NATION-BUILDING

PROBLEMS OF CONSTITUTIONALISM IN THE REPUBLIC OF KYRGYZSTAN

Nartsiss SHUKURALIEVA

D.Sc. (Political Science),
researcher at Kujawy and Pomorze University,
Bydgoszcz Department of Administration and
International Relations
(Bydgoszcz, Poland)

Introduction

The transformation and democratization processes have given rise to several regimes that are difficult to define and cannot be classified in the traditional categories of totalitarianism, authoritarianism, and democracy. Contradictory types of democratic and nondemocratic regimes are creating unusual political systems that can be defined as "hybrid regimes," "imitative democracies," or "delegative democracies." The ambiguity of these regimes is making it difficult to classify them according to the well-known categories. On the one hand, they contain many elements characteristic of an authoritarian regime, while on the other, they appear to be close to democracy. As J. Linz showed,[1] the authoritarian elements are related to the instability of the political system, the continuous constitutionalization of which has introduced ambiguity into the rules of the game. The democratic elements, in turn, are related to the declared adherence to the democratic idea expressed in constant political revision of the constitutional norms. This situation, which is typical of many states (not only of hybrid, but also of democratic regimes), is manifested very clearly in Kyrgyzstan.

[1] See: J. Linz, "Totalitaryzm i autorytaryzm," in: *Władza i społeczeństwo. Antologia dziejów z zakresu socjologii i polityki,* Wybór i opracowanie J. Szczupaczyński, Warszawa, 1995, S. 325.

Historical Prerequisites

The political system that has been forming in Kyrgyzstan for 16 years is akin to a "mobile, chaotic" regime. Amendments and addenda were made to the Constitution almost every two years (1994, 1996, 1998, 2001, 2003, 2006, 2007) and almost every time the interrelations among the branches of government and their powers underwent dramatic changes. All the novelizations,[2] however, were introduced in their own "particular" way—with violation of the constitutional procedures for making amendments and addenda. Moreover, the political system was essentially not regulated by the Constitution, but by the law for putting the Constitution into effect. This law, in turn, established entirely different, and at times contradictory, adaptive-temporary provisions. This was compounded by the differences in the Constitution texts in the Kyrgyz (state) and the Russian (official) language. Theoretically, the Constitution in the Kyrgyz language dominated and was considered the main document. In practice, however, despite the principal contradictions in content, both versions were in effect at the same level.[3] A situation developed in which the formal-legal side of political life consisted of several layers (or elements): constitutional, legislative, presidential decrees with statutory force,[4] and by-laws. Each layer was horizontally and vertically unstable and mobile, frequently contradicting the others, and seemed to live a life of its own.

At the same time as this chaotic structure took shape, a constitution cult and campaign aimed at respecting the law came into being. In the interim between one novelization and the next, the government called on society to participate in discussing the drafts of the Constitution. The draft was discussed everywhere: in labor collectives and at community-based citizen gatherings. Then these discussions were widely covered in the mass media. The Constitutional Assembly was responsible for summing up the discussion and drawing up a draft of the new Constitution. This Assembly was formed by the president. It had a special status, since the constitutional norms not only did not envisage this type of novelization of the Constitution, nor did they mention the Constitutional Assembly at all. Despite its illegal functioning, the presidential camp was so strong that no one objected to the Assembly's activity. It appeared to be an absolute necessity in keeping with the "*principles of openness and taking the fullest account of public opinion.*"[5] It consisted of individual members of the legislative, executive, and judicial power branches and representatives of political parties, nongovernmental and nonprofit organizations, the People's Assembly of Kyrgyzstan, public associations, and the press. Discussions about the draft of the new version of the Constitution were held with a fair degree of openness. Depending on the novelization, some Constitutional Assemblies were formed, and then others. Sometimes new bodies were created (for example, the expert working group in 1998). The membership of the Constitutional Assembly also frequently changed. Moreover, a multitude of drafts were published and offered for discussion at the same time. In this way, the feeling was created that the entire republic was involved in discussing the constitutional amendments. This gave rise to the hope that the impending changes would be democratic. But this temporary pluralism was only of outer decorative significance. By skirting around or permitting only a sprinkling of oppositional voices, the novelizations were mainly introduced in keeping with an established scenario. As a result, the outer chaos of the legal system served to strengthen presidential power, while the constitutional instability helped to stabilize the regime.

