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Instrumentalization of Constitutional Law in Central Asia

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<b> Introduction

Constitutional law and politics in five Central Asia countries – Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan – as reflected in the absence of judicialization of politics have been a *terra incognita* in comparative constitutional studies (Mazmanyan, 2020:77). A few scholars have analyzed formal constitutional texts (see, e.g., Gönenç, 2002; Kachkeev, 2012a; Newton, 2017) of these countries and pointed out that the 1) lack of the rule of law tradition, and 2) conservation of Soviet legacies blocked democratization and constitutionalism in this part of the world. Many more scholars insisted that this blockage occurred because authoritarian presidents as patrons-in-chief (Hale, 2015) formally and informally dominate politics, build personalist (Stykow, 2019; Pistan, 2020) neopatrimonial (Laruelle, 2012; Isaacs, 2014; Izquierdo-Brichs and Serra-Massansalvador, 2021) and globally connected kleptocratic (Cooley and Heathershaw, 2017; Magyar and Madlovics, 2020) regimes. To be sure, Central Asia's "dictators without borders" (Cooley and Heathershaw, 2017) govern their regimes through coercion, cooptation, and corruption. Yet, as Table 1 shows, Central Asian presidents invest significant efforts in making and remaking constitutions and constitutional

courts, even if both are solely meant to be façades for disguising their personalist regimes and barricades for preventing judicialization of high-level politics.

Table 1: Constitutional Amendments in Post-Soviet Central Asia

	1991-1995	1995-2000	2000-2005	2005-2010	2010-2015	2015-2022
Kazakhstan	**1993** Constitution ratified; **1995** current presidentialist Constitution Ratified after Referendum;	**1998** Presidential age limit eliminated; term increased to 7 years	-	**2007** "First president" status established eliminating term limits; term reduced to 5 years;	-	**2017** Parliament's power increased; "Security Council" established with Nazarbayev as its head **2022** Deleted references to Nazarbayev; Constitutional Court reorganized
Kyrgyzstan	**1993** Constitution ratified; **1994** Bicameral parliament established; constitutional referendum procedure enacted	**1996** Presidential powers in appointment and dissolution expanded; **1998** Private property enshrined;	**2001** Kyrgyz language established as state language, Russian as official, with guarantees to minority languages; **2003** President's term limits abolished	**2006** Two new drafts introduced; **2007** Constitutional Court suspended previous Constitution and enacted the 1993 Constitution; **2007** Presidentialist Constitution ratified in the referendum	**2010** New semi-parliamentary constitution introduced with one-term limit for president	**2016** Supremacy of international agreements suspended; prime-minister's power expanded; **2021** Presidentialist constitution adopted; Constitutional court reorganized
Uzbekistan	**1992** Constitution ratified; **1993** Number of MPs changed;		**2003** Bicameral parliament established; presidential term increased;	**2007** Presidential appointment power increased; **2008**	**2011** President's term limit reduced; prime-minister's power	**2017** Supreme court and constitutional court reorganized **2018**

				Number of MPs changed	expanded; **2014** Cabinet and parliament's power increased	Local government reorganized **2019** **P**arliament's assent required for members of the cabinet
Tajikistan	**1994** Constitution ratified	**1999** **B**icameral parliament; president's term extended to 7 years;	**2003** President can be elected to two terms (previously 1); previous terms do not count	-	-	**2016** President's term limits abolished; minimum age for presidential candidates reduced to 30

Indeed, we know little about the degree of judicialization of politics in these countries. Scholars view judges in these countries as passive servants or "pawns" of the ruling regime (Mazmanyan, 2015), explore institutional dependence of the judiciary on the chief executive (Kachkeev, 2012b), and examine regime-sponsored violence against human rights activists (Hug, 2020; Hug, 2021a; Hug, 2021b). Yet by examining the absence of judicialized politics in the context of formal empowerment of constitutional courts in Central Asia, we can better understand how necessary conditions of judicialization work. Moreover, as Table 2 shows, there is a lot of variation among Central Asian courts in terms of their willingness to strike down laws

Table 2. "Activist Rulings" by Constitutional Tribunals in Central Asia[1]

[1] Note: This includes only the decisions in which constitutionality of the provision was under question. The decisions about the questions of constitutional interpretation are omitted from this summary due to difficulty in classifying these interpretations as "activist". The majority of decisions, in which tribunals recommend amendments to the legislative bills before promulgation are not considered as invalidation.

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	Number of decisions that invalidate the legislative or executive provision	The proportion of decisions invalidating a legislative provision
Kazakhstan (2013-2019)	25	45%
Kyrgyzstan (1996-2019)	29	33%
Tajikistan (1996-2019)	7	16%
Uzbekistan (1995-2019)	6	18%

Sources: (Juzgenbayev, 2019a; Juzgenbayev, 2019b, Ismatov, 2020; Nazarova, 2021)

and regulations as unconstitutional. This shows that similar abuses of human rights, similar socio-economic conditions, and similar neopatrimonial regimes, which arose from common legal cultures and Soviet past, may result in both passive and assertive constitutional courts. Moreover, by exploring the differing trajectories of judicialization of high-level politics in Kazakhstan and Kyrgyzstan – each having two constitutional review tribunals in the past 30 years – we can identify key factors, which stymied and/or enabled the willingness of constitutional courts to have an autonomous say in national politics.

We argue that outcomes of judicialized politics depend on the nature of the process of judicialization and on political salience of issues brought to constitutional courts. We focus on the separation-of-powers disputes because they directly concern the distribution of political power in the context of constitutions, which are written with and for specific persons in mind, and in the context of concrete patron-client relationships between politicians and judges. We argue that constitutional courts tend to be assertive when 1) they operate in the context of competing patron-client pyramids, and 2) when patrons-in-chief do not unilaterally control appointments to the bench of these tribunals (Table 3).

Table 3. Clientelist Structure and Appointment Procedure of Constitutional Tribunals in Central Asian Countries

Constitutional Tribunal and Its Years of Operation	Do Competing Patron-Client Pyramids Exist?	Who Nominates the Judges of the Constitutional Tribunal?	Who Confirms the Nominations of the Judges of the Constitutional Tribunal?	Do Constitutional Tribunals Make "Activist" Rulings?
Kazakhstani Constitutional Court 1992-1995	Yes	President with Presidium of Parliament	Parliament	Yes
Kazakhstani Constitutional Council 1996-2021	No, since 2004	President: 2 members + Chairperson; Upper Chamber of Parliament: 2 members; Lower Chamber of Parliament: 2 members	-	Yes, until 2004
Kyrgyzstani Constitutional Court 1995-2010	No	President	Parliament	No
Kyrgyzstani Constitutional Chamber 2013-2020	Yes	Council on Selection of Judges with President	Parliament	Yes
Tajikistani Constitutional Court 1996 -2021	No, since 1998	President	Upper Chamber of Parliament	Yes, until 1998
Uzbekistani Constitutional Court 1996 -2021	No	President	Upper Chamber of Parliament	No

Judges of the newly created constitutional courts have agency - they make the decision rules for the newly created courts and shape the ways in which these courts choose to decide or not to decide cases. This explains the initial short-term assertiveness of the Kazakhstani Constitutional Court (1992-1995) and Tajikistani Constitutional Court (1996-1997), and

sustained assertiveness of the Kyrgyzstani Constitutional Chamber of the Supreme Court (2013-2020). However, once presidents consolidated their personalist regimes, eliminated rival patron-client pyramids and gained full control over judicial appointments, constitutional courts lost their assertiveness and switched to offering services to the patrons-in-chief, like approving constitutionality of constitutional amendments, which presidents had sponsored, extending the incumbent's terms of office, and dismissing all cases, which could threaten their patrons. In exchange for this instrumentalization of constitutional review, constitutional courts gained more powers, and their judges enjoyed higher salaries, posh perks and generous retirement benefits as well as memberships in prestigious international judicial organizations (see Table 4).

