

Strengthening the Vertical: Kyrgyzstan's 2016 Constitutional Referendum

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- On December 11, 2016, a referendum in Kyrgyzstan approved extensive changes to the country's Constitution, which was adopted in 2010 following the revolution that overthrew President Kurmanbek Bakiyev. The referendum took place despite a widespread consensus in 2010 that the fundamental structure of the new Constitution should not be altered for 10 years. The constitutional changes come at a critical time, as President Almazbek Atambayev's single constitutionally permitted term in office expires this year, and a new president will be elected in November.
- Although the president of Kyrgyzstan lacks the *de jure* power to initiate constitutional amendments, President Atambayev forcefully campaigned for the changes, overriding objections from other members of the 2010 interim government, and then mustering 84 MPs in support of the changes. He also used his influence to rally the support of other governmental bodies for changing the Constitution. The Ombudsman, the government, the Supreme Court, and the general prosecutor's office spoke in favor of the changes. The amendments also received a positive ruling from the Constitutional Chamber of the Supreme Court, which overlooked inconsistencies to find the amendments acceptable.
- President Atambayev argued that the amendments were needed to change the state structure from a mixed presidential-parliamentary system to a fully parliamentary one, in order to resolve concerns about the division of powers and make it more difficult to establish an authoritarian regime.
- In reality, under the new amendments the president retains his levers of influence, including through the propresidential party in parliament and his influence on law enforcement and national security structures. The changes preserved the influence of Atambayev's Social Democratic Party of Kyrgyzstan (SDPK), currently the main party in the ruling coalition. Rather than weakening the presidency, the changes' main institutional consequence was to weaken the judiciary's independence. The amendments increased the president and parliament's influence on judges, including the judges of the Constitutional Chamber of the Supreme Court.

Strengthening “stability”

In advocating for the amendments, supporters of the constitutional changes argued that Kyrgyzstan needed a stable government. From 2010 to 2016, the country had six prime ministers. Some of the constitutional changes, therefore, sought to reduce the possibility that the coalition—and, by extension, the government—might collapse. On the other hand, government stability will also allow the majority coalition, which is dominated by the pro-presidential SDPK, to monopolize “administrative resources” in the lead-up to the November presidential elections. Officials’ use of government structures, facilities, and personnel for campaign functions external to their official purposes is always crucial for electoral success in Kyrgyzstan, and having a stable governmental coalition will be important for deploying these resources in support of Atambayev’s candidate in November.

Prior to the presidential elections in 2017, governmental stability will rely on a new provision that allows the prime minister to call for a confidence vote in the government two times a year, instead of just once a year. This increases the prime minister’s leverage over the governing coalition. “Stability” is further preserved through a measure that allows the government to remain in power even in cases where the parliament passes a vote of no confidence and the president calls for early parliamentary elections. This reduces the parliament’s incentive to call for early elections, because such elections could mean that the parliament would lose its levers of influence and the administrative resources it directs. Early elections could still take place if the parliament passes a self-dissolution motion, if there is vote of no confidence in the government, or if the parliament refuses to approve government formation. However, in the event that any of these scenarios occurs, the government would still control the administrative resources until the first day of the new parliament, due to a provision allowing the government to remain in place until elections are held.

These new provisions concerning the powers of the prime minister were enacted on January 15, 2017, and will remain in effect during the November presidential elections. After December 1—that is, after the presidential elections—stability of the government will be further reinforced by a new provision that complicates the breakup of a governing coalition in parliament. Previously, a decision of a faction to leave the coalition would be taken and signed by the leader of the faction with the approval—but not signature—of two thirds of its members. According to the new convention, the faction itself must take a decision to leave the majority coalition, and the decision requires the approval and signed declaration of two thirds of the faction’s members. The authors of the constitutional amendments argue the new provision regulating coalition splits allows every member of the majority coalition to take personal responsibility for the decision, thereby reducing the odds that members will break from the coalition.

If the new president supports and is supported by SDPK, the system may indeed be “stable” as intended.

