



17 APRILE 2019

Pseudo Constitutionalism in Central Asia: Curse or Cure?

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Abstract: The article discusses a disturbing phenomenon, which is termed as pseudo constitutionalism. The latter is defined through the article as a practice in which constitutionalism is used to undermine democracy itself and move toward authoritarian rule. By using Central Asia as a case study – notably known as the most repressive region of the post-Soviet Union sphere and the least inclined towards democratization – the aim of the article is to show how and to what extent non-democratic regimes of contemporary era use democratic instruments found in constitutions (separation of powers, system of checks and balances, political pluralism, and national referenda), or instruments traditionally viewed to protect democracy (constitutional amendments and constitutional justice) to preserve, on one hand, a veneer of democratic development and, on the other hand, as tools for authoritarian state building.

Summary: 1. Introduction. 2. Defining “Pseudo Constitutionalism” and its tools. 3. “Free and fair” elections without a choice. 4. Referendums: Central Asian style. 5. Constitutional amendments and replacement: democratic in form, autocratic in content. 6. Constitutional justice: battling the influence of democracy. 7. Concluding remarks.

1. Introduction¹

This article identifies a growth of a disturbing phenomenon: the use of democratic instruments found in constitutions as expedients for insincere commitments to democratization, which are instead used to build or maintain the stability of substantively authoritarian regimes. Such a practice resembles what I call through the article “pseudo constitutionalism”. The latter thus involves the use of democratic mechanisms to undermine democracy itself and move toward authoritarian rule. Pseudo constitutionalism is a common practice of both hybrid regimes and modern authoritarian regimes which have proliferated in the post-Cold War period especially in the post-Soviet sphere and have persisted over the last nearly three decades in a wide range of former Soviet Union countries.

Central Asia – which encompasses the former Soviet republics of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan – has widely proved to be a part of this phenomenon. Although the five republics experienced in the early 1990s an initial democratic impulse, the process of democratization

* Peer reviewed.

¹ The research for the preparation of this article has been carried out at the *Center for Constitutional Studies and Democratic Development* (CCSDD). I thank the George Lawrence Abernethy Endowment.

stalled in the mid-1990s and then reversed in all of the region's states. The result was the emergence of non-democratic regimes, which, in a variety of ways, combine democratic features with authoritarian rule, appearing at best as a type of hybrid regime between democracy and autocracy, and at worst as consolidated autocracies.² In all of these cases, democratic instruments are formally present to create an aura of democracy, but from a substantial perspective, such instruments are all bent to serve authoritarian goals.

By using Central Asia as a case study – notably known as the most repressive region of the post-Soviet Union sphere and the least inclined towards democratization³ – this article aims to demonstrate how and to what extent non-democratic regimes of contemporary era use democratic mechanisms, on one hand, as expedients to create a veneer of democracy and, on the other hand, as tools for the successful installation of non-democratic regimes. To this end, the article proceeds as follows. First, it defines the characteristic features of pseudo constitutionalism in Central Asia by revealing its main tools. Then, it unveils – through a series of examples – how pseudo constitutionalism works in practice. In conclusion, the article discusses the purposes pseudo constitutionalism serves and, finally, whether it constitutes a curse or a cure for Central Asian states.

2. Defining “Pseudo Constitutionalism” and its tools

Since the Central Asian republics were hurled into a process of independence from the Soviet Union in 1991, Western analysts have viewed these newly emerging states with a great deal of euphoria, predicting the rapid triumph of liberalism and democracy all over the region.⁴ Today, however, it is increasingly evident that prospects for democratization in Central Asia represent the triumph of hope over reality. On one hand, all of the region's states possess constitutions providing for secular governments, representative legislatures, judicial systems, constitutional justice and guarantees for human rights and freedoms – thus meeting the formal requirements of democracy. Both parliamentary and presidential elections are more or less regularly held and, in specific cases, reasonably free. On the other hand, Central Asian states moved in multiple directions, but in none of these cases was liberalism or democracy the final destination. In particular, during the early 1990s only Kyrgyzstan and Kazakhstan experienced some political and economic liberalization; Tajikistan was plunged into a civil war from 1992 to 1997, and

² See T. TUGSBILGUUN, *Democracy in Central Asia: Authoritarian Regimes or Hybrid Regimes?*, in *The Mongolian Journal of International Affairs*, No.18/2013, p. 124; N. SHUKURALIEVA, *Problems of Constitutionalism in the Republic of Kyrgyzstan*, in *Central Asia and Caucasus*, No.6/2007, p. 7.

³ See for example J. BUNSTRA, *Democracy in Central Asia: Sowing in unfertile fields?*, in *EUCAM Policy Brief*, No.23/2012.

⁴ See N.J. MELVIN, *Authoritarian Pathways in Central Asia: A Comparison of Kazakhstan, the Kyrgyz Republic and Uzbekistan*, in I. RO'J (ed.), *Democracy and Pluralism in Muslim Eurasia*, London-New York, 2004, p. 119.

Uzbekistan and Turkmenistan rejected democratic reforms outright. Then, when the 1990s drew to a close, the overall political climate in Central Asia had switched from regime divergence to convergence. At the beginning of the new millennium all five republics were, without exception, under one form or another of authoritarian rule.⁵

Despite different fates in terms of the speed at which each came under some form of authoritarianism, the five countries share many characteristics in their respective constitutional and political developments. Following independence, all the former communist leaders – with the singular exception of Askar Akayev in Kyrgyzstan – became the first popularly elected presidents of their newly independent republics: Nursultan Nazarbayev in Kazakhstan, Emomali Rahmon in Tajikistan, Islam Karimov in Uzbekistan, and Saparmurat Niyazov in Turkmenistan. In all states, these democratically elected presidents have largely dominated constitutional processes and actively sought to accumulate power in the hands of the executive.

