7. Specifics of the Late Soviet Constitutional Supervision Debate: Lessons for Central Asian Constitutional Review?

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Abstract

This research will trace in detail the legislative process that paved the way for the establishment of the Soviet Committee of Constitutional Supervision (hereinafter, the CCS). This late Soviet practice of constitutional review offers some lessons for contemporary Uzbekistan, as despite a long list of rights in its 1992 constitution and a separate constitutional court, a contemporary Uzbekistan's constitutional review has been largely non-existent. In fact, since the collapse of the Soviet Union almost 29 years ago, the Uzbekistan's Constitutional Court has issued fewer decisions than the Soviet CCS issued in 18 months of its short but fascinating life. This article will therefore shed light into the previous positive lessons from Soviet constitutional supervision, and argue that contemporary constitutional review bodies in Central Asia should now to make several steps back to make a reference to the previously omitted, but highly valuable and helpful judicial experience. Such experience, including in the area of fundamental rights protection, offers a positive feedback and distinct case-law that may stimulate a more vigorous approaches towards constitutional judiciary.

Keywords; Constitutional review, constitutional supervision, socialist law, Soviet Union, Uzbekistan, Committee of Constitutional Supervision, constitutional court.

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I. TRADITIONAL VARIATIONS BETWEEN THE SOCIALIST AND NON-SOCIALIST APPROACHES TOWARDS JUDICIAL REVIEW

The classic socialist state doctrine in the former Soviet Union and Soviet bloc countries of Eastern Europe had generally rejected the principles of judicial review over the constitutionality of legislation as incompatible with the principles of democratic centralism which prioritized a supremacy of legislature.[1] There are, broadly speaking, several substantive reasons given for the importance of the legislature in a socialist state. In the words of western professors of socialist law, the primary is that "the legislature is conceived to be the supreme expression of the will of the people and beyond the reach of judicial restraint".[2] A leading Soviet commentator Chkhikvadze asserted that legislation, not judicial decisions, was recognized as the sole source of law in the socialist system. [3]

According to the Marxist-Leninist jurisprudence, the socialist state concept conflicts with a doctrine of separation of powers and, hence, opposes the rule of law concept.[4] Historically, socialist states often allocated public functions between the legislature, executive and judicial segments in such a way that these three authorities collaborated under the direct and strict supervision of the communist party.[5] In the context of democratic centralism as interpreted by quasi Marxist Soviet ideas, the party, while being represented by the will of the people, morally obtained an unlimited power to rule for achieving good results. Simultaneously, the socialist legal theory highlighted the supremacy and power of the party-led legislature as a fundamental law-making body. Therefore, the named three segments of power in socialist states were by no means separate or equal.

Hence, the socialist legal doctrine rejected any idea of the judicial review over the constitutionality of legislation by any separate extra-legislative (extra-parliamentary) bodies which naturally did not have an authority to represent the party and, therefore a people (i.e. citizens). This is not, however, to assert that socialist system rejected any form of judicial review. Judicial review was usually vested with the legislative bodies which, like the Presidium of the Supreme Soviet of the USSR, exercised many of the

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[1] Similar approaches alongside with idea of necessity to introduce specific constitutional review mechanisms still exist in Vietnam, Laos and China. Refer further to Hand, Keith J., 'An Assessment of Socialist Constitutional Supervision Models and Prospects for a Constitutional Supervision Committee in China: The Constitution as Commander?' in John Garrick and Yan Chang Bennett, *China's Socialist Rule of Law Reforms Under Xi Jinping*, (Routledge 2016); Hualing Fu et al., *Socialist Law in Socialist East Asia* (Cambridge University Press, 2018).

[2] John Newbold Hazard, William Elliott Butler, and Peter B. Maggs, *The Soviet Legal System: The Law in the 1980's* (Published for the Parker School of Foreign and Comparative Law, Columbia University in the City of New York, by Oceana Publications, 1984), 320

[3] Victor Mikhailovich Chkhikvadze, *The Soviet State and Law* (Moscow, Progress Publishers, 1969), 221; René David, *Major Legal Systems in the World Today : An Introduction to the Comparative Study of Law /*, 3rd ed. (London : Stevens & Sons, 1985), 240; Hazard, Butler, and Maggs, 40.

[4] Mary Ann Glendon, Michael W. Gordon, and Christopher Osakwe, *Comparative Legal Traditions: Text, Materials, and Cases on the Civil Law, Common Law, and Socialist Law Traditions, with Special Reference to French, West German, English, and Soviet Law.*, American Casebook Series (St. Paul, Minn: West Pub. Co., 1985), 226–27.

[5] Article 6 of the 1977 Constitution of the Union of the Soviet Socialist Republics, (1977).

"powers of the parent body".[6] In practice, such bodies did not exercise a constitutional review in a form that existed in the non-socialist jurisdictions. According to socialist legal doctrine, an individual who believed that his constitutional rights had been violated could file a complaint in the executive branch supervising the institution that had been responsible for the alleged violation or in the appropriate office of the procurator.

From a non-socialist perspective, there are two principal moments highlighting the importance of judicial review. As a primary reason, scholars and practitioners assert that judicial review is a fundamental element of the rule of law state. Western legal literature mainly states that the rule of law state creates borders between authoritarian and free states.[7] Attanasio, while comparing socialist and non-socialist state models, asserts that in the rule of law state, individual conscience of free people cannot co-exist with collective interests.[8] Russian based scholars, for example, Shul'zhenko discusses the issue in a similar way by addressing the need of separation of power for democratic rule of law state.[9] Both scholars also point to the unconditional necessity to have real and effective system of judicial review as essential element for existence of such democratic rule of law state. In sum, the primary reason presupposes that an effective system of judicial review in which judges are authorized to examine and, if necessary, declare the decisions of the legislature and executive branches void, specifically when it comes to the question of fundamental rights, is an absolute component of the rule of law.

