【Special Features : The Role of Constitutional Review Bodies in the Asian Post- Authoritarian Democratization Process. A Comparative Perspective】

# The Constitutional Judiciary and its Role in the Democratization Process in post-Soviet Central Asia. The Constitutional Court in Uzbekistan

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Abstract

The Constitutional Court in Uzbekistan is the body which is primarily expected to defend and promote constitutionalism. This Court is theoretically expected to perform as an independent actor in assuring respect for fundamental rights and fair competition between political parties. The factual situation, however, demonstrates that the Court rarely acts as an impartial adjudicator and often prefers to distance itself from legislative deliberations. A limited number of the Court's decisions reflects the soul for the constitutionalism in Uzbekistan. Between 1995 and 2019, the Court has taken up a total number of only 33 cases, with the most significant part initiated by its justices. This statistical data indicates structural problems in the area of constitutional justice in Uzbekistan. A careful look at the modern constitutional review system in Uzbekistan, especially its static condition, reveals grave concerns about the issue of protection of fundamental rights and the promotion of democracy. This report is an attempt to shed light on the constitutional review in Uzbekistan with a particular focus on basic features, jurisdiction, and case-study law. The author also aims to clarify the nature of interactions between the Court and democratical processes.

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## I. The Origins of the Constitutional Court of Uzbekistan

In general, the discussion of constitutional review in Uzbekistan starts with the establishment of a standalone Constitutional Court (from now on, the Court) in 1995. The attempts to initiate constitutional review also existed before 1995. A pioneer initiative on constitutional review dates back to 1990 when the Uzbek Soviet Socialist Republic (Uzbek SSR) transplanted the USSR 1989 Law on the Constitutional Supervision[1] and created the Uzbek SSR's Committee for Constitutional Supervision (from now on, CCS).[2]

This Soviet model of constitutional supervision in the Uzbek SSR included ten justices who provided an advisory opinion to the legislature, but had no authority to invalidate unconstitutional statutes or executive decisions, with the exception of those which violated human rights. In practice, the CCS only carried scientific expertise of normative-legal acts and research on their constitutional compatibility. The 1990 law stipulated that only the legislature, the President, one-fifth of parliamentarians, or a limited number of public officials could initiate such scientific expertise of legal-normative acts.[3] The legislature had the authority to appoint the CCS justices and exercise overall control over the CCS's activities. [4]

The mere fact of establishing a pioneer constitutional review system in Soviet Uzbekistan resulted in multiple opinions from legal theorists, both within and outside the country. Mainly, the effectiveness of the CCS was vague and questionable in a country whose state doctrine had generally rejected the principles of judicial review over the constitutionality of legislation as incompatible with the supremacy of parliament or democratic centralism.[5]

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[1] *Zakon SSSR o Konstitutsionnom Nadore v SSSR* [the 1989 Law of the USSR on Constitutional Supervision in the USSR, *Izvestiya* No. 360, Dec. 26, 1989, at 1, 7-8 and at 3, 1-6. (First session was held on May 16, 1990)

[2] *Prikaz ob Utverjdenii Komissii po Razrabotke Zakona o Konstitutsionnom Nadzore v Uzbekskoy SSR* [Regulation on the Establishing a Commission on the Draft Law of the Constitutional Supervision of the Uzbek SSR]. *O'zbekiston Respublikasining Markaziy Davlat Arhivi* [Central State Archive of the Republic of Uzbekistan] *XII Chaqiriq, O'zbekiston Respublikasining Oliy Kengashining 1990 Yil 18-20 Iyun kunlari bo'lib o'tgan XI Sesssiya Materiallari* [11th Plenary Session Materials], (Fond-2454, N 6,7091), 124-25.

[3] Art 12, *Zakon o Konstitutsionnom Nadzore v Respublike Uzbekistan* N 93-XII (Outdated).

[4] Art 5-6, *ibid*.