Table 4. Engagement of the Central Asian Constitutional Courts in International Legal Community

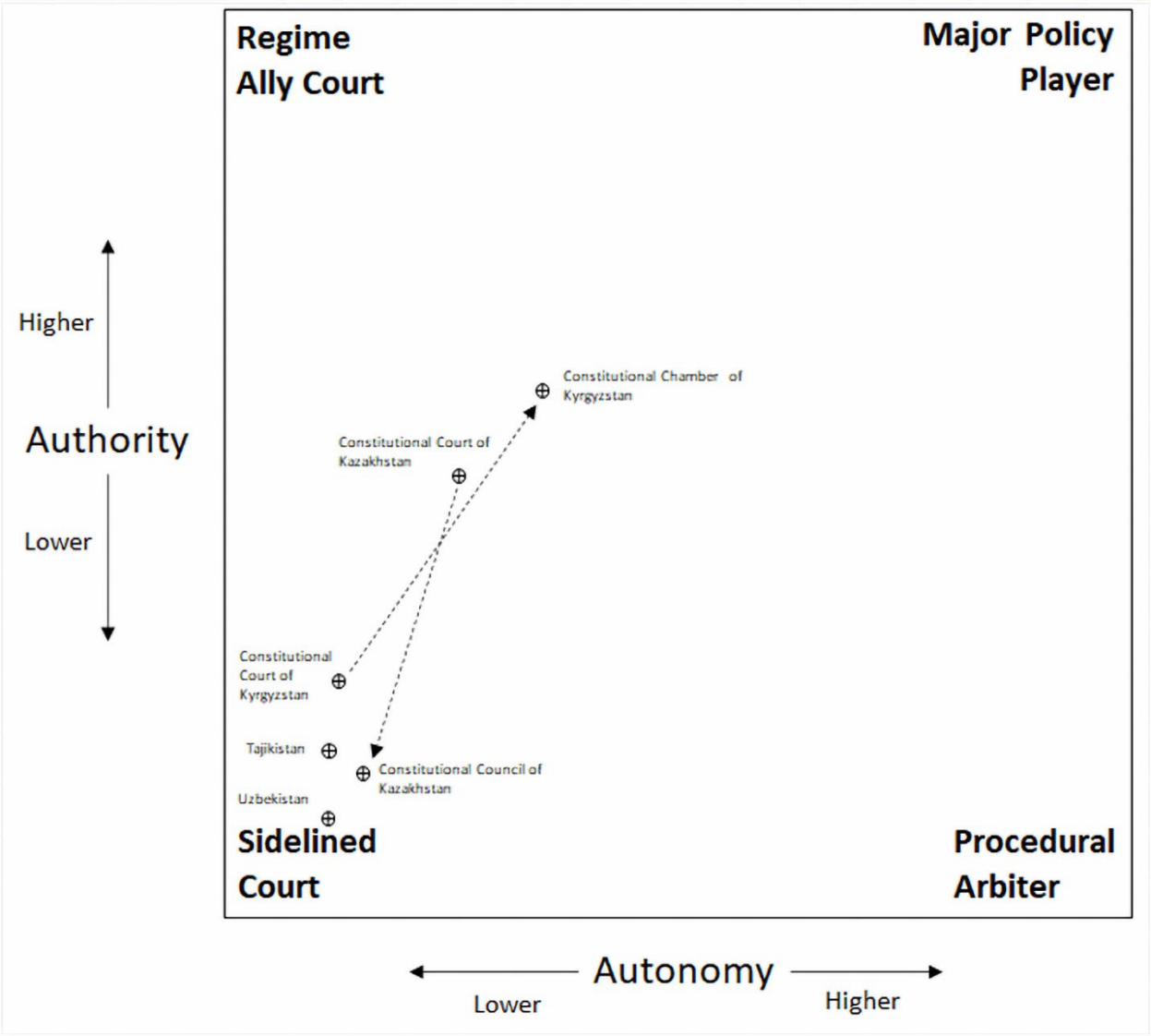
	Membership in the Association of Asian constitutional courts and equivalent institutions	**Membership in the "Venice Commission"[2]**	**Hosted meetings with the "Venice Commission"**	**Opinions of the "Venice Commission"**
Kazakhstan	Yes, since 2013	Yes, since 2012	29	9
Kyrgyzstan	Yes, since 2015	Yes, since 2004	46	32
Tajikistan	Yes, since 2011	No	6	3
Turkmenistan	No	No	2	0

[2] The "Venice Commission" is the European Commission for Democracy through Law is an advisory body of the Council of Europe, created in 1990 and composed of independent experts in the field of constitutional law.

Uzbekistan	Yes, since 2010	No	8	3

As a result, the Kazakhstani Constitutional Council resembles an office of presidential administration, while its Tajikistani and Uzbekistani counterparts work more like redundant part-time interpreters of statutes and occasional enforcers of authoritarian rule by law. These judge-made roles indicate both variation and oscillation in the range between a "sidelined" court and a "regime ally" court (see Figure 1), to use the typology of the constitutional courts, which have low autonomy from political leaders (Brinks and Blass, 2017). This judge-made repertoire holds little prospect for judicialization of politics in Central Asia outside Kyrgyzstan, a country, in which the Constitutional Chamber managed to cultivate a nascent support structure in the legal community beyond the confines of the president's patronal network.

Figure 1. Central Asian Constitutional Courts as "Regime Allies" and "Sidelined" Courts



To show variation in mechanisms of instrumentalization of constitutional law and politics in Central Asia, we first distinguish it from the genuine judicialization of politics as a set of processes and relationships (Dressel et al., 2017), which enable or prevent assertiveness of judges in deciding politically important cases. Next, we explore how six Central Asian constitutional courts handled the separation-of-powers disputes. We conclude with summarizing several lessons learned from studying constitutional law and politics in authoritarian personalist patron-client regimes.

<b> Outcomes of Judicialized Politics

Scholars of comparative courts have come a long way since first discussing descriptive and normative implications of judicialization of politics in western liberal democracies (Tate and Vallinder, 1995; Hirschl, 2006), and, more recently in fragile democracies as well as autocracies around the globe (see, e.g., Sieder et al., 2005; Ellett, 2013; Dressel, 2014). Mazmanyan (2015; 2020) concluded that despite the formal empowerment of the constitutional courts in the post-Soviet countries, these tribunals depended on the rulers, acted as mere pawns of autocrats in cases of utmost political importance and a few of them displayed autonomy only in extremely rare moments of failing authoritarianism. These tribunals were "Regime Allies" courts, which are closely tied to the rulers so that they endorse and promote preferences of the rulers and serve as tools to impose and legitimize the particular vision of constitutional justice by whoever is in power (Brinks and Blass, 2017:303).

How, then, can we distinguish genuine judicialization of politics from instrumentalization of constitutional review by the powerful executives? We argue that we can do so by observing three distinct *outcomes* of judicialized politics as products of relations between politicians, judges and other actors (Dressel et al., 2017):

(1) Delegation of formal authority to determine policy outcome on politically salient issues to the formally independent tribunals. Courts as "Regime Allies" have broader jurisdiction than the "sidelined" courts (Brinks and Blass 2017).

(2) Growing expectations among the political actors that such issues can be resolved within these tribunals *qua* legal institutions and via the process of *legal reasoning*. Such expectations are stronger for the "Regime Ally" courts than for the "sidelined" courts (Brinks and Blass, 2017).

(3) An ability of such tribunals to make independent determinations on the policy outcomes of the disputes on these politically salient issues. Neither the "Regime Ally" courts nor the "sidelined" courts have such ability, as both types of tribunals have low autonomy from dominant political actors (Brinks and Blass, 2017).

Taken together, these three outcomes of genuine judicialization of politics may be a direct result of 1) the need among elites for a third-party dispute resolver (Stone Sweet, 2000); 2) a conscious decision on part of the ruler to empower an independent tribunal (Moustafa, 2003); 3) the attempts of the judges themselves to expand their own power (judicialization from *within*, Steytler, 1993); or 4) a combination of these factors. Scholars have also identified conditions, which indirectly may facilitate or stymie judicialization of politics, such as political competition and electoral uncertainty (Ginsburg, 2003; Popova, 2012; Ramseyer, 1994), public opinion (Helmke, 2017; Staton, 2010), formal rules of autonomy and authority (Brinks & Blass, 2017), social support structures (Epp, 1998; Landau, 2018), judges' strategies (Epstein and Weinshall, 2021) and attitudes and norms held by judges and political actors (Hilbink, 2012). Positioning outcomes of judicialization at the center of our inquiry allows us to describe the state and dynamics of constitutional law and politics more precisely in Central Asia and carefully test theories that best predict conditions that give rise to judicialized politics.

We also consider judicialization of politics to be *issue-specific.* This is not to say that judicialization in one area of law does not affect or cause change actors' perceptions or judicial behavior in other areas of law, and scholars have found abundant evidence of the opposite (Moustafa, 2003). Focusing on *specific* issues matches nicely with the scholarly understanding of patron-client relationships, which are organized about the repeated personalized exchanges of *concrete* rewards and expectations (Hale, 2015) between patron-president and clients-judges.

This focus allows for both a more fine-grained exploration of the issue areas in which judicialization has occurred and ones in which it hasn't and an explanation of why and how judges asserted their power (or how patrons allowed them to assert it) in some issue areas but not in others.

Finally, the outcomes of this judicial assertiveness, if any, have to deal with *politically salient* issues. According to Svolik (2012), formal institutions like constitutional courts in autocracies may help to share the power between the autocrat and the ruling elites by clarifying the procedures of power-sharing, delineating the scope of authority of each key office-holder and enabling the monitoring by the ruling elite of the autocrat's compliance with his promises. In this chapter, we focus on politically salient issues in which constitutional tribunals are supposed to be involved: conflicts over the distribution of political power. Patrons-in-chief can benefit both from disallowing high courts from deciding certain political disputes and from inviting high courts to decide on politically salient issues and "notarize" decisions of the patrons. Therefore, both "sidelined" courts and "Regime Ally "courts (Brinks and Blass, 2017) can decide politically salient issues but these decisions always favor the core interests of the patrons-in-chief. In this sense, the courts are instrumentalized to preserve the power of the patron through shifting expectations about the rigidity of constitutional text and shifting blame for unpopular decisions in the eyes of domestic and international audiences.