A second reason, which is particular in newly emerging democracies, is the assertion that effective judicial review is an instrument to ensure and give effect to the primacy of international law over domestic law. As demonstrated by ongoing practice, true and effective constitutional review mechanisms adopted aftermath of the collapse of socialism in select Eastern European jurisdictions, demonstrate positive tendency of making domestic laws compatible with universally accepted standards, especially those covering fundamental human rights.

Arguments presented above are hardly new or original except for demonstrating certain common approaches among western and non-western (predominantly Russian-based) doctrines regarding socialist and non-socialist judicial review principles. However, this research will also draw to the hypothesis that centralist phenomenon continued affecting judicial review mechanisms, and eventually the rule of law concept, even after the collapse of the socialism in the former socialist states, particularly ex-Soviet Central Asia where democratic centralism has gradually transformed into presidential centralism.

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[6] Article 121, ibid; Refer also to Mauro Cappelletti, *Judicial Review in the Contemporary World*, Edition: First edition. (Bobbs-Merrill, 1971), 7. Note; Supervision over the observance of laws was vested in the procurator-general who was often appointed by and responsible and accountable to the supreme legislative body.

[7] Jane Henderson, "The First Russian Constitutional Court: Hopes and Aspirations," in Rein Müllerson, Malgosia Fitzmaurice, and Mads Andenas, *Constitutional Reforms and International Law in Central and Eastern Europe* (Martinus Nijhoff Publishers, 1998), 382.

[8] John Attanasio, B. "The Russian Constitutional Court and the State of Constitutionalism." *St. Louis Law Journal 38*: (1994), 889.

[9] Yu. Shul'zhenko, *Konstitutsionniy Kontrol' v Rossii* [Constitutional Review in Russia], (*Moskva, RAN, Institut Gosudarstva i Prava*, 1995), 14.

II. PRE-HISTORY. A BRIEF BUT FASCINATING EXPERIMENT WITH SOVIET CONSTITUTIONAL SUPERVISION

As a state based on a Leninist, quasi Marxist concept of democratic centralism, the USSR implemented a socialist public legal doctrine in which supreme legislature enacted and amended the constitution and gave concrete legal effect to its provisions.[10] The Congress, led by the Communist Party, was the highest organ of the state power and, as such, beyond any form of judicial review.[11] In other words, this organ had an uncontested authority and no agency could review its decisions. For most of the socialist period, this constitutional arrangement therefore left no room for adequate constitutional review of legislation or executive acts.

In the 1980s in socialist Eastern Europe and the former Soviet Union, a growing desire to build 'socialism with a human face' gave rise to a wide-scale public debates that challenged these centralized principles. In particular, these debates included a robust discussion of the possibility of inventing a socialist version of rule of law and rights-based judicial review. A formalized decision to initiate in the former Soviet Union a "socialist state under the rule of law" appeared first in July 1988 in the CPSU Resolution 'On Legal Reform'.[12] This document initiated a series of long-term political negotiations on the introduction of a special mechanism, initially at the Union level and, subsequently, at the republican levels, that would have an authority to supervise the constitutionality and legality within the realities of the state centrist system.

The Congress level deliberations regarding the future model of the proposed judicial review institution in the USSR started at the second half of the 1980s. Notably by 1950, different constitutional review bodies existed in most civilized states of the globe.[13] Mixed types of judicial control institutions also existed since the post-WWI period in socialist states of Eastern Europe such as Czechoslovakia, Poland, Bulgaria, Rumania, Hungary.[14] Some of these states started a process of reconstruction of their judicial review systems in the post-Stalin era. One example is Yugoslavia, which first launched experiments with the forms of judicial review and, later in 1963, established the Federal Constitutional Court and the special constitutional courts.[15]

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[10] The Congress of People's Deputies (*S'yezd Narodnykh Deputatov SSSR*) and the USSR Supreme Soviet (*Verkhovniy Sovet SSSR*)

[11] See B. N. Topornin, *Konstitutsiia v Sotsialisticheskom Pravovom Gosudavstve* [The Constitution in the Socialist Rule by the Law State], in *Sotsialisticheskoe Pravovoe Gosudarstvo 24*, (1989), 35.

[12] I*zvestiya*, July 5, 1988. Supplement No. 29.

[13] Refer to Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989); Edward McWhinney, *Supreme Courts and Judicial Law Making: Constitutional Tribunals and Constitutional Review* (Martinus Nijhoff Publishers, Dordrecht, 1986)

[14] Austrian centralized type of control, Political control (Constitutional Committees within the Parliament), Supreme Administrative Tribunals. Refer further to Rett R. Ludwikowski, '*Constitution Making in the Countries of Former Soviet Dominance: Current Development'*, *23 Journal of International and Comparative Law 155* (1993), 92-94.

[15] Ludwikowski, 92-94.

