part of the same network” (Malyavina and Garcia, 2017, pp. 12-13). Thus, conflict within the state ceases to be manageable, and state institutions (including constitutional justice bodies) start to serve the interests of certain political groups and their leaders, which forms a special – dependent – type of institutional design.

The cases of Moldova and Ukraine reveal a number of significant political and legal challenges of democratic transit in former Soviet Union countries. “In a highly polarized political space supreme courts become the victims of political polarization themselves” (Sajó and Uitz, 2017, p. 457) This was made possible because institution-building started before political transit had been fully completed – a new configuration of power relations had not formed, the society was not structured, and the goal of

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<sup>48</sup> *The Constitutional Court of Ukraine Invalidates much of the Anti-corruption Reform as Unconstitutional. Zelensky Proposes to Terminate the Powers of all Constitutional Court Judges.* Available at: <https://www.interfax.ru/world/734451> (accessed on: March 16, 2021).

<sup>49</sup> *Zelensky Withdraws the Draft Law on Dissolving the Constitutional Court of Ukraine.* Available at: <https://tass.ru/mezhdunarodnaya-panorama/10562075> (accessed on: March 16, 2021).

ensuring sovereignty had not been set. As a result, the political systems of Moldova and Ukraine have been further unbalanced. Meanwhile, “[both] constitutionalism in general, [and] constitutional adjudication in particular is needed as a corrective mechanism of the democratic process” (Sajó and Uitz, 2017, p. 453).

## V. THE RUSSIAN MODEL OF CONSTITUTIONAL JUSTICE AND THE 2020 CONSTITUTIONAL AMENDMENTS

A different model of constitutional justice was established in Russia. Judges are appointed by the Parliament from the candidates nominated by the President, for an indefinite term. The maximum age for a judge is 70 years, but this limit does not apply to the Chairman of the Constitutional Court.<sup>50</sup> From the lack of term limits, it can be concluded how stable and sustainable the institution of judge is. Article 13 of this Law guarantees judges’ independence, which is ensured by their irrevocability, judicial immunity, equality of rights, the right to resign, prohibition of any interference in the judicial process, material, social and other security guarantees given to the judge.<sup>51</sup>

As mentioned above, in the summer of 2020, Russia carried out a major constitutional reform. Many of the amendments addressed the system of constitutional justice. The number of judges of Russia’s Constitutional Court was reduced from nineteen to eleven, but the powers of constitutional control were expanded. Now, in addition to federal laws (as was the case before the reform), constitutional control could be applied to draft laws of all types, including constitutional drafts, as well as the laws of the constituent entities of the Russian Federation prior to their publication by the top official of the federal subject.<sup>52</sup> For the first time, constitutional control extended to presidential decrees, regulations issued by the Government, and unratified international treaties of the Russian Federation.<sup>53</sup>

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<sup>50</sup> Art. 12 *Federal Constitutional Law of 21.07.1994 No. 1-FKZ (ed. 09.11.2020) “On the Constitutional Court of the Russian Federation”*. Available at: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_4172/](http://www.consultant.ru/document/cons_doc_LAW_4172/) (accessed on: July 8, 2021).

<sup>51</sup> *Ibidem*,

<sup>52</sup> Art. 125 *Constitution of the Russian Federation*. Available at: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_28399/](http://www.consultant.ru/document/cons_doc_LAW_28399/) (accessed on: June 11, 2021).

<sup>53</sup> *Ibidem*.

Conceivably, these new powers could increase the politicization of the Russian model of constitutional justice, which has always remained at a quite moderate level. At the same time, it is clear that the institution is being democratized.

The most important change of 2020 is the following power that now granted to the Constitutional Court of the Russian Federation: at the request of the President, the Government or the Supreme Court, it will now settle issues regarding the execution of the rulings produced by foreign or international courts that impose obligations on the Russian Federation, if those rulings run counter to the fundamental principles of Russia's legal system.<sup>54</sup> In other words, this amendment marks a shift from an absolute priority of international law to a conditional priority, and the control of compliance with these conditions is now in the hands of the Constitutional Court of the Russian Federation (Ispolinov, 2020, pp. 20-30). This amendment ended a long discussion among Russian legal experts about the priority of international and national law in relation to the rulings of international courts, with Russia taking a step towards ensuring unconditional sovereignty (Abramova, 2017, pp. 21-44).

The most important democratic feature of the Russian model is the institution of individual constitutional complaint, as all citizens of Russia have the right to appeal to the Constitutional Court of the Russian Federation (Narutto, 2012, pp. 16-18; Justice: Aligning to the Constitution, 2018). The models of Belarus, Moldova, Kazakhstan and Uzbekistan lack this institution: a similar situation can be found for example, in Italy (Zagrebelsky and Marceno, 2012; Sajó and Uitz, 2017, p. 420).

Notably, legal communities in these countries view the absence of this institution as negative and hope that, as soon as possible, mechanisms would be established allowing citizens to appeal directly to specialized bodies of constitutional justice (Kostaki and Raylyan, 2014; Udartsev, 2015; Udartsev, 2018). The same issues are raised by Carolina Alves das Chagas, who carried out a comparative study of citizens' access to Constitutional Courts in Germany, Brazil and France (Alves Das Chagas, 2019, pp. 323-348).