To explore the dynamics of judicialization of politics and instrumentalization of constitutional review in authoritarian patron-client regimes, we focus on the decisions of six constitutional tribunals in Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan (Turkmenistan did not create a constitutional review tribunal) in the past three decades (see Table 5). We demonstrate distinct mechanisms and relationships that drive or prevent judicialization in

separation-of-powers disputes in Central Asia. This allows us to shed light on judicial politics in authoritarian clientelist regimes, an understudied topic in the studies of comparative courts.

Table 5. Design and Period of Operation of the Constitutional Tribunals in Central Asia, 1991-2021

	Established in Constitution	**Law on CC adopted**	**Start - End of CC's operation**	**Number of CC members**	**Term limits of CC members**	**Is dissenting opinion published ?**	**Constitutional Complaint**
Kazakhstan Constitutional Court	Dec-1991	Jun-92	Jul-92 - Oct-95	11	10 years	Yes	Yes
Kazakhstan Constitutional Council	Aug-1995	Dec-95	Feb-96 - present	7	6 years	No	No
Kyrgyzstan Constitutional Court	Dec-1990	Dec-93	Sep-95 - Apr-10	9	15 years	No	No, since 2003
Kyrgyzstan Constitutional Chamber	Jun-2010	Jun-11	Sep-13 – Apr-21	11	7 years	Yes	Yes
Kyrgyzstan Constitutional Court	Apr-2021	Nov-21	May-21	9	Until age of 70	Yes	Yes
Tajikistan Constitutional Court	Nov-1994	Nov-95 Jul-14	Jan-96 - present	7	5 years; since 2003, 10 years	Yes	Yes, since Mar-2008
Uzbekistan Constitutional Court	Dec-1992	Aug-95 May-17 Apr-21	Jan-96 - present	7 9 since 2021	5 years	No	Yes, since Apr-2021

<b> Central Asian Constitutionals Tribunals and Mega-Politics: Instrumentalization instead of Genuine Judicialization

The sudden collapse of the USSR at the end of 1991 ushered in a wave of constitution-making in Central Asia. Central Asian presidents quickly learned about potential risks that constitutional courts can bring to their ruling status in the fall of 1993 when the Russian Constitutional Court allowed impeachment of President Yeltsin. Yet Yeltsin's victory in the 1993 constitutional crisis in Russia, which he had achieved by shelling the opposition-dominated Parliament and nearly abolishing the Constitutional Court (Trochev, 2008), sent a clear signal to Central Asian presidents that they could seriously punish (with impunity) recalcitrant judges for meddling in the high-level political disputes. However strong this warning signal was, we still observe differing trajectories of instrumentalization of constitutional review mechanisms instead of judicialization of high politics in four Central Asian countries. In both Kazakhstan in the 1990s and in Kyrgyzstan between 2013 and 2020, politicians tried to use constitutional courts to win their heavyweight political disputes, and the constitutional tribunals often ruled on such issues yet they failed in having an independent effect on political outcomes on questions of utmost political significance to the executive. In contrast, in Uzbekistan and Tajikistan post-1997, presidents did not allow constitutional courts to distribute political power on their own. Instead, these tribunals marginally assisted patrons-in-chief in enshrining their patronal status and recommended legislative changes. As we show below, patronal presidents instrumentalized constitutional review instead of allowing genuine judicialization of high-level politics and instead of cultivating authoritarian constitutionalism (Garcia and Frankenberg, 2019).

<c> Constitutional Review in Kazakhstan: Towards Greater Instrumentalization

Instrumentalization of constitutional review in Kazakhstan has significantly grown from what it was in the early 1990s because President Nazarbayev unexpectedly devoured its own "pawn," the constitutional court, and transformed it from the "Regime Ally" tribunal to the "sidelined" quasi-judicial Constitutional Council (Webb Williams and Hanson, 2022). Kazakhstan's first constitutional review tribunal, 11-member Kazakhstani Constitutional Court (KCCt), was elected by the Parliament for a 10-year-term in July 1992 under the heavily amended Soviet-era Constitution and in the context of competing patron-client networks and formal parliamentary supremacy. This tribunal was designed on the model of the 1st Russian Constitutional Court (Trochev, 2008), consisted of law professors and government lawyers, and was led by a legal philosopher, chairman Murat Baimakhanov. He saw the Court's mission in educating both politicians and ordinary people about the supremacy of the Constitution. Having returned from his study trip at the Russian Constitutional Court, chairman Baimakhanov announced to his colleagues that they had to be critical thinkers and to protect the Constitution from the abuses by the government officials (Udartsev, 2003).

Indeed, in the three years of its short life, the KCCt issued a total of 15 decisions on the meris, thus, averaging 5 decisions per year. To the displeasure of top politicians, in the total of 15 decisions on the merits, the Court declared unconstitutional statutes, decrees of President Nazarbayev (something unimaginable in today's Kazakhstan), and the Cabinet edicts on top of uncovering various secret legal acts, including one secret constitutional amendment (!) (Baishev, 1994; Udartsev, 2003). As a result of this rapid judicial assertiveness, at the end of 1992, the drafters of the new post-Soviet Constitution tried to abolish the KCCt by merging it with the Supreme Court. They were inspired by the model of the US Supreme Court, the model that was

advocated by Boris Yeltsin's legal advisers for Russia at the time. Defiant chairman Baimakhanov managed to mobilize the mass media and a broad pro-Constitutional Court coalition in the Parliament, which, in January 1993, preserved both the tribunal in the 1993 Constitution and kept its sitting judges on its bench. According to one journalist, the "fate of the Constitutional Court was able to consolidate society" as a constitutional bulwark against authoritarianism (Udartsev, 2003). But the KCCt was preserved as a compromise between a strong parliament and a strong president in the Article 131 of the 1993 Constitution, an innovation that did not exist in the Russian Constitution. The Article 131 granted the President and the Parliament Speaker each a unilateral veto power over the Constitutional Court decision, but it also enabled the Court to overrule this "veto" by the two-thirds majority or by the vote of 8 (out of 11) judges.

The KCCt used this veto power in March 1995, in its most famous *Kvyatkovskaya* case. The Court decided it at the request of a journalist Tatyana Kvyatkovskaya, who had run in the 1994 parliamentary elections and lost to the deputy mayor of the capital city by a very slim margin. Having lost her lawsuits against the local election commission in the regular courts, she asked the KCCt to overturn the election procedures in her district as unconstitutional. These procedures were set by the Central Election Commission for the whole country, and subsequently she asked the Court to cancel nationwide election results as outcomes of unconstitutional election procedures. After a year of hearings and deliberations, in March 1995, the Constitutional Court agreed with Kvyatkovskaya's arguments. The KCCt boldly blamed the Central Election Commission for systemic gerrymandering, for violating constitutional principle "one person - one vote" in several electoral districts and for violating the rights of electoral candidates on a massive scale and declared the elected Parliament as unconstitutional

(Kazakhstani Constitutional Court decision of March 6, 1995). Both President Nazarbayev, who had been frustrated with parliamentary opposition and faced threats of parliamentary investigations, and enraged Parliamentary Speaker Kekilbayev vetoed this decision but the KCCt overruled their vetoes. Western election observers also identified massive electoral irregularities and applauded the surprising Constitutional Court's assertiveness. The then US Ambassador to Kazakhstan William Courtney declared that this unexpected decision was "a democratic victory," that all Kazakhstani citizens could be proud of this lesson of democracy, and that the USA had "a reason to be proud of Kazakhstan" (Laumulin, 2000; Amandykova and Malinovskyi, 2012). The OSCE/ODIHR, a European election observation mission, awarded the KCCt a medal "For Courage" in June 1995 (Amandykova and Malinovskyi, 2012).

Indeed, this judge-ordered cancellation of the vote was the first in post-Soviet politics, several years prior to the colored revolutions in Georgia, Ukraine, and Kyrgyzstan - mass street protests over fraudulent elections results, which had been cancelled by the supreme courts in these three countries (Trochev, 2013). Yet, as Toktogazieva (2019, 201) argued, by annulling the entirety of the election results, the Court grabbed the powers to annul nationwide election results beyond those set for the tribunal in the constitution and beyond redressing harm shown by the complaint. What looked like a genuine judicialization of high-level politics, turned out to be instrumentalization of constitutional law. The independent election observers - both Western and domestic - have not recognized a single election in Kazakhstan as "free and fair" since then.

Moreover, shortly after this KCCt decision, President Nazarbayev acted swiftly to consolidate his power on many fronts. He immediately dissolved the Parliament in March 1995 and turned off water, power, and telephone for the parliament building. He regained his power - granted by the previous Parliament - to adopt law-making decrees. He also ordered a nationwide

referendum at the end of April 1995 to extend his presidential powers until 1999 and cancel presidential elections in 1995 (Laumulin, 2000), and authorized the drafting of the new Constitution, to be ratified on another referendum scheduled for the end of summer of 1995. Nazarbayev also scolded those MPs who had refused to leave the parliament building and accused the Constitutional Court of colluding with him over this power grab and of facilitating the transition to the dictatorship. He promised to keep the Court in the new draft Constitution.

