Distinguishing arbitrary from legitimate constitutional amendments in countries with ever-changing constitutions: a comparative perspective between Kyrgyzstan, France and Brazil

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Abstract

Constitutions, being the main law of the state, tend to change due to different circumstances. Some change rarely, others change very often. In the situation, when constitutions have a tendency to change often it is very difficult to assess the legitimacy of the amendments. Therefore, the present research aims to distinguish between arbitrary and legitimate constitutional amendments. The insight to conduct this research comes from the problem that have taken place in Kyrgyzstan, where political elites often used constitutional amendments for personal benefits. France and Brazil are the examples of countries, whose constitutions have also had many constitutional amendments both of legitimate and arbitrary character. Therefore, I will analyze the constitutional history of all three countries and will try distinguishing between arbitrary and legitimate constitutional changes.

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Introduction

The topic of constitutional amendments and its rules has been studied by many scholars and many works have been devoted to this issue. However, as the time goes, the new challenges and questions arise. The present work addresses one of such questions. How to distinguish between arbitrary and legitimate constitutional amendments in the environment of ever-changing constitutions? The examples of the countries with ever-changing constitutions are Kyrgyzstan, France and Brazil. The difference between arbitrary and legitimate constitutional amendments can be slightly visible in times, when constitutions change very often, therefore, there shall be certain patterns or signs, which will help to distinguish them.

The question arises from the issues that have taken place in the Kyrgyz Republic. Since the Kyrgyz Republic acquired its independence, it has become a "champion" among Central Asian countries and countries of Former Soviet Union, in adopting constitutional amendments. However, the major problem is not necessarily the frequency of constitutional amendments, but rather the substance of these amendments. The majority of the constitutional amendments in Kyrgyzstan are arbitrary and biased; they serve personal interests of the ruling majority in Parliament and the President. France and Brazil are chosen as comparators, because these two countries, even though having relatively old constitutions, have adopted many constitutional amendments as well, some of which were legitimate and some were arbitrary. The purpose of this work is to identify and differentiate between arbitrary and legitimate constitutional amendments in all three countries and identify the cause and effect of these amendments.

The present work will first describe constitutional amendments as a term, rules of constitutional amendments and their importance, in order to provide the reader with some

understanding of the mechanisms of constitutional amendment. Later the paper will proceed with giving a constitutional history of each country for the purposes of providing the reader with an explanation why these particular countries have been chosen and why they are regarded as countries with frequently changing constitutions. Moreover, since the paper will analyze different constitutional amendments that were adopted in different time periods, it will be important to know the constitutional history in order to relate the amendment to certain period in history. The next step will be to identify those amendments, which are legitimate before moving on to distinguish them from arbitrary constitutional amendments that have taken place in all three countries. Usually such amendments are adopted with regard to presidential powers and human rights. Having identified arbitrary constitutional amendments, their cause and effect, the paper will proceed to provide a conclusion on how to differentiate between arbitrary and legitimate amendments and whether it is possible to eliminate arbitrary amendments.

Description of constitutional amendments as a term

Constitutions, whether they are written or unwritten, are the main laws, which govern any state, whether federal or unitary, monarchial or republican, presidential or parliamentary, as a legal foundation. There are constitutions, which are very old, for example the Constitution of the United States of 1788 or the Constitution of San Marino of 1600. On the other hand, there are constitutions that did not last long, for example the Constitution of France, which was drafted approximately at the same time as the US Constitution, in 1791. The French Constitution of 1791 survived for a little more than one year followed by fourteen more constitutions.[1] There is no answer to the question whether it is good to have an old Constitution or a young one, rather it is

[1] Elkins, Zachary, Tom Ginsburg, and James Melton. The Endurance of National Constitutions. Cambridge: Cambridge University Press, 2009, p.1.

obvious that as long as the constitution serves its role as a guarantor of the political stability, rule of law and democracy, it is a good Constitution.

It is undebatable that through time the political situation and overall environment in a country and in the world changes, thus some provisions in the constitutions become useless, while others seem to be in need of development. It is normal that constitutions are changed and the framers tend to bring new provisions into the texts of the main law of the state, because constitutions, in order to be effective, have to customize and adjust to the time and environment. There are various methods of improving and amending the constitution.

There is a formal method of amending the constitution through the amendment procedure, which is usually stipulated in the text of the Constitution itself.[2] This method is the most popular one; however, one shall not undermine the power of judicial interpretation and practice, which can have a greater effect rather than the formal process of amendment.[3] Indeed, come scholars criticize the last method of amending the constitution through a judicial review.[4]

The formal rules of amendment can be different in complexity and concreteness. According to traditional perception, rules of amendment are the major variable in determining the rigidity of a Constitution. Flexible constitutions are usually those, which can be amended as ordinary statutes, the examples of which are United Kingdom and Ireland, indeed these countries

[2] Tom Ginsburg & James Melton, "Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty", Coase-Sandor Institute for Law & Economics Working Paper No. 682, 2014, p.2.

[3] Yaniv Roznai, *Unconstitutional constitutional amendments: the limits of amendment powers*, Oxford Constitutions of the World, February 16, 2017. http://oxcon.ouplaw.com/view/10.1093/law/9780198768791.001.0001/law-9780198768791-chapter-1#law-9780198768791-chapter-1-note-6.

[4] See Walter Dellinger, "The legitimacy of constitutional change: rethinking the amendment process", 97 Harvard Law Review (1983), p. 387. "If we are to agree on what the fundamental law is, we need to have an amendment process that operates with a fair degree of certainty…For this reason, a satisfactory amendment process demands, at a minimum, that the rules for the adoption of an amendment be clearly understood…Judged by such a standard, our [American] amendment process is seriously flawed." https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1031&context=faculty_scholarship.

do not have written constitutions. Rigid constitutions, in turn, cannot be amended as ordinary statutes and there is always a specific procedure. Depending on the rigidity of the rules, rigid constitutions can also be classified as very rigid, rigid and less rigid constitutions. The level of rigidity depends on the number and complexity of the steps that need to be taken in order to amend the constitution, among these steps are the vote in the parliament and its threshold, approval by the constitutional court, nation-wide referendum, etc. The less steps are needed, the less rigid is the constitution.

Tom Ginsburg and James Melton in their work "Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty", which was based on the "Comparative Constitutions Project"[5], had an argument that since there is a social and technological progress and it tends to accelerate, the rules have to adjust in order to stay useful, in other words the constitutions have to be amended in order to fulfill its primary function.[6] Therefore, if the constitution stays flexible it will be easier to adjust to never-ending tendency of social and political processes to change. I would definitely agree with the argument that the Constitution has to change in order to adjust to social environment, which changes through time.

However, there is an issue, which seems to be very problematic in assessing from the legal point of view. This is the issue of constitutional amendments, which take place for political

[5] http://comparativeconstitutionsproject.org/ -web page of the Comparative Constitutions Project, directed by Zachary Elkins (University of Texas, Department of Government), Tom Ginsburg (University of Chicago, Law School), and James Melton. The project produces comprehensive data about the world's constitutions.
[6] Tom Ginsburg & James Melton, "Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty", Coase-Sandor Institute for Law & Economics Working Paper No. 682, 2014, p.3.

reasons to serve someone's personal interest. This is the case with the Kyrgyz Republic, where the mechanism of amending the constitution is used frequently to serve someone's interest.

Chapter I

To proceed with the issue of abusive or arbitrary constitutional amendments and the solution of this problem, the present chapter will provide some information on the history of constitutional development of the Kyrgyz Republic, France and Brazil. As has already been mentioned, France and Brazil are taken as comparators, because these two countries have adopted many constitutional amendments as well as Kyrgyzstan.

1. Constitutional history of Kyrgyzstan

The Kyrgyz Republic is a sovereign, democratic, legal, secular, unitary, social state.[7] It has acquired its independence in 1991 after the collapse of the Soviet Union. The first Constitution of the independent Kyrgyzstan was adopted in 1993, which aimed to enshrine and protect the sovereignty and democratic values of a newly established state.

Obviously, the Kyrgyz Republic is a relatively young country, which is only on its way to development. The first Constitution of independent Kyrgyzstan was adopted short after the collapse of the Soviet Union in 1993. However, for the period of a little more than 20 years, the history of the Kyrgyz Republic has seen a number of amendments to the main law of the state and several adoptions of completely new constitutional texts. For example, after the adoption of the first Kyrgyz Constitution of 1993, there were amendments adopted in 1994 and 1996, which proposed changes to referendum's agenda, reorganized parliament, clarified relationship between the branches of government and defined their functions. However, these were the changes that were needed for the state, since it was in the fast phase of development after the collapse of the Soviet Union. These amendments were not in conflict with the rule of law and other principles of

[7] Constitution of the Kyrgyz Republic, 2010, Section 1, Article 1.

a law governed state. The big issues arose, when political figures have started to use the Constitution as a mechanism to preserve personal political interests or some sort of personal gain. This issue can be classified by two periods. The first period of constitutional changes have taken place with the presidency of Askar Akaev, the first president of independent Kyrgyzstan. The second phase or period started with the leadership of the second president, Kurmanbek Bakiev.