[5] Ismatov, Aziz, "Specifics of the Late Soviet Constitutional Supervision Debate: Lessons for Central Asian Constitutional Review?" (*CALE Discussion Paper* 19, *CALE/Nagoya University, 2019*)

In 1992, Uzbekistan achieved independence and became the first post-Soviet republic to adopt a written constitution.[6] This 1992 Constitution included a long list of fundamental rights and a Kelsenian, or European-style, stand-alone Constitutional Court. The 1993 law implementing this new Court of Uzbekistan afforded it significant power, including the power to strike down executive acts and formal laws based on the 1992 Constitution.[7] This power notably included the authority to strike down acts based on constitutional invalidity. Formally, this appeared to be a step forward, even though the former CCS practically continued the role of the successor of the court.[8]

In August 1995, the Parliament replaced the 1993 law with the 1995 Law on the Constitutional Court of Uzbekistan.[9] The same year the parliamentarians elected the Court's first team of justices and enabled its administrative regulations. A prominent feature of the 1995 law is that during their deliberations on the model of the Court, the framers referred not only to the existing Soviet model of the constitutional supervision, but also to the U.S. version of diffused judicial review of the Supreme Court, and the Kelsenian model of concentrated constitutional review by the standalone constitutional court.

In particular, during the negotiation process, some parliamentarians considered the U.S. version less burdensome and more achievable at a lesser time and effort for Uzbekistan regardless of the country's hybrid legal system with elements of socialist law, Russian civil law tradition, and local indigenous customs.[10] The feasibility of the U.S. model of judicial review was also strongly associated with the U.S. led legal aid project in Uzbekistan, which aimed to aid legal development mainly through the transplantation of laws.[11] Finally, the application of the U.S. model in Uzbekistan

[6] The Constitution of the Republic of Uzbekistan (December 8, 1992) Supreme Council, 11 session; (Uzbekistan).

[7] *Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan N820-XII (Outdated since 1995) (1993).*

[8] *Postanovlenie o Vremennom Vozlojenii Funkciy Konstitutsionnogo Suda Na Sostav Komiteta Konstitutsionnogo Nadzora Respubliki Uzbekistan.*, Tashkent (Verkhovniy Sovet Respubliki Uzbekistan, 1993).

[9] *Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan* N103-I (Amended in 2017), (1995).

[10] On hybrid legal system of Uzbekistan in Aziz Ismatov and Sardor Alimdjanov, 'Developmental Trajectory of Mahalla Laws in Uzbekistan: From Soft Law to Statutory Law', *Nagoya University Asian Law Bulletin* Vol.4 (December 2018).

[11] Ismatov, Aziz, "Do Hybrid Legal Systems Matter in Legal Transplantation Projects? Some Philosophical Aspects of Legal Aid in Uzbekistan as Provided by Foreign Donors." Paper presented in the ALSA Conference. (Osaka, Japan, 2020)

seemed plausible as there were other examples when a country with a predominantly continental system of law, for example, Japan, transplanted the diffused model of judicial review.[12]

However, despite the strong regional pro-U.S. lobby in the first years of independence, Uzbekistan opted for the Kelsenian model of a constitutional court or concentrated judicial review. Presumably, such a step came as a result of reference to the experience of Eastern European states (i.e., Poland, Hungary) and Russia. Notably, each of these states established a constitutional court as the most effective mechanism for the promotion of *Rechtsstaat*, or rule by the law state (*pravovoe gosudarstvo),* that presumably could best protect constitutional values and principles.

## II. Selection Method and Term of the Constitutional Court Justices

The significant amendments to the 1995 law took place as a result of the transition of presidential power in Uzbekistan in 2016. The policymakers initiated specific changes to the selection method and jurisdiction of the Court, and their efforts resulted in a new 2017 Constitutional Law on the Constitutional Court (from now on, the 2017 law).[13]This law stipulates seven Court justices.[14] According to the 2017 amendments to the 1992 Constitution, the President nominates the candidates to the Upper Chamber of the Parliament (Senate), and the Senate finalizes the appointments upon voting for each candidate individually.[15] The Constitution also stipulates that the President should nominate the candidates for the position of justice out of specialists in the area of politics and law recommended by the newly established organ, the Supreme Judicial Council. The nature of this organ is still unclear. Notably, before this Council came into existence, the nominations of justices fell explicitly within the authority of the President. On the other hand, one cannot assert that this Council now actively limits

[12] Or vice-versa, for example in 2011, Myanmar which had inerited its largely common legal tradition from its former British colonial past, introduced a concentrated constitutional review in the form of the standalone Constitutional Tribunal.