By addressing the experience of different countries and their adopted models of judicial review, the Soviet socialist legal doctrine had to choose either between an existing concept or create one of their own. For example, Savitsky suggested to sporadically follow American model and grant the Supreme Court of the USSR the authority to practice both the concrete and abstract review features.[16] Indeed, by the end of 1980s, a group of legal scholars and politicians were supporting the idea of dualist constitutional control, namely by the Supreme Court and by the legislature. However, while considering the American model of diffused constitutional supervision, Topornin stressed that the composition and structure of the Supreme Court of the USSR "seemed incapable of assuming new functions".[17] As a reasonable ground for rejecting the American model, Hausmaninger mentioned also that the Soviet career judges who were trained mostly in criminal and civil law were not prepared to produce quality constitutional judgements.[18]

Some Soviet jurists also proposed to follow the Austrian (Kelsenian) model of a separate constitutional court elected by people and independent from public organs.[19] Simultaneously, following Kelsen's logic, they suggested amending the constitution by enforcing the principle of separation of powers and placing the constitutional court on the top.[20] This idea clearly demonstrated a reflection of radical moods among some jurists during the *perestroika* period. On the other hand, the majority of Soviet bureaucrats and some prominent Soviet lawyers resisted against the creation of the constitutional court. They stated that it would obviously conflict with the doctrine of democratic centralism and the supremacy of the legislation.

Shul'zhenko noted, "specialized constitutional controlling organs [if created] should be functioning in such a way so that the parliament [not constitutional court] pertains the main role in the area of [constitutional] control, and it should be a parliament to finally decide upon the constitutionality of acts."[21] Hence, out of intention to preserve the deeply rooted concept of supremacy of the legislation (legislative power), the Soviet policymakers came up with the idea of creation of the Committee of Constitutional Supervision of the USSR - CCS (*Komitet Konstitutsionnogo Nadzora SSSR*) which represented an original 'socialist' model of a rights based judicial review.

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[16] V.M. Savitsky, '*Pravosudie i Perestroika*', *Sovetskoe Gosudarstvo i Pravo*, *No. 9* (1987), 32-33.

[17] Topornin, 35.

[18] Herbert Hausmaninger, 'The Committee of Constitutional Supervision of the USSR' *Cornell International Law Journal 23*, *No. 2* (1990), 288.

[19] M. Mityukov, '*Predtecha Konstitutsionnogo Pravosudiya. K Istorii Komiteta Konstitutsionnogo Nadzora SSSR'*, *Konstitutsionnoe Pravosudie 4, No. 30* (2005), 35-36.

[20] G. Shahnazarov, *Tsena Svobody. Reformatsiya Gorbacheva Glazami Ego Pomoshnika.* (*Moskva: Rossika-Zevs*, 1993), 93.

[21] Yu. Shul'zhenko, '*Avtoritet Osnovnogo Zakona'*, *Moskovskaya Pravda*, June 14, 1988.

III. SELECTED MATTERS FROM THE PREPARATORY PROCESS

To negotiate the design, composition, jurisdiction and other organizational matters related to the legal foundations of the proposed CCS, the Soviet authorities created a special commission of 23 prominent lawyers. These lawyers mainly came from union-republics and worked for more than half a year on the concept of the CCS law.[22] Guided by Professor Kerimov, a scholar from Azerbaijan SSR, this special commission eventually obtained his name – the Kerimov's Commission. The activities of the Kerimov's Comission and subsequent *travaux preparatoires* on the CCS gave rise to a numerous controversies and clashes of interests between involved parties and demonstrated a complex political and legal nature of the matter. This section will refer only to the selected unique moments relevant to the present research.[23]

The preparatory work of the Kerimov's Commission demonstrates that the most politically sensitive issue touched upon the subordination of the union republics' constitutions and laws to the CCS supervision authority. As the initial idea was to enable the CCS to monitor the constitutionality of both union and republican level legislation, it was largely opposed by the delegates from certain republics, mainly Baltic States, Moldova, and Georgia. Notably, these republics most actively claimed sovereignty of republic level law from the union level law. Within the draft preparatory process and subsequent multiple negotiations with the opposing deputies from Latvia, Lithuania, Estonia, Moldova, and Georgia, the Kerimov's Commission could achieve a temporary political compromise in the form that the proposed CCS would not be extending its supervisory authority to the republic-level legislation until a new Union Treaty was passed, which, actually, never happened.[24]

The work of the Kerimov's Commission also demonstrates peculiar to the *perestroika* period debates around the issue of nominating the CCS members. Notably, according to the recent constitutional amendments, the USSR President enjoyed the right to nominate members of the CCS. This provision first raised opposition by some delegates within the commission itself. In this regard, as a part of sovereignty claims, delegates from the union republics repeatedly demanded the right to propose their own candidates. Some proposed a contested election of members by the Congress. After some debates, the commission decided to upheld the President's Gorbachev's constitutional prerogative to present his candidates for confirmation (or rejection), emphasizing that he would naturally consult with the republics.[25] However, the Congress decided to support the claims of some delegates and ruled that CCS members should not be the President's political appointees as it would affect their ability to review President's decrees. Therefore,

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[22] Kerimov's Comission, or Commission to Prepare a Draft Law of the USSR on Constitutional Supervision in the USSR. *Vedomosti S'ezda Narodnykh Deputatov. Verkhovniy Sovet SSSR* No. 1, item 24 (1989); *Izvestiia* No. 162, June 11, 1989, at 1, 7.

[23] For detailed discussion on CCS in English refer to Hausmaninger 1990, 1992;

[24] However, it should be noted here that out of 2250 deputies who voted to establish the Union CCS, 433 deputies voted against, 61 abstained, and 50 Lithuanian deputies left the premises in open protest of the Union CCS issue.