[2] Novelization (from the Ital. novella, lit. novelty)—the introduction of new provisions, amendments, and addenda into the legislation.

[3] See: R. Esembaeva, "Konstitutsiia po-kyrgyzski…," *Obshchestvennyi reiting* (Bishkek), No. 44, 18 November, 2004.

[4] Presidential decrees with the force of law should be categorized separately, since they differ from laws adopted by parliament.

[5] Decree of the Kyrgyzstan President No. 235 of 26 August, 2002, On Measures for Preparing Constitutional Reform in the Kyrgyz Republic (in the version of Decree of the Kyrgyzstan President No. 234 of 8 September, 2002).

Significant features of this political experiment were the difficult economic situation, the absence of any democratic heritage[6] or corresponding political culture, both in the government and in society, the weakness of the democratic opposition before 1991, and the lack of any alternative to the communists. This was all impounded by the country's dependence on Moscow and on its influential nondemocratic neighbors, its lagging political development, and the absence of a civil society and personnel for carrying out democratic reforms. Despite the formal recognition of democratic norms, constructive changes did not take place, political practice remained the same, and the Constitution and legal science continued to exist in an embryonic state. This was inherited from Soviet times, when the Center monopolized all the branches of legal science, and the Union republics engaged only in a few of its problems. This also led to the lack of personnel, a scientific base, and the holistic development of the reforming of the legal system inherited from the former Soviet Union. During the first years of independence, the state bodies did essentially nothing to bring the Constitution and new laws into harmony with the legislative regulatory acts remaining from Soviet times; and no analysis was carried out of which legislative regulatory acts of the Union legislation were effective and which were not.[7] Nor was an integrated system of development drawn up later either. The level of legal science fell in proportion to the increase in university law departments. All of this together served to legitimize the current regime.

Violation of the principle of division of powers into three branches also affected the system's instability. Division of powers into the legislative, executive, and judicial branches was officially announced as early as 1990 in the Declaration on the State Sovereignty of the Republic of Kyrgyzstan. But the government delayed this reform. Other legislative acts served as a loophole that permitted posts to be combined. For example, according to the laws regulating the status of people's deputies, the latter could perform their duties while still carrying out their production or service activity. As a result, deputies of the Zhogorku Kenesh (ZhK) simultaneously worked or occupied high posts in the executive and judicial bodies of power. Beginning in 1993, the Constitution also perfunctorily declared division of powers. This time, adoption (along with the Constitution) of the Law on Putting the KR Constitution into Effect retained the practice of combining posts.

Later, open permission to hold combined posts was replaced with the concentration of presidential power, bringing the Kyrgyz system closer to the conception of O'Donnell's "delegative democracy." In this way, the previous obvious violations of the Montesquieu principle were retained, but now in veiled form. Adherence to the democratic rhetoric *"division of powers"* functioned at the same time as the need for an "arbitrator," a "*symbol of the nation and state power, guarantor of the Constitution, human and citizen rights and freedoms.*"[8] He (the arbitrator) should be above group interests, overcome factionalism, and smooth out regional-clan antagonisms. The president became this "arbitrator." His special place in the power system was justified by the supremacy of universal trust. According to populist rhetoric, he was the only one chosen by the republic's entire electorate. The president's delegative mandate made it possible to regard him as the main "custodian" and "adept" of the people's interests. This populist method of legitimization was reflected in the constitutional order. The president as arbitrator and depository of the people's will stood above all the power bodies. Without directly belonging to any one of the power branches and being guarantor of the Constitution, he held the executive, legislative, and judicial bodies in complete or relative depend-

[6] Local authors introduced the concept "nomadic democracy" or "tribal democracy." This was supposed to emphasize the regional (local) nature of the democratic heritage and not its adaptation to Western culture. In this text, however, democratic heritage means the heritage of liberal democracy.

[7] See: "Konstitutsia KR—osnova pravovoi reformy," *Res Publica* (Bishkek), 3 July, 1994, p. 3.