[13] *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431, (2017).

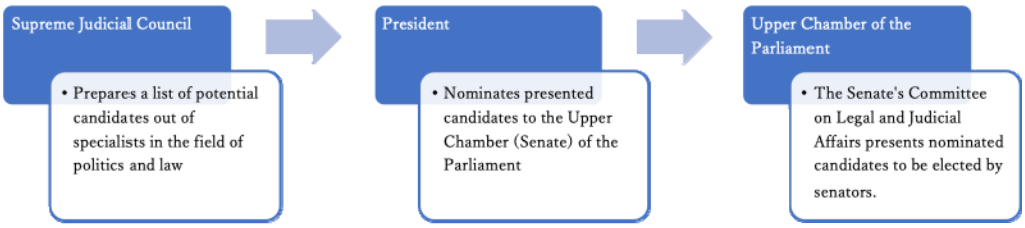
[14] Art 5, *ibid*. Chairman, Deputy Chairman and five members of the Constitutional Court including a judge from the Republic of Karakalpakstan

[15] *Zakon Respubliki Uzbekistan o Vnesenii Izmeneniy v Otdel'nie Stat'yi Konstitutsii Respubliki Uzbekistan,* (st 80, 93, 108 i 109), N430 (2017).

the presidential power to appoint justices as most of the Council's members are presidential appointees.[16] The Constitution separately mentions that one candidate must be a representative of the Republic of Karakalpakstan.[17] (Refer to Table 1)

**Table** 1. The nomination and election process of the Constitutional Court Justices.

Sources: Article 108, The Constitution of the Republic of Uzbekistan; Article 5, The Law on the Constitutional Court.




The Senate approves justices of the Court by relying on a bare majority (more than 1/2) rather than a qualified majority (more than 2/3 or 3/5). While a similar scheme exists in many emerging democracies, there is a risk that "... the majority party (coalition) in the [parliament] can appoint justices who may defer to the majority without consent of minority parties."[18] Hence, the election of justices in Uzbekistan does not stipulate any framework in which ruling or opposition parties would come to a compromise or consensual decision regarding their appointments to the Court.

Furthermore, by paying closer attention to the practical side of the current Court's justice election system, one might observe a vast presidential influence on the overall nomination process. In other words, the system of checks and balances between the three branches of power is not explicitly applicable in the case of appointments of

[16] Art 5. *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan,* ZRU-431. Please note, this Council is composed of 21 members, 11 of whom are appointed by the President. Refer further to, *Zakon Respubliki Uzbekistan o Vysshem Sudeyskom Sovete Respubliki Uzbekistan*, ZRU-427, (2017).

[17] Art 108, The Constitution of the Republic of Uzbekistan, (*Sobranie Zakonodatel'stva Respubliki Uzbekistan)*, (1992, amended in 2017); Refer also to Art 5, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431.

No member shall have the right to simultaneously serve as a deputy…. may not be members of political parties ... Judges … have the right of immunity. [and]… shall be independent....

[18] Odonkhuu Munkhsaikhan, *Towards Better Protection of Fundamental Rights in Mongolia: Constitutional Review and Interpretation.*, CALE Books 4 (2014), 82.

justices in Uzbekistan. Also, in the actual process of elections of the candidates to the position of justice, there is no rule or practice which would stipulate the right or privilege for the ruling and opposition parties to elect one justice by each, or elect by consensus between the ruling and the opposition parties. Such a rule which would balance the interests in the Parliament does not exist, and only the Senate bears the competence to approve candidates offered by the President. Indeed, the existing practice does not demonstrate even a single case where the senators would question or refuse any presidential nominee.