Refer further to Hausmaninger 1990, 293

[25] Kerimov's second report, *Izvestiia* No. 358, Dec. 24, 1989, at 2, 8.

it was decided that it would be a prerogative of a Chairman of Supreme Soviet to appoint such high-class judges.[26]

Another *perestroika* related feature is that the drafters decided to include the protection of human rights into the catalog of the competency of the CCS. Indeed, the initiative with inclusion of human rights attracts attention because of the following several issues. First, some commission members demanded that the clause on human rights would stipulate a free individual access (*actio popularis*) to the CCS. That would mean that individuals who believed their fundamental rights were violated, could have a standing to bring their claims to the CCS after exhausting all local remedies at the ordinary republic-level courts. Second, some deputies demanded that if the CCS finds that a normative act or provision violates fundamental human rights and freedoms secured by the Constitution of the USSR or by any international treaty to which the USSR is a party, such act or provision is immediately deemed invalid. While in the final reading the draft law on the constitutional supervision rejected the *actio popularis*, it confirmed the authority of the CCS to invalidate any law which infringed human rights. The latter point was adopted unanimously and did not face any resistance from union republics, whether Baltic or other states. Eventually, at the end of 1988, upon increasingly heated political debates, the Congress passed the 1989 Law on the Constitutional Supervision of the USSR (the 1989 Law) which eventually paved the way for the creation of the CCS.[27]

IV. THE ESTABLISHMENT OF THE CCS AND SELECTED JURISDICTIONAL ISSUES

The CCS started its work on May 1990. The 1989 Law contained 31 articles grouped into five parts: General Provisions, Membership and Process of Election of the CCS, Jurisdiction and Procedure of the CCS, Status of Persons Elected to the CCS, and Other Questions of the Organization of the CCS. This section will not provide a detailed examination of the law but rather focus only on several critical moments which laid the foundation of the Soviet and post-Soviet judicial review models.

Article 1 defined the objectives of the constitutional supervision in the USSR which aimed to promote "the conformity of acts of state organs and social organizations with the Constitution of the USSR and the constitutions of union republics and autonomous republics" and ~~to~~ protect "constitutional human rights."[28] Article 3 laid down the fundamental principles guiding the activity of all organs of constitutional

[26] Refer for a detailed discussion to Herbert Hausmaninger, "From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court," *Cornell International Law Journal* 25 (1992): 308

[27] *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).

[28] Art 1, *Ibid*.

supervision including, socialist legality, collegiality, and *glasnost*.[29] Article 5 provided that members of the CCS to be elected from among "specialists in the area of politics and law."[30]

The 1977 Constitution and the 1989 law granted standing only to several public high organs to initiate judicial examination of union level normative acts including the Presidential and Council of Ministers decrees which represented the executive branch. The CCS members also had the authority to initiate a review on their own prerogative. Indeed, the biggest part of the total 29 cases produced by the CCS during its short 19 months life, came as a direct initiative of the CCS judges. Such fact may raise justified doubts regarding the impartiality of reviewing the cases initiated by judges themselves. Furthermore, in those cases the CCS reviewed mainly acts violating fundamental right and freedoms.

As mentioned earlier, in light of some union republics' sovereignty claims it was agreed that the CCS would not extend its review to republics' laws until adoption of the new Union Treaty. To note, this contradictive treaty was never signed. However, notwithstanding the issue of non-existent treaty, the CCS obtained the authority to immediately invalidate any union or republic level law which violated human rights stipulated by the Soviet constitution or any international treaty ratified by the USSR.[31] As for the other types of the acts, the CCS had no authority to repeal.

The CCS, upon its examination of a certain normative act, issued a finding annexed by the analysis and opinion on constitutionality or unconstitutionality of specific act. Such findings had mainly advisory and suspending force. Human rights were the only exclusion. The content and style of the findings point to several critical points. The findings from several cases show extremely brief text with almost no or vague references to the legal sources. The language abounds with sweeping generalities and often lacks legal precision. The CCS's opinions are devoid of the rigorous interpretation and analysis that marks their Western counterparts. They also convey no sense of opposing viewpoints to a constitutional dispute or of scholarly theory. To mention, all of the CCS's decisions were unanimous. Dissents have been few and brief whereas open sessions were held very restrictively.[32]

Main Findings

The mere fact of establishing a pioneer constitutional review system in the Soviet Union had resulted in multiple opinions from legal theorist both within and outside the country. Some questioned the effectiveness of the CCS 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. Some scholars contested the role of the CCS in disputes between the union and republic level governments.

[29] Article 3; [Rem] *Glasnost'* means openness.

[30] Article 5; The establishment of minimum and maximum age requirements, as suggested by Deputy Kryzhkov, was rejected by the Commission as arbitrary and without scientific foundation. *Izvestiia* No. 358, Dec. 24, 1989, at 2, 8.

[31] Article 124 of the 1977 Constitution of the Union of the Soviet Socialist Republics. Article 21 of the 1989 Law.

[32] Article 17 of the 1989 law stipulated a provision on open meetings.

Deliberations in the preparatory process of the 1989 law evidence that initial constitutional review model in the Soviet Union had indeed emerged in the context of sophisticated and unique environment.

While the negotiations on the top-level witness of multiple suggested scenarios on the future composition and functions of the CCS, there was one critical aspect in the background which eventually affected the effectiveness of the constitutional supervision in the late-period USSR. In particular, from the very beginning, even before the adoption of the law on CCS, there appeared an unbalanced dualism as the supreme legislation secured for itself an unlimited authority in constitutional supervision. This supervision was subsequently named as parliamentary and co-existed with a specialized constitutional supervision practiced by the CCS. Furthermore, such parliamentary supervision was theoretically under the auspices of the Supreme Party Control. Separately, it is worth of mentioning of a procurator's supervision system (*Prokurorskiy nadzor*), which in the former USSR pertained very wide authority and, thus, questioned the competence of the constitutional supervision. In other words, in the former Soviet Union, the competence of the CCS was simultaneously duplicated by multiple actors, including, the President, legislation and procuracy.[33]

These specific moments help to understand to what actual extent the CCS judges could embark on a mission to initiate and review the constitutionality of normative legal acts. This also included several unprecedented cases, when the CCS declared the decree of the President and the USSR security related regulations as unconstitutional. In the first case, the CCS found that the President Gorbachev had violated constitutional provisions on freedom of assembly of citizens when he signed a decree which attempted to regulate demonstrations in the capital city. In the second case, it has found that some security related acts contained vague provisions which eventually violated fundamental freedoms.