[8] According to Art 42.2 of the 1996 version of the Constitution, the KR President was a symbol of unity of the nation and state power and the guarantor of the KP Constitution and human and citizen rights and freedoms. This regulation was retained in the novelizations of 1998, 2001, 2003, 2006, and 2007.

ence. These presidential claims led to the courts and the legislature being only a "*hindrance, a burden to the advantages that the status of a democratically elected president provided on the domestic and international arena.*"[9]

The president's big or small opponent,[10] depending on the political situation, was the parliament (or part of it).[11] They came to loggerheads mainly over constitution- and law-building. This struggle was informal in nature, whereby both sides resorted to institutionally unenforced means, such as mudslinging, blackmailing, and pressure. The head of state naturally tried to settle the crisis situations that periodically arose. Since he (and not the relatively autonomous powers) was the main initiator in carrying out policy, the decisions on novelization of the Constitution were made in a hurry. Inconvenient legislative initiatives were blocked by presidential decrees that overlaid them. But this did not lead to the feverishly adopted decisions being implemented with any certainty. On the contrary, hasty biased decrees and chaotic maneuvering increased the likelihood of mistakes and risky methods of putting them into practice.

In the conflict of interests between the parliament and president, the judicial system did not occupy an independent position and did not perform the functions of arbitrator between the branches of power entrusted to it. Disputes over interpretation of the Constitution and nation-building were resolved depending on the political situation. The boisterous campaigns aimed at reform of the judicial system, building a law-abiding state, and adhering to the constitutional norms and "letter of the law" remained at the level of political rhetoric. The indicated attempts at reform did not change the status of the judicial system, which did not become an independent power branch, despite the declarations. This situation was a direct result of the activity of both the president and the parliament, which did not glean any benefit from an independent judicial power. There were at least two reasons for this. On the one hand, corruption became part of the game (for example, in privatization, the misappropriation of loans, etc.), the disclosure and legal investigation of which was not to the advantage of both power branches. On the other hand, this ensued from the normative legal chaos, under the conditions of which judicial decisions regarding the legitimacy of the Constitution were also decisions on the government's legality. Under these conditions, a "controlled" court would have ensured predictability and guaranteed the government's authority.

The Constitutional Court (CC) also had a specific role to play with respect to the authoritarian stabilization of Kyrgyzstan's political order. According to Art 82 of the Constitution (in the 1993, 1996, 1998, 2001, 2003, 2006 [Art 85], and 2007 versions), the CC was the highest body of judicial power for protecting the Constitution; it deemed laws and other regulatory legal acts unconstitutional if they contradicted[12] the Constitution; it settled disputes relating to the validity, application, and interpretation of the Constitution; and it issued conclusions on the amendments and addenda to the Constitution. But in practice, the CC did not participate in the novelizations of the Constitution, which were carried out by means of a referendum or, in extreme situations, were adopted by the parliament. The situation that developed was explained by the lacuna in Kyrgyz legislation,[13] when the presidential administration was the real interpreter of the Constitution and active initiator of nation-building.

---

[9] G. O'Donnell, "Demokracja delegacyjna," in: *Przyszłość demokracji,* Wybór tekstów, wybór i wstęp P. Śpiewak, Fundacja Aletheia, Warszawa, 2005, S. 176.

[10] The executive power was not included in this analysis, since it depended on the president and was the actual executor of his policy.

[11] The ZhK was not a monolithic body. In almost all the ZhK's convocations, some of the deputies projected themselves as supporters of the president's policy, while others posed as its opponents. The oppositional-minded deputies closely cooperated with the extra-parliamentary opposition.

[12] In the versions of the Constitution of 1993, 1994, 1996, 1998, and 2001, the legislator meant "*discrepancies* with the Constitution," and in the versions of 2003, 2006, and 2007 "*contradictions* with the Constitution."

[13] See: K.S. Sooronkulova, B.O. Tungatarov, "Konstitutsionnyi protsess v Kyrgyzskoi Respublike (1991-1998)" (from personal archives).

The Constitutional Court had a double role to play. As an independent body, it performed a fictitious-decorative function on the political arena. But at the same time, the CC's support of the president's policy was of great significance. It provided guarantees and additional legitimization at the legislative level. The CC confirmed the constitutionality of extending the powers of President Askar Akaev to a third term. Nor did it question the Bakiev-Kulov tandem or legitimacy of all the novelizations of the Basic Law.