This complicated new procedure, however, does not make coalition splits impossible. Although it is unlikely at the present moment given the current majority held by the pro-presidential faction and its supporters, parliamentary factions could collude to remove the government in the period before elections, and then use administrative resources to further their goals. The constitutional amendment acts to reduce the risk of this scenario, extending the period for coalition formation from 15 to 25 days. This extended timeframe will allow the presidential administration more opportunities to use its resources to ensure the majority coalition forms again around the pro-presidential party.

Assuming there are no early elections in 2017 that change the balance of parties in parliament, these amendments ensure that the postelection stability of the majority coalition and the government will significantly depend on Atambayev’s SDPK party and its plurality in parliament. If the new president supports and is supported by SDPK, the system may indeed be “stable” as intended. However, if the new president

throws his support behind another party, the stability of the coalition and the entire political landscape may be threatened.

Strengthening the “vertical”

In his speech on Kyrgyzstan’s Independence Day commemoration on December 31, 2016, President Atambayev stressed that the Constitution of 2010 had not introduced a parliamentary system, and argued that the mixed presidential-parliamentary system still contained conditions that could allow the formation of an authoritarian regime. However, the referendum preserved the president’s power to remain a key figure in decision-making, even in a parliamentary system. The authors of the amendments conceded that the suggested changes did not address the division of powers between the branches of the state, and that better clarification was required between the executive and legislative branches of government to ensure stability.¹



Source: UNIS Vienna, Flickr.

The amendments increased the president’s ability to influence the other branches in a number of ways. The first is the new provision permitting the prime minister to call for a confidence vote in the government as many as two times a year (instead of just once). If there is a vote of no confidence in parliament, this provision also confers to the president the power to ask parliament to resign and hold early elections. In the current disposition of powers, the stability of the parliamentary coalition will also heavily depend on the propresidential faction. This creates the possibility for the president to influence the dismissal of the speaker of the parliament. According to a new provision, if the coalition loses its majority status, a majority of MPs must elect the new speaker.

Another way in which the amendments increased the president’s influence over the branches of government was the restoration of a de facto “veto” power, which allows the president to block legislative proposals relating to the country’s budget and taxes. Under the new rules, the prime minister can ask the president to return such laws without signing them.

The constitutional amendments did not affect the president’s chairmanship of the Security Council, or his power to appoint and dismiss the heads and deputies of government organs responsible for defense and national security. The unaltered retention of these presidential powers was a missed opportunity to introduce parliamentary control over the security sector and encourage the depoliticization and demilitarization of law enforcement and state security services, which would have been critical to shifting these organs away from acting as tools of political influence. The fact that there is no parliamentary or civic control over these bodies permits the executive branch to manipulate their resources for political purposes. Such methods were seen during the presidential administration’s campaign to pass the amendments through parliament in the fall of 2016.

The president has also kept control over the general prosecutor’s office, which is still appointed by the president with parliament’s consent. The amendments only slightly diminished the president’s powers, by making the process of gaining parliament’s approval to dismiss the general prosecutor more difficult. While the previous law required only one third of parliament to approve the president’s dismissal of the general

prosecutor, the new constitutional amendments now stipulate that more than half of MPs must support the president's proposal for the dismissal to be effective.²

Retaining control over the general prosecutor's office is important for the president. The general prosecutor has the capacity to initiate criminal cases against MPs, judges, or any other individual in accordance of Kyrgyzstani law. The general prosecutor can also rule on the actions of the president, and is responsible for evaluating whether the president's actions contain indications of criminal activity, if parliament advances such accusations.

The amendments eliminated the prosecutor's power to act against any official, leaving it only with the power to prosecute military personnel and officials from certain state organs listed in the constitutional law. This development might have been seen as positive, if it were concomitant with the depoliticization and demilitarization of the law enforcement and security sectors.

However, the amendments retained the influence of the president and the dominant party to appoint and dismiss heads of the police, the prosecutor's office, and other law enforcement bodies. This undermines the principle of political neutrality and these agencies' orientation towards public security. These circumstances, combined with the limited immunity of members of parliament, create favorable settings for the exploitation of these "power agencies" as an instrument of political pressure. In late February, while this briefing was being prepared, the General Prosecutor of Kyrgyzstan initiated criminal proceedings against and arrested the leader of the opposition party, Omurbek Tekebaev. The case was launched following claims made by a Russian citizen, which were later forwarded to the security services.