Justices have a term of five years and cannot hold a justiceship for more than two terms.[19] The same provision also stresses that the maximum age for justices is 70 years old.[20] Scholars and practitioners assert that the term of five years is too short as it does not allow justices to create consistent and logical reasoning for a long-term period, which, in turn, may weaken constitutional integrity.[21] Hence, as the term of the justices is five years, which is the same as the President,[22] and with the possibility of re-election just once, there appears a threat to the independence of the Court, as justices may be reluctant to rule against bodies that had nominated them.

Non-legal professionals may be appointed *de jure* as justices, which makes the existing framework of appointing Court justices in Uzbekistan different from the classic continental constitutional court model. In the context of Uzbekistan's law, the framers considered that apart from legal professionals, experienced politicians were also necessary for the successful functioning of the Court. The parliamentarians widely supported this viewpoint by referring to the idea that constitutional disputes would touch upon various political foundations and social life.[23]

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[19] Art 6, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431, (2017).

[20] *Ibid*.

[21] Ronald D. Rotunda, John E. Nowak, and Jesse Nelson Young, *Treatise on Constitutional Law: Substance and Procedure* (West Publishing Company, 1986), 9.

[22] Art 90, the Constitution of the Republic of Uzbekistan, (1992).

[23] B.A. Eshonov, '*Nezavisimost' i Deystvennost' Resheniy Konstitutsionnogo Suda Respubliki Uzbekistan*', *Konstitutsionnoe Pravosudie* 3, no. 13 (n.d.), http://www.concourt.am/armenian/con_right/3.13-2001/uzbekistan.htm. [Accessed on May 16, 2019]

## III. The Main Features of the Constitutional Court of Uzbekistan

The Constitution dedicates Chapter XXII to the judicial authority. By taking a careful look at the contents of this part, it is evident that the Constitutional Court is legally independent of the Supreme Court to exercise constitutional review. Ordinary courts do not have this competency. The Court theoretically aims to enforce the supremacy of the Constitution and implement the Constitutional principle of protection of fundamental rights in the acts of the legislative and executive branches of power.[24] In addition, the Court should be able to necessitate compliance to the Constitution in regards to laws and international treaties.

Although Uzbekistan is a unitary state according to its Constitution, the existence within its territorial-administrative division of the autonomous Karakalpak Republic demonstrates that Uzbekistan is indeed a state with elements of federalism. Similarly, Karakalpak has its own constitution, and one of the tasks of the Court is to monitor the compliance of the Karakalpak Constitution and statutes to the Constitution and statutes of Uzbekistan.[25]

Another feature of the Court is normative interpretation. In a few of its cases, the Court offers a constitutional and legal interpretation of unclear or contested norms. The Court also revises petitions of ordinary courts originating in concrete cases. Ordinary courts cannot transfer such petitions directly but only via the Supreme Court. Finally, this Court annually submits a report on constitutional legality conditions in the country and hears cases to which it bears competence. [26]

Hence, *de jure* this Court exercises constitutional review of legislation and executive acts, and analyzes their compatibility with international treaties[27]. The Court

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[24] Art 8, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431, (2017). i.e., laws of the Republic of Uzbekistan and resolutions of the chambers of the Parliament of the Republic of Uzbekistan, decrees of the President of the Republic of Uzbekistan, enactments of the government and local bodies of state authority, interstate treaties and other obligations of the Republic of Uzbekistan.

[25] *Ibid*.