The Genesis and Evolution of Instability

Askar Akaev's advent to power as the President of the Kyrgyz S.S.R., on the basis of alternative elections, departed from the typical model of Central Asian legal succession, when the former first secretary of the Central Committee of the Communist Party was always the person to take the post of president. At that time, the gradual concentration of executive power, followed by social, economic, and political issues (during transition to market relations) in the hands of the president, was regarded as a real need. It was supposed to weaken the role of the local conservative communists and of Moscow.[14] At the same time, due to the division of powers and the weakening of the communist party's role, the Supreme Soviet of the Republic of Kyrgyzstan of the twelfth convocation unexpectedly found itself at the top of the political Olympus. In the Soviet system, it was a decorative body that unconditionally adopted laws. This meant that the overwhelming majority of its members was not ready to work under the new conditions.

"*At the first session of the Supreme Soviet, it took only three hours to adopt the laws on private property, rental, and land use, while no one considered the fact that the laws should be understood and discussed article-by-article*," recalled Ch. Baekova.[15] The deputies had very little clue about how to carry out legislative activity and had no experience in how democratic power institutions functioned. The deputies accumulated the necessary experience as they performed their political duties, which had a negative effect on the efficiency of the parliament's work. The number of legislative acts increased endlessly and there was no integrated strategy or legal policy, which resulted in the laws adopted either functioning poorly or not functioning at all. Despite the shortcomings inherent in almost every post-Soviet legislative body, this parliament was more pluralistic than all the previous and subsequent Kyrgyz parliaments. The decisions it adopted played an important role in the transition from the communist system to democratization.[16]

On 5 May, 1993, the Supreme Soviet adopted the KR Constitution after completing the constitutional reform begun in the fall of 1990 by enforcing democratic standards. The Constitution declared Kyrgyzstan to be a sovereign, unitary, democratic republic built on the foundations of a secular state ruled by law. The Constitution introduced new principles for organizing state power and the electoral policy, defined the basic status of man and citizen in the republic, wrote diversity in forms of property into law, the priority of human rights, and the division of powers into the legislative, executive, and judicial branches. Legislative power was represented by a one-house parlia-

[14] See: M. Sherimkulov, "Stroit demokraticheskoe obshchestvo s chistogo lista nevozmozhno," *Svobodnye gory* (Bishkek), No. 6, August 1991, p. 4.

[15] "I believe in a time when everyone will live morally." Interview with Ch. Baekova—chairman of the Standing Supreme Soviet Commission of the republic on legislation, lawfulness, and law and order. The interview was held by G. Deviatov, *Svobodnye gory* (Bishkek), No. 6, August 1991, pp. 2-3.

[16] See: U. Chotonov, *Suverennyi Kyrgyzstan: vybor istoricheskogo puti*, Bishkek, 1995, p. 66; J.J. Wiatr, *Europa pokomunistyczna. Przemiany państw i społeczeństw po 1989 roku*, Scholar, Warszawa, 2006, S. 258.

ment, the Zhogorku Kenesh (ZhK). Executive power was executed by the government and the local state administration. Judicial power consisted of the Constitutional Court, Supreme Court, Higher Arbitration Court, and courts and judges of the justice system. However, the adoption of these regulations did not lead to either division of powers actually being carried out or to the Constitution coming into real effect.

Copying the main regulations and institutions of the old liberal democracies did not guarantee their adaptation to Kyrgyz conditions. Constitutionalization of democracy and the chances of its stabilization during withdrawal from the communist system depended to a certain extent on the transition to the market economy. In so doing, it was very difficult to associate the economic reforms with democratic prospects,[17] which became clearly manifested in a situation where division of powers was not complete. By performing the duties of both executive and legislative power, "deputy-bureaucrats" possessed double powers and twice as many opportunities. On the other hand, as representatives of executive power, they were subordinate to the president. When the Constitution came into force in 1993, this meant re-elections and the end of combined posts. A consensus was found by adopting the Law on Putting the KR Constitution into Effect, which envisaged a gradual transition to the requirements of the Constitution.

The pathologies of the economic reform had significant political consequences. The policy of the president, executive power, and "deputy-bureaucrats" regarding the privatization of state property, the extraction of mineral riches, and the acquisition of loans was severely criticized by the parliamentary opposition. A parliamentary commission was formed to investigate the democrats' corrupted policy. The results of its work placed part of the parliament, the government, the prime minister, and the president under fire. The political conflict (based on the precedent created by Yeltsin in Russia and Nazarbaev in Kazakhstan) was also settled by nonconstitutional means.