But, to the surprise of KCCt justices who had published a letter with critique of the draft of the Constitution, something unthinkable in today's Kazakhstan, Nazarbayev did not keep their Court in the draft presented for the approval of voters in August 1995. Instead, it established a French-style seven-member Constitutional Council, not a part of the judiciary, with limited powers and less insulation yet with the president's power of veto of the Council's decisions (Webb Williams and Hanson, 2022). Over 89% of voters approved both the extension of Nazarbayev's term in office until 1999 and his super-presidential Constitution (Nurumov and Vashchanka, 2016, 156) as a result of which the KCCt was liquidated, and Nazarbayev laid off its judges in October 1995. Four of them served terms of different lengths on the bench of the Constitutional Council between 1996 and 2021, while others retained important positions, yet others returned to teaching in the law schools (Juzgenbayev, 2019b).

Under the 1995 Constitution, the Kazakhstani Constitutional Council (KCCl) consists of seven members: each two members were appointed by the President, Senate (upper-chamber) chair, and Majilis (lower-chamber) chair. The President appoints the chairman of the KCCl unilaterally, and interestingly, Nazarbayev has not appointed law professors to this position any longer (Juzgenbayev, 2019b). He seemed to prefer appointing his loyal clients from the executive branch on the bench. Though the Constitutional Council was no longer a court, it still

retained authority to review the constitutionality of legal acts before their promulgation by the President and draft international agreements, to offer interpretations of the Constitution, and, on referrals of the courts, to review the legal acts on their compliance with the constitutionally protected human rights guarantees (Article 72 of the 1995 Constitution). Importantly, neither individuals nor individual MPs had standing before the Council, and the Council lacked the power to open cases on its own initiative.

Yet, the Council did not quickly become the President's "personal bureau" until Nazarbayev's complete takeover of Parliament in 2004. It showed some autonomy when adjudicating disputes between the Cabinet and the still vocal parliament between 1996 and 2003, when the Nazarbayev's regime was not fully consolidated, and when parliament speakers had open political ambitions. For example, the Council decided that the Prime-Minister lacked the power to request a confidence vote in parliament to pass a law on more than one bill (Kazakhstani Constitutional Council decision of 12 March 1999), and that the Cabinet did not have the power to denounce any international agreements because the Constitution allocated this power only to the legislature (Kazakhstani Constitutional Council decision of 26 December 2000). At the same time, the KCCl also ruled in favor of the executive, by stating that any bill proposed by the MPs that would require an increase or decrease in budgetary spending needed to be approved by the Cabinet before it could be placed on the legislative agenda (Kazakhstani Constitutional Council decision of 28 June 1997). It sought some, albeit imperfect, balance between the policy-goals of the executive and the calls for accountability and power-sharing coming from the important factions in the legislature (Table 6).

Table 6. Separation of Power Cases in the Kazakhstani Constitutional Council, by Petitioner, 1996-2019

	Number of Referrals (1996-2004)	Number of Interpretations Favorable to Petitioner/Legislation Declared Unconstitutional (1996-2004)	Number of Referrals (2005-2019)	Number of Interpretations Favorable to Petitioner / Legislation Declared Unconstitutional (2005-2019)
Legislature	18	5	6	4
Prime-Minister	10	8	5	3
President	9	6	2	0

Source: (Juzgenbayev 2019b)

In 2000, in the crucial period of the move away from democracy, and the growing elite awareness that Nazarbayev might back away from sharing power, the Council permitted him to run for the third term (Kazakhstani Constitutional Council decision of 20 June 2000). It found that the "term limits did not apply to the person who was elected in accordance with the Constitution of 1995". As we show below, both Kyrgyzstani and Tajikistani constitutional courts did the same. In May 2001, the Council solidified Nazarbayev's grip over the Parliament and his political party by declaring that the expulsion of one opposition leader from the ranks of his ruling party constituted grounds for Nazarbayev's opponent no longer being a member of Parliament (Kazakhstani Constitutional Council decision of 17 May 2001). This Council's decision was a signal to several members of Nazarbayev's inner circle who had been disgruntled with his policies and publicly announced the creation of the "Democratic Choice of Kazakhstan," an organized movement that questioned the foundations of Nazarbayev's rule (Junisbai 2010; Junisbai and Junisbai 2005). Even though this Council's decision came in collision with Council's own precedent (Kazakhstani Constitutional Council decision of 23 May 1997) and was

sharply criticized in the media and in the legal community, it showed the Council's use of constitutional law as a weapon against anyone who had betrayed Nazarbayev.

However, after the consolidation of Nazarbayev's rule and in the second half of the 2000s and the total control over the legislature by the President, the Council's adjudicative function became less important (see Table 5). On average, the Council issued 3.2 decisions per year. The Council became slightly more active in 2018 when Nazarbayev, by that time with the constitutionally enshrined status of the Father of the Nation, used it to get a constitutional stamp of approval for his carefully orchestrated resignation in March 2019 and transfer of some of his authority to his successor, a former diplomat and a former Prime-Minister Kassym-Zhomart Tokayev (Caron, 2019). However, following the January 2022 riots, President Tokayev began consolidating power in his own hands by targeting Nazarbayev's clan and calling for a constitutional referendum to be held in June 2022. In May 2022, the Council approved Tokayev's constitutional amendments, including those, which deleted references to Nazarbayev as the Father of the Nation and restored the 11-member Constitutional Court with its 6 members being appointed by Tokayev (Kazakhstani Constitutional Council decision of 4 May 2002). In short, for two decades, KCCl has been the President's legal assistant that notarized significant constitutional changes or a sidelined court, much more irrelevant to politics than its predecessor, KCCt.

<c> Kyrgyzstan's Constitutional Review: Asserting Power and Limiting Instrumentalization

Among Central Asian states, Kyrgyzstan's constitutional politics have been unusual. The country's first president Askar Akayev branded his regime as the "Island of democracy" and "Switzerland of Central Asia" in the early 1990s (Anderson, 1999). Yet the country went through several overhauls of constitutional order and several overthrown presidents, including Akayev, in

the context of semi-competitive - thanks to the recalcitrant parliament - politics, in which the Kyrgyzstani Constitutional Court (KyrCCt) played a highly visible role as an ally of the ruling regimes until its abolition in 2010. The nine-member KyrCCt was led by a charismatic chairman Cholpon Baekova, a member of Akayev's clan and a former Procurator-General, who was initially respected by international experts for her pro-democracy views (Collins, 2006, 229). Even though the KyrCCt was created in 1990, its enabling legislation was adopted only in May 1993 together with the adoption of the Constitution. Yet the Court began its operation only in September 1995 because of semi-competitive politics: legislative-presidential standoffs (Cummings, 2012, 60-76) and repeated parliamentary rejections of Baekova's nomination (Collins, 2006, 229).

However, having learned from Boris Yeltsin's suspension of the Russian Constitutional Court - a revenge for giving the green light to his (unsuccessful) impeachment in the fall of 1993, the KyrCCt displayed extreme loyalty to President Akayev, who, in turn, redesigned constitutions and attempted to instrumentalize constitutional review - both to enhance his ruling status. When, right before his re-election in December 1995, Akayev had decided to enhance his unilateral presidential powers via constitutional referendum. as he could not do so through the recalcitrant parliament, he asked the recently activated Constitutional Court for an advisory opinion. In November 1995, the KyrCCt granted Akayev's wishes and declared them constitutional (Kyrgyzstani Constitutional Court decision of November 9, 1995) without offering any analysis of the proposed expansion of presidential prerogatives (Toktogazieva, 2019, 210-211). In December 1995, the KyrCCt has both approved Akayev's changes to the referendum process (Collins 2006, 230) and certified electoral victory of Akayev, who had received 72% of the vote in the pre-term elections for another 5-year term and declared that his first term in office

began in October 1991 (Kyrgyzstani Constitutional Court decision of December 28, 1995). In July 1998, the KyrCCt overruled this declaration and declared that Akayev's first term in office began in December 1995 because his prior term began before the 1993 Constitution and, therefore, did not count (Kyrgyzstani Constitutional Court decision of July 13, 1998). The Court issued this decision at the request of the anti-Akayev MPs who had feared that he would run for the third term in 2000, contrary to the Article 43 of the Constitution, which set the two-term limit for the holder of the President's office. Akayev's opponents ridiculed this KyrCCt decision as a sign of blatant subservience of the tribunal. Indeed, "from 1995 through 1998, the Court issued twenty-four rulings that served primarily to approve executive decrees" (Collins, 2006, 230). Until the spring of 2005, the KyrCCt continued to display extreme loyalty to an increasingly unpopular - at home and abroad - Akayev by nixing all constitutional challenges brought by the opposition against his powers.