[26] Art 109, The Constitution of the Republic of Uzbekistan; Art 4, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431. Also note; Judgments of the Constitutional Court shall take effect upon publication. They shall be final and cannot be appealed.
Organization and procedure for the work of the Constitutional Court shall be specified by law

[27] Please note, as in many cases, the Court of Uzbekistan adjudicates the conformity of international treaties to the Constitution of Uzbekistan before they are ratified. Similarly, most constitutional review bodies do not have the

only hears cases relating to the constitutionality of acts of the legislative and executive authorities.[28] The Court can initiate the examination and settlement of constitutional disputes on its initiative given a relevant request from three or more Court justices.[29] The Parliament (both chambers)[30], the President, the Cabinet of Ministers, Human Rights Ombudsman, the Parliament of Karakalpak Republic, the Supreme Court, and the Prosecutor General also have standing in bringing their claims for constitutional review.[31] However, these bodies can only initiate a matter within the competence of the Court.

There is no individual access to the Court. Analogous to Kelsen's original idea of constitutional review, the framers of the Constitutional Court in Uzbekistan widely rejected *actio popularis*.[32] Hence, individuals do not have the right to make an application to the Court, which, in turn, would have been obliged to review the constitutionality of disputed matter. It is the central critical issue affecting the core constitutional principle of protection of fundamental rights. When violations of rights in Uzbekistan result in statutes, executive acts, or court judgments, individuals have no right to file a complaint to the Court after exhausting all remedies at the ordinary courts. In other words, there is no possibility to initiate a constitutional review of ordinary court judgements or executive acts which are believed to result in the violation of individuals' rights, once ordinary courts fail to quash them.

The Court's jurisdiction also does not stipulate a constitutional question. Therefore, in Uzbekistan, ordinary judges cannot play a direct role in the concrete review of statutes. Whenever judges of ordinary courts have reasonable doubts as to the constitutionality of a specific law, they cannot stop the proceeding and refer directly to

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authority to review those international agreements which have already been ratified as long as such review might negatively impact upon mutual relations with other countries or international agencies.

[28] Art 108, The Constitution of the Republic of Uzbekistan.

[29] Art 25, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431.

[30] Note that the law also mentions a group of parliament members who are eligible to initiate constitutional review. Not less than ¼ of lower chamber members might initiate constitutional review. Similarly, when it comes to the upper chamber (the Senate), not less than ¼ of senators may initiate constitutional review. Refer further to Art 25, *Ibid*.

[31] *Ibid*.

[32] Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution* (Journal of politics, 1942), 197.

the Constitutional Court, which in turn would examine the matter and forward its decision back to the original court in order to resume the instant case. Ordinary judges can forward their queries to the Court only via the Supreme Court. As an example, in Germany, Italy, and Spain because, any judge has an authority to refer a question directly to the constitutional court. On the other hand, in Uzbekistan, similarly to Austria and France, only the Supreme Court may follow such procedure.[33]

The Court *de jure* exercises abstract and concrete review of legislation.[34] Review always focuses on the legal norm but not a case. The Court decides on particular matters only when the consideration of their constitutionality is challenged. The Court may also upon examination for the constitutionality of the normative act simultaneously decide in respect of the other normative acts that contain a reference to the examined statute even they have not been mentioned in the matter introduced for the hearing of the Court.[35] "The issue of the constitutionality of the norm may arise in a pending case, but the review by … the Court is strictly confined to the norm."[36] Although the 2017 law enables the Parliament to initiate review procedure, there is not even a single case in which the Court demonstrated how abstract review acts as a mechanism to protect a parliamentary minority from the abuse of power by the majority groups.[37] This moment raises grave concerns about the qualitative aspects of constitutional review and the parliamentarian culture in Uzbekistan.

Theoretically, once the Court declares a statute or executive act as unconstitutional, it orders their invalidation since the moment of their adoption. The decisions of the Court are final and cannot be appealed.[38] According to the law, the Court itself may

[33] John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe Symposium: Comparative Avenues in Constitutional Law - Constitutional Structures and Institutional Designs', *Tex. L. Rev.* 82 (2003–2004): 1689; Federico Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, Rochester, NY, SSRN Scholarly Paper (Social Science Research Network, 15 March 2015), 9.

[34] In particular, a review of conformity with Constitution.