More specifically, between 1992 and 1994, all five republics passed new constitutions that created predominantly presidential systems but provided national parliaments with a mechanism to balance strong presidential powers. Nonetheless, the Central Asian political reality clearly shows that each incumbent president has attempted to construct an aura of democratic legitimacy while simultaneously building a personalistic dictatorship.⁶ Key steps in this direction consisted of establishing strong presidential rule largely through manipulating both presidential and parliamentary elections to preserve political hegemony; using national referenda to postpone scheduled presidential elections, thus extending presidential office terms; amending or replacing the constitution to allow presidential reelection, or elevating the status of the president by significantly augmenting his powers and minimizing the importance of other institutions intended as independent checks on government power. This resulted in the establishment of non-democratic regimes largely ruled by autocratic decree, in which parliaments are regularly ignored, courts are weak, and basic rights such as speech, media and association are highly restricted or frequently violated. With the exceptions of Kyrgyzstan – in which the 2005 Tulip revolution

⁵ See K. COLLINS, *Clans, Pacts, and Politics in Central Asia*, in *Journal of Democracy*, No.3/2002, p. 140.

⁶ A partial exception is Turkmenistan, which, under Niyazov's rule (1990-2006) did not attempt even to resemble a democracy, but evolved very early into a highly authoritarian state where, for example, the president was also the prime minister with the absolute power to appoint all executive, judicial and regional officials. As many have commented, the only reforms to take place in the country were directed at enhancing the glory and authority of the president. In fact, a defining feature of Niyazov's political system was his cult of personality. Niyazov called himself Turkmenbashi (father of the Turkmen) and "The Great"; he renamed the months of the year, reserving one for himself and one for his deceased mother, and he introduced *Rukbnama* as a fundamental feature of Turkmen law: a "holy book" of his teachings, containing a collection of sayings and narratives that suggest specific ways in which Turkmen must live. In addition, the president's birthday was a national holiday, monuments to Niyazov were built across the country, and the state-controlled media constantly praised the president and his policies. See P.L. ROUDIK, *The History of Central Asian Republics*, London, 2007, p. 153.

marked the end of Akayev's rule – and Kazakhstan – where Nazarbayev surprisingly announced his resignation on 19 March 2019⁷ – in Turkmenistan and Uzbekistan the respective authoritarian rulers preferred “die on the throne” as the power transfer occurred only after the sudden death of Niyazov in 2006 and Karimov in 2016. The “president for life” path has been most probably chosen by Rahmon in Tajikistan as he is still running the country.

At first sight it might appear that it was primarily informal, unconstitutional measures that shaped Central Asian regimes. However, closer examination reveals that it is fallacious to ignore the role of constitutional rules in these countries. In Central Asia, incumbent presidents took power constitutionally, through regular elections and, except in Turkmenistan, have consolidated their power positions by playing in accordance with constitutional rules. In fact, all Central Asian constitutions enshrine instrumental features such as the separation of powers or constitutional justice – however, these regimes have also used formal democratic measures to neutralize the values of those checks. In this way, several constitutional tools crucially strengthened authoritarian rule rather than liberalism and democracy. It thus follows that Central Asian constitutions are not constitutions without constitutionalism, but that constitutionalism, even if normally associated with a rise and consolidation of democratic order, has become here a key part of building authoritarian projects – a practice which resembles what I call pseudo constitutionalism. Democratic instruments found in constitutions, such as elections and referenda, or instruments traditionally viewed to protect against threats the democratic order, such as constitutional amendments or constitutional justice, have proven to be remarkably susceptible to such manoeuvres; in fact, they have all been manipulated to work exclusively on behalf of presidential political projects. To demonstrate how pseudo constitutionalism works in practice I will now turn to examine its main tools: multi-party elections, referenda, constitutional amendments and replacement, and constitutional justice.

3. “Free and fair” elections without a choice

The role of elections in Central Asia's political development is particularly notable. Although patterns of political development initially differed in the five countries and only later converged, there are many similarities in the ways these countries have chosen to use consultative exercises. Despite the fact that all of the region's republics are dominated by authoritarian rule, all Central Asian states, except Turkmenistan, started experimenting with elections in the mid-1990s, offering their populations the

⁷ According to some political analysts, Nazarbayev's recent decision to resign with immediate effect represents a move of a “smart authoritarianism”, which is trying to define, given the Nazarbayev's advanced age, a succession plan in order to avoid power struggles and maintain country's political stability in the post-Nazarbayev era. See P. STRONKI, *What's Behind Nazarbayev's Surprise Resignation 'Ruse' in Kazakhstan?*, in *Worldpoliticsreview.com*, 28 March 2019.

chance to formally elect both parliaments and presidents.⁸ Such a trend is far from surprising – in fact, elections have become the basic method of legitimizing Central Asian non-democratic regimes. Yet the main problem of elections in Central Asia is that they are manipulated to follow a complex political construct. The elections must be held with a semblance of democracy, but at the same time ensure that the political result is predetermined and that the opposition cannot use the election campaign to increase its influence.⁹ To achieve such outcomes, Central Asian presidents invented several solutions, summarized in the following steps:

a) *the manipulation of the nomination procedure* so as to limit the ability of opposition parties or presidential candidates to put themselves forward. This frequently implied setting both high numeric barriers for allowing political parties to register and unfeasible demands for the registration of presidential candidates for elections. In other words, candidates are forced to collect vast numbers of signatures while the administration retained the right to decide which signatures are genuine and which are not, or demand a huge monetary deposit as a precondition for registration.¹⁰ For example, in Kazakhstan, the 1995 parliamentary elections required each candidate to put forth a non-refundable deposit equivalent to one hundred times the minimum monthly wage, something beyond the ability of many of those not backed by the government; in 2002, the country raised the number of members needed for party registration from 3,000 to 50,000 and required parties to have a branch office and at least 7,000 members in each of Kazakhstan's regions. The latter move led to the deregistration of most of the 19 parties represented in parliament.¹¹ Similarly, in Kyrgyzstan, the 1995 presidential elections requested candidates to gain the signatures of 50,000 citizens from all regions of the country. Although six candidates managed to register