CCS existed until December 23, 1991 and during a short span of its existence produced two dozen findings mainly about human rights violations by Union law and executives including on the ground of such international human rights treaties as the ICCPR and ICESCR. Most cases and subsequent findings came as the CCS's own initiative because of the judicial passivism from organizations which enjoyed standing and multiplicity of actors who could perform a constitutional review in the former USSR. On the other hand, available case-law from CCS definitely present a positive development in the newly emerging field of law in the USSR and, subsequently, the post-Soviet space. Furthermore, there are certain signs of judicial activism performed mainly by the judges of the CCS, specifically in the field of protection of human rights - the area which was left widely ignored by the pre-*perestroika* judiciary. Simultaneously, Soviet legal scholars, somewhat to their discredit, failed to analyze every finding of the CCS critically and ~~to~~ enter into a public dialogue to develop constitutional doctrine and educate further politicians and the population about the values of separation of powers and the rule of law.

[33] Yu. Shul'zhenko, *Konstitutsionniy Kontrol' v Rossii* [Constitutional Review in Russia], (*Moskva, RAN, Institut Gosudarstva i Prava*, 1995), 101.

V. THE ESTABLISHMENT OF THE CCS IN THE UZBEK SSR

Article two of the 1989 law established several layers of constitutional supervision to correspond with the federative organization of the Soviet Union. Thus, the article two introduced the CCS of the USSR and provided for organs of constitutional supervision to be created in the union republics and autonomous republics. The Kerimov's Commission clarified that the republics may establish their own organs to supervise the conformity of republic law with republic constitutions. It was considered that these organs would act in complete independence from the CCS of the USSR. Hence, in theory, the Union level CCS was not placed at the top of the hierarchy, except for the matters related to the protection of the fundamental rights and freedoms. Practically, there are some doubts with regard to complete independence from the Union level CCS.

In March 1990, the delegates of the Uzbekistan's Supreme Council, during its first plenary session raised the necessity of adopting a separate statute on constitutional supervision in the Uzbek SSR, Their deliberations soon resulted in regulation on establishing a special Commission on the Draft Law of the Uzbek SSR on Constitutional Supervision.[34] A prominent (however, non-legal) scientist Khabibullaev chaired the Commission of 13 members that took a responsibility to prepare a draft law and forward it to the Permanent Commission of the Supreme Council of the Uzbek SSR for further deliberations. In June 1990, the delegates of the Supreme Council in their plenary session, among 21 critical issues, had also raised several aspects of the future Committee of the Uzbek SSR on Constitutional Supervision (Uzbek SSR CCS) and its composition. Khabibullaev pointed that constitutional supervision had recommended itself as a vital institution that demonstrated a positive practice for several decades in many democracies.[35] He also pointed out that the commission elaborated a draft law in accordance with the CCS' authority and the main organizational principles as reflected in the article 116 of the 1978 Constitution of the Uzbek SSR.[36] The draft law was composed of five sections and 31 articles. The drafters also included a provision that the members of the CCS would be elected by the Supreme Council of the Uzbek SSR out of specialists in the fields of law and politics for a term of ten years. When some delegates raised their concerns about the ten-year term of the CCS judges, Khabibullaev said that "... as long as the CCS is [was] an institution

[34] *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.

[35] (Author remark) Obviously he mentioned 'review' rather than 'supervision', a nuance that also exists in the Russian language.

[36] *Ibid*, 184. *O'zbekiston Kengashining Majlislari. Ikkinchi Sessiya, 1990 yil 18-20 Iyun: Stenografik Hisobot. T*., 1992, 103-104. Also Article 116 of the "1978 Constitution of the Uzbek Soviet Socialist Republic" (1978).

subjected directly to the Constitution, the term of its justices should not be tied to the term of the delegates [Peoples' Deputies of the Supreme Council]".[37]

After a group of delegates commented and supported the work of the Commission, the Supreme Council adopted in June 20, 1990, the Law on the Constitutional Supervision of the Uzbek SSR. This law was enforced in July 1, 1990.[38] It mainly duplicated the 1989 law which laid the foundations of the union level constitutional supervision and the Union level CCS.[39]

VI. COMPOSITION OF THE CCS OF THE UZBEK SSR

After the delegates adopted the law, they recommended multiple candidates for the position of CCS judges mainly out of Supreme Council's delegates. Archival documents say that, in between the sessions, President Karimov suggested that composition of the CCS to be decided by a prominent Soviet legal scholar, Academician Urazaev, who was simultaneously recommended to take the position of CCS's chairman. This moment raises specific concern and question with regard to the actual authority of the President to make such proposal. Though similar initiative was rejected for President Gorbachev, one may think that in Uzbekistan SSR such a sensitive moment regarding nominations was omitted, and could potentially pave the way for the political appointments, notwithstanding the fact of Professor Urazaev's high prominence in Uzbekistan. Later, delegates approved the following Urazaev list of CCS judges. (Refer to Table I)

Table I. The members of the CCS of the Uzbek SSR as approved in June 1990.[40]