[35] Refer further to; (https://www.venice.coe.int/WCCJ/Seoul/docs/Uzbekistan_CC_reply_questionnaire-3WCCJ-E.pdf) [Accessed on May 16, 2019]

[36] Scott Newton, *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis* (Bloomsbury Publishing, 2017), 190.

[37] Note. Not a preventive control.

[38] Art 33, *Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan*, ZRU-431.

revise its own decision when new or unknown circumstances arise. The Court may also revise a decision if the constitutional norm that was at issue in the dispute changed.[39]

To maintain regular contacts with legal scholars, the framers decided to establish within the Court a separate Scientific-Consultative Council. According to the law this Council must research the most recent trends, and international law's influence on the constitutional courts' decisions in foreign states. This Council is expected to employ and attract prominent legal and political science scholars to cooperate in developing and applying legal-scientific approaches towards constitutional review.

## IV. Available Case Study Law

The modern Uzbek constitutional review demonstrates a critically small number of case-study law. Even though the Law on Petitions from Individuals and Legal Entities[40] paved the way for the Court to act on numerous claims from individuals, the Court's reaction has been rare or non-existent.[41] As an example, between 1995-2001, the Court received more than 2,000 letters and petitions from citizens. Generally, these petitions questioned the constitutionality of statutes and acts of the executive branch.[42] Regardless of this chance to actively engage with relevant claims and create precedent database, the Court has demonstrated an unforgivable passiveness. In fact, over 24 years of formal existence, the Court has issued only 33 cases out of which 16 have a form of decrees, 3 definitions, and 14 decisions.

As an example, in the *Frolov case*, the plaintiff lodged a petition against public authorities who barred him from obtaining benefits stipulated by Article 16 of the Law on the Guarantees of Free Entrepreneurship.[43] In particular, the plaintiff, Mr. Frolov, asserted that public taxation and financing organs incorrectly interpreted and applied the provisions of the named statute, which in turn, barred the plaintiff from obtaining financial and tax benefits. In the instant case, the Court had very briefly analyzed the

[39] Art 34, *ibid.*

[40] *Zakon Respubliki Uzbekistan ob obrasheniyah Fizicheskih i Yuridicheskih Lits,* 378 (Uzbekistan 2014).

[41] The Court has elaborated a special Regulation to sort and address the relevant petitions of the citizens.

[42] Interview with the Justices of the Constitutional Court of Uzbekistan, Tashkent (April 2019). (March 2018)

[43] *Frolov case* (2001), *Narodnoe Slovo,* 158, (2718).

circumstances of the dispute and by considering the reports from the Ministry of Finance and State Tax Committee, found a misleading wording in the statute. In the instant case, the Court declared that the actions of the relevant tax and financing organs were unconstitutional because of the provisional vagueness and upheld the statutory provision of the two-year benefit for individual entrepreneurs, as long as individual entrepreneurs had registered before the amendment to the tax code. The conclusion in this concrete review, while being protective of the individual's rights, on the other hand, does not offer a logical and a well-reasoned argumentation story that would help to follow and support the position of justices.

In another case on constitutional interpretation, the Court revised Article 6 of The Law on Bar. Three justices decided to bring the matter before the Court after they had received and analyzed a petition from Mr. Nurmuhammedov, a practicing lawyer in Uzbekistan. In the instant case, Mr. Nurmuhammedov complained that the Forensic Center refused him access to the written expert-conclusion necessary for the legal defense of his client. In particular, the named center pointed to the absence of a legal provision that would enable a practicing lawyer to request such conclusions in procedural matters. Justices initiated the interpretation of Article 6 on The Law on Bar which provided "a lawyer, upon obtaining permission from his client, has the right to inquire and obtain the forensic results or expert-conclusions from the relevant agencies necessary for the legal defense of the client." After reviewing this norm and consulting with specialists in relevant fields, the Court ruled that "expert agencies do indeed have to present files necessary for a person's legal defense to lawyers after they obtain a relevant agreement from their clients." [44] Again, as in the previous case, the Court did not demonstrate in its conclusion a detailed argumentation and legal analysis.