⁸ Between 1994 and 2013 both parliamentary and presidential elections were practically non-existent in Turkmenistan. The presidential elections were cancelled in 1994, when a referendum extended Niyazov's term in office until 2002. Then, in 1996 the People's Council (the country's highest representative body) requested the appointment of Niyazov as president for life, a proposal that he at first refused. However, in 1999, "under the pressure from the Turkmen nation", he agreed magnanimously to become president for life, thus abrogating any constitutional restraints on his rule. In 2004 the parliament opposed Niyazov's professed offer to hold presidential elections in 2008 or 2009. Thus, from its independence to 2013, Turkmenistan remained the only one-party state in the former Soviet bloc, as the former Communist Party – renamed the Democratic Party – was the sole registered party, and opposition groups were never registered nor allowed to function. In fact, Niyazov had prohibited the establishment of any alternative political party until 2010, explaining, "Turkmenistan will get a multiparty system and an opposition in time, but it has had more important things to do since independence, such as ensuring that the people's living standards don't plummet." Therefore, even if parliamentary elections were generally held, they did not even have the semblance of multi-party elections. For instance, in the 1999 elections, 103 of 104 candidates were members of the Democratic Party; the other was co-opted as an independent. See S. PEYROUSE, *Turkmenistan: Strategies of Power, Dilemmas of Development*, Armonk-New York, 2012, p. 74.

⁹ See G. GOLOSOV, *Lipstick on a Crocodile: Electoral Authoritarianism in Central Asia*, in *Opendemocracy.net*, 11 March 2011.

¹⁰ G. GOLOSOV, *Lipstick on a Crocodile*, cit.

¹¹ See M. OCHS, *Human Rights in Central Asia*, in D. BURGHART – T. SABONIS-HELF (eds.), *In the Tracks of Tamerlane: Central Asia's Path to the 21st Century*, Washington DC, 2004, p. 97.

on this basis, there were frequent complaints that the local officials responsible for ensuring legitimate processes instead obstructed attempts to gather signatures and refused to verify them when collected. Then, as the campaign began, three candidates were removed from the ballot paper on the grounds of irregularities in their collection of names.¹²

Registration of political parties is an arduous process also in Tajikistan, where the registration threshold is 4,000 members. Since Tajikistan is a relatively small country, only parties supporting the regime can meet such a requirement. Moreover, there were several cases where registrations were denied on technicalities or for unknown reasons. Thus, for instance, in the 1999 presidential elections, Rahmon ran alone as two candidates were excluded a month before the election.¹³ In Uzbekistan, a legal opposition, although technically allowed, does not exist in practice. In fact, to establish a political party, 20,000 signatures have to be collected across the country. In addition, various opposition groups (democratic, religious and ethnic) have been denied registration ostensibly because they represented sources of Islamic fundamentalism, but more likely because they represent an alternative to the current system. Karimov justified such restrictions by pointing to the experience of neighbouring Tajikistan, where a civil war raged among forces representing former communists, nationalists, democrats and Islamists. Thus, to avoid such chaos, he promoted a “cult of stability” by claiming that his rule, even if considered harsh by some, was the only way to ensure social and inter-ethnic harmony in the country.¹⁴

b) the use of an appropriate electoral system to preserve a political monopoly. In particular, Kyrgyzstan, Tajikistan and Kazakhstan have opted for majority systems or at least mixed electoral systems. Thus, for instance, in the 1995 Kazakh parliamentary elections, deputies for the lower house were elected on the basis of single-member constituencies; those for the Senate on the basis of two representatives chosen by local authorities in each region. The contest produced a legislative body that appeared chock full of Nazarbayev’s loyalists since the large size of constituencies made it very hard for opposition candidates to stand much chance of success even if they gained registration.¹⁵ However, a key invention of the Kazakh regime has been the substitution of the mixed electoral system with the proportional system since the 2007 parliamentary elections. At first glance, it might appear unexpected, but as has been noted, this substitution represented a logical way to preserve the political monopoly.¹⁶ Once the Kazakh regime had the registration procedures under control, it then made sure that the elections resulted in cooperative and

¹² See B. PANNIER, *The Shrinking Shores of Central Asia’s ‘Island of Democracy’*, in *Transition*, No.2/1996, p. 56.

¹³ M. OCHS, *Human Rights*, cit., p. 105.

¹⁴ M. OCHS, *Human Rights*, op.cit., p. 109.

¹⁵ J. ANDERSON, *Elections and political development in Central Asia*, in *Journal of Communist Studies and Transition Politics*, No.4/1997, p. 32.