The nationwide protests over the two rounds of rigged parliamentary elections in February and March 2005, in which the party led by Akayev's daughter seemed to have won, and the cascading defections from Akayev's inner circle led to the "Tulip Revolution," his ouster from the office and escape to Moscow. At this tense moment the Supreme Court cancelled the results of the vote (Trochev, 2013), while the KyrCCt chairwoman Baekova claimed that her tribunal was the only functioning constitutional organ in the country. She formalized the peaceful transfer of power by the outgoing parliament to the acting President and Prime-Minister Bakiev, who won elections in July 2005 with 89% of the vote, and subsequently pushed through a series of constitutional changes that decreased the power of the President Bakiev, who has been increasingly governing through cooptation and intimidation of his opponents (Huskey and Iskakova, 2010). Baekova's court, however, in September 2007, at the request of pro-Bakiev

MP, declared the entire text of these changes null and reverted the constitution back to the super-presidentialist Constitution of 2003, which had been written for Akayev (Toktogazieva, 2019, 225) and which Bakiev wanted to restore (Kyrgyzstani Constitutional Court decision of September 14, 2007). The Venice Commission announced that it was "highly unusual, if not unprecedented" to declare the full text of the constitution in force unconstitutional. The Parliament rebelled. It accused the Court of a de-facto coup d'etat, voted no confidence in the Constitutional Court, and removed 3 judges from its bench. Having listened to Baekova's complaints about this political interference in the operation of her court, Bakiev dissolved the recalcitrant parliament in October 2007 for causing a crisis in the relations with the Constitutional Court and scheduled new elections in December 2007. The KyrCCt head Baekova quit the bench, won a parliamentary seat on the ticket of Bakiev's party in the fraudulent 2007 parliamentary elections and became the Vice-Speaker of the Parliament, as Bakiev wanted to strengthen his hold on the parliament. He won the rigged elections in 2009 and used the KyrCCt for approving yet another round of constitutional amendments, which would regulate the transfer of power to his successor, probably his son, by his hand-picked assembly bypassing the parliament. In January 2010, the KyrCCt again granted his wish and declared Bakiev's constitutional amendments constitutional (Toktogazieva, 2019, 227-229). This was the last decision of the KyrCCt (Kyrgyzstani Constitutional Court decision of January 21, 2010) because in April 2010 street protesters stormed the government buildings and forced Bakiev to flee to Belarus, and the Interim Government dissolved the Constitutional Court on April 12, 2010 for helping to concentrate the power in the same hands, both under Akayev and Bakiyev, and for leading to the violent ouster of the "anti-people regime of Bakiev" (Toktogazieva, 2019, 231). In

short, the KyrCCt has been a clear "Regime Ally," that imposed one autocratic constitutional vision first of Akayev and then of Bakiyev (Dzhurayev et al., 2015, 272).

The April Revolution of 2010 brought about a new constitution of Kyrgyzstan, which 92% of voters approved in the referendum in June 2010. The 2010 Constitution set a 10-year moratorium on constitutional changes in order to prevent the president-election-winners from changing the constitutional texts as they see fit. It placed the president firmly in the executive branch and not above all three branches of government, as previous constitutions did. It created a semi-parliamentary system with a strong 120-member parliament, in which no party could have more than 65 seats and the opposition would control two key parliamentary committees, and which would select a Prime-Minister in charge of a relatively autonomous Cabinet, which, in turn, would be a product of a coalition of parties represented in parliament. It also created an eleven-member Constitutional Chamber of the Supreme Court (KyrCCh), a tribunal with broad *apriori* and *aposteriori*, abstract and concrete constitutional review powers except the power to review election results. Importantly, the 2010 Constitution introduced an open selection process for the KyrCCh judgeships, a process that limited the domination of a single patron in forming the Chamber. The President nominated the KyrCCh judges for approval by the parliament from the list of nominees, made up by the separate Judicial Selection Council, a nine-member body elected by the parliament with no formal input from the President. Parliamentary majority, parliamentary opposition and the Council of Judges would each selected 3 candidates for the Judicial Selection Council. As a result of a highly competitive selection process, the Parliament managed to elect first two judges, a law professor and a private attorney, for life to the bench of the KyrCCh in 2011. And then, in the summer of 2013, the Parliament elected seven more

KyrCCh judges, all of them being former procurators, judges and government lawyers, to a once-renewable seven-year term.

The Constitutional Chamber issued its first decision in September 2013. In its first two years of operations, the KyrCCh issued 50 decisions (Dzhurayev et al. 2015), averaging 25 years a year, a number, which is several times greater than the rest of constitutional courts covered in this chapter. In January 2014, in the midst of lively public debate and President Atambayev's highly advertised campaign against high-level corruption, the Constitutional Chamber - at the request of a judge who had been charged with bribery - declared that the Procurator-General's office (led by the Parliament's appointee) could not delegate the investigation of such cases to other relevant institutions, such as the State Committee for National Security (led by President's appointee), the Atambayev's right hand in his anti-corruption campaign (Kyrgyzstani Constitutional Chamber decision of January 13, 2014). The majority opinion interpreted the vague separation of powers principle and reasoned that according to the Article 104 of the Constitution, the special role, status and competence of the procuracy were necessary for its independence during the criminal investigation and prosecution, and no other law-enforcement agency had the same independent status. The lone dissenting judge Mamyrov argued that the Chamber should have both declared the delegation of investigative powers constitutional and ordered the Parliament to clarify the criteria of exceptionality of cases, in which such delegation was permitted. The practical effect of this Chamber's decision was that all anti-corruption investigations had to be transferred to the procuracy. President Atambayev and his supporters in parliament and in the Cabinet slammed the Chamber's decision for creating chaos in combating corruption and punishing senior officials of the *ancien* regime, and the Chamber caved in to this criticism. Having endured two weeks of Atambayev's condemnations of its "shortcomings", the

Chamber issued a "clarification," in which it declared that its decision did not have a retroactive effect, which meant that all ongoing investigations of high-level corruption by the National Security Committee could continue (Dzhurayev, 2015). In response, emboldened Atambayev continued to criticize the Chamber, had one of his outspoken critics expelled from the bench and another one reprimanded in May 2015 (Putz, 2015), managed to have the loyal judge Mamyrov elected by his peers to chair the KyrCCh in July 2016, and used his supporters in Parliament to introduce a set of numerous constitutional amendments in September 2016 and to request the approval of these amendments in the Constitutional Chamber. One of these amendments concerned Article 104 of the Constitution. It excluded criminal investigations of government officials from the purview of the procuracy, which, in effect, overrode the January 2014 KCCh decision analyzed above. This time the Constitutional Chamber approved - by a majority opinion - all constitutional amendments, which reminded many observers of the approach taken by the Constitutional Court under previous presidents (Toktogazieva, 2019, 238). The lone dissenting judge Oskonbayev, who had been reprimanded in 2015, argued that the 2010 Constitution had a 10-year moratorium on constitutional amendments, and, therefore, introducing these amendments in 2016 violated this moratorium and was unconstitutional (Kyrgyzstani Constitutional Chamber decision of October 11, 2016).

This turnaround of the KyrCCh was a sign that the President tamed the constitutional review tribunal (Toktogazieva, 2019), while the opposition called Atambayev's successful constitutional referendum an attempt to usurp power. In the wake of the referendum, Atambayev often used law and courts to punish his opponents. He did not run for office again in the highly contested 2017 presidential elections. Instead, Atambayev openly promoted his Prime-Minister

Jeenbekov, hoping that he would still be able to govern behind the scenes. Jeenbekov won with 55% of the vote, which the Western election observers generally described as fair.

President Jeenbekov successfully used his formal powers to consolidate the patronal network around him, fired Atambayev's appointees, launched his own anti-corruption campaign targeting them, and ultimately authorized criminal investigation into his anointer. In the fall of 2018, a well-known human rights activist asked the Constitutional Chamber to declare unconstitutional - as violating both the constitutional principle of equality of all before the law and court and the principle of imminence of punishment for crimes - the provisions of the 2003 Law on the Guarantees of President - adopted to protect the first President Akayev - which guaranteed blanket immunity for former presidents. The KyrCCh agreed that the contested provision of blanket immunity was unconstitutional. The Chamber ruled that this immunity had to be limited and that the procedure for lifting the immunity of ex-presidents had to be legislated. The Chamber also boldly ordered the parliament to design this procedure, which had to be similar to the one of lifting the immunity for incumbent presidents (Kyrgyzstani Constitutional Chamber decision of October 3, 2018). Some MPs criticized this boldness as abuse of Chamber's power forcing the KyrCCh to issue two press-releases with the plea to the parliament to respect constitutional procedures. In essence, the Chamber succeeded in pushing away the responsibility for the struggle between Jeenbekov and Atambayev to the parliament (Toktogazieva, 2019, 123). In May 2019, the parliament enacted the required amendments for lifting the immunity of former presidents by copying Russia's model. But the parliament included a clause - applied retroactively starting in 2007 - that immunities and guarantees for those former presidents who continue their involvement in politics or return to government service would be waived. This clause clearly targeted Atambayev, who had remained as a leader of his political party (Huskey,

2019). In June 2019, the parliament applied this clause retroactively to Atambayev and declared that he had lost his status as former president. Around the same time, Parliament elected a new judge, Karybek Duysheev, to the Constitutional Chamber. He was then quickly elected by the Chamber's judges to be its new chairperson replacing the previous chair, judge Mamyrov (see above), whose term had expired. Duysheev was thought to be well-connected to President Jeenbekov because the former had previously served as an advisor to the President's brother and a former speaker of the Parliament (Juzgenbayev 2019d). Atambayev's supporters complained to the Constitutional Chamber that the waiver of the immunity clause and its retroactive effect as well as the actual lifting of his immunity violated the Constitution. He refused to be interrogated in the criminal case of corruption and usurpation of power against him, triggering the bloody raid by special forces and his eventual arrest (Juzgenbayev 2019c). The Chamber disagreed with Atambayev's arguments and sided with the Jeenbekov's lawyers and the parliament (Kyrgyzstani Constitutional Chamber decision of October 24, 2019). The KyrCCh unanimously declared almost all changes to the 2003 Law constitutional. The Chamber repeated that immunity for former presidents was not absolute, that the waiver of immunity was a proportional measure of protecting national security and public order, and that the argument about retroactive effect was moot because the waiver did not impose any new duty or aggravated responsibility on the former president. But the Chamber declared unconstitutional the unilateral power of the incumbent president to remove all guarantees and protections of the former president because the Constitution did not enumerate this power. In effect, the Chamber allowed the arrest of Atambayev and his criminal prosecution to proceed (Juzgenbayev 2019d), an outcome wanted by President Jeenbekov.