In the Russian model, the right of citizens to appeal to the Court with a constitutional complaint can be viewed as one of the active channels of

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<sup>54</sup> Art. 3 *Federal Constitutional Law of 21.07.1994 N 1-FKZ (ed. 09.11.2020) "On the Constitutional Court of the Russian Federation"*. Available at: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_4172/](http://www.consultant.ru/document/cons_doc_LAW_4172/) (accessed on: July 8, 2021).

political and legal communication between the state and the society. Other republics of the former Soviet Union have a mechanism of ‘mediation’ through Supreme courts (Moldova) or the Head of state, the houses of Parliament, or the Government (Belarus). In Kazakhstan and Uzbekistan, this right is given to lower courts or lower courts with higher courts mediation. It appears that all these mechanisms can be regarded solely as factors limiting the power of constitutional justice bodies and a considerable barrier to the implementation of the principle of absolute priority of human and civil rights and freedoms, which is enshrined in the Constitutions of all CIS states.

Speaking of courts appealing to constitutional justice bodies, there is some uncertainty with respect to what exactly should be understood by ‘the court.’ The most logical thing would be to view ‘the court’ as a particular judge who, while working on a particular case, concludes that there could be conflict between the legislation in question and the country’s Constitution. However, the literal interpretation would broaden the definition of ‘the court’ to the organization which has a head – a chairman, responsible for the operation of the court as a whole, including any appeals to the constitutional justice body. Any chairman of the court is likely to be concerned about timeframes of the cases his court is working on, so he would probably not be interested in suspending the proceedings unless the reason is serious enough. This is why ‘the court’, personified as the chairman, often prevents cases from being sent to be reviewed by constitutional control bodies, making the judge working on a particular case unable to properly defend the interests of the individual. Thus, in order to better protect rights and freedoms of citizens, a reasonable way to solve the problem would be to change the wording from ‘court’ to ‘judge’ in the text of laws in the CIS countries.

## VI. CONCLUSION

As Hungarian lawyers András Sajó and Renáta Uitz rightly point out, “the urge to eradicate the ‘political’ from constitutional adjudication is a futile exercise at the outset” (Sajó and Uitz, 2017, p. 429). That said, we must not forget that, according to Hans Kelsen’s original idea, the constitutional court as a special institution is, above all, a ‘negative legislator.’ Its main goal is to prevent potential constitutional violations and thus help

advance the rule of law (Ostapovich, 2015, p. 575). The imperfection of various modern democratic models suggests that institutions of constitutional justice should be considered as one of the instruments of political communication between the state and the society, rather than as a mechanism that ensures progress towards the rule of law. “In democracies, social problems are expected to be resolved in election booths and not by courts. However, the political process is often not as democratic and legitimate as it claims to be, and very often it is inconclusive. Judicial review is democracy-reinforcing or at least it may remind political actors and the general public of certain moral obligations under the constitution” (Sajó and Uitz, 2017, pp. 456-457). In this sense, the functioning of constitutional justice bodies as ‘negative legislators’ becomes essential.

This study has revealed the imperfections of the institution of constitutional justice in the CIS, where “constitutional courts mushroomed in the wave of democratization and aggressive constitutional review increasingly seemed to gain legitimacy around the world” (Sajó and Uitz, 2017, p. 451). The transit from the old Soviet model to the new political system was rapid and somewhat erratic: the social structure of the new society was not yet fully formed, but many of the past political institutions not only endured, but evolved, embedding themselves into the post-Soviet neo-patrimonial political systems. A key dilemma for constitutional lawyers and experts – to what extent the supreme legislative body, which expresses the will of the sovereign people, can be controlled (Gugliano, 2019) – has been further complicated in the CIS because of power struggles between various political actors.

The analysis shown in this paper reveals that in almost all of the CIS countries, all three branches of government are involved in the formation of judicial review bodies – this, however, did not automatically ensure their independence, and the additional powers devised as tools to extend their reach (controlling constitutionality of international treaties, assessing coherence of the rulings of international courts with the Constitution; ascertaining legality of elections and constitutionality of parties; resolution of constitutional disputes, etc.) took priority over the rest. As a result, constitutional justice bodies in Moldova and Ukraine have become extremely politicized, despite the fact that all branches of power, including the judges, are involved in their formation. The addition of the quota system makes judges dependent on the ones who nominate the candidates and makes their decision-making susceptible to outside pressure. The po-

litical conflict between the Parliament, the President and the Constitutional Court of Moldova regarding early parliamentary elections and the formation of the government reached its climax in March-April 2021 (Kogalov, 2021). Moldova's political system is becoming increasingly unhinged and unbalanced: MPs, the President and the judges have to compete with one another for the authority to appoint the head of the Government.

An opposite extreme can also be found among the CIS countries – in Turkmenistan, for example, which operates a model under which the formal powers of constitutional control are transferred to the Parliament. In other words, the legislative body passes laws – and also reviews the constitutionality of these same laws.

This paper provides an analysis of the issue raised at the very start, concerning the relationship between the degree to which an institution of constitutional justice is democratized, and the manner in which it is formed. However, the emphasis shifts from the assumption about a correlation between the two factors to the notion that there is increasing politicization of constitutional justice taking place across all CIS countries, regardless of the manner in which individual constitutional control bodies are formed. Politization is dangerous because an institution designed as a tool to ensure constitutional supremacy and rule of law may, under certain conditions (in this case, during the political transit of former Soviet Union countries), begin to serve the opposite goal. The abuse of influence over constitutional courts leads to irreparable consequences for the state and the society, as they lose an effective channel of political communication, which can ultimately result in the expansion of neo patrimonial practices, a loss of sovereignty, as well as social and political crises. Therefore, political elites need to make an informed collective decision, labeling it unacceptable for anyone to interfere in the decision-making of Constitutional Courts or put political pressure on the judges.

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