¹⁶ See G. GOLOSOV, *Lipstick on a Crocodile*, cit.

docile assemblies. Parliaments elected under a majority system remain linked to the group of voters that elected them and cannot ignore their constituents' demands; however, under the proportional system, deputies' stances are largely dependent on their political party (i.e., on the person who controls the party). In addition, the Kazakh proportional system includes a further piece of machinery that conveniently keeps undesirable parties out of assemblies: there is a seven per cent national electoral threshold. By contrast, Uzbekistan introduced something much simpler: it retained the majority system but allowed only loyal political parties to field candidates.¹⁷

c) the creation of a faint semblance of a formal 'genuine' opposition. As far as presidential elections are concerned, democratic semblance allows 'technical' candidates, although they often openly encourage the electorate not to vote for them but rather for the official candidate. Thus, for example, in Uzbekistan during the 2000 presidential elections, the person permitted to run against Karimov said he would vote for the incumbent. Similarly, following the Kazakh 1995 parliamentary elections, the leader of the People's Unity Party, a Nazarbayev creation and the largest party in the legislature, emphasized that his party had no interest in exercising power because it, like other parties, lacks the political maturity to assume leadership.¹⁸ Nonetheless, parliamentary elections remain the main showcase of pseudo constitutionalism; there has been a push to make these events resemble proper multi-party elections as much as possible. This resulted in the construction of a multi-party system where, as in Kazakhstan, "88 percent vote for the ruling party"; or where, as in Tajikistan (up to 2010), "the opposition always win [sic] two seats"; or, more simply, as in Uzbekistan where "every political party support the president".¹⁹

Most precisely, in Kazakhstan, the party of power, Nur Otan, was established in 1999, while the second regime party, Asar, was not even allowed a semblance of independence when, during the 2004 elections, it featured Nazarbayev's daughter at the head of its list. The Agro-Industrial Union of Workers is another puppet party that supports the president. However, in the 2007 parliamentary election, Nazarbayev did not even create additional allied parties, but limited himself to just one: Nur Otan. Consequently, Nur Otan received an embarrassingly high 88 per cent of the vote, winning all seats in parliament.²⁰ Since such an outcome have not been planned, the example demonstrates how Central Asian leaders cannot always fully control the outcome of electoral contests. However, the real opposition has been circumscribed. In particular, Nazarbayev has singled out nationalist or separatist groups, finding them guilty of violating a constitutional provision that prohibits groups attempting to promote social, racial, national, religious,

¹⁷ G. GOLOSOV, *Lipstick on a Crocodile*, *op.cit.*

¹⁸ J. ANDERSON, *Elections and political development in Central Asia*, *cit.*, p. 34.

¹⁹ See G. GOLOSOV, *Lipstick on a Crocodile*, *cit.*

²⁰ G. GOLOSOV, *Lipstick on a Crocodile*, *op.cit.*

class or tribal discord. Prominent targets have been a Kazakh nationalist party, Alash, and the Zheltoqsan movement, which were both banned and their leading opposition figures subject to harassment.

Tajikistan is something of a special case since its multi-party system is composed of Rahmon's People's Democratic Party and a few other fictitious opposition groups that fully support Rahmon's regime. However, the country, at least initially, had a real opposition – in fact, the civil war forced Rahmon to concede to Islamic and democratic opposition groups by granting them 30 per cent of government posts until the 2000 parliamentary elections. Tajikistan thus became the only Central Asian country where the government has formally reached an agreement with the opposition about nominal power sharing, and where a legal Islamic political party was permitted to function openly. Nonetheless, between 2000 and 2010, in almost all elections, the Party of Islamic Rebirth has gained only two seats. Six other opposition parties were banned in 1999 and, as in Kazakhstan, their leaders subject to harassment.²¹ Then in 2015 Tajikistan further strengthened its authoritarian system; the Party of Islamic Rebirth lost its two parliamentary seats and has been banned on the grounds that it represents a terrorist organization.²² On the contrary, in Uzbekistan, Karimov formed four opposition parties to create a semblance of pluralism. None of them can be classified as a party of power, but all four existing parties supported Karimov. For example, in the 2009 parliamentary elections, the Liberal Democratic Party took 53 out of 135 seats, the National Democratic Party took 32, 31 went to the Democratic Party and 19 to the Social Democratic Party; thus, it resembled a multi-party system, but it was one in which all four parties supported Karimov. The real opposition parties have been hampered by government restrictions – for example, national democratic movements such as Erk and Birlik have been banned and their leaders forced into exile abroad. Finally, in Turkmenistan,

after Niyazov's era, the newly elected president, Gurbanguly Berdimuhamedow, followed his Central Asian counterparts by introducing a new legislation in 2012 aimed at promoting pluralism in politics, the freedom of media and a multi-party political system.²³ The measure was presented as a national democratic milestone – even though the first multi-party election, in 2013, of the Turkmen parliament saw only the participation of candidates loyal to the president. This illusionary democratic outcome would have not changed even if the real opposition parties had not been banned since the Turkmen parliament,

²¹ R.D. KANGAS, *Legal Reform in Central Asia: Battling the Influence of History*, in D. BURGHART – T. SABONIS-HELF (eds.), *In the Tracks of Tamerlane: Central Asia's Path to the 21st Century*, cit., p. 80.

²² M. EDWARDS, *Meet Tajikistan's embattled Islamists*, in *Opendemocracy.net.*, 28 September 2017.