The issues have started from the time when the first president of the Kyrgyz Republic, Askar Akaev, started using the constitutional amendment mechanism in his favor with the adoption of new amendments in 1998, which granted wide powers to the President of the state.

In 2003 President Askar Akaev introduced new amendments to the Constitution, which extended his term limit to the third term. In 2005 parliamentary elections took place and the opposition party did not make it to the Parliament due to falsification of the election results.[8] Even more interestingly, the party called "Alga Kyrgyzstan" led by the President's son and daughter, won the majority of seats in Parliament.[9] This was the ending point and the so called *coup d'etat* took place. Persident Askar Akaev was overthrown and had to leave the country. Now he resides in the Russian Federation, serving as a professor at Moscow State University.[10]

In the same year 2005, the new President, Kurmanbek Bakiev, came to power. He did not bring back the initial Constitution, but decided to adopt a new constitution in November, 2006.[11]

[8] Zainidin Kurmanov, "Parliamentary election in Kyrgyzstan in 2005 and collapse of the political regime of Akaev", Central Asia & Central Caucasus Press AB, accessed 03 December, 2017. https://www.ca-c.org/journal/2005/journal_rus/cac-03/01.kurmru.shtml.
[9] "Akaev's children lead the elections", newspaper "Vedomosti", 28 February 2005. https://www.vedomosti.ru/library/articles/2005/02/28/deti-akaeva-lidiruyut-na-vyborah.
[10] "Askar Akaev-former President of the Kyrgyz Republic", news portal "Lenta", accessed 03 December, 2017 https://lenta.ru/lib/14159652/.
[11] N. Sheripov, "Constitutional Development of Kyrgyz Statehood", news portal CenterAsia, translated from Russian, 23 June, 2014. http://www.centrasia.ru/newsA.php?st=1403516220.

This Constitution did not intend to remedy the results of the previous president's maladministration, but made things even worse. However, in September 2007 the Constitutional Court declared the 2006 Constitution void and the text of the 2003 Constitution was brought back.[12] Nevertheless, in October the President held a referendum on adoption a new Constitution of 2007, where he proposed to liquidate the position of a Prime Minister; the functions of the Head of State and the Head of government should have been performed by one person, he also restructured the parliament.[13] Besides amending the Constitution, President Bakiev started using his power to benefit his family. His brothers and children have taken high positions and political figures, who were against him or were in opposition, were removed from the offices for different absurd reasons.[14] Even though the situation was problematic and his reputation was already instable, he got reelected for a second term in 2009. However, in 2010 after his intent to move the capital of the Republic to the city of his origin and his intent to pass the presidential mandate by birth, meaning to his son, the opposition and people from different parts of the region have raised against the President and another *coup d'etat* took place.[15] Unlike the first one, the second was very severe and violent. The president had to leave the country. Now he resides in Belarus.

The interim government came into place led by Roza Otunbaeva, who became the first female president of the state. Nevertheless, it was an interim measure. In 2010, the new Constitution was introduced and proposed very positive changes. Along with international and local experts, the new raft constitution was created and was given a good feedback by the Venice

[12] Ibid.
[13] Constitution of the Kyrgyz Republic of 23 October, 2007. https://online.zakon.kz/Document/?doc_id=30212746#pos=0;0
[14] N. Sheripov, "Constitutional Development of Kyrgyz Statehood", news portal CenterAsia, translated from Russian, 23 June, 2014. http://www.centrasia.ru/newsA.php?st=1403516220.
[15] N. Sheripov, "Constitutional Development of Kyrgyz Statehood", news portal CenterAsia, translated from Russian, 23 June, 2014. http://www.centrasia.ru/newsA.php?st=1403516220.

Commission. The Venice Commission emphasized that the new Constitution deserves very high praise.[16] Among the changes there were introduction of the judicial review by the Constitutional Chamber, shift in system of government, separation of powers and checks and balances, abolition of death penalty and life imprisonment. The new Constitution still having its flaws, was human rights friendly and rule of law and democracy oriented. In 2011 the President Almazbek Atambaev was elected.

Shortly before the end of the term of the President Almazbek Atambaev, there have been new amendments taken place. The new amendments proposed the dualist approach in the effect of international treaties.[17] It established the notion of "highest values of the state" and classified that Kyrgyz culture, traditions and language are these highest values.[18] It also defined marriage as a union between men and women.[19] It triggered the mechanism of checks and balances, principle of independence of judiciary, and transparency of judicial review.[20] Almost every provision of the law on amendments serves its role in fulfilling someone's interests to reach personal gain. Definitely, there were legitimate amendments in 2016, but the paper will distinguish them from arbitrary in the next chapter.

On 15 October, 2017 presidential elections took place and the candidate from the same party as the former president won, which raised a number of questions over the transparency of the elections and many argue that the scenario is very much alike to Russia's Putin-Medvedev

[16] Opinion on the Draft Constitution of the Kyrgyz Republic (version published on 21 May 2010) Adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010) in English, CDL-AD(2010)015-e.
[17] Law of the Kyrgyz Republic on introduction of amendments to the Constitution of 2010, dated 28 December, 2016, no. 218. http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru.
[18] Ibid.
[19] Ibid.
[20] Ibid.

rule.[21] No one knows what the new president will bring and will he also use the Constitution for his interests.

The Constitution of the Kyrgyz Republic can be classified as rigid based on the explanation above,[22] because the Constitution provides very strict rules of amending the Constitution, which requires the majority of the votes in Parliament after three readings and a referendum.[23] According to the constitutional amendment mechanisms of other countries, these criteria make the Constitution of rigid character, which is presumably difficult to amend. Nevertheless, rigidity of the Constitution does not make constitutions stable or does not minimize the risk of abuse. The comparator constitutions of France and Brazil are also rigid.

2. Constitutional history of France

One of the best ways to address the problem is to look at the Constitution France, because it has also adopted many constitutions and constitutional amendments, moreover, it is rigid. In light of this, there is a joke, which is stated as follows: "A man goes into a library and asks for the copy of French Constitution, only to be turned away with the explanation that library does not stock periodicals".[24] In order to not to be unfounded, it is appropriate to mention that during the period between the French Revolution of 1789 and the adoption of the Constitution of 1958, France has had fifteen different constitutions.[25] Fortunately enough, the reluctance came with the

[21] Vyacheslav Polovinko, "Like it or not, Sooronbai will win" (Sooronbai is a new President of the Kyrgyz Republic, former Prime-Minister), "Novaya Gazeta" newspaper article, 17 October, 2017. https://www.novayagazeta.ru/articles/2017/10/17/74230-vybiray-ne-vybiray-pobedit-sooronbay.
[22] Present paper, p. 4, paragraph 3.
[23] Constitution of the Kyrgyz Republic, 2010, Article 114.
[24] Elkins, Zachary, Tom Ginsburg, and James Melton. The Endurance of National Constitutions. Cambridge: Cambridge University Press, 2009, p.1.
[25] Martin A. Rogoff, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, Jus Politicum, n° 6 http://juspoliticum.com/article/Fifty-years-of-constitutional-evolution-in-France-The-2008-amendments-and-beyond-373.html.

Constitution of the Fifth Republic of 1958, however, that is not to say that this constitution remained unamendable.

Before discussing the nowadays Constitution of 1958 of France, in order to provide a better understanding of French constitutional history, it will be reasonable to describe the process of French constitutional evolution. Before 1789 France was ruled by a King, who possessed all the powers of the government. Lack of liberty, equality, self-government and national consciousness led to the Revolution of 1789. The revolutionary government drafted the first constitution of France, which is known to be a Declaration of the Rights of Man. In 1791 the assembly enforced a new constitution, which was still monarchial, but the sovereignty belonged to the Legislative Assembly, which was elected through indirect voting system.[26] This was a start of the First Republic. The Constitution of 1791 was replaced by the Constitution of 1795, which provided for bi-cameral legislature and executive consisting of five members, named Directory. The central government retained great powers, such as emergency powers in order to suppress freedom of press and association.[27] The Directory continued working until it was replaced by the Counsel with Napoleon Bonaparte as the first Consul in 1799. In the year 1800 the new Constitution was drafted that concentrated all powers in the Counsel, particularly in the hands of Napoleon.[28]

In 1802 Napoleon Bonaparte proclaimed himself as a Consul for life and 1804 he became an Emperor of the First Empire. The First Empire lasted since 1804 till 1815, when Napoleon was defeated. During his ruling, many reforms and changes have taken place, for example civil

[26] The Editors of Encyclopedia Britannica, *Constitution of 1791,* Encyclopedia Britannica website, published May 13, 2016, accessed February 4, 2018. https://www.britannica.com/topic/Constitution-of-1791-French-history.
[27] The Editors of Encyclopedia Britannica, *Constitution of 1795 (Year III),* Encyclopedia Britannica website, published July 16, 2014, accessed February 4, 2018. https://www.britannica.com/topic/Constitution-of-1795.
[28] The Editors of Encyclopedia Britannica, *Constitution of the Year VIII,* Encyclopedia Britannica website, published February 22, 2016, accessed February 4, 2018. https://www.britannica.com/topic/Constitution-of-the-Year-VIII.

and criminal laws were created, which are still working nowadays. Titles were brought back and imperial nobility was created. France was involved in a number of wars and military actions, for example the war with Britain (1803-1805), the Prussian war (1806) and the great battle of 1812 between Russia and France. The First Empire came to an end as a result of military collapse in 1815.[29]

After the fall of Napoleon First Empire, the period of Bourbon Restorations began, which lasted until 1830. When Charles X tried to intervene into the Constitution, it led to July Revolution and Charles X was replaced by Louis Philip, who intended to act as a constitutional ruler. The Period of 1830 to 1848 is known as July Monarchy, which ended as a result of Revolution.[30] The years of 1848 was also the year of establishment of the Second Republic, which lasted until 1852.