When striving to settle the crisis situation, President Askar Akaev questioned the legitimacy of the Constitution of 5 May, 1993. He announced some very serious intentions, justifying them by the fact that the Constitution was adopted by the parliament and not by the people. In his decree of 5 September, 1994, he called for "*holding a referendum to reveal the will of the people regarding the amendments and addenda to the KR Constitution aimed at ensuring real people's power, strengthening the guarantees of the KR Constitution, and improving the interaction among the state power bodies.*"[18] Referring to universal trust, rhetorical "*guarantee of real people's power*," and warning about existence of damaging information (for example, on certain deputies), he took decisive measures, forcing his opponents to retreat. As a result, in a very short time, the government resigned, the parliament was disbanded, and judicial power proved illegitimate. The only legitimate body remaining was the head of state.[19]

Again ignoring the constitutional provisions, the president issued a decree of 21 September, 1994 On a Referendum on the Amendments to the KR Constitution. According to the decree, "*two democratic amendments*" (Item 2) were to be put up for discussion at the referendum. This formulation was supposed to conceal the true meaning and importance of the amendments being introduced. In actual fact, the changes concerned not two issues, but five chapters (3, 4, 5, 6, 8) and more than a dozen articles, and meant complete review of the Constitution.[20] In particular, the president suggested introducing a two-house parliament. He also brought up the question of the legal possibility of putting up the constitutional novelizations and other "*important issues of state life*" for discussion at the referendum (at

[17] See: J.J. Wiatr, op. cit., S. 114-120.

[18] Decree of the KR President No. UP-226 of 5 September, 1994, On Ensuring Political Stability in the Kyrgyz Republic and Urgent Socioeconomic Measures.

[19] See: B. Shamshiev, "Osennie 'igry,'" *Res Publica*, 22 September, 1994, p. 2.

[20] See: M. Ukushov, "Krizis konstitutsionnoi zakonnosti v Kyrgyzstane," *Res Publica*, 6 October, 1994, p. 7.

that time he usurped this right).[21] In the event the referendum yielded a positive result, legislative power, divided into two houses, would become a weak and obedient body. In turn, the head of state would acquire the legal power to decide questions regarding constitutional amendments and any other disputed aspects by means of a referendum.

When announcing a constitutional referendum in his decree of 21 September, 1994, Askar Akaev referred as early as the introduction to a rhetorically imaginary people: "*...the highest indirect expression of power of the people of Kyrgyzstan is universal voting aimed at strengthening the foundations of the constitutional system of the KR, improving the activity of the legislative power, and ensuring fuller account of national and local interests in the republic's highest representative body...*"[22] Only later did he refer to Art 1.5, Art 46.2 and Art 46.5 of the 1993 Constitution, on the basis of which he issued a decree on amendments to the Constitution.

But the said constitutional provisions did not envisage the president's right to put up for discussion or announce a referendum on making amendments and addenda to the Constitution. Moreover, Art 96 of the Constitution clearly defined that amendments and addenda to it should be adopted by the parliament (as proposed by the president) by no less than one third of the ZhK deputies and no fewer than 300,000 citizens. Proposals on making amendments and addenda to the Constitution were to be examined by the parliament after the Constitutional Court submitted its conclusion, no sooner than three months, but no later than six months from the day they were made. The formulations of the amendments and addenda to be made to the Constitution could not be changed during their discussion in parliament. No other way of novelizing legislation was envisaged. If we are dealing with the right to initiate a referendum, the president (according to Art 10 of the 1991 Law on Referendum in the KR) occupied the last place in the hierarchy of those who have the right to initiate referenda—after the citizens and the ZhK. The Constitution, however, ambiguously set forth that "the president may bring up issues of state life for discussion at a referendum" (Art 46.2 and Art 46.5).

The president's striving for free manipulation of constitutional order was expressed in limitation of the term for introducing constitutional amendments. Constitutional amendments should be made within an extremely short time. According to the presidential decree of 21 September, 1994, the referendum should have been held within a month (!), on 22 October. Askar Akaev made sure in advance that the universal voting would yield a positive result. When making his decision on the referendum, he issued a decree the same day on Membership of the Central Election Commission for Holding a Referendum and Election in the KR. In it (again with no legal grounds for this), the president appointed members who were most favorable for him. They consisted, according to Soviet tradition, of "representatives" from the political parties, associations, and organizations of blue- and white-collar workers, farmers, businessmen, young people, veterans, and women; from creative unions, the People's Assembly of Kyrgyzstan, and national-cultural centers. Implementation of the president's ideas was also accompanied by the low level of legal consciousness and legal culture, limited access of the opposition to influential national mass media, and, finally, support of the presidential reforms by the heads of the local administrations, heads of state enterprises, organizations, and institutions.