²³ At the same time, Berdimuhamedow is largely continuing the authoritarian rule of his predecessor. For example, he gradually dismantled Niyazov's cult, but only to replace it with its own; state media refer to him as *Arkadag* (protector), while his family became an icon of adoration. See Freedom House, *Turkmenistan Report*, 2018, in *Freedomhouse.org*.

designed formally as a democratic institution, is not permanent legislative body; instead it is convened annually or at the pleasure of the president.

d) to limit the electoral campaign. Besides restrictions on freedom of assembly and association, in all Central Asian states, the media remains completely controlled by the state, although the degree of government authority varies considerably. While Uzbekistan and Turkmenistan lack absolutely any freedom of expression, in Kirghizstan and Kazakhstan some newspapers were able to express support for alternative candidates, although in many cases they also found themselves under state pressure. For instance, in Kazakhstan, the president's daughter currently runs the main TV network, and national media are generally concentrated in the hands of persons close to Nazarbayev. The newspapers and television stations can report on intra-governmental discord and low-level corruption, but stories about Nazarbayev, his family, or allegations of their corruption are likely to result in state harassment.

e) to report Soviet-level turnouts in electoral exercises. In all Central Asian countries official results of both parliamentary and presidential elections have largely reported the Soviet style compulsory participation. According the official results one finds Kyrgyzstan reporting turnouts of 77 per cent in the 2000 presidential elections won by Akayev with 74.49 per cent of vote; Kazakhstan reporting turnouts of 89.9 per cent in the 2011 elections won by Nazarbayev with 95 per cent of vote, and Tajikistan reporting turnouts of 86.6 per cent in the 2013 elections won by Rahmon with 86.9 percent of the vote.

It is evident that both parliamentary and presidential elections – even if staged to offer formal freedom of voting, choice amongst candidates, and citizen impact on government – present themselves as only nominally democratic; they are in fact completely fictitious. Similar is also the case of Kyrgyzstan even though the country faced in 2010 violent protests known as the April revolution, which ended with the resignation of the Kyrgyz president, Kurmanbek Bakiyev (2005-2010) and the adoption of an entirely new constitution, which introduced the proportional system. Thus the 2010 parliamentary elections were marked by a semblance of political pluralism and vibrant political campaign; however, to gain seats in parliament, a political party had to surpass a 5 per cent national and 0.5 per cent regional threshold, both calculated against the number of registered voters rather than based on turnout. The unusual regional threshold clearly compromised the objective of proportional representation. Then, in 2011 Almazbek Atambayev won the presidential election with 63 percent of the vote defeating 15 other candidates amid 60 percent turnout. The following 2015 parliamentary elections thus appeared to mark a milestone for the country as a competitive vote with an uncertain outcome; nonetheless, the presence of multiple

parties in the parliament did not result in political pluralism. Despite holding about 30 percent of seats, the president's Democratic Party of Kyrgyzstan has taken control over key political processes.²⁴

4. Referendums: Central Asian style

National constitutional referenda are used by all Central Asian regimes to maintain a veneer of democratic legitimacy while simultaneously serving their authoritarian rulers in three ways: reaffirming democratically elected presidents; prolonging their terms in office without facing elections at the constitutionally appointed time; and as a chance to put forward constitutional changes that extend prescribed presidential terms in office or greatly expanded presidential powers. Just as with the elections, numerous referenda have been held since the mid-1990s, reporting Soviet-style percentages of popular participation.

Regionally, Turkmenistan began the trend of exploiting referenda when the government invited citizens to take part in a referendum to give the president a second office term without having to face election. The referendum, held in 1994, extended Niyazov's term until 2002, and according to official results, 99.7 per cent of the population voted for and only 212 people opposed the proposal.²⁵ Turkmenistan's example was then followed by Karimov in Uzbekistan, who was confirmed as president until 2000 in a 1995 referendum, which he won with 99.6 per cent of the vote. Kazakhstan followed its neighbours in 1995, when Nazarbayev used his constitutionally prescribed power to dissolve the legislature – from which he sensed reluctance – and then took advantage of the parliament's absence to extend his tenure in office until the end of the century in a referendum supported by 91 per cent of the population. With his reinforced legitimacy, Nazarbayev then put forward an entirely new constitutional draft, approved by a similar percentage of the population in 1995.²⁶

Similar practices can be found in Kyrgyzstan, where the growing crisis in relations between Akayev and his parliament led the president to engineer first the dissolution of the legislature in 1994, calling it an “outdated Soviet relic”,²⁷ and then a referendum asking people to vote on two issues: to make it possible to amend the constitution via popular referendum rather than solely through a two-thirds parliamentary majority, and to approve constitutional changes aimed at creating a new two-chamber legislative body. Official results suggested that over 86 per cent of the population voted, and that each question was approved with majorities of over 80 per cent. In addition, Akayev exhibited increasing frustration with the parliament elected in 1995 and sought to follow the example of his neighbours in having his term

²⁴ See Freedom House, *Kyrgyzstan Report*, 2018, in *Freedomhouse.org*.

²⁵ See J. ANDERSON, *Constitutional development in Central Asia*, in *Central Asian Survey*, No. 3/1997, p. 301.

²⁶ J. ANDERSON, *Constitutional development*, cit. p. 302.

²⁷ J. ANDERSON, *Constitutional development*, *op.cit.*, p. 304.

extended. Although the legislature acted to block the latter proposal, it did reluctantly accept Akayev calling a new referendum in 1996 to approve constitutional changes aimed at shifting the balance of power between parliament and president through an extension of executive powers. The electorate responded with a Soviet-style 96.5 per cent turnout, and 94.5 per cent supported the proposed changes. Similar moves were launched later by Bakiyev, who orchestrated a referendum on a new draft constitution, which led to the adoption of the 2007 Kyrgyz constitution, and more recently by Atambayev, who orchestrated a referendum in 2016 to approve changes to the 2010 country's constitution.²⁸

Likewise, several referendums on constitutional changes were also held in Tajikistan and Uzbekistan; in the former, a 2003 referendum offered an illusory limit on the president's incumbency to two seven-year terms, while in the latter a referendum was orchestrated in 2002 to create a new bicameral legislature and to extend the president's term in office.