The Constitution of the Second Republic was adopted and provided for the executive power to be concentrated in the hands of the President, who was elected by the method of universal male suffrage for the term of four years. During the Second Republic slavery was abolished. It ended with a *coup d'etat* by Louis Napoleon Bonaparte, who was proclaimed an emperor and the Second Empire took place.[31]

The Second Empire lasted for a period of almost twenty years since 1852 till 1870 under the rule of Louis Napoleon Bonaparte (Napoleon III). The empire was authoritarian on its early stages, but the principles economic growth and favorable foreign policy was preserved. Later on

[29] Jacques Godechot, *Napoleon I*, Encyclopedia Britannica website, published February 1, 2018, accessed February 4, 2018. https://www.britannica.com/biography/Napoleon-I.
[30] The Editors of Encyclopedia Britannica, *July Monarchy*, Encyclopedia Britannica website, published March 30, 2012, accessed February 4, 2018. https://www.britannica.com/topic/July-monarchy.
[31] The Editors of Encyclopedia Britannica, *Second Republic*, Encyclopedia Britannica website, published February 14, 2011, accessed February 4, 2018. https://www.britannica.com/topic/Second-Republic-French-history.

the imperial powers were criticized, people became against the autocracy and high taxes, which led to overthrow of the government and the end of the Second Empire.[32]

After the fall of the Second Empire, the provisional Government established by the national defense committee took control over the state. The Constitution of the Third Republic was adopted with many flaws and weaknesses. However it was able to serve for a period of sixty-five years. Among the flaws of the Constitution were the absence of the bill of rights, civil liberties, provisions on judiciary and local government.[33] Indeed, the Third Republic was known for "social stability, industrialization, and establishment of a professional civil service."[34] The Third Republic stopped its existence with the fall of France in 1940 to Germany. Since the collapse of the French Government of 1940, France was divided into two parts, one was occupied, and another was unoccupied. In the unoccupied France Marshall Petain was appointed as a Head of State, however he became a dictator, who concentrated all the executive and legislative powers in his hands without the responsibility to the Assembly. Between the period of 1944 and 1946, France was ruled by a provisional government of General Charles de Gaulle, who resigned expecting to become the President of the Fourth Republic, however, the constituent assembly chose Félix Gouin as a head.[35] During the time of the Fourth Republic, universal suffrage was extended to women, because 33 women were among 600 voters for the First Constituent Assembly, who drafted the Constitution of 1946, which was rejected by people with majority of 53%. After the Constitution was rejected, the new Constituent Assembly prepared

[32] The Editors of Encyclopedia Britannica, *Second Empire*, Encyclopedia Britannica website, published February 11, 2011, accessed February 4, 2018. https://www.britannica.com/topic/Second-Empire.
[33] The Editors of Encyclopedia Britannica, *Third Republic*, Encyclopedia Britannica website, published April 17, 2017, accessed February 4, 2018. https://www.britannica.com/topic/Third-Republic-French-histor.
[34] Ibid.
[35] The Editors of Encyclopedia Britannica, *Fourth Republic*, Encyclopedia Britannica website, published December 15, 2017, accessed February 4, 2018. https://www.britannica.com/topic/Fourth-Republic-French-history.

another draft of 1946 Constitution, which was approved and adopted on December 24, 1946.[36] The Constitution of the Fourth Republic had almost no differences with the Constitution of the Third Republic, therefore, it lasted only for twelve years until the adoption of 1958 Constitution of the Fifth Republic. The adoption of a new Constitution was partly influenced by the Algerian war, which was caused by the fact that France rejected to give independence to Algeria, while it gave freedom to such colonies like Morocco and Tunisia. On 1 of June, 1958, the Fourth Republic collapsed as a result of a military coup in Algeria.[37]

Consequently, the powers of the National Assembly were given to Charles de Gaulle, who inspired and drafted the Constitution of 1958 establishing parliamentary government with strong executive, incorporating the values of the Declaration of the Rights of Men and Citizen of 1789, fundamental principles recognized by laws of the Republic and the Preamble of the 1946 Constitution.[38] Indeed, there was left the room for amendment and interpretation.

French Constitution of 1958 is rigid. Article 89 establishes the procedure of making amendments to the Constitution. It is provided that the President and Members of parliament may initiate the amendment. If the government proposes the amendment, it shall bypass through the approval (three-fifth majority) of National Assembly and Senate and through a referendum, before being adopted.[39]

[36] John Frederick Drinkwater, John E. Flower and Others, *France. The Fourth Republic*, Encyclopedia Britannica website, published January 30, 2018, accessed February 4, 2018. https://www.britannica.com/place/France/The-Fourth-Republic.
[37] Ibid.
[38] Martin A. Rogoff, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, Jus Politicum, n° 6 http://juspoliticum.com/article/Fifty-years-of-constitutional-evolution-in-France-The-2008-amendments-and-beyond-373.html.
[39] Constitution of France, 1958, Article 89.

Since 1958 there have been twenty-four constitutional amendments, twenty-three of them took place before 2008, sixteen of them took place since 1996.[40] "Some amendments proposed changes in the operation of institutions, others constitutionalized new values, and some were required by European integration, a few were made to overcome decisions of Constitutional Council".[41]

3. Constitutional history of Brazil

Another good comparator to the Constitution of Kyrgyzstan and France will be the Constitution of Brazil, which also has relatively rigid rules of amending the constitution, but has been amended many times. The rate of amending the Constitution of Brazil equals to approximately three amendments in one year.[42]

The Federative Republic of Brazil is a Latin American sovereign democratic state with a Constitution, which was adopted in 1988.[43] Based on Article 60, paragraph 2, of the Brazilian Constitution on constitutional amendments, "A proposed amendment shall be debated and voted on in each Chamber of the National Congress, in two rounds, and shall be considered approved if it obtains three-fifths of the votes of the respective members in both rounds".[44] As can be concluded from the aforementioned text, it is not a very easy process to amend the constitution, however there have been more than 100 constitutional amendments since 1988 till 2017.[45]

[40] Martin A. Rogoff, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, Jus Politicum, n° 6 http://juspoliticum.com/article/Fifty-years-of-constitutional-evolution-in-France-The-2008-amendments-and-beyond-373.html.
[41] Ibid.
[42] Juliano Zaiden Benvindo, *The Brazilian Constitutional Amendment Rate: A Culture of Change*?, Int'l J. Const. L. Blog, Aug. 10, 2016, at: http://www.iconnectblog.com/2016/08/the-brazilian-constitutional-amendment-rate-a-culture-of-change/.
[43] Constitution of Brazil, 1988.
[44] Constitution of Brazil, 1988, Art. 60, par. 2.
[45] Comparative Constitutions Project, Timeline of Constitutions, Brazil. http://comparativeconstitutionsproject.org/chronology/.

Moreover, the Constitution of Brazil contains provisions, which are unamendable. For example, the federative system cannot be changed.[46] On the other hand, there is no judicial review for constitutional amendments, which is a sufficient safeguard against their unconstitutionality and arbitrariness. Indeed, besides numerous constitutional amendments to 1988 Constitution, the history of independent Brazil, which is a little less than 200 years old, has had eight constitutions. "The adoption of these constitutions as well as of the last one profoundly influenced the political system, because brought changes to electoral system by determining the extension of the electoral body, delineating eligibility criteria, changing existing party systems, and recomposing the elective powers", as was stated by Professor Doctor Eneida Desiree Salgado in her article on constitutional amendments in Brazil.[47]

Turning back from the present Constitution of Brazil, as it was mentioned earlier, there were eight constitutions since Brazil acquired independence from the Portuguese rule. The Prince of Portugal, who later became an Emperor of Brazil proclaimed its independence in 1822. In 1824 the Constitution of the independent Brazil was changed giving the emperor the wide powers over legislature and local government. The rule of the emperor lasted for sixty five years until he was overthrown and the Republic of Brazil was formed.[48]

In 1891 the first republican constitution was built, which provided for presidential system of government with bi-cameral legislature and federative territorial division. The new