Urazaev Shavkat (Chairman)	Academician, Academy of Sciences of the Uzbek SSR, Juris Doctor, Professor
Kauymov Rauf (Vice-chairman)	Academy of Internal Affairs, Associate Professor
Velikanov Vladimir	State and Law Dept of the Central Committee of the Communist Party of Uzbekistan
Izambetov Tazhen	Nukus State University, PhD, Professor
Mirhamidov Mirshohid	Tashkent State University (V. I. Lenin) Juris Doctor
Nosirov Pulat	Academy of Sciences of the Uzbek SSR, Institute of Economics, Doctor of Economics
Saidov Akmal	VLKSM (Youth committee of the Uzbek SSR) Juris Doctor Candidate
Skripnikov Nikolai	Academy of Sciences of the Uzbek SSR, Institute of Philosophy and Law, Juris Doctor Candidate

[37] *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), 104-106.

[38] *Ibid*, 51.

[39] *Zakon Respubliki Uzbekistan o Konstitutsionnom Nadzore v Respublike Uzbekistan* N 93-XII (Outdated) (1990).

[40] Akmal Saidov, *O'zbekiston Konstitutsiyasi Tarihi* [The History of Uzbekistan's Constitution] (Tashkent: Tasvir, 2018), 146.

Teshaboev Mamatkhon	Tashkent Supreme Party School, Juris Doctor Candidate
Tojiev Tursun	Tashkent city, Legal consultant, Juris Doctor Candidate
Khakimova Saiyora	Procurator's Office of the Uzbek SSR Juris Doctor Candidate

VII. STANDING AND JURISDICTION OF THE CCS OF THE UZBEK SSR

Article 12 of the 1990 law listed the organs competent to submit questions to the Uzbek CCS. Upon the request by the Supreme Council of Uzbek SSR, the Uzbek CCS initiated procedures to revise the draft laws and other acts which remained under the consideration of the Supreme Council of Uzbek SSR itself.[41] With respect to existing laws of Uzbek SSR and other acts adopted by the Supreme Council of Uzbek SSR, not less than one-fifth of the local people's deputies, the President of Uzbekistan (this post was introduced in Uzbekistan first among Soviet Central Asian republics), the Chairman of the Supreme Council of Uzbek SSR, the Supreme Council of the Karakalpak Autonomous SSR could raise an issue with the Uzbek CCS.

The Supreme Council of Uzbek SSR could contest the edicts (*ukazy*) of the President of Uzbekistan. Upon the requests by the Supreme Council of Uzbek SSR or proposals from the President of Uzbekistan, the Chairman of the Supreme Council of Uzbek SSR, and the Supreme Council of the Karakalpak ASSR, the Uzbek CCS could initiate review of the Constitution and existing laws of the Karakalpak ASSR. Mentioned public actors could also raise an issue with the Uzbek CCS regarding the decrees (*postanovleniya*) and regulations (*rasporyazheniya*) of the Council of Ministers of Uzbek SSR, international treaties and other obligations of Uzbek SSR.

Finally, apart from the existing actors, the 1990 law also stipulated standing for the Permanent Commissions of the Chambers and Committees of the Supreme Council of the Uzbek SSR, Council of Ministers of Uzbek SSR, Committee of People's Control, the Supreme Court of the Uzbek SSR, the Procurator General, the Chief State Arbitrator, republic level social organizations, and the Academy of Sciences of Uzbek SSR.[42] Moreover, the CCS of Uzbek SSR was authorized to independently initiate examination of conformity with the Constitution and laws of Uzbek SSR, all acts of the supreme organs of public power and administration of Uzbek SSR, and other organs that were formed or elected by the Supreme Council and the People's Deputies Council.

A Chairman, a Deputy-Chairman, and other CCS members had the standing authority. The 1990 law did not stipulate the exact number of the Uzbek CCS judges' votes for the issue to be raised before, but rather required a simple majority of votes by the respective members. Hence, in general terms, the 1990 law stipulated a limited circle of public actors who pertained an exclusive authority to raise issue before

[41] Article 12 of the 1990 law.

[42] These bodies could raise issues pertaining to normative legal acts of other public organs and social organizations which did not fall within the authority of procuracy supervision

the CCS, namely the Supreme Council, the President, one-fifth of parliamentarians, the Council of Ministers and a limited number of public officials. The 1990 law provided no standing for individuals to bring their claims before the CCS. It only stated that citizens and other actors who had no standing to initiate constitutional supervision could bring their concerns through the entitled organs discussed above.[43]

VIII. PROCEEDINGS AND CASES

Upon analyzing the conformity or non-conformity of the examined act or draft (or its individual provisions) with the Constitution, laws of the Uzbek SSR, and in cases where a matter of supervision touched upon the international legal obligations, the Uzbek CCS issued a statement-finding (*Zakluchenie*) with a 'well-reasoned' written opinion with the elements of legal references, comparison and legal argumentation.[44] However, even if such statement-findings contained opinion on constitutional non-conformity of examined items, they did not suspend the applicability of respective laws and other acts adopted by the Supreme Council of the Uzbek SSR. Furthermore, the Supreme Council could reject any finding of the CCS upon a two-third majority of vote at the following session.[45] The only case in which the conclusion of the CCS could immediately invalidate a normative act or any of its individual procedures occurred in the case of infringements to human rights secured by the Constitution of the Uzbek SSR or international treaties to which Uzbekistan was a part.