5. Constitutional amendments and replacement: democratic in form, autocratic in content

Constitutional arrangements have proven to be remarkably fluid in all Central Asian states. As indicated by numerous referenda on constitutional reforms, since the mid-1990s Central Asian national constitutions have been subject to several amendments or, in certain cases, to complete replacement. Rewriting constitutions gave Central Asian rulers the chance to shift from one constitutional order to another, legitimately replacing bodies that are supposed to check executive power, such as parliaments or constitutional courts, while simultaneously ensuring presidents' permanence in office or the expansion of their powers. The resulting constitutions still look formally democratic and still commit to a separation of powers, but their texts have been substantially reworked in a way that actually lessens the possibility of future democratization. While maintaining the rhetoric of democratization, Central Asian presidents created constitutional orders that place few constraints on their power and instead emphasize their personal leadership.

The first Central Asian state that replaced an existing constitution as a way to consolidate power was Kazakhstan, following the crisis between the president and his parliament in 1995. The Kazakh parliament was initially pro-presidential, but it soon developed into a body that was highly critical of the government. Nazarbayev perceived the reform process as being impeded by several articles of the constitution and that he lacked sufficient power to push through reform in the face of the legislature's resistance, as it began to challenge his reform measures and sought to introduce its own. Nazarbayev

²⁸ Freedom House, *Kyrgyzstan Report*, 2018, cit.

became increasingly impatient with the assembly and – supported by the constitutional court, which ruled the 1994 parliamentary elections invalid – quickly moved to dissolve the legislature. In the absence of an active parliament, he then replaced the existing 1993 constitution with an entirely new constitutional document. The move gave him a chance to maintain a strong presidency and weaken the legislature by creating a new bicameral parliament. At the same time, he replaced the constitutional court with a weaker constitutional council, thus preventing any serious check on the exercise of his greatly expanded powers. In particular, the 1995 constitution (and further constitutional amendments approved in 1998, 2007, and 2011) gives Nazarbayev the right to rule by decree, dissolve parliament more or less at will, appoint the prime minister and other governmental figures, as well as seven members of the 47-member Senate, and to permit parliament to delegate law-making powers to the president for up to a year. Moreover, it established an impeachment process that renders the notion more or less unthinkable: it requires an initial vote by one-third of deputies in the lower house (who would lose their seats if the motion eventually fell), majorities in both houses, a ruling by the supreme court and a 75 per cent majority vote in a joint sitting of the two houses.²⁹ Finally, in 2017 Kazakhstan approved a new constitutional reform; in the words of Nazarbayev it was aimed at seriously redistributing powers and democratizing the political system as a whole. However, the latter has been not accompanied by political pluralism, thus remaining the country a consolidated authoritarian regime.³⁰

Similarly, in Kyrgyzstan, Akayev grew frustrated with both the 1993 constitution – which he thought was idealistic – and the parliament, elected in 1995. However, he used the tactic of constitutional amendments to extend his powers and to weaken the legislature, which he saw as a major obstacle to his reforms. In particular, the 1996 constitutional amendment gave him more power to veto legislation, dissolve the parliament and appoint officials (excluding the prime minister, whose appointment needed legislative confirmation). The constitutional changes were attacked as an unwarranted extension of presidential powers, but official sources continued to stress that Akayev's power remained limited compared to those of his Central Asian neighbours and that his dominance was necessary in order to boost the pace of reforms.³¹ On the other hand, in Kyrgyzstan constitutional amendments and replacement were used to curtail strong presidential rule. Following the 2005 Tulip revolution, Akayev was forced to agree to a revised constitution, which turned the country into a parliamentary system. The reform was, however, rejected by the constitutional court, a move that subsequently permitted Bakiyev to replace the 1993

²⁹ See P. JONES-LUONG, *Institutional Change and Political Continuity in Post-Soviet Central Asia: Power, Perceptions, and Pacts*, Cambridge-New York, 2002, p. 121.

³⁰ See C. PISTAN, *2017 Constitutional Reform in Kazakhstan: improving democracy without political pluralism?*, in *Constitutionnet.org*, 28 March 2017.

³¹ P. JONES-LUONG, *Institutional Change*, cit., p. 131.

constitution with an entirely new 2007 constitutional document that restored strong presidential powers. The latter has been replaced again with an entirely new constitution, which destroyed presidential powers and introduced a form of government close to the parliamentary system following the 2010 April revolution. Nonetheless, in 2016 new constitutional changes, depicted by Atambayev as necessary to definitely move to the parliamentary system have finished to strengthen the power of the executive and weakened the parliament and the judiciary.³²

Tajikistan also experienced illusory democratic reform via the 2003 constitutional changes; these apparently limited the president to two seven-year terms but in practice allowed Rahmon to be elected for another 14 years, whilst in 2016 new constitutional changes allowed Rahmon to rule indefinitely.³³ In Turkmenistan, constitutional amendments were passed in 1993 and 2003 to strengthen the role of the People's Council, which was designed as the country's highest representative body but was in fact a rubber stamp for Niyazov. The body was the sole authority able to reverse its own decisions, effectively placing it above the constitution, and it had the power to adopt constitutional amendments without parliamentary approval. It was then abolished by in 2008 by Berdimuhamedow as part of his chimeric democratic reforms, but only to be reintroduce again in 2017. Moreover, in 2016 Berdimuhamedow put forward a new constitution that extends presidential term from five to seven years and removes the upper age limit on candidates for presidency (previously set up at 70 years). Even though the new edition of the constitution has been primarily adopted to ensure the longevity of Berdimuhamedow (who won the 2017 elections with a 97% of vote), it was presented as the only constitution in the world which reflects the provisions of the UN General Assembly resolutions, thus claiming that an ample space has been given to human rights in the country.³⁴