[46] Constitution of Brazil, 1988, Art. 60, par. 4.
[47] Eneida Desiree Salgado, Brazilian Legislators at Work: Constitutional Amendments as Electoral Strategy, Election Law Journal, Volume 16, Number 2, 2017. DOI: 10.1089/elj.2016.0416.
[48] José Fonseca. A Brief History of Brazil. The New York Times. Web. Accessed February 4, 2018. http://www.nytimes.com/fodors/top/features/travel/destinations/centralandsouthamerica/brazil/riodejaneiro/fdrs_feat_129_9.html?pagewanted=1.

constitution had provisions on universal male suffrage, separation of powers and checks and balances. This constitution was directly inspired by the Constitution of the United States.[49]

The government under the rule of Getulio Vargas created a new Constitution in 1934 after organizing a successful revolt, which led to *coup d'etat*. However, unstable military situation in the country made him create a new Constitution of 1937, giving both executive and legislative powers to the President. The 1937 Constitution allowed Vargas to proclaim a dictatorship and to remain in power for another decade.[50]

Getulio Vargas was overthrown by his war minister and the Constitution of 1946 was creating, establishing a representative democracy with a guarantee of basic human rights and separation of powers.[51]

Before 1969 Constitution, Brazil has had numerous constitutional amendments and a new Constitution of 1967, which corrupted the President and eliminated democratic character of the constitution.[52] Year of 1974 became a year of transition from authoritarian rule towards democracy, because the free congressional elections were organized. In 1982 direct elections of state governors were held. In 1985 the National Constituent Assembly started working on the new Constitution "from scratch", eventually after three years the Constitution of 1988 was created.[53]

[49] "Constitutional history of Brazil", Constitutionnet.org website, the project of International IDEA with the support of Norway to support legislators, constitutional lawyers and other constitutional practitioners. https://www.constitutionnet.org/country/constitutional-history-brazil.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid.

This Constitution aimed to provide more autonomy to the states, decentralizing the federal power. In addition, the new constitution reduced the presidential powers.[54] Nevertheless, Brazil still remains a presidential system of government.

[54] BBC News. Latin America & Caribbean: Brazil Profile. Web. 2014. Last accessed February 8, 2018. http://www.bbc.com/news/world-latin-america-1935911.

Chapter II-Legitimate Constitutional Amendments

As the constitutional history of all three countries shows, there have been many changes that have taken place throughout time. As the time went by, rulers changed, constitutions changed and system of government as well. It is hard to say whether these changes of constitutions were efficient or not, therefore further in depth analyses is needed in order to answer this question. It is necessary to identify and differentiate legitimate constitutional amendments and arbitrary constitutional amendments.

The present work shows that constitutional amendments that have taken place in all three countries had different provisions, while some provisions were abusive and arbitrary, others were in accordance with good governance and constitutional development. I would describe legitimate constitutional amendments as those, which serve for the purposes of improving an already established rule so that it would adjust to the changed circumstances or which serve for the purposes of changing the rule to address past injustices and prevent future ones.

Below, the paper will provide three particular areas, where legitimate constitutional amendments have taken place in all three countries. These are the areas of judicial review, protection of human rights and separation of powers and checks and balances.

1. Judicial review

Judicial review is the ability of the court to review acts of the executive or legislative organs. This is a kind of check on the power of legislature or executive, which guarantees that the norms of the constitution are not violated and the rights under the constitution are not violated. In all three countries, there are institutions, which have the power to review the constitutionality of certain legislative or executive acts, for example in Kyrgyzstan, it is a Constitutional Chamber of the Supreme Court, in France it is Constitutional Council (*Conseil*

Constitutionnel) and in Brazil it is a Supreme Federal Court (*Supremo Tribunal Federal*), which has an obligation of judicial review. However, the history of development of these courts is different. These three countries used constitutional amendments in order develop the system of judicial review.

The history of the organ in competence of protecting the Constitution in Kyrgyzstan began at the times, when Kyrgyzstan was under the Soviet rule. There was a Constitution of the Kyrgyz SSR in force at that time, when the Law of September 23, 1989 on amendments to Constitution was adopted.[55] This amendment established the Committee of the constitutional oversight of the Kyrgyz SSR, which was responsible for ensuring the conformity of acts of state bodies and public organizations with the Constitution of the Kyrgyz SSR, the protection of constitutional rights and individual freedoms, and democratic foundations of the Soviet society.[56] It pursued the aims through providing the Supreme Soviet of the Kyrgyz SSR its conclusions on conformity of the acts with the Constitution. The next step in the development of the constitutional review was the amendment to the Constitution of April 12, 1990, which established a right to appeal to the Committee of the constitutional oversight for the purpose of getting a conclusion on whether the normative legal acts were in conformity with the Constitution.[57] It was a special organ established for the purposes of protection of the Constitution; it did not serve as a Supreme judicial body, because it could not review the decisions of local courts and other governmental bodies.

[55] "History of establishment and development of the constitutional oversight in the Kyrgyz Republic", official website of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, last accessed 22 March 21, 2018. http://constpalata.kg/en/about/istoriya/.
[56] Ibid.
[57] "History of establishment and development of the constitutional oversight in the Kyrgyz Republic", official website of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, last accessed 22 March 21, 2018. http://constpalata.kg/en/about/istoriya/.

With the establishment of the position of the President of the Kyrgyz SSR, the system of state power and governance bodies underwent many changes, including liquidation of the Committee for constitutional oversight and establishment of the Constitutional Court of the Kyrgyz SSR.[58] Kyrgyzstan was the first republic in the Soviet Union to establish a supreme judicial body for constitutional oversight. Among the competences of the Court were to oversee that normative legal acts are in conformity with the Constitution, to settle disputes between local state administrations and state administration of Kyrgyz SSR, to settle other disputes in the area of state power and governance of the Kyrgyz SSR, which were referred by the Constitution to its competence.[59] Decisions of the Constitutional court were binding upon state organs.[60] Even though Kyrgyzstan made a bid step towards democratic state based on rule of law, the Court was not much effective, not until Kyrgyzstan gained independence in 1993 and adoption of the new Constitution. With the adoption of the new Constitution, the Constitutional Court of Kyrgyz SSR was reorganized into Constitutional Court of the Kyrgyz Republic and its jurisdiction was expanded to the cases involving declaration of unconstitutionality of laws; producing the opinion on the legality of elections and impeachment of the President, as well as dismissal of judges of the high and constitutionality of constitutional amendments.[61]

However, during the rule of the two authoritarian president, Akaev and Bakiev from the period of 1993 till 2010, the Constitutional Court was in some way "obedient" to the position of the President, which allowed the presidents to change constitution in their favor and create

[58] Ibid.
[59] Law of the Kyrgyz SSR "On the reorganization of the system of state power and governance bodies in the Kyrgyz SSR and the introduction of changes and amendments to the Constitution (the Fundamental law) of the Kyrgyz SSR" dated December 14, 1990.
[60] Ibid.
[61] "History of establishment and development of the constitutional oversight in the Kyrgyz Republic", official website of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, last accessed 22 March 21, 2018. http://constpalata.kg/en/about/istoriya/.

unlimited presidential powers. All the arbitrary constitutional amendments were declared constitutional. The institution of Constitutional Court became corrupt and biased. There was a strong tension between this Court and the legislature Jogorku Kenesh. As it was already mentioned above, the authoritarian rule ended with the second revolution and adoption of the new Constitution of 2010. The second decree of the interim government was in regard to Constitutional Court's reformation and with the entry into force of the new Constitution, a new organ for constitutional oversight was created.[62] The new organ is Constitutional Chamber of Supreme Court of the Kyrgyz Republic, which still successfully operates today. The competence of the Chamber is limited in comparison with previous organ, Constitutional Court. Now it performs such functions as: to recognize unconstitutionality of laws and other normative legal acts in case if they contradict to the Constitution; to give an opinion on the constitutionality of international treaties that have not entered into force and the draft law on amendments to the Constitution.[63]

Even though the established Constitutional Court did not meet the aims of its creation, it is obvious that the amendments, which were introduced in regard to establishment and development of the organ for constitutional oversight, were legitimate. The amendments were adopted for the purposes of ensuring rule of law and human right, better governance of the state and good image on the international arena. The amendments were introduced through laws, which were passed in accordance with all procedural requirements that were in place under the Constitution of the Kyrgyz SSR and independent Kyrgyz Republic. It means that both procedurally and substantively, it was a legitimate step forward for the Kyrgyz state. The

[62] Decree of the provisional government of the Kyrgyz Republic On reformation of the Constitutional Court of the Kyrgyz Republic, April 12, 2010 VP No. 2, Bishkek.
[63] Constitutional Law of the Kyrgyz Republic On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, June 13, 2011 № 37, Article 4.

changes that Kyrgyz judicial review system faced were definitely legitimate and served as a good sign of the newly emerging democracy. The fact that the institution became dependent and corrupt, and contributed to the concentration of powers in the hands of one individual, thus destructed the system of checks and balances, is not caused by the constitutional amendments that were described above. It was more of a human factor that played a role, rather than institutional one. Therefore, it will be incorrect to say that the constitutional amendments made the institution the way it was.