Despite the fact that the president freely interpreted the legal regulations, his initiatives were not regarded as clear violations of the law. In contrast to other post-Soviet Central Asian republics, Akaev's

[21] Correspondingly, in the president's decree, this point was formulated as follows: "Amendments and addenda to the KR Constitution, KR laws, and other important issues of state life may be brought up for discussion at a referendum."

[22] Decree of the KR President No. UP-245 of 21 September, 1994, On a Referendum on Amendments to the KR Constitution.

Kyrgyzstan always made sure its violations remained within a democratic framework. The power bodies tried to preserve the semblance of constitutionality and referred to constitutional legitimacy even when they were violating human rights. Lawyers exerted great effort to ensure this, always taking care to find other legislative acts that were more in keeping with their demands. Supremacy of the interests of the people, who were represented by the president, prevailed over the idea of constitutionalism understood as a set of limitations on realizing the will of the majority.

Askar Akaev's constitutional novelizations (1994, 1996, 1998, 2001, and 2003), despite the differences in the sociopolitical aspects of their adoption, had common features and were conducted according to a specific pattern. First, all the constitutional amendments and addenda were introduced by means of referenda. Before each of them, the impending changes were pompously declared as another step toward democratization. The national-wide discussions were initiated in order to hold a "*dialog with the opposition and ensure the triumph of people's power,*" and a Constitutional Assembly, formed by the president himself, was created for drawing up a draft of the addenda and amendments to the Constitution. Although at that time neither the Constitution, nor the legislation envisaged the institution of a Constitutional Assembly. Theoretically, the draft it prepared should be brought up at a referendum and, consequently, all attention was concentrated on drawing it up. However, it was not a draft "zealously discussed" and published by the Constitutional Assembly that was put forward for consideration at the referendum, but a version prepared behind closed doors by the presidential administration. All of this took place in a very short amount of time (between the time the referendum was announced to the day it was held) and was characterized by unclear formulation of the questions in the voting bulletin, tapping of the administrative resource, and manipulation of the elections.

The opportunity to carry out radical constitutional reform aimed at changing the existing system of governance appeared when Askar Akaev fled the country in March 2005. The opposition came to power on the wave of the ensuing mass unrest. For the first time, a Constitutional Assembly was created that was instituted by the parliament and not by the president. At that time, the elite that acquired power made all kinds of promises about cardinal reforms. According to the agreements among the political forces, if K. Bakiev won the presidential election, he would begin carrying out constitutional reform through the Zhogorku Kenesh. The new version of the Constitution was to make the president responsible for foreign policy and the security and defense structures and withdraw from his competence any bodies that duplicated the government's functions. The new system of state power organization was to expand the authority of the prime minister. After constitutional reform, holding referenda on the president's initiative would only be possible with the consent of the Zhogorku Kenesh.[23]

But pluralism did not last long this time either. After the presidential election, at which K. Bakiev received 88.71% of the votes, the democratic reforms curtailed. The new president did not rush to fulfill his promises, and constitutional reform was put off until a later date. The parliamentary and extra-parliamentary opposition expressed open protest. The six-month political bargaining ended after a week-long open-ended meeting at which the demand for immediate constitutional reform was put forward. In this way, on 9 November, 2006, a new version of the Constitution was adopted (as the result of pressure on the president) with incredible haste and in incomplete form. However, referring to the imperfection of the new wording of the Constitution, the government

[23] See: "Pobeditelem stanet narod." Statement by Felix Kulov, *Slovo Kyrgyzstana*, No. 49 (21811), 17 May, 2005; K. Mambetov, "Tak diktuet vremia," *Slovo Kyrgyzstana*, No. 49 (21811), 17 May, 2005; F. Kulov: "Adilet biilikke adilet shailoolor arkyluu gana kelүүgө bolot" (A Fair Government Can Only Come to Power through Fair Elections), Agym (Bishkek), No. 51, 1 July, 2005, p. 8.

detained its publication for a month. And the November Constitution did not last for long either. On 30 December, K. Bakiev brought up the question of new amendments to the Constitution at a meeting of the Security Council. This decision was evidence of more usurpation of his powers, since from the legal standpoint consideration of constitutional issues during Security Council meetings was not allowed. On the same day, the parliament (blackmailed by the president's entourage with the prospect of disbandment) voted for introducing seven amendments into the Constitution. However, two weeks later (on 15 January, 2007), the president did not sign the version adopted by the parliament, but an entirely different one, in which amendments and addenda to the Constitution were introduced into more than 40 articles. Novelization was nevertheless carried out. But in practice it was not approved by the political players and did not acquire the necessary legitimization.