In 1990, the Supreme Soviet of Uzbek SSR adopted the 1990 Resolution on Managing Public Demonstrations, which restricted individuals from organizing meetings and demonstrations in the streets and other public areas.[46] This Resolution limited citizens' right for public demonstrations and protests. In particular, it allowed holding protests only inside the buildings (indoors), and after obtaining formal permission from public authorities. The drafters of the Resolution stated that organizing mass demonstrations, meetings, and protests in public areas, including in the streets, parks, and squares, would entail risks related to public security concerns. To ensure effective compliance, the drafters also stipulated a provision that any failure to conform with the requirements of the Resolution would entail criminal responsibility.

To implement this Resolution in practice, the Tashkent City Council (*Gorsovet*) had issued in the same year the order on a temporary ban of mass protests and demonstrations in the Tashkent city. Following this move from city authorities, citizens submitted a petition (*obrashenie*) to the CCS of Uzbek SSR with a request to review the constitutionality of the Resolution and reaction of the Tashkent city authorities.

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[43] Article 12 of the 1990 law.

[44] Art 18, *Ibid*

[45] *Ibid*

[46] *Ukaz Prezidiuma Verkhovnogo Soveta Uzbekskoy SSR, Ob Uporyadochenii Organizatsiy i Provedeniya Sobraniy, Mitingov, Ulichnih Shestviy i Demonstraciy v Uzbekskoy SSR* (1990).

In its decision, the CCS stated that although there was a conflict between the requirements of the 1990 Resolution and the constitutional provision on the freedom of expression as enshrined in article 48 of the 1978 Constitution, the Committee nevertheless upheld the constitutionality of the Resolution. As a justification, the CCS pointed to the art 37(2) of the Constitution, which permitted the restriction of certain fundamental rights, which potentially could have damaged the state or social interests or interests of citizens.[47]

The CCS further interpreted the constitutional provision enshrined in article 37(2) in a way that the Supreme Soviet, while being the sole and supreme representative of people's will, was eligible to pose such restrictions. Hence, according to the CCS interpretation, "people [were] the sole source of power. Its representative, the Supreme Soviet, acting in the name of people, could resolve the issue in a way that would conform with peoples' interests."[48] Hence, the CCS ruled that the 1990 Resolution did not violate the constitutional provision on the freedom of expression and freedom of assembly. By referring to the actual text of the case, one may notice that judges failed to provide enough and well-reasoned legal argumentation and analysis in support of the constitutionality of the 1990 Resolution.

However, there was yet a positive aspect of CCS's decision. Having examined the Tashkent City Council's order of temporary ban on mass protests and demonstrations in the city, the CCS found a grave violation of article 48 of the Constitution. By pointing to the unconstitutional limitation of citizens' fundamental rights, that CCS invalidated the executive order issued by the city council.[49] Although justification of the Resolution's constitutionality, on the one hand, and unconstitutionality of the city council's order on the other leaves many questions, this case at least shows the effectiveness of the CCS to outlaw disproportional measures resulting in executive orders.

Another case touches upon the labor related issues in the late yeast of the soviet Union. In 1988, following the *perestroika* in the state economic management sector, the Supreme Soviet of the USSR adopted the Resolution amending the Union-level Labor Law.[50] This Resolution legally enabled the employer to terminate the labor contracts with those workers whose age permitted receiving a pension. In other words, this Resolution granted the employer an authority to terminate a labor contract with a pension-age employee without a preliminary agreement from the labor union and regardless of such an employee's wish to continue the job.

After this Resolution was passed from the union to republic level, the Supreme Soviet of the Uzbek SSR had accordingly amended the article 41(1) of its Labor code. In 1992, CCS of Uzbekistan initiated a

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[47] *Zakluchenie Komiteta Konstitutsionnogo Nadzora Uzbekskoy SSR* (*O konstitutsionnosti Ukaza Prezidiuma Verkhovnogo Soveta Uzbekskoy SSR, Ob uporyadochenii organizatsiy i provedeniya sobraniy, mitingov, ulichnyh shestviy i demonstratsiy v Uzbekskoy SSR*) (1990). 1-3.

[48] Ibid.,2.

[49] 3.

[50] Article 95, *Ukaz Prezidiuma Verkhovnogo Sovet SSSR o Vnesenii v Zakonodatel'stvo Soyuza SSR o Trude Izmeneniy i Dopolneniy Svyazannykh s Perestroykoy Upravleniya Ekonomikoy*," *Vedomosti Verkhovnogo Soveta* No. 6 (1988).

review of article 41(1) of the Labor code after receiving several complaints about the discriminatory character of the article. In the course of the judicial examination, the CCS concluded that article 41(1) of the Labor code violated individual's right for labor enshrined in the article 38(1) the 1978 Constitution, which provided;

> Citizens of the Republic of Uzbekistan have the right to work - that is, to receive guaranteed work with remuneration in accordance with the quantity and quality and not lower than the minimum wage established by the state, - including the right to choose a profession, occupation and work in accordance with vocation, abilities, professional training, education and considering social needs.[51]

Apart from the constitutional provision, the CCS stated that age-based dismissal was inconsistent with the Resident Employment Law and, thus, sharpened discrimination of retired persons in the employment and labor area.[52] Furthermore, the CCS found that the article of the Labor code conflicted with the Pension Securities Law, which formalized a voluntary nature of the retirement in the USSR.[53]

Judges have noted that the named article of the labor code contained a provision that factually legalized compulsory terminating of a labor contract with individuals reaching retirement age. Judges also noted that mandatory termination of a labor contract, apart from limiting certain guarantees and compensation, also affected the right of a retired individual to seek reasonable justification of a dismissal in the court. As a matter of fact, many judges, when dealing with similar cases, only upheld the decision of the employer after establishing the fact of plaintiffs achieving full retirement age and right for a pension. In the instant case, the CCS, by pointing to the discriminative character of the dismissal as provided in article 41(1) of Labor code, ruled on its unconstitutionality and invalidated it.[54]

Notably, earlies similar case was initiated in the union level CCS.[55] Whereas the Union-level CCS started the initial examination of this Resolution in the final days of the USSR in 1991, it was the Constitutional Court of Russia that issued a final decision on this case in 1993 and similarly found the dismissal provision as unconstitutional.[56] Russian judgment even goes further in its logic and justification of the case by citing international human rights instruments, particularly regulations of the International Labor Organization, and even provides some dissents from individual judges.[57]

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[51] Article 38(1) of the 1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution), (1978).