In regard to France there were two major amendments, which became very land-marking in regard to judicial review. This amendment was taken place in 1974 and in 2008. The judicial review is performed by the Constitutional Council of France.

Initially, the Constitutional Council was established in 1958 with the emergence of the Fifth Republic and beginning of the presidency of Charles de Gaulle.[64] It was not intended to perform judicial review, but "to protect new executive power, created by and for General de Gaulle, from the parliamentary usurpations".[65] It was not an important and effective institution until 1970's. Similarly to Kyrgyzstan's Constitutional Court, which was in the hands of two authoritarian presidents, the Constitutional Council of France was in the hands of General de Gaulle. One of the examples, when the Constitutional Council showed its affiliation to the first president of the French Fifth Republic, was the referendum on amendments to the Constitution, which established direct elections of the President. The referendum was held with violation of

[64] Morton, F. L. "Judicial Review in France: A Comparative Analysis." The American Journal of Comparative Law 36, no. 1 (1988): 89-110. doi:10.2307/840185.
[65] Morton, F. L. "Judicial Review in France: A Comparative Analysis." The American Journal of Comparative Law 36, no. 1 (1988): 89-110. doi:10.2307/840185.

procedural constitutional rules, however, the Constitutional Council stayed away from deciding the issue, stating it was not in its competence.[66]

However, in 1971 the Constitutional Council decided the case establishing the "constitutionality block"[67] and limiting the legislative freedom.[68] This "constitutionality block" resulted in 40% of laws that were nullified by the Council.[69] In 1974 there was a constitutional amendment, which expanded the standing before the Council to sixty member of the National Assembly or Senate.[70] It gave the opposition an opportunity to refer to the Council. Before the amendment, the right to referral belonged only to four officials the President of State, Prime Minister, President of the National Assembly and President of Senate.[71] Expanding the number standing right definitely served a good purpose, because aforementioned four officials were usually from the governing party, therefore they it is unlikely that they would challenged laws they intend to pass themselves. Therefore, for the purposes of checks and balances and avoidance of usurpation of power, it was reasonable to adopt this amendment.

The next important amendment that was adopted in France with regard to judicial review was 2008 establishment of ex post review. On July 21st 2008 there was a constitutional reform, which introduced ex post judicial review. In order to make it clearer, there are currently two types of judicial review in France, ex ante and ex post review, however, the latter was introduced

[66] Martin A. Rogoff, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, Jus Politicum, n° 6 http://juspoliticum.com/article/Fifty-years-of-constitutional-evolution-in-France-The-2008-amendments-and-beyond-373.html.
[67] Norms against which the legislation is challenged.
[68] Decision no. 71-44 DC of 16 July, 1971 on Law completing the provisions of Articles 5 and 7 of the Law of 1 July 1901 on association agreements.
[69] Morton, F. L. "Judicial Review in France: A Comparative Analysis." The American Journal of Comparative Law 36, no. 1 (1988): 89-110. doi:10.2307/840185.
[70] Law No. 74-904 of Oct. 29, 1974, J.O., Oct. 30, 1974, at 11035 on Parliamentary referral to Constitutional Council.
[71] Morton, F. L. "Judicial Review in France: A Comparative Analysis." The American Journal of Comparative Law 36, no. 1 (1988): 89-110. doi:10.2307/840185.

only in 2008. In 1974 the constitutional review was only ex ante and abstract.[72] Ex ante review or preliminary review is when acts are challenged before the Council before their promulgation. It was abstract, because the question could be referred only by a limited number of persons. Ex post or concrete review is when the act, which is already in force is referred to the Council, it is concrete, because the question can be referred by a citizen, who is the subject of the challenged act. This is called "Question prioritaire de constitutionnalité" or QPC, which is literally means the priority of constitutionality question, it gives priority to constitutional dispute.[73] These changes to constitution and addition to constitutional review are legitimate both procedurally and substantively, because no procedure was violated and the changes led to good results. As one of the honorable members of Constitutional Council in 2012 said: "Since the implementation of the QPC on the 1st of March 2010, the Council has delivered in 9 months more great and important decisions for rights and liberties than during the 9 years during which I [he] had the honor to sit on its bench".[74]

With regard to Brazil, it has a very complex judicial review system. The history of judicial review starts from the period of the first republican Constitution of 1891. This Constitution was influenced by the United States and one of the signs of such influence was the judicial review.[75] In order to declare a law unconstitutional, judges had to decide specific cases brought before them. It was impossible to declare an act unconstitutional without the case involving the application of this act. However, in 1946 there was a constitutional amendment

[72] Olivier Dutheillet de Lamothe , "A French legal success story the "question prioritaire de constittuionnalite", Section President of the Council of State, Honorary Member of the Constitutional Council (Président de section au Conseil d'Etat, Membre honoraire du Conseil constitutionnel, Friday September 14, 2012.
[73] Ibid.
[74] Ibid.
[75] Maliska, Marcos A., "The Brazilian Judicial Review", Education and Science without Borders 6 (12): p. 54-57. https://search.proquest.com/docview/1755076873?accountid=15607.

approved, which established "abstract constitutional review", which allowed the Attorney General to refer to the Supreme Court to challenge directly the constitutionality of the federal or state law.[76] With the adoption of this amendment, the Brazilian judicial review system includes both American decentralized, incidental review and European centralized, abstract form of judicial review.[77] The incidental review comes from cases, which involve the application of a particular act, the constitutionality of which is challenged. The abstract review allows to bring directly actions challenging certain legal acts on conformity with the Constitution. The incidental review may be exercised by any judge and any court of Brazil, while the abstract review is exercised solely by the Supreme Federal Court.[78] In 1993 there was a constitutional amendment adopted, which established a new function for the Supreme Federal Court "the declaratory action of constitutionality". It is believed by many scholars that it is useless, because there is a direct action of unconstitutionality.[79] However it is used as a device to resolve sensitive cases quickly and authoritatively.[80] Its purpose is "to avoid delay and contradictions with respect to constitutional questions of highest importance, which if not resolved rapidly, might lead to true legal chaos, prejudicing the national economy and the very development of the Country".[81]

Procedurally the amendments that were adopted in Brazil in regard to judicial review were legitimate. They were adopted in accordance with the constitutional requirement of that time. However, the constitutional amendments, which expanded the forms of judicial review had

[76] Ibid.
[77] See Mauro Cappelletti, "Judicial review in the contemporary world", p. 85-86 (1971) in Rosenn S. Keith, "Judicial Review in Brazil: Developments Under the 1988 Constitution", 7 Sw. J. L. & Trade Am. 291 (2000).
[78] Rosenn S. Keith, "Judicial Review in Brazil: Developments Under the 1988 Constitution", 7 Sw. J. L. & Trade Am. 291 (2000).
[79] Ibid.
[80] Ibid.
[81] See Arnoldo Wald, Alguns Aspectos da Afdo Declarat6ria de Constitucionalidade, 76 REV. PROCESSO p. 19 (Oct.-Dec. 1994) in Rosenn S. Keith, "Judicial Review in Brazil: Developments Under the 1988 Constitution", 7 Sw. J. L. & Trade Am. 291 (2000) p.305.

unexpected results. Even though they were aimed to raise the supremacy of the constitution, they resulted in a case overload in the courts of Brazil, both of federal and state level.[82] The role of the Supreme Federal Court became too big, because it had significantly participated in the legislative processes, thus fusing and limiting the powers of the legislature to legislate. In this case, the expenditure of the competence of the judiciary in the area of judicial review went way too far.

2. Human rights

Another area, where a number of constitutional amendments have taken place is human rights area. Different kind of amendments were adopted, some of which were legitimate and some arbitrary, therefore the present paper will include amendments in the human rights domain twice, when such amendments were legitimate and when these amendments were arbitrary.

All three countries at certain time have had included provisions, which would guarantee and protect human rights and fundamental freedoms into the Constitution. The first example is abolition of death penalty and life imprisonment in Kyrgyzstan. It was introduced with the adoption of the Constitution of 2010 after the country was relieved from authoritarianism. It was a big step forward for the Kyrgyz Republic, because the nature of the punishment is in conflict with human rights standard. Even though death penalty is not prohibited in an absolute manner by international law, there are many limitations imposed by the most universal human rights instrument International Covenant on Civil and Political Rights. In regard to European continent, death penalty is abolished in all countries except for Belarus and Russia. Many other countries have also abolished death penalty. Such a tendency tells a lot in favor of the argument that

[82] Rosenn S. Keith, "Judicial Review in Brazil: Developments Under the 1988 Constitution", 7 Sw. J. L. & Trade Am. 291 (2000).