In short, the Constitutional Chamber continued to play the role of the “Regime Ally " court, similar to its predecessor, imposing constitutional vision first of President Atambayev and then of President Jeenbekov. President Zhaparov who came to power as a result of Jeenbekov’s ouster in the wake of fraudulent October 2020 parliamentary elections had his own version of the Constitution (or *Khanstitution* as Zhaparov’s opposition called it in reference to the *khans* who had ruled Central Asia prior to the Russia’s conquest (Putz 2020)) approved in the April 2021 referendum. This Constitution established a standalone Constitutional Court staffed through the procedure dominated by the president. Therefore, in line with our argument, the new tribunal is not likely to become assertive when the patron-in-chief strengthens his grip over judicial appointments.

<c> Tajikistan’s Constitutional Court: Strong on Paper, Sidelined in Practice

The lack of judicialized high-level politics in Tajikistan may appear puzzling because this country had numerous conditions, which are often cited as facilitating judicialization of conflicts over distribution of power. The November 1994 Constitution that established a constitutional court was adopted in the context of political uncertainty: highly contested presidential elections in which the winner got 60% of the vote and in the midst of bloody civil war. First justices of the constitutional court were appointed at the end of 1995, and the court heard its first case in March 1996, a year after parliamentary elections in which the President's party won mere 5 seats. Justices did not have to begin their work from scratch. They could draw on the jurisprudence of the Constitutional Supervision Committee, a quasi-judicial body in 1990 and led by an activist law professor, who, in turn, advocated for the establishment of the full-blown constitutional court (Imomov 1992). Moreover, until 2014, the justices of the constitutional court could initiate judicial review themselves. The 5-year-long civil war – the bloodiest conflict in the post-Soviet

space - ended in 1997 with the UN-brokered power-sharing agreement. This would also invite peaceful and possibly judge-made clarification of its terms. The government's top priority was to build peace and maintain it, and the constitutional court could contribute to maintaining social peace. Moreover, Tajikistan is divided along regional, religious, ethnic, and linguistic lines (Heathershaw 2009; Thibault 2018), which is believed to be a judicialization-friendly context. Finally, the ruling patronal network led by President Emomali Rakhmon since 1994 is considered to be weaker than that of President Nazarbayev in Kazakhstan, even though both individuals carry the constitutionally protected title of the "Leader of the Nation." Indeed, between 2008 and 2018, the ruling regime faced several serious challenges: military confrontation in the city of Khorog on the border with Afghanistan in 2012, announcement of creation of new political party by a former minister of industry and a member of the President's patronal network in 2013, defection of the commander of the elite police forces to the ISIS in 2015, and the violence against the opposition leaders and the suppression of the Islamic Renaissance Party of Tajikistan – the only officially registered Islamic political party in post-Soviet countries - in the 2015 parliamentary elections campaign (Collins 2020).

However, the Tajikistan Constitutional Court (TCC) has been inactive in terms of defining the separation of powers, a principle established in the Article 9 of the 1994 Constitution. The court issued only 4 decisions – all declaring the contested laws unconstitutional – between 1996 and 1997, a period when peace agreement had yet to be implemented, the strong presidential powers had yet to be established in the Constitution, and recently elected president had yet to build his personalist patronal regime (Nazarova 2021). Still, this limited output of the court outraged the Majlisi Oli (Parliament). The Parliament got especially upset at one particular constitutional court case in 1997, a case that had challenged

provisions of the Constitutional Law on the Majlisi Oli, which allowed for the Chairman of the Majlisi Oli to be removed from the office by a super-majority of two-thirds of the members, as opposed to the simple majority specified in the Constitution. The Constitutional Court ruled that the contested law had to be amended to comply with the Constitution (American Bar Association, 2008:27). But in December 1997, the Parliament, using its power to interpret the Constitution, voided this and another decision of the TCC in which the court invalidated provisions of two constitutional laws (Nazarova 2021). President Rakhmon did nothing to defend the court and restrain the Parliament. He benefited from this judicial-legislative rivalry, which, according to the former chairman of the Constitutional Supervision Committee (Imomov 1998), created a fertile soil for concentrating power in his hands and building personalist authoritarian regime. Indeed, neither President Rakhmon nor the Cabinet filed cases with the Constitutional Court, which, in turn, did not decide a single case in 1998-2000, 2002, and 2003. All in all, between 1996 and 2018, the TCC issued 53 decisions on the merits, averaging 2.3 decisions per year. Between 2008 and 2018, the tribunal dealt with only 5 cases raising separation of powers issues, and in only one of these cases did it declare the contested legal act - a directive of the Ministry of transport - unconstitutional.

Yet the TCC played a role like the one played by the Kyrgyzstani Constitutional Court and the Kazakhstani Constitutional Council. It legitimized constitutional amendments, which enhanced the ruling status of presidents. In June 2014, the Tajikistani parliament adopted a new Law on the Constitutional Court, which justices helped to draft. The Venice Commission in its opinion of June 13-14, 2014, on this draft law noted, “it is a coherent text, which will provide a firm basis for an effective work of the Constitutional Court” (Nazarova 2021). Among other things, this law extended the tenure of judges to 10 years and granted to the Court the new power

to review constitutionality of draft laws and draft constitutional amendments, which are supposed to be voted in the referenda. And on February 4, 2016, the court heard a case brought by the lower chamber of parliament on whether the 40 proposed constitutional amendments - presented as one package and to be adopted in the nationwide referendum - complied with the Constitution of Tajikistan. The most significant amendments gave Emomali Rakhmon, the Leader of the Nation a lifetime presidency, lowered the eligibility age for presidential candidates (supposedly to allow Rakhmon's son – Rustami Emomali, to run for office in 2020), for MPs and judges (including Constitutional Court justices), and banned faith-based political parties (with the clear target being Islamic Renaissance Party of Tajikistan). Nobody was surprised when the TCC approved these regime-sponsored amendments by concluding that they *"encapsulate the process of political and social democratization of Tajik society, strengthening of legal protections of individuals, and represent a continuation of politico-social, legal and judicial reforms in the country. They are aimed at betterment of the Constitution, and are in compliance with worldwide practice of constitutional amendments and with values and basic principles of the Constitution of the Republic of Tajikistan."* (Nazarova 2021)

In sum, the personalist patronal regime that runs Tajikistan through the concentration of power in the hands of the president's extended family (Cooley and Heathershaw, 2017) seems to need the constitutional court only as an assistant for drafting legal cover and a notary for constitutionalizing decisions made within this family. The constitutional court in Tajikistan, then is a "sidelined court" that is irrelevant to politics, to use terminology of Brinks and Blass (2017). President appears to control both the fate of the tribunal and its members. As Stykow (2017) puts it, in "the politically more closed regimes, such as Tajikistan's, … elite networks are integrated into comprehensive, nationwide "power pyramids," which are led by presidents who enjoy the

privilege of an often constitutionally granted status of the "Leader of the Nation." They rely on a carefully calibrated mix of patronage and oppression vis-à-vis the elite and are eager to maintain a high level of popularity among their citizens." President granted the tribunal increasing powers, allowed constitutional complaints in 2008, and offered longer tenure guarantees in exchange for personal loyalty, while justices know what is expected of them and enjoy generous perks of pre-retirement tenure on the bench. The court remains the element of "the facade of Western patterned legal arrangements" (Abdullaev, 2004:8; Toktogazieva, 2019, p. 151), which hides the family-run regime with no interest in the judicialization of high-level politics and with no commitment to share power with the governing coalition (cf. Svolik 2012).