Both novelizations of the Constitution carried out as a result of pressure on the president on 9 November, 2006 and on the parliament on 30 December, 2006 came as a complete surprise to everyone. Initiated at first by the opposition, and later by the president's entourage, they were discussed, written, and adopted by the parliament in almost one day. The amazing ease and speed with which the Constitutions were amended made it impossible to consider the legal act being created, thus turning the Constitution into a weapon of the political forces. This ensued not only from the undermined importance of legal regulations, but also from other informal stable norms and rules which until now regulated public relations (for example, patron-client relations). The unconcealed legislative nihilism and increased use of double standards were justified now by the revolution, now by national will, now by the forced or temporary situation. In this chaotic system, where no one felt compelled to play by the rules of the game, the ruling group, driven by a sense of self-preservation, adopted entirely unpredictable decisions; it provoked the conflict itself in order to later settle it unconstitutionally. The president "*says one thing today and does another tomorrow, and all of his decisions are dictated by the present moment.*"[24] This quotation precisely expressed how the political actors themselves perceived the situation. As a result, suspicion and mutual mistrust became aggravated and there were frequent political clashes between the supporters and opponents of the existing regime, as well as between the groups within the government and the political groups united by regional-clan principles.[25] A situation in which none of the political players fulfilled their promises and did not keep their word did nothing to promote reaching a stable agreement or drawing up clear rules of the game.

In this unstable situation, the idea of "*supremacy of the Constitution*" as an important legitimizing formula of Akaev's era was no longer a necessary attribute of political rhetoric. The two above-mentioned novelizations were adopted with blatant violations that had never been encountered before. In this respect, they represented more a temporary political agreement than a legal act. Constitutions adopted by means of deceit and blackmail cannot be regarded as documents of consensus. Since they were consented to under high political pressure, they were only documents of temporary stabilization, and not agreements among the main political forces on stable rules of the game. With its insurmountable legal contradictions, the January novelization also proved as temporary as the rest.[26]

---

[24] Answers by T. Ibraimov, see: "Nash opros. Opros provel S. Chernov," *Delo ¹*..., No. 6 (673), 21 February, 2007.

[25] See: T. Koychumanov, J. Otorbaev, S.F. Starr, *Kyrgyzstan: put vpered*, Johns Hopkins University-SAIS, Washington, 2005, pp. 8-13.

[26] See: "The New Constitution: Politics or Law? Roundtable Transcript," in: *Kyrgyzstan Brief*, Institute for Public Policy, Bishkek, 2006, Issue 7, pp. 11-17.

Novelization of the Constitution: General Characteristics of the Amendments

All the constitutional reforms were adopted with the head of state predominating over the parliament, government, and judicial power. They changed many elements of constitutional order, apart from one—presidential power. Despite the frequent amendments made to the Constitutions, the president retained significant legislative powers for forming state bodies and appointing and dismissing officials. Moreover, every time the method for imitating a weakening of the president's actual powers changed. They were either shifted to a different section, creating the semblance of alleviating the "President's Powers" section, or formulations, such as "with the consent of the parliament," "expression of mistrust by the parliament," were added. In this way, all the versions of the Constitution retained a lack of consistency between the president's broad powers and his irresponsibility. The president had complete control over the executive power branch. Whereby the prime minister, who only has nominal power, held responsibility for all the failures of the president's policy. Weakening of the parliament was also a characteristic feature of almost all the novelizations. It was expressed in limitation of the ZhK's powers, on the one hand, and the president's domination in legislative activity, on the other. This was all impounded by the continuous dependence of judicial power.