Kyrgyzstan has made a big progress. There can be many discussions and debates on the issue of abolition of death penalty and life imprisonment, but this is not the subject of the present research. Therefore, it shall be emphasized that such a positive change in human rights are in the Kyrgyz Republic is definitely legitimate. It will eliminate the risk that death penalty will be arbitrarily misused for political or any other purposes. France has committed itself to promote human rights, in particular human dignity as well, when abolished death penalty. Initially, death penalty was abolished under the Act of October 9, 1981, but it was constitutionalized only in 2007 with adoption of amendment to the Constitution on February 23.[83] Now Article 66-1 of the French Constitution contains the provision, which reads as follows: "No one shall be sentenced to death." The same arguments speak in favor of this amendment as in the Kyrgyz Republic. With regard to Brazil, it was never entirely abolished in the Constitution, but has not been practiced for a long time. According to Brazilian Constitution of 1988, death penalty is prohibited to use by penal justice system[84], however it can be practiced during war times.[85] These provisions were not introduced through amendments, but came along with the Constitution of 1988.

These were the major legitimate constitutional amendments that have taken place in the human rights area. There are definitely more human rights related legitimate constitutional amendments, for example, in 1999 France introduced a constitutional amendment, which equalized the status of the men and women.[86]

[83] Constitutional Law No. 2007-239 of 23 February 2007 on the prohibition of the death penalty, 23 February 2007.
[84] Constitution of Brazil of 1988, Article 5.
[85] Constitution of Brazil of 1988, Article 84, paragraph 19.
[86] Constitutional Law No. 99-569 of 8 July 1999 on equality between women and men (in French). 8 July 1999.

3. Other

There were also other constitutional amendments that were legitimate in all three countries. For example, after the adoption of the first Kyrgyz Constitution of 1993, there were amendments adopted in 1994. The amendments dealt with the issue of referendums and their agenda. It was proposed that amendments to the Constitution of the KR, laws of the KR and other important issues shall be put on referendum and another amendment was the introduction of a bicameral parliament. The next amendments adopted in 1996 clarified the relationship between the President, Parliament and Government and defined their functions. There were requirements established for the positions of the deputies in the local administrations, thus the deputy had to reside in a particular region for at least for three years.[87] It was needed for the purposes of better administration, so that the deputy would have been aware of the real problems in the region. These were amendments that have taken place shortly after the adoption of the new Constitution and I consider them legitimate, because the Kyrgyz Republic was in the transitional stage from being a part of Soviet Union to be an independent state. These changes were inevitable and they served for the purposes of improving the system of government.

The next legitimate amendments in the Kyrgyz Republic have taken place after the overthrow of the second President, Bakiev. As it was already mentioned, his authoritarian presidency and nepotism resulted in violent a *coup d'etat,* which have taken away about one hundred lives and as a result of which more than 1500 people were injured. After these events, the country was under a deep crisis, both economic and political, therefore new constitutional changes were necessary to further development and way out of crisis. This was the time, when such constitutional changes have taken place, new Constitution was adopted and shifted the

[87] N. Sheripov, "Constitutional Development of Kyrgyz Statehood", news portal CenterAsia, translated from Russian, 23 June, 2014. http://www.centrasia.ru/newsA.php?st=1403516220.

system of government from presidential to parliamentary, but unlike traditional parliamentary state, the president is not just a formal position with symbolic powers.[88] The President enjoys more powers than in traditional parliamentary states. This provision strikes a good balance between the two branches, the executive and the legislature. The number of deputy mandates was enlarged from 90 to 120 members with introduction of quotas, so that one party could not take more than 65 seats.[89] This particular provision addresses the past injustices, when the opposition could not take part in parliament and the President's majority party could take all of the seats. Moreover to escape over diversity in parliament, which can also lead to certain unpleasant consequences, the 7% threshold was established for the party to take part in parliament. These are some of the examples how Kyrgyzstan used constitutional amendments for their initial purposes.

With regard to France, one of the significant amendments that have taken place after 1958 Constitution was adopted was direct universal suffrage for elections of the President. Prior to that the President was elected by an electoral college. Universal suffrage is a one of the best signs of democracy. Elections of the President through universal suffrage shows the legitimacy of his presidency, as now his status is directly recognized by people of this state. However, there are still debates over constitutionality of the referendum where people voted for universal suffrage. President de Gaulle relied on Article 11 of the Constitution of 1958 instead of Article 89. Article 11 was about the referenda on government bills, while Article 89 was specifically on referenda on constitutional amendments. The latter required parliamentary involvement, therefore, in order to circumvent the law, de Gaulle used Article 11. The amendment in itself

[88] N. Sheripov, "Constitutional Development of Kyrgyz Statehood", news portal CenterAsia, translated from Russian, 23 June, 2014. http://www.centrasia.ru/newsA.php?st=1403516220.
[89] Ibid.

brought positive changes to France, it gave legitimacy to the powers of President, which was needed. However, by using Article 11 of the Constitution, de Gaulle made his actions arbitrary. The Constitutional Council found that the law adopted by the referendum does not fall within the jurisdiction of the Council, it stated that "it follows from the spirit of the Constitution, which has established the Constitutional Council as an organ to regulate the actions of public authorities, that the laws that the Constitution envisaged in its article 61 are only laws voted by Parliament and not those which, adopted by the people pursuant to a referendum, constitute a direct expression of national sovereignty".[90] Even though, the Constitutional Council of France did not say anything on his actions, the arguments of the legal scholars and politicians are valid and persuasive, the actions of Charles de Gaulle are contrary to the Constitution of 1958.[91] Therefore, it is hard to relate this amendment to legitimate ones, because procedurally it was adopted with violation of the Constitution. On the other hand, if one is relying on procedural matters only, many arbitrary constitutional amendments can be regarded as legitimate. Therefore, it necessary to take into account the substance of the amendment and the situation, when this amendment was adopted.

Brazil has also amended its 1988 Constitution, which is still in force today, in order to balance the powers between the executive and legislative branches. It is a well know fact that Brazil has a presidential system of government. After several centuries of changes, when Brazil has experienced being a colony, after being a colony it gained independence as a monarchy, after being a monarchy it was a dictatorship, from dictatorship it turned to democracy for a while, then it turned into a military dictatorship and as a last transition, Brazil went through a process of

[90] Loi référendaire [Referendum Law], CC decision no. 62-20 DC, November 6, 1962, Rec. 27.
[91] Alec Stone, "The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective", Oxford University Press, chapter III, ISBN 0-19-507034-8.

redemocratization.[92] In the arbitrary amendments section, the present paper will discuss the events of dictatorial Brazil, in this section there will an example of the modern Constitution of Brazil.

Since the adoption of the 1988 Constitution, the Brazilian presidents were granted the power to pass provisional decrees in times of emergency.[93] Such a power belongs to many presidents worldwide, however, in Brazil it became a tool for Presidents to participate in law-making process, which is the prerogative of the legislative branch. In thirteen years after the adoption of 1988 Constitution Brazilian presidents issued a big number of provisional decrees, most of which obtained the statuses of the law and this amounted to 75% of all law adopted in this period of time.[94] Even though the decrees should have been approved by the parliament within 60 days after they were passed, the presidents had an opportunity to reissue these decrees indefinite number of times.[95] Having realized the problem, there was an Amendment no.32 adopted, which limited the power of a president to issue provisional decrees.[96] Presidents could reissue decrees only once and only in the case, when Congress have not review the decree within 60 days. Another provision in this amendment, which reassured that the decree will be reviewed, provides the following: if either chamber of the legislature fails to review the decree within 45 days, the issue becomes of primary importance and it stands at the top of Congress's agenda.[97] This amendment was introduced in accordance with all procedural rules that are required by the

[92] "Brazil: Five Centuries of Change? By Students, For Students", website created by students from Brown University under the mentorship of James N. Green. Last accessed March 24, 2018. https://library.brown.edu/create/fivecenturiesofchange/timeline/.
[93] Constitution of Brazil of 1988, Article 62.
[94] Pereira, Carlos, Timothy J. Power and Lucio Rennó. "From Logrolling to Logjam: Agenda Power, Presidential Decrees, and the Unintended Consequences of Reform in the Brazilian Congress." Centre for Brazilian Studies (2010).
[95] Constitution of Brazil, 1988, Article 62 before Amendment 32.
[96] Constitutional Amendment n. 32 to Constitution of Brazil of 1988, September 11, 2001.
[97] Constitutional Amendment n. 32 to Constitution of Brazil of 1988, September 11, 2001.

Constitution of Brazil and serves for the purposes of stabilizing the separation of powers. Even though it is believed by many scholars that the Amendment has not fulfilled its purposes, because the decrees were issued too often and Parliament had to deal with the presidential decrees first of all and it simply did not have enough time to cope with other legislative processes.[98] It means that the Amendment unintentionally served for the President to define the legislative agenda.

Consequently, it may be followed that it is very hard to define whether certain amendment is legitimate or arbitrary. As Brazilian last example shows the amendment can be legitimate both procedurally and substantially, however no one knows how well and whether it will achieve its initial goal.

[98] Pereira, Carlos, Timothy J. Power and Lucio Rennó. "From Logrolling to Logjam: Agenda Power, Presidential Decrees, and the Unintended Consequences of Reform in the Brazilian Congress." Centre for Brazilian Studies (2010) in Arberry L. Lance, "The Evolving Executive: Provisional Decrees and Their Impact on Brazil's Executive-Legislative Relationship", University of Nevada theses, 2013. https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1008&context=honors_theses.