<c> Uzbekistan: Stably Sidelined Constitutional Court

In contrast to cases described above, the lack of judicialized high-level politics in Uzbekistan is much easier to explain. There, the former Communist Party leader Islam Karimov who ruthlessly ruled the country until his death in 2016 (Cooley and Heathershaw, 2017), despite the constitutionally prescribed limit of two five-year presidential terms. Karimov held a tight grip over the constitution-making process, personally drafted constitutional clauses and had his version of the Constitution adopted in December 1992 (Ismatov 2021). This made Uzbekistan the first post-Soviet republic to adopt a new Constitution in the wake of the break-up of the USSR. The Articles 107-109 of the Constitution set up the Constitutional Court, which would consist of "political and legal experts" elected by the legislature for a once renewable term of five years. In a stark contrast to the speedy adoption of the Constitution, Karimov was in no rush to activate the Constitutional Court. The Karimov-controlled legislature adopted the Constitutional Court Act in May 1993, then adopted another Constitutional Court Act in August 1995. The 1995 Act granted broad powers to the Court yet denied it the power to handle

constitutional complaints. The legislature then elected five justices of the Court – all Karimov's nominees, including 2 law professors – in December 1995. It took justices another six months to develop the Court's procedures, and the Court began accepting cases in January 1996. Two more justices were elected in 1998, after the OSCE-sponsored study tour for sitting justices in Paris (Saidov, 2000).

Like in Tajikistan (until 2014), the seven-member Uzbekistani Constitutional Court (UCC) could initiate judicial review on its own initiative, if at least 3 justices agreed that the contested act merited judicial review. Between 1996 and 2001, the chief justice boasted that the his tribunal had received some 2,000 petitions from firms and citizens and reviewed some 2,000 legal acts of central and local government bodies, including President Karimov's decrees (Eshonov 2001). But Uzbek lawyers and lower court judges interviewed in the spring of 2002 could not cite a single "decision that had arguably been made against the interests of the executive power" with several lawyers calling the Constitutional Court "a "dead" organization" (American Bar Association, 2003:11). Moreover, according to Ismatov (2020), the Court handled even fewer cases than its Tajikistani analog – 33 - between 1996 and 2019, averaging 1.4 cases a year. According to two scholars (Brezhnev, 2020; Ismatov, 2020), the UCC justices initiated by themselves the judicial review of contested laws and regulations in most of these cases. The texts of all Court's decisions are not publicly available on the Court's website. Judging by the texts of several decisions available, the Court helped the patron-in-chief to rein in recalcitrant ministers and provincial governors. The Court reviewed the compliance of the Cabinet edicts with President Karimov's decrees and compliance of decisions of provincial governors regulations with the statutes, a role that has been played by the Procuracy in the USSR. In contrast to decisions of the Kazakhstani Constitutional Council and the Kyrgyzstani

Constitutional Chamber, decisions of the UCC are short and consist of quotes from the laws and regulations instead of judicial reasoning and interpretation of constitutional rules (Ismatov, 2020). In fact, the content of the UCC decisions is very similar to the statements of the Procuracy, the government agency - inherited from the Russian Empire and the Soviet Union - that supervises the legality of central and local administration (Smith, 1978). This duplication of procuratorial functions makes this tribunal redundant and indicates that Uzbekistani presidents do not use the constitutional courts for the purpose of sharing power with the ruling elite (cf. Svolik, 2012).

In contrast to other Central Asian constitutional courts, the UCC did not take a formal part in any highly symbolic and crucial for President issues, such as confirming the constitutional amendments and extending the presidential term limits. As one journalist wrote at the time of Karimov's unexpected death in 2016, Karimov and his key clients ignored the Constitution when "it was deemed inconvenient for the head of the state or contradicted his interests or those of groups providing him support, including corrupt officials, the heads of the security services, organized crime, and regional clans" (Taksanov 2016).

As with the Kazakhstani Constitutional Council and the Tajikistani Constitutional Court, President Karimov's highly coercive and highly corrupt regime (Markowitz, 2017) both controlled individual justices and the fate of the tribunal. Meanwhile, justices knew that he expected their court to play a marginal role in politics, and they did not want to be recalcitrant. His key lieutenants led the court and received posh perks serving as chief justices. The first chief justice who led the Court between 1995 and 2002 was Karimov's right-hand in the legislature and one of the co-authors of the 1995 Constitutional Court Act. His successor between 2002 and 2004 served as Procurator-General, who oversaw criminal prosecutions of Karimov's opponents,

prior to joining the bench. The current chief justice has already served as chief justice between 2004 and 2005 and then was appointed to lead the Central Elections Commission between 2005 and 2021. Like other Central Asian patronal presidents, who were confident in the utmost loyalty of constitutional court justices, Karimov gradually expanded the powers of the constitutional court (Mukhamedjanov, 2019). He even allowed the tribunal to become the founding member of the Association of Asian Constitutional Courts and Equivalent Institutions in 2010, which shows that he considered the constitutional court to be important in propagating his constitutional wisdom to external audiences.

Karimov's successor, former Prime-Minister Shavkat Mirziyoev, elected in 2016, was keen to modernize the redundant Constitutional Court. To show his capacity to keep justices under control President Mirziyoev had one former justice, who had previously served as the Procurator General between 2000 and 2015, imprisoned for 10 years for corruption. In April 2021, Mirziyoev signed the new Constitutional Court Act, which enlarged the size of the Court from 7 to 9 justices, removed the power of the Court to initiate judicial review on its own initiative and granted citizens and firms the right to file constitutional complaint. Yet there does not seem to be either demand for or supply of judicialization of high-level politics. In short, the constitutional court in Uzbekistan, like the one in Tajikistan, then is a facade tribunal (Toktogazieva, 2019, p. 161) or a "sidelined court" that is irrelevant to politics (Brinks and Blass, 2017) with no ability and willingness to distribute political power.

<b> Analysis: Differing Trajectories of Instrumentalization of Constitutional Law and Politics in Central Asia

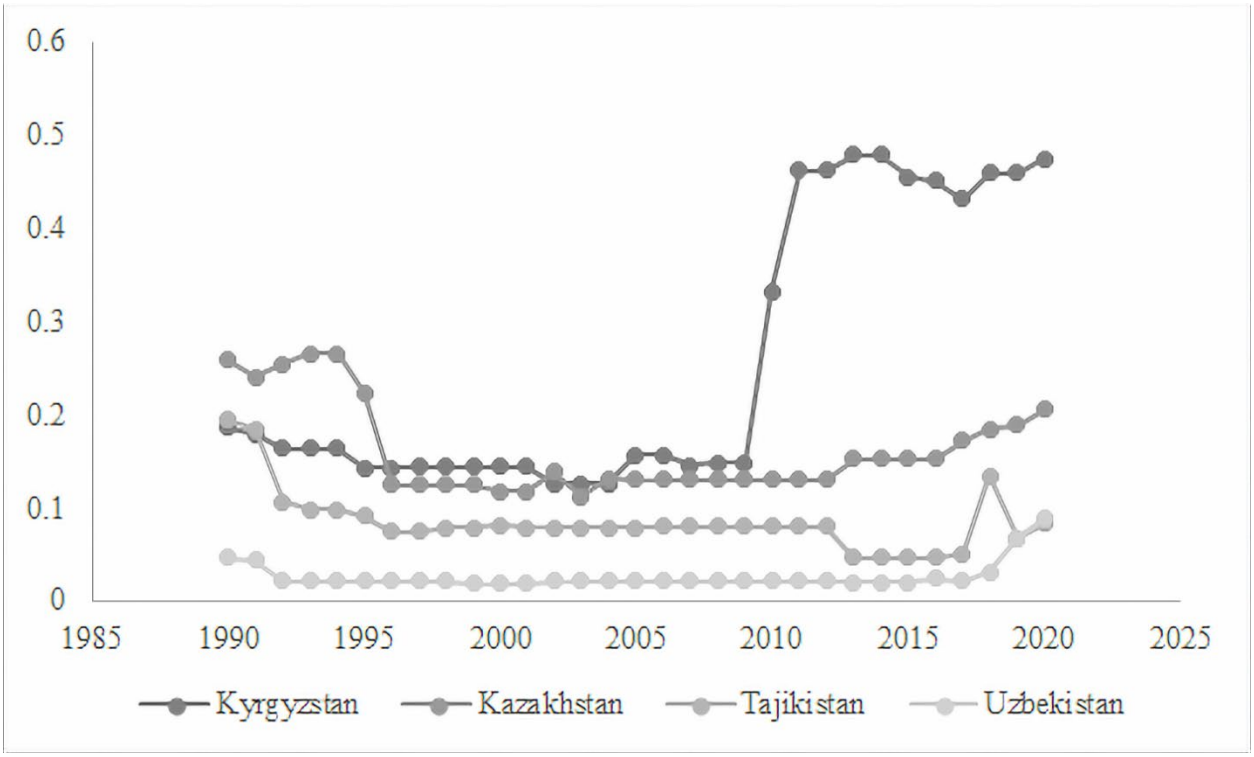
Existing research on authoritarian regimes suggests that formal institutions can play a crucial role in elite power-sharing. They may increase coordination among the elites by creating clear

procedures of power-sharing, delineating the scope of authority of each key office-holder and enabling the monitoring by the ruling elite of the autocrat's compliance with his promises (Svolik 2012). Yet our analysis shows that the Central Asia's constitutional review tribunals performed these roles only in Kazakhstan until the early 2000s and in the post-2010 Kyrgyzstan by restraining the unnecessary cascades of rebellion against the President that had resulted from the elite perception of the power-grab on the part of the President's faction in both countries.