Out of the remaining limited number of Court decisions, there are several in which justices utilized their right for the legal initiative. For example, in 2001, when the Court found inconsistency in several articles of the Code on Administrative Responsibility and declared these articles unconstitutional, it introduced the matter to the Parliament with a request to revise the inconsistency. Notably, it took the

[44] *Nurmuhammedov case* (2000), *Narodnoe Slovo*, 134, (2429).

Parliament two months to revise and resolve the issue in the way the Court requested it.[45]

There have not yet been any cases in the Court's jurisprudence in which political minority parties claimed a legitimacy in Parliamentary deliberations, although such cases should exist in the political arena.[46]One idea might suggest that such situation is an outcome of an underdeveloped condition of the legislature. Another hypothesis suggests that the Court is unable or unwilling to secure parliamentary compliance because of its constant political neutrality. Such distancing from political controversies eventually affects the much-awaited stabilizing role of the Court in political deliberations.

## V. Effectiveness of Constitutional Review

The story of Uzbek constitutional review began in the late Soviet period. After the fall of the Soviet Union, the newly independent parliament of Uzbekistan created its Constitutional Court. Formally, this appeared to be a step forward as such a decision suggested the beginnings of a move towards rights-based judicial checks on legislative and executive power. However, this newly empowered court has not emerged as a powerful force for constitutional implementation.

Despite a long list of rights in its Constitution and a separate constitutional court, Uzbekistan's constitutional review has been largely non-existent. Notably, the Court has not relied on the essential methods of review, such as *actio popularis*, constitutional question, or constitutional complaint.

The Court ignored numerous vague legislative and executive acts, as well as cases in which ordinary courts failed to quash apparent violations of fundamental rights. Had the Court taken a more active and detailed approach, these acts could have been used as potential elements that could generate a reasonably grounded case study law.

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[45] Constitutional Court, Constitutional Decision, *O Vnesenii Predlojeniya Ob Ustraneniii Nesootvetstviya Mejdu Statyami 53, 34 i 257 Kodeksa Respubliki Uzbekistan Ob Administrativnoy Otvetstvennosti, Narodnoe Slovo,* 117, (2627), 2001.

[46]Refer to; (https://www.venice.coe.int/WCCJ/Seoul/docs/Uzbekistan_CC_reply_questionnaire-3WCCJ-E.pdf) [Accessed on May 16, 2019]

A few available cases reveal another weak aspect in the Uzbek constitutional jurisprudence, namely, the inability of justices to provide logical reasoning to justify their decisions. In fact, not even a single case out of the 33 decisions rendered by the Court demonstrated a clear and detailed record of how justices interpreted the statutory provisions in a clear, coherent, and justifiable manner.

## VI. The Constitutional Court and Democratic Transition

Scholars assert that "the achievement of a stable system of constitutional justice depends heavily on the same factors and processes related to the achievement of a stable democracy." [47] Such factors as an adequate parliamentarian system with competitive parties, fair and transparent elections, the principle of *Rechtsstaadt*, respect for human rights, legal education, and legal profession play a substantial role in creating and sustaining constitutionalism in transition societies.

After Uzbekistan adopted its 1992 Constitution, which contained a set of well-written individual rights and the separate constitutional court, there appeared an impression that the country, being analagous to some successful Eastern European states, had started its transition from state centralism to constitutional democracy. Within the next 25 years of constitutional review's evolution, it became evident that the court failed to perform several functions which are crucial for the facilitation of a transition to democracy. First, within the complicated transition process, the Court failed to act as a dispute resolution tool between various political forces which framed the political system after the fall of the Soviet Union. Second, the Court failed to prove itself as a thriving institution capable to invalidate statutes with prominent unconstitutional elements. The Court could not construct a dialog with the parliament and protect political minority groups. Another critical point touches upon an inability to protect the rights and freedoms of individuals adequately.