Chapter III- Arbitrary Constitutional Amendments

Having described legitimate constitutional amendments, it is important to identify arbitrary provisions in constitutional amendments. Due to the fact that the conditions while changing constitution in all three countries were different and different factors caused these changes, it is very hard to differentiate between legitimate and arbitrary constitutional amendments. The difficulty arises from the fact that different background of the problem causes different results, as for example, when French 1958 Constitution was adopted, France experienced hard times due to Algerian crisis and this crisis would have been impossible to resolve without strong executive. As it was described in one of the legal articles, the situation in France was described as: "France was like a ship in stormy seas. The ship was floundering. It had no leadership. The officers were in violent disagreement. The crew was surly and indifferent. The passengers seemed resigned to their unknown fate".[99] In light of these circumstances, the situation is hardly comparable to the situation in the Kyrgyz Republic, when Kyrgyz presidents extended their own powers.

1. Presidential Powers

From the first glance, it might seem that all of these constitutional amendments that have taken place, serve good purpose, indeed they do, however we shall not undermine the fact that the Fifth Republic's Constitution was mainly inspired by General de Gaulle, who strengthened his own powers, as the head of state, by means of the Constitution. Nevertheless, such measures were needed in order to address the crisis of Algerian war, the Constitution has been used as a

[99] "De Gaulle and the new French Constitution" *Section of International and Comparative Law Bulletin* 3, no. 2 (1959): 3-7. http://www.jstor.org/stable/25743179.

tool to serve the interests of one person. The Constitution was put on referendum for the people to vote, however, there were only 25 days given in order to take a decision. This scenario reminds of the situation in Kyrgyzstan, when the former presidents A. Akaev and K. Bakiev tried to build a system with all the powers belonging to the president. These two presidents have also had good intentions, when amended the Constitution, declaring it to be for the greater good.

As it has already been discussed above, the first President of the Kyrgyz Republic has widened his powers by means of constitutional amendment. It was provided that in certain cases the President could dissolve Parliament.[100] Parliament was not able to dismiss the government and government, headed by the Prime Minister, was accountable before the President.[101] Besides these provisions, President had the power to declare the state of emergency.[102] The vast majority of high officials were appointed by the President.[103] All the questions related to international treaties and economic development were decided by the President.[104] The President as well as Members of Parliament also could enjoy absolute immunity in case of any violations of law while they stay in office.[105] These were the powers of the President enjoyed by the first President of the Kyrgyz Republic, Askar Akaev. The second President, besides enjoying these powers had added the power to appoint and dismiss the heads of local administrations, to suspend the operation of normative legal acts adopted by the Government.[106] Government is responsible before the President.[107] These two presidents enlarged their presidential powers to the level,

[100] N. Sheripov, "Constitutional Development of Kyrgyz Statehood", news portal CenterAsia, translated from Russian, 23 June, 2014. http://www.centrasia.ru/newsA.php?st=1403516220.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Ibid.

when people could not let them rule anymore. The result of their power-hungry presidency was violent and bloody.

Using their wide powers, the first two Presidents of the Kyrgyz Republic got rid off opposition in parliament, appointed their close relatives to the high positions in government. The first President extended his presidential term limit. The second President liquidated the position of the prime-minister and declared himself as the head of State and the head of government. Both presidents intended to seize the whole power by means of giving key positions in government to members of family and close relatives and the transition of power from father to son, fortunately the latter was not accomplished. Deeply rooted corruption, nepotism and tribalism are the result of uncontrolled wide powers of the president.

The presidential powers in France, as it has already been described above, were dramatically expanded with the adoption of 1958 Constitution. Before, the French President played a very symbolic role. In order to address the problems of the Algerian crisis, the country needed a strong leader. General Charles de Gaulle came to power as well as the new Constitution, which was designed mainly by and for de Gaulle, who became the first President of the Fifth French Republic. Among the powers of the President, there were: the appointment powers, the French President can directly appoint the Prime Minister; the President can dissolve the National Assembly; he can call for referendum to propose changes to laws and Constitution; the President is a Head of the Armed Forced of France; he can call upon the Constitutional Council for conclusion on new laws and can appoint three of the members of the Constitutional Council; in cases when national institutions, territorial integrity, national independence or established treaties come under threat, the President has the emergency power to take measures; along with the Prime Minister he appoints the members of government; he also has a right to

grant individual pardons.[108] These is a highly multiplied number of powers of president compared to what it was before. In order to legitimize the presidency and newly established wide powers, the President of France Charles de Gaulle decided to introduce amendments to the Constitution. In the proposed amendments it was provided that the President shall be elected directly be people. General de Gaulle, as it was already mentioned previously, called for a referendum in 1962 with the subject matter to amend the Constitution, the proposed changes were supported by the majority of votes. However, de Gaulle used Article 11 as a mechanism to conduct a referendum. It was already explained above why it was a problem.[109] In short, he should have used Article 89, which talks about the referendum on constitutional amendments, but since this mechanism required parliamentary involvement, de Gaulle used Article 11, which was also on referendum, which he had the power to conduct, but on a different subject matter, and this mechanism did not require parliamentary involvement.[110] From one side, legitimizing the power through direct elections serves a good purpose as a sign of democracy, however, from the other side, de Gaulle used constitutional mechanism to amend the constitution in arbitrary manner for his own personal reasons, despite the fact that these personal reasons might have been the remedy of Algerian crisis and stability of the French Republic. Therefore, this amendment that was made cannot relate to either legitimate or arbitrary classification.

With regard to Brazil, the arbitrary constitutional amendments, which deal with presidential powers, can be traced back to 1934-1937. During this period Getulio Vargas has shaped a Constitution of the Republic of Brazil into authoritarian document.[111] Vargas organized

[108] Constitution of France, 1958, Art. 8-16.
[109] Present paper, p.28-29.
[110] Alec Stone, "The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective", Oxford University Press, chapter III, ISBN 0-19-507034-8.
[111] "Constitutional history of Brazil", Constitutionnet.org website, the project of International IDEA with the support of Norway to support legislators, constitutional lawyers and other constitutional practitioners. https://www.constitutionnet.org/country/constitutional-history-brazil.

a military coup in 1930 as a result of which, he gained power. In 1934 he drafted the new Constitution, which did not survive for long and in 1937 Vargas with his government adopted a new Constitution.[112] This Constitution granted both executive and legislative powers to the President, giving him an opportunity to proclaim dictatorship. However, the important thing, which makes his presidency and hid powers arbitrary and unconstitutional is the fact that according to the Article 187 of the Constitution, it was required that the new text of the Constitution shall be approved by referendum, which was never held.[113] This is a clear violation of procedural constitutional rules, moreover, substantively such a change severely undermined, rule of law, democracy and human rights. As a result of the presidency of Vargas, individual rights were suspended, parliament was dissolved, legislative process was led by the executive.[114] However, this is not the only period, when constitutional amendments were used in order to widen the powers of the president.

After Vargas was overthrown in 1946, there was a representative democracy established and the new President tried to remedy the consequences of Vargas dictatorship.[115] Unfortunately, during the period from 1967 to 1969 new constitutions were adopted, which brought the military regime, which lasted for more than twenty years.[116] Through these constitutional reforms, the powers were concentrated in the hands of the President, the term of the presidency was increased and some law-making powers were shifted to the executive.[117]

[112] Ibid.
[113] "Constitutional history of Brazil", Constitutionnet.org website, the project of International IDEA with the support of Norway to support legislators, constitutional lawyers and other constitutional practitioners. https://www.constitutionnet.org/country/constitutional-history-brazil..
[114] Ibid.
[115] Ibid.
[116] The Politics of Military Rule in Brazil, 1964-85. New York: Oxford University Press, 1988.
[117] "Constitutional history of Brazil", Constitutionnet.org website, the project of International IDEA with the support of Norway to support legislators, constitutional lawyers and other constitutional practitioners. https://www.constitutionnet.org/country/constitutional-history-brazil.

Brazilian authoritarian presidents used the same schemes as presidents of Kyrgyzstan in order to obtain power. General de Gaulle, even though he also widened his powers, the motivations behind his actions were different. Therefore, we can conclude that exploiting the mechanisms to change the rules of the game, meaning the Constitution, for non-democratic, despotic, rule of law and separation of powers ruining purposes is arbitrary; doing these without following the procedural rules is arbitrary as well. These are the components of arbitrariness, however, if only one component is present, each of such situation shall be assessed separately, taking into account the all the circumstances of the case, for example political, economic or social background.

2. Human Rights

Even though constitutional amendments in the sphere of human rights have been already described above, they formed only a small piece of information. There have been many amendments that have taken place in all three countries, which undermined human rights and fundamental freedoms, thus were introduced arbitrarily.