Uzbekistan perhaps best illustrates presidential use of constitutional changes for insincere pledges to democratization: Karimov first introduced a 2002 constitutional amendment to create a new bicameral legislature and to extend presidential terms from five to seven years. Simultaneously, he urged "radical" democratic changes, telling parliament that the country was ready for freedom of the media, political activity, independent courts, and economic liberalism. The 2003 constitutional amendments established that, after the presidential election at the end of 2007, the prime minister would exercise greater power. In fact, Karimov explained that he aimed to create three powerful branches of government, to correct a situation where "everything now depends on me."³⁵ The situation was thus "corrected" with the 2011

³² Venice Commission, *Opinion on the draft law "on introduction of amendments and changes to the constitution"*, No.863/2016, 19 October 2016.

³³ Freedom House, *Tajikistan Report*, 2018, in *FreedoHouse.Org*.

³⁴ Freedom House, *Turkmenistan Report*, 2018, in *FreedoHouse.Org*.

³⁵ See M. OCHS, *Human Rights*, cit., p. 109.

constitutional amendments, which reduced the presidential term from seven to five years. The change was hailed as advancing democratization, but it was simply a reversion to the pre-2002 terms of office. Following the 2011 constitutional changes, Karimov stressed that the country was following a path of “evolutionary” democratization, which included increasing checks and balances among the three branches of power and strengthening political parties. However, he also stated that the government’s power would continue to increase in the “transitional period” in order for it to direct the reforms, and further cautioned that the process of democratization was lengthy and never-ending. The process of democratization appears to be never-ending also in Kazakhstan, where Nazarbayev claimed that “democracy is not the starting point of our way, it is a final point of our destination.”³⁶

6. Constitutional justice: battling the influence of democracy

During the early years of post-Soviet transformation, all Central Asian states except Turkmenistan set up constitutional courts in order to implement constitutional review.³⁷ Besides the function of abstract norm control as their most important power, Central Asian constitutions empowered constitutional adjudication bodies to exercise the concrete norm control (in Kazakhstan, Kyrgyzstan and Tajikistan) as well as to decide on jurisdictional disputes between government branches (Tajikistan), the impeachment of the president (Kazakhstan and Kyrgyzstan), and electoral disputes (Kazakhstan and Kyrgyzstan). Nonetheless, in none of these cases were constitutional courts given the chance for genuine guardianship of the democratic values expressed in their national constitutions, and they have overall failed to emerge as independent checks on their strong executives. In Uzbekistan and Tajikistan, constitutional adjudication bodies have become mere façade institutions; in Kazakhstan and Kyrgyzstan – the two Central Asian countries that experienced some liberalization during the early 1990s – constitutional courts initially attempted to carve a more active role by being pro-democratic in their orientations, but they were brutally attacked when their respective consolidated presidencies changed governance patterns.³⁸

Kazakhstan provides a good illustration of such a practice: the constitutional court initially supported the president by ruling the 1994 parliamentary elections unconstitutional, which permitted the president to quickly dissolve the reluctant parliament in 1995. However, after the constitutional court repeatedly annulled several presidential decrees and commented unfavorably on the president’s new constitutional

³⁶ See D. PISAREVA, *Making Sense of Nazarbayev’s Abrupt Resignation in Kazakhstan*, in *Atlanticcouncil.org*, 25 March 2019.

³⁷ See generally C. PISTAN, *Tra democrazia e autoritarismo: sistemi di giustizia costituzionale nell’Europa centro-orientale e nell’area post-sovietica*, Bononia University Press, Bologna, 2015.

³⁸ See A. MAZMANYAN, *Constrained, Pragmatic, Pro-democratic: Appraising Constitutional Review Courts in Post-Soviet Politics*, in *Communist & Post-Communist Studies*, No.4/2010, p. 413.

draft, it was simply deleted from the constitution. Although Nazarbayev denied that this was a reaction to the open letter from 6 of the 11 judges attacking the sweeping powers granted to the president by the proposed draft of the 1995 constitution, the constitutional court was quickly substituted with a docile constitutional council, the decisions of which the president might veto³⁹ (up to the 2017 constitutional reform).

Nazarbayev then made use of the constitutional council for two different purposes. On one hand, he used the constitutional adjudication body to paint Kazakhstan as a progressive, democratic nation with an efficient judicial system while simultaneously achieving his authoritarian goals. In 2011, for example, the constitutional council adopted a decision that rejected the proposal to extend Nazarbayev's term in office until 2020, thus bypassing two consecutive presidential elections. The decision, however, resembles an illusory judicial activism: it was engineered by the president, who then opted to not use his power to veto the decision, but maintained that he would respect the democratic principles established by the constitution and, thus, the council's decision. Shortly after, though, Nazarbayev won the early presidential elections with 95 per cent of the vote. On the other hand, Nazarbayev also used the council to present himself as a democratic reformer by appearing more democratic than the country's constitutional adjudication body itself. For instance, in 2012 the constitutional council decided, with the consent of the president, that national elections could not be held in the region of Zhanaozen where a state of emergency was declared due to clashes between protesters and police. It is self-evident that such a decision would have led to further violations of human rights in the protesting region, but it was instantly overruled by the president, who argued that residents cannot be denied their constitutional rights.⁴⁰

On the contrary, in Kyrgyzstan, the constitutional court played a central role in annulling the 2007 constitutional reforms passed by the parliament in order to introduce a parliamentary system after political turmoil. The decision was very much in the interest of Bakiyev, who readily complied with the court's ruling and put forward the 2007 constitution, which reestablished a strong presidential republic. Then, after severe political turmoil in 2010, the Kyrgyz interim government suspended the constitutional court, accusing it of supporting the president after the latter was displaced following the wave of popular protests. Finally, the 2010 constitution substituted the constitutional court with a constitutional review

³⁹ See A. MAZMANYAN, *Judicialization of politics: The post-Soviet way*, in *International Journal of Constitutional Law*, No.1/2015, p. 200.