[52] Article 5, *Zakon Respubliki Uzbekistan o Zanyatosti Naseleniya,* Pub. L. No. 510– XII (1992).

[53] *Zakon o Pensionnom Obespechenii Grazhdan v SSSR*, Pub. L. No. 1480–1 (1991).

[54] *Zakluchenie Komiteta Konstitutsionnogo Nadzora Respubliki Uzbekistan (O konstitutsionnosti normy, zakraplennoy v punkte 1 statyi 41 Kodeksa Zakonov o trude Respubliki Uzbekistan)* (1992).

[55] *Zakluchenie Komiteta Konstitutsionnogo Nadzora SSSR No.20 (O polojeniyakh zakonodatel'stva, ogranichivauyshih ravenstvo vozmojnostey grazhdan v oblasti truda i zanyatiy)* (1991), 68-69.

[56] *Postanovlenie Konstitutsionnogo Suda RF po delu o proverke konstitutsionnosti pravoprimenitel'noy praktiki rasstorjenie trudovogo dogovora po osnovaniuy, predusmotrennomu punktu 1 statyi 33 KZot* (1993), 29-37.

[57] Ibid, *Osoboe mnenie sudyi Konstitutsionnogo Suda RF G.A. Gadzhieva*

CONCLUSION: CONTEMPORARY CONSTITUTIONAL COURT OF UZBEKISTAN AND REVIEW WITHIN THE STRONG STATE CONTEXT

This late Soviet practice of constitutional review offers some lessons for contemporary Uzbekistan. As mentioned, the story of Uzbek constitutional review began in the late Soviet period. Delegates from the then-Soviet Republic of Uzbekistan participated in the Soviet-level discussions of a socialist version of constitutional law. Most notably, this included Urazaev, and another prominent Soviet legal scholar Agzamkhodzhaev who also served as a judge on the Soviet Union level CCS. In 1990, the Uzbek SSR also adopted a CCS with authority that was largely identical to that of the Soviet-level CCS. The Uzbek CCS also issued very notable decisions that demonstrate a greater respect for fundamental rights. It is however, also highly likely that the Uzbek CCS was simply a top-down imitation of the Soviet model.

In 1992, Uzbekistan achieved independence and became the first post-Soviet republic to adopt a written constitution. This 1992 Constitution included a long list of fundamental rights and a European-style, stand-alone Constitutional Court. The 1993 law implementing this new Constitutional Court of Uzbekistan[58] afforded it a significant power, including the power to strike down executive acts and formal laws based on the 1992 Constitution. This power notably included the authority to invalidate acts based on constitutional invalidity. Formally, this appeared to be a step forward.

This newly empowered court however has not emerged as a powerful force for constitutional implementation. One key problem was of personnel as the newly independent Uzbekistan had very few constitutional law experts except for Urazaev, Khakimova, and Saidov. Moreover, another key problem was the return of unbridled centralism to the post-Soviet space, particularly Russia and Central Asian republics.[59] In 1995, amidst large-scale economic depression and political instability, presidents across the post-Soviet space argued that checks and balances on presidential power weakened their ability to respond to challenges. Uzbekistan's then-president, Islam Karimov, was no exception. Although the Uzbekistan's Constitutional Court had not yet exercised its power to strike down laws or executive acts, Karimov pushed through amendments to the 1993 law that removed the Court's power to invalidate laws and presidential acts within 'certain span of time'. These amendments neutered Uzbek constitutional review before it even had a chance to begin. Despite a long list of rights in its post-Soviet 1992 Constitution and a separate constitutional court, Uzbek constitutional review has been largely non-existent up to now. In fact, over almost 27 years, the Court has issued barely about 20 cases.

Presently, the Soviet-level debate and practice of constitutional supervision offers a possible source for beginning the largely unrealized project of Uzbek constitutional review. First, this debate is in Russian and is readily available to scholars and judges in the region. Second, this late Soviet-era debate and its

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

[59] William Partlett, *Late Soviet Constitutional Supervision: A Model for Central Asian Constitutional Review?* Int'l J. Const. L. Blog, Oct. 2, 2019, at: http:/www.iconnectblog.com/2019/10/late-soviet-constitutional-supervision-a-model-for-central-asian-constitutional-review/ accessed on July 29, 2020.

institutional practice at the Soviet level offer a way of viewing constitutional review not as a western transplant with no relevance to Uzbek practicalities but instead as a practice that is in line with its needs and requirements. In particular, recovering this history can help reformers better understand how constitutional review was justified in a highly centralized regime. For instance, a key theme in the Soviet-level debates about the CCS was the importance of constitutional review in overcoming the vast number of contradictory executive decrees and pronouncements. The problem of conflicting executive pronouncements remains a significant issue in Uzbekistan today. This kind of justification can therefore emerge as the foundation for a more focused and more persuasive discussion of the necessity of constitutional review in the region.