There are, of course, clear limits as to the extent to which constitutions and constitutional courts can serve as meaningful checks on the to-be autocrat's desire to accumulate power. Scholars argue that formal institutions and constitutional texts, like term limits, can serve as crucial focal points at which factions within the elites can coordinate against the autocrat, thereby creating a self-reinforcing norm of exit and power rotation (Fearon, 2011; Svolik, 2012). In contrast, we find that breaking and making of constitutions and bypassing the term limits became pet projects of Central Asian patrons-in-chief, who controlled constitutional tribunals through formal and informal means and gained favorable judge-made interpretations of these reforms. In this sense, we argue that formal institutions *per se* do not serve the regime-stabilizing function. Rather than ensuring credible commitment, constitutional tribunals can redistribute power and threaten the power-sharing function of other institutions. While the Kyrgyzstani Constitution of 2010 could, in theory, stabilize the regime by ensuring power-sharing among different elite groups, it failed to do so. Several pro-president amendments to its structure coupled with the inability of the Constitutional Chamber to thwart these amendments, ultimately, produced destabilizing effects that led to the arrest of the former President by his hand-picked successor in 2019, to the ouster of this successor in October 2020 and to instrumentalizing of the constitutional law. Indeed, as Figure 2 shows, in regimes, like the post-2010 Kyrgyzstan, where

presidents as patrons-in-chief do not control judicial appointments and face stronger judicial constraints, they tend to interfere with the assertive judiciary more in order to tame the courts.

Figure 2. Judicial Constraints on Executive Index in Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan, 1991-2021.



Source: Coppedge et al. (2021).

We also find little support for the strategic insurance approach that posits that greater electoral competition and political uncertainty lead to more formal insulation of constitutional courts and judicialization of politics (see Table 6). Neither Kazakhstani competitive politics in the mid-1990s nor the post-civil-war power-sharing in Tajikistan in the same period nor six Kyrgyzstani presidents in the last 30 years made constitutional courts more insulated and independent. To the contrary, presidents (and parliaments in Kyrgyzstan) demanded from these

tribunals a greater care for their short-term power needs. Central Asian constitutional review tribunals behaved with a remarkable degree of deference to the presidents and oscillated between the "Regime Ally" and sidelined types of courts (Brinks and Blass, 2017). These tribunals further entrenched these presidents' hold on power yet did not expand their own actual judicial power - either cautiously or through landmark decisions.

Table 6. Political Context and Activism of Constitutional Courts in Central Asia

	Political Competition at the time of activation	Share of Academics and Private Lawyers at the time of activation	Jurisdiction and Access	International Support	Judicial Activism in the Separation-of-Powers Cases	Average Annual Caseload
Kazakhstan Constitutional Court	High	High	Broad	Low	Yes	5 cases
Kazakhstan Constitutional Council	Low	Low	Limited	Moderate	Yes, until 2003	3.2 cases
Kyrgyzstan Constitutional Court	Moderate	Low	Broad	Low	No	7 cases
Kyrgyzstan Constitutional Chamber	High	High	Broad	High	Yes	25 cases
Tajikistan Constitutional Court	Moderate	Low	Broad	Low	No	2.3 cases

Uzbekistan Constitutional Court	Low	Medium	Limited	Low	No	1.4 cases

What factors then explain the outcome of judicial deference to the presidents? We stress three key mutually reinforcing conditions. Firstly, the legacy of the Soviet Union produced regimes with strong executives in Central Asian countries. Even Kyrgyzstan's relatively strong parliament - between 2010 and 2020 - still delegated many powers to the President. Conformity with the wishes of a paternalistic leader who is ultimately responsible for guaranteeing order and social peace, through the use of force, if needed, remains a strong social norm, especially with the government employees (Ismatov, 2021). In short, judges defer because they do so habitually: they learned to defer in the past, and they also learned from the 1993 Russian constitutional crisis that the displays of recalcitrance do not end well.

Secondly, this strong norm of deference to the strong ruler gains material and symbolic support from patron-client politics in Central Asia, which has been well-set in the late Soviet era (Gleason, 1997). This type of politics is a social equilibrium, when "individuals organize their political and economic pursuits primarily around the personalized exchange of concrete rewards and punishments, and not primarily around abstract, impersonal principles such as ideological belief or categorizations that include many people one has not actually met in person." (Hale, 2015, p. 20). Such equilibrium facilitates greater instrumentalization of constitutional courts because it creates the *capacity* on part of the presidents as patrons to have leverage over individual members of constitutional courts. Patronal presidents need political "front men" serving on the bench of constitutional courts, persons who would be politicians-in-robes "by Western standards" yet who "are indeed, informally, deprived of their autonomy in patronal

autocracy and are de facto degraded to mere executors of the chief patron's will" (Magyar and Madlovics, 2020:617). Because in patronalized politics, judicial recruitment and security of tenure is often shaped by expectations of rewards and loyalties individual judges can bring to the patrons, the autonomy of the constitutional courts from the executive is limited. This limited judicial autonomy is the result of both self-selection of individuals with little abstract commitment to impartial justice but strong desire to remain in the ruling patronal network and of the capacity of the executive to reward loyal judges. This explains why President Nazarbayev kept several loyal to him justices of the previously abolished Constitutional Court in 1995 and why the Constitutional Chamber in Kyrgyzstan authorized the arrest of the former president Atambayev after the new President, Atambayev's protege, came to office and quickly amassed significant powers (Juzgenbayev, 2019c). These informal and personal exchanges of material rewards-for-loyalty explain the unwillingness of constitutional court judges to hold their (new) patrons accountable despite broad jurisdictional rules and formal guarantees of judicial independence. Individual judges of these tribunals gain no material or reputational benefit for asserting judicial power and do not desire to risk their posh retirement benefits granted for the long-term loyalty to the patron-in-chief.

Thirdly, patronal presidents are authoritarian leaders, who concentrate power in their own hands and instrumentalize constitutional review. They prefer tamed constitutional courts because they *desire* to control them (Webb Williams and Hanson, 2022) as well as other government organs as institutions. If constitutions were mere facades, we would not expect recurring conflicts over the content of their texts and extreme attention with which presidents of Central Asian states personally oversee the drafting and interpretation of constitutional texts (Nurumov and Vashchanka, 2016; Ismatov, 2021). Patronalist regimes are built around expectations of the

power of the particular elite networks, and the meaning of constitutional texts is important to control because constitutional rules serve as *signals* about which of the clientelist networks is expected to maintain and enlarge their share of material resources (Hale, 2015). Constitutional review tribunals are particularly crucial for the would-be autocrats to control because these tribunals make these signals visible and allow to bypass the resistance from parliamentary opposition. The small size of these tribunals and their loneliness make them easier to control by patrons-in-chief through appointments, budgets, and administrative support.

Taken together and supported by patronage-based equilibrium and Soviet-era understandings, the combination of presidential cooptation, control and coercion (sometimes through the threat of releasing the compromising information (Markowitz, 2017; Magyar and Madlovics, 2020, 307)), of the individual constitutional court judges and constitutional courts as institutions leads to constitutional tribunals performing as "regime allies" or sidelined courts, which distribute power in favor of presidents and playing other non-judicial roles, which legitimate both tribunals and their patrons. On paper, constitutional tribunals may gain more powers and become more accessible yet this does not, by itself, translate into greater judicial power or promote judicialization of distribution of power because formal and informal relations, in which judges are embedded facilitate their instrumentalization by the powers that be.

Conclusion

Our analysis of constitutional separation of powers in four Central Asian countries shows a great deal of dynamism. But this dynamism is a product of ambitions of powerful presidents as patrons-in-chief who aspire to rule unilaterally, and not a product of power-sharing bargains between presidents and the ruling elites legalized by constitutional review tribunals. Just as constitutions have been pet projects of Central Asian presidents, so have the constitutional courts

in those countries been of presidents' legal advisers who had persuaded their patrons-in-chief in the usefulness of constitutional review tribunals in building a modern personalist autocracy. In the countries we have analyzed, constitutions, the laws on constitutional courts and the decisions of those courts are written with the core interests of specific persons in mind. These legal texts are products of instrumentalization of constitutional review, not of judicialization of high-level politics and not of cautious judicial empowerment. Patronal presidents who control both constitutional courts and individual judges through corruption, cooptation and coercion have their autocratic initiatives approved by the constitutional courts. In exchange for favorable judgments, constitutional court judges enjoy posh salaries and paid trips to the meetings of prestigious judicial associations in foreign capitals and do not seek to expand the actual power of their tribunals. Thus, Central Asian constitutional courts fall in the category of non-cases in the studies of judicial empowerment in authoritarian regimes (Moustafa, 2014). We have shown that the absence of actual judicial empowerment are both results of institutional design (personalist autocracy), formal and informal patron-client exchange of concrete benefits and sanctions between presidents and judges, and learning on the part of judges that recalcitrance - on the bench and off-bench - carries more costs than benefits. As a result, constitutional tribunals in Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan, play redundant roles of legal advisers, notaries and law-enforcement monitors for presidents instead of holding them accountable.

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