In addition to these elements, the constitutional amendments gave the prime minister the right to appoint and dismiss heads of local government administrations, whom previously were appointed in consultation with political parties represented in local government bodies. The changes to local government appointments reinforces the vertical power structure and strengthens the administrative resources available to the propresidential party.

Weakening judicial independence

The case of Azimjon Askarov and its relationship to the constitutional amendments evinces the absence of judicial independence in Kyrgyzstan. Askarov was arrested on June 15, 2010, after the ethnic conflict in southern Kyrgyzstan that year. Local courts found him guilty of the charge of inciting ethnic hatred, inciting unrest, and participating in the murder of a police officer. He was sentenced to life in prison. In 2016, the United Nations Human Rights Committee (OHCHR) found that Askarov was detained illegally, was being held in inhuman conditions, and was subjected to torture and ill-treatment. OHCHR further established that Askarov was deprived of the opportunity to properly prepare his defense for trial. In its decision, the Committee called on Kyrgyzstan's government to immediately release Askarov. Following OHCHR's findings, the Supreme Court decided to remit Askarov's matter to the Chui Regional Court, which ruled to leave his life sentence in force. Askarov remains imprisoned.

During the referendum campaign, the president and his supporters used the OHCHR ruling in Askarov's case to illustrate the need for constitutional change in order to protect Kyrgyzstan's sovereignty. In his speech on Independence Day, President Atambayev stated that he would not have sought to change the constitution before 2020 were it not for the Askarov case and the UN's decision. In direct response to the Askarov case, the referendum removed the obligation of the government to implement decisions by international bodies regarding human rights and liberties.

Despite the controversial character of the way the amendments were introduced, the fact that they lowered the protections of rights and freedoms of the individual, and their contradiction of the stated goals of the amendments, the Constitutional Chamber approved the amendments. Only one of the Constitutional Chamber's eleven judges, E. Zh. Osonbaev, questioned the Chamber's conclusion with a dissenting opinion.

This was not the only way the amendments weakened judicial independence. The amendments also altered the process of selecting, disciplining, and dismissing judges, in a manner that strengthened the president's

role. The Council of Judges, which is comprised of members of the judiciary, previously controlled the process of judicial appointment and dismissal. Following the referendum, a new Disciplinary Commission—comprised of members proposed by the parliament, president, and Council of Judges, which will each select one-third of the new body’s members—will conduct the selection and removal of judges. The Disciplinary Commission is now also empowered to approve the criminal and administrative prosecution of judges, as well as determining whether to initiate disciplinary proceedings against judges.

Conclusions

The December 2016 referendum in Kyrgyzstan aimed to strengthen the existing leadership model in the country, including by securing the transfer of power to a chosen successor after the upcoming presidential election in November 2017. Although the changes were supposed to shift the republic to a parliamentary system, the president remains the key figure in the triumvirate of the president, parliament, and government. With the constitutional amendments, the president has retained and even strengthened his primary levers of power.

The president has retained influence over the security sector and law enforcement bodies; conversely, the parliament does not enjoy control of these organs. If these bodies are not depoliticized and demilitarized, they will continue to be used as tools to pressure the opposition and derogate pluralism.

Additionally, the increased influence of the president and parliament on the judiciary could lead to greater imbalance among the branches of government, and even less independence in the courts. The constitutional amendments’ abolition of the responsibility to comply with international human rights decisions allows officials to contravene international law with impunity, as in Azimjon Askarov’s case.

The goals of the reforms that followed the 2010 revolution—a more transparent judicial system, a more accountable national elite, and stronger protections for individual human rights—seem further away than just a year ago.

¹ СПРАВКА-ОБОСНОВАНИЕ к проекту Закона Кыргызской Республики «О внесении изменений в Конституцию Кыргызской Республики» <http://www.kenesh.kg/ru/draftlaw/download/89085/accompdoc/ky>

² For the parliament to dismiss the General Prosecutor on its own, first it needs one third of its members to vote to initiate the dismissal, which two-thirds of its members must then approve.

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