One of the characteristics of the political situation in Kyrgyzstan was the extremely complicated and hidden game of stability and change, and the differences between the legal provisions and practical activity. In practice there was no officially declared hierarchy of regulations. On the one hand, according to Art 12 of the Constitution (in all of its versions), it had supreme legal force and was directly in effect in the republic. Constitutional laws, laws, and other regulatory legal acts were adopted on its basis. On the other, Kyrgyz legislation subtly wrote an entirely different hierarchy of regulations into law, according to which the president's decrees had the force of law and, consequently, did not refer to by-laws. But it was not clear to which laws they referred—to constitutional or ordinary laws. Nor was anything said about them being issued on the basis and in pursuance of the Constitution and laws of the Kyrgyz Republic. According to the text and meaning of the Constitution, the supremacy and force of the president's decrees were more significant than the supremacy and force of the laws. From this it also followed that the president had the power to enforce essentially new legal rules that directly regulated social relations, in other words, to "make" the law (Art 46.5 and Art 46.6; Art 47; Art 68.3). Moreover, it was not mandatory for a law to be published in order for it to be endowed with legal force. Art 67 of the Constitution very subtly said that a law comes into force ten days after it is published, unless otherwise envisaged by this law or by the law on the procedure for putting it into effect. In this way, the legislator reanimated one of the important regulations of Soviet times. This legalized the possibility of regulating important aspects of legal relations by means of unpublished acts "for official use."

Conclusion

Intensified exploitation of the constitutional reforms served as actual reinforcement of the ruling elite. The frequent changes in the rules of the game, feeding the illusion of democratization, and the ongoing search for an "ideal" constitution, as well as its easy and rapid novelizations, gave rise to an unusual political situation. The law was intensively applied for all outward appearances and the

supremacy of the Constitution was cultivated, but all these legal subtleties did not have any great meaning in practice. The protection of interests depended not on the force of the law, but on political ties and the ability to bring pressure to bear both on partners and on opponents. The new legal system was based on personal ties, interrelations along patron-client lines, and unofficial rules and institutions. When problems arose or negotiations reached an impasse, unofficial rather than legal mechanisms were resorted to. Meetings, civil disobedience campaigns, and political blackmail were employed; even criminal pressure was not outside the realm of possibility.[27]

As already stressed, during Akaev's time, the Constitution was the main component of the democratic rhetoric. Even if the supremacy of the constitutional provisions was not expressed in practice, great attention was given to creating its illusion. Respect for the law and democratic norms was intensified rhetorically. Askar Akaev, being the only main center of power, could carry out all the novelizations very subtly and, although he violated the legislation, he retained the semblance of constitutionality. This made it possible to make selective use of the legal regulations, on the one hand, and, without leading to degradation, adhere to the meaning of the law at a relative level, on the other. This helped to maintain a sense of the importance of the law in society as the regulator of sociopolitical relations.

The attitude toward the Constitution and its novelization changed along with the arrival of the new government in March 2005. The new team had a flippant attitude toward legal procedure, which was openly used as a tool in the political struggle. During novelization, violations were no longer concealed, they became more risky and even more unstable. Legal vocabulary and primarily the constitutional dominant disappeared from the political rhetoric. An ideal example of this is the following fragment from a speech by President K. Bakiev, in which he noted: "*...I promised to get rid of authoritarian rule. Today we have done that without waiting to make amendments to the Constitution.*"[28]

Insufficient respect for the law was inherited from the previous system, on the one hand, while the new government that came to rule the country by means of Askar Akaev's overthrow and in so doing tried to preserve his regime had extremely low legitimization, on the other. But K. Bakiev was no longer the only main center of power and was unable to carry out the policy of his predecessor. In addition to him, there were other relatively autonomous political forces in the political sphere. They competed in the fight for the relatively limited resources. This situation, in which the political forces were not ready to cooperate and could only enter into temporary pacts, promoted degradation of state power, constant changes of the government, unpredictable political decisions, and aggravated instability. Corrosion of the Kyrgyz legal system, the unsatisfactory nature of the legislative acts, and their mutual contradiction greatly complicated their application and increased the unwillingness to use the force of the law even more.[29] At the beginning of Bakiev's rule (in contrast to Akaev's time), intense degradation of the meaning of the law began. Nevertheless, although this is very difficult, the constitutional instability continues to be a tool for stabilizing presidential power.

---

[27] See: K. Hendley, "Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law," *East European Constitutional Review*, Vol. 8, No. 4, Fall 1999, pp. 89-92.

[28] Speech by the President of the Kyrgyz Republic K. Bakiev at a meeting with representatives of political forces and civil society, 27 October, 2006.

[29] See: K. Hendley, op. cit., pp. 89-93.