Up to 2016, as the Government often approached the human rights concept by actively relying on Asian (Oriental) values and supreme national development interests. By doing so, many policymakers it often utilized an interpretation that in order to achieve developmental goals with particular national characteristics, sacrificing

[47] Alec Sweet, 'Constitutional Courts', *Faculty Scholarship Series*, 1 January 2012, 1.

individual freedoms or restricting particular human rights was unavoidable. This claim for development influenced the degree of democracy which in contemporary Uzbekistan is mainly associated with the importance of the strong rule by a dominant leader aimed at achieving good results. As it is the case in other Asian countries, for example, present-day Indonesia or South Korea in the 1980s, this may have paved the way for the so-called authoritarian developmentalism.[48]

As in the other Central Asian republics, often referred to in the academic literature as "super-presidential,"[49] Uzbekistan may indeed be one example of the rapid development of presidential authority, which is based on constitutional guarantees and public trust. The factual situation demonstrates that presidential authority, additionally represented in such instruments as Presidential Reception Offices (*Priyomnaya Prezidenta, Virtual'naya Priyomnaya Prezidenta*), *de facto* replaces certain elements associated with constitutional review. This situation further raises justified concerns and questions on mainly what mechanism of judicial review is more suitable for a transitional country such as Uzbekistan.

## VII. Conclusion

Constitutional review in the Central Asian region was an innovation of the late *perestroika,* which before had been widely unknown to the former Soviet Republic of Uzbekistan. After the collapse of the USSR, Uzbekistan aimed at distancing itself from socialism and moving towards a democratic state. One precondition for such a transition was an ambitious plan to design an institution that would protect the newly adopted constitution using a system of judicial review. Simultaneously, scholars and politicians expressed their hopes that within a short period, such an institution would turn into an actor capable of protecting fundamental rights and freedoms of individuals.

Historically, in the socialist Uzbekistan, legislature enjoyed unlimited sovereignty and denied any notion of limited government. Indeed, strong legislature laid the foundations of the democratic centralism and socialist legality that became core

[48] Refer further to; Helena Alviar García and Günter Frankenberg, *Authoritarian Constitutionalism* (Edward Elgar Publishing, 2019).

[49] Newton, *The Constitutional Systems of the Independent Central Asian States*.

principles in many socialist states across the globe. While these notions existed mainly under the slogans of popular sovereignty, their factual effect often resulted in autocracy. After the fall of socialism in many parts of the world at the end of 1980s, new political elites adopted new constitutions and declared their transition towards a representative democracy and rule of law. In many states, new constitutional courts were thus expected to perform the role of the guarantor in protecting the fundamental rights, and catalyst for the democratic transition. However, in many instances, these instruments could not overcome the judicial passivism inherited from the highly centrist structure of socialist state. Whereas, the centrism, in many states, particularly in Asia had moved from legislative supremacy to the strong authority of executive branch. The Court's active role as a successful adjudicator capable of enforcing rules and principles of the constitutionalism while acting even on political issues, but from purely legal base, could have paved the way for an adequate balance between different branches of power. So far, the analysis of the institutionalization of the constitutional review draws to the conclusion that setting a vibrant and reliable constitutional judiciary in Uzbekistan requires fundamental reconsideration of traditional judicial passivism and resisting the state centrist theory of state.

**Appendix**

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|---|---|
| Date of establishment | August 1995 |
| Members | 7 |
| How appointed | The President, based on the recommendation of the Supreme Judicial Council nominates the candidates out of specialists in the area of politics and law to the Upper Chamber of the Parliament (*Senate*), and the Senate finalizes the appointments upon voting for each candidate individually. |
| Term length in years | 5 |
| Terms renewable | Yes (Renewable only once) |
| *Actio popularis* | No |
| Petitions from citizens | Yes (based on the Law on Petitions)<br>It is not *Actio Popularis* |
| Abstract/Concrete review | Both |
| Constitutional complaint | No |
| Constitutional question | No |
| Review of legislation *ex post/ ex ante* | *Ex post* |
| Are decisions final? | Yes |
| Impeachment power | No |
| Declares political parties unconstitutional | No |