⁴⁰ A. MAZMANYAN, *Judicialization of politics*, cit., p. 202.

chamber, which is structurally part of the national supreme court. However, it was incapacitated for more than three years, while in 2016 an attempt was made to curtail its powers.⁴¹

Concluding remarks

Pseudo constitutionalism serves two main purposes. Internally it reflects popular participation in politics, anesthetizing the population with a semblance of democracy. Such a practice has proved to be very effective, as the regimes enjoy fair amounts of democratic legitimacy at home. For instance, when Kazakhstan inaugurated an increasingly authoritarian rule in the mid-1990s, in a survey of 1500 citizens, many respondents approved of Nazarbayev's conduct and agreed that the country was a democracy. On the external level, pseudo constitutionalism serves as an insincere response to international pressures for democratization. It aims to convince the international community, Western states and potential investors of these gas- and oil-rich countries' sincere pledges to democratic politics in order to secure financial assistance and investment to develop their natural resources. The factor of "they are trying to be like us, therefore we should help them" undoubtedly plays a significant role in the decisions of international actors to allocate funds to support the economic development of Central Asian states. For example, it seems not an exaggeration that Kyrgyzstan under Akayev's rule was extremely motivated by a desire for Western economic assistance, promising to make Kyrgyzstan an "island of democracy in Central Asia". Moreover, it was not a case that Karimov in Uzbekistan urged "radical" democratic reforms in 2002, the same year in which the US gave the country the financial aid to help the president to rebuild the country's economy. Furthermore, in Kazakhstan, Nazarbayev cleverly calculated the constitutional council's objection to hold a referendum for the extension of the presidential term so as to test the reactions of the international community, since the country has been seeking to improve its international standing as a progressive, democratic nation. Turkmenistan learned from its Central Asian neighbours and in 2012, its second president launched ostensible democratic reforms in order to preserve building profitable economic relations with the European Union.⁴²

Yet the core problem of pseudo constitutionalism is that it is very attractive to autocratic presidents, who have significant incentives to appear as if they are constructing democracy while subtly promoting varying degrees of authoritarianism. Such a practice has, rightly or wrongly, been seen in all Central Asian states as offering the best prospects for ensuring solutions to regional problems. In fact, for most of the region's

⁴¹ See C. PISTAN, *Tra democrazia e autoritarismo*, cit., p. 383; Venice Commission, *Draft opinion on the draft constitutional law on introducing amendments and additions to the constitutional law on the Constitutional chamber of the Supreme court of the Kyrgyz republic*, No.771/2014, 30 May 2014.

⁴² See CEPS Policy Brief, *Democratisation and Human Rights in Central Asia: Problems, Development Prospects and the Role of the International Community*, No.134/2017.

leaders, the appeal of Western-style democracy quickly wore off since pluralistic politics simply appeared to be a gateway to chaos and disorder in societies lacking national unity and facing serious political and socioeconomic problems.

Certainly, in all Central Asian states there are inexcusable excesses in terms of human rights violations, but with the manipulation of democratic instruments these regimes have all managed to guarantee national unity, political stability and consensus, as well as to prevent potential inter-ethnic conflict in their large, multi-ethnic states, and to meet the acute need to be accepted in the Western sphere of influence. In other words, to be an Uzbek or Turkmen is to give up all freedom, but also to belong to a state capable of furnishing order and protection.⁴³ This is not to say that the practices that led to authoritarianism, no matter how limited or benign it is, must be seen as a proper path for Central Asian countries. In fact, the end result of pseudo constitutionalism is particularly dangerous as it maintains these regimes at a continual crossroads between some kind of hybrid regime and consolidated autocracies, undermining future opportunities for sincere democratization. For example, Kyrgyzstan, Kazakhstan and Tajikistan have all been illiberal democracies at some point, but subsequently backtracked to consolidated autocracies, and from there they moved toward some kind of hybrid regime. Uzbekistan opted for authoritarian development very early, while Turkmenistan has deteriorated to a tragic sultanistic regime characterized by personal rule, large-scale corruption, and the manipulation of fear and rewards. Both Uzbekistan and Turkmenistan recently appear intent on moving from consolidated autocracies to some kind of hybrid regimes.

On the other hand, it is unrealistic to expect that democracy will fall from the sky in Central Asia. Perhaps even insisting on the immediate introduction of democracy in societies whose politics appear to not support it is not only unrealistic but may do far greater damage. This is not to say that Central Asia can afford to suspend its reforms, but forced democratization can be as dangerous as attempts to remain within the paradigm of surface changes. I believe that first and foremost, Central Asian reform should focus on *reviving constitutionalism* – that is, constructing a sincere and genuine system of checks and balances designed to prevent the accumulation of power and the abuse of office. The latter requests as its first step to dissolve national parliaments, form a genuinely competitive party system, hold free elections, and ensure that newly elected parliaments become a forum for pluralistic debate. Only then will conditions become more amenable for a real transformation of Central Asian regimes into truly pluralistic and democratic orders.

⁴³ C.H. FAIRBANKS, *Disillusionment in the Caucasus and Central Asia*, in *Journal of Democracy*, No.4/2001, p. 53.