For example, in Kyrgyzstan the last amendments that were adopted in 2016 include many provisions, which are not in line with human rights standards. First of all, it shall be emphasized that according to my personal observations, these amendments were introduced with violation of procedural rules. The amendments were adopted through a referendum, the validity of which I personally doubt, due to the fact that the minimum voter turn-out was lowered. Short before the referendum was held there was a law adopted, which introduced new changes to the law on referendum. According to the old Law dated October 23, 2007 the minimum voter turnout shall

be more than 50 percent in order for the referendum to be valid.[118] According to the new Law dated October 31, 2016 (note: referendum was held on December 11, 2016) the minimum voter turnout is 30 percent, it means that the referendum is considered valid if more than 30 percent of citizens participated in the referendum.[119] This is a very low requirement for holding a nationwide referendum. The population of Kyrgyzstan is 6.2 million of people, of them only 3.8 million is legally capable to vote, if 30% of these people participate in referendum, we have only 1.2 million of participants, simple majority of this number is a little more than half a million of people. Elementary mathematical calculation shows that 600,000+1 votes is enough to decide very sensitive issues, including changing the Constitution. If this new law on referendum was not adopted, the referendum would have been declared void in accordance with the old law, because the overall number of participants of referendum did not exceed 40%. The second reason why these 2016 amendments to the Kyrgyz Constitution should have been declared unconstitutional is stated in the Constitution itself. When adopting 2010 Constitution, the drafters aimed to remedy the crisis left after two authoritarian presidents who manipulated the Constitution. They tried to minimize the risk that the Constitution will be changed and included a provision, which expressly prohibited any constitutional amendments until the year 2020.[120] Despite these facts, the constitutional amendments were approved and entered into force in 2017.

With regard to substance, new amendments proposed the dualist approach in the effect of international treaties.[121] It means that international treaty does not enter into force in the Kyrgyz

[118] Constitutional Law of the Kyrgyz Republic on referendum in the Kyrgyz Republic, dated 23 October, 2007, No. 159. Outdated with the adoption of the Constitutional law of October 31, 2016.
[119] Constitutional Law of the Kyrgyz Republic on referendum in the Kyrgyz Republic, dated of October 31, 2016, No.173.
[120] Constitution of the Kyrgyz Republic of 2010, Article 114.
[121] Law of the Kyrgyz Republic on introduction of amendments to the Constitution of 2010, dated 28 December, 2016, no. 218. http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru.

Republic, until its entry is not verified by the national law. Also new amendments established the highest values of the state, among which are culture, traditions and language of the Kyrgyz Nation. These highest values can be easily be misused for human right violations and discrimination, for example when dealing with ethnic, linguistic, sexual or sexual orientation minorities.[122] All of these highest values can be misinterpreted and abused, because history and culture of Kyrgyz nation is patriarchal and non-secular. New amendments also established the definition of a marriage, which discriminates same-sex couples and unmarried couples.[123] The text of the new Constitution after the amendments defines the marriage as a union between men and women only. Such a definition puts opposite-sex couples over same-sex couples. Also new amendments provided that Kyrgyzstan is no longer obliged to remedy human rights violations in cases when international organizations found those violations.[124] To conclude this list, which is not an exhaustive one, new amendments provide that a citizen can be deprived of citizenship or can be denied to change citizenship in cases provided by law. It is unclear what the cases are and such a provision can easily be misused to violate human rights, guaranteed by human rights instruments. This is absolutely in conflict with all human rights treaties Kyrgyzstan is the party to. The problem is that all of these amendments are used in order to serve certain political interests, the main law of the state is used as a mechanism to reach personal gains. Almost every provision of the law on amendments serves its role in fulfilling someone's interests.

[122] Ibid.
[123] Law of the Kyrgyz Republic on introduction of amendments to the Constitution of 2010, dated 28 December, 2016, no. 218. http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru.
[124] Ibid.

With regard to Brazil, the Congress has recently approved an amendment to Constitution, which limits public spending to inflation for the next 20 years.[125] This measure was taken in order to address economic crisis in Brazil, unfortunately, it is in conflict with human rights standards. There have been massive protests around Brazil and despite of them, the "harshest austerity program in the world" was enacted.[126] Before the amendment was approved, Brazil was warned by one of the UN experts on extreme poverty and human rights, Philip Alston. He said that "If adopted, this amendment would lock in inadequate and rapidly dwindling expenditure on health care, education and social security, thus putting an entire generation at risk of social protection standards well below those currently in place".[127] This amendment was proposed by the President of Brazil, Michel Temer, who wanted to restore economy in the country by cutting the public spending of citizens.[128] Even though procedurally this amendment was adopted legitimately, the substance of the amendment is arbitrary.

Another amendment that was very controversial and raised many non-groundless protests. Brazil was already know as a country, where abortion was allowed only in cases if the life of a woman is in danger, if the pregnancy is resulted from rape, or if the fetus has anencephaly.[129] This is the limited list of circumstances, when abortion was allowed, however,

[125] Philips Dom," Brazil senate approves austerity package to freeze social spending for 20 years", The Guardian news portal, December 13, 2016, https://www.theguardian.com/world/2016/dec/13/brazil-approves-social-spending-freeze-austerity-package.
[126] Aleem Zeeshan, "Brazil just enacted the harshest austerity program in the world: The president is giving unprecedented shock therapy to the country's failing economy", Vox news portal, Dec 15, 2016 https://www.vox.com/world/2016/12/15/13957284/brazil-spending-cap-austerity.
[127] Alston Philip, "Brazil 20-year public expenditure cap will breach human rights, UN expert warns", OHCHR website, December 9, 2016. http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21006.
[128] Philips Dom," Brazil senate approves austerity package to freeze social spending for 20 years", The Guardian news portal, December 13, 2016, https://www.theguardian.com/world/2016/dec/13/brazil-approves-social-spending-freeze-austerity-package.
[129] Carvalho Andrea, "Brazil's Congress to Vote on Abortion Ban: Brazilians March Against Proposed Amendment", Human Rights Watch website, November 15, 2017. https://www.hrw.org/news/2017/11/15/brazils-congress-vote-abortion-ban.

new amendment, which was approved by the majority in Congress, proposed an absolute ban on abortion. According to Human Rights Watch, Erika Kokay was the only member in Brazil's congress to vote against a constitutional amendment on absolute abortion ban, eighteen other deputies (men) voted in favor of the amendment.[130] The arguments against the amendment are overwhelming, among which are the right to physical integrity, privacy, private and family life, if the life of the mother is in danger, right to life. As the first amendment that was discussed, this one was procedurally legitimate and substantively arbitrary. Abortion is a very sensitive issue, where vote in congress is not enough. Even vote on the referendum might not be enough, if the rules on conducting a referendum are for example like in Kyrgyzstan.

France have not held any constitutional reforms since the adoption of the 1958 Constitution, which would arbitrarily be in conflict with human rights and fundamental freedoms. On the contrary, there were amendments, which guaranteed human rights and equalized the status of the men and women. Therefore, France remains the winner among the three compared countries in restraining from using constitutional amendments arbitrarily to jeopardize human rights.

[130] Ibid.

Conclusion

Even though much research shall be done and many more amendments shall be reviewed in order to give a more clear picture on how to distinguish between arbitrary and legitimate constitutional amendments, the present paper provides with basic feature of arbitrary and legitimate constitutional amendments, This paper sets the requirements, which are needed in order to identify legitimate and arbitrary constitutional amendments. It demonstrates the criteria according to which an amendment can be classified as either arbitrary or legitimate, it also shows the difficulty of distinguishing arbitrary and legitimate constitutional amendments.

First of all, the paper provided with brief constitutional history of each country that have been compared. This constitutional history served as a navigator for the reader in terms of relating certain amendments to a particular time period, which can be characterized as a period of democratization or authoritarianism. The constitutional history of Kyrgyzstan was described from the period, when Kyrgyzstan acquired independence, because crucial amendments have taken place in this particular timeframe. With regard to Brazil and France, the deeper historical background was provided, because these two countries have a very long and deep-rooted constitutional history. As a next step the paper provided with legitimate constitutional amendments that have taken place in all three countries. It was identified that all three countries have had constitutional amendments establishing or improving the system of judicial review and there were also amendments that served for protection for human rights and fundamental freedoms. There was also another part, which combined very different constitutional amendments that were legitimate, but they were not common for all three countries. Having identified legitimate constitutional amendments and provided the reader with some understanding of the criteria of legitimacy, the paper proceeds with arbitrary constitutional

amendments in the areas of presidential powers and human rights. These were tow common areas, where the amendments have taken place, but they were arbitrary.

As a result of describing and analyzing constitutional amendments it was revealed that in order to be legitimate, the amendment has to be procedurally and substantively correct, which means that they shall be adopted without violation of procedural rules and substantively shall not undermine the principles of rule of law, democracy and human rights. Besides, the amendment shall reach its intended aim. If one of the criteria is not met, it can be hardly related to the legitimate classification. Nevertheless, it is not an absolute rule, because when assessing the legitimacy of an amendment many other criteria shall be taken into account, such as social, political and economic situation in the country.

It was proved that distinguishing between arbitrary and legitimate constitutional amendments in the circumstances of ever-changing constitutions is extremely hard and differences in such amendments can be hardly noticed, but certain criteria exist in order to differentiate between them.

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