Discussion Paper No.19

Emergence and Features of the Constitutional Review Bodies in Asia:

A Comparative Analysis of Transitional Countries' Development

Edited by Aziz Ismatov and Emi Makino

August, 2020

Nagoya University
Center for Asian Legal Exchange

Center for Asian Legal Exchange (CALE)

Nagoya University, Japan

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FOREWORD

This research discussion paper provides a study on theory and practices of constitutional review developments in five selected Asian jurisdictions, Myanmar, Singapore, Korea, including Russia and Uzbekistan, which in some scholarly works are also addressed as Eurasia. The objective is to create systematic narratives to document theoretical grounds and practical aspects of constitutional review, collect and present to a broader audience comparative, historical, analytical, and critical perspectives covering constitutional judiciary in Asia. We hope that this collection will be of high interest for scholars, practitioners, and students of comparative constitutional law, human rights, democracy, the rule of law, constitutional adjudication, and Asia's legal systems.

The general philosophy of constitutional review presupposes that constitutional courts are established to limit or balance executive and legislative branches' activities. In such circumstances, scholars and practitioners expect that constitutional courts would work as neutral arbitrators among the two branches. Simultaneously, the vital role of the constitutional court which is a protection of fundamental rights is sometimes neglected within the broader context of political involvement.

Contributors to this discussion paper were all invited to attend the workshop on Emergence and Features of the Constitutional Review Bodies in Asia held at the Department of Law, University of Yangon, on October 22, 2019, and present their draft papers for this workshop. This research project was made under the auspices of Core-to-Core Program: Asia-Africa Science Platforms 'Advancing Research in Asian Constitutionalism - Establishing a Transnational Research Network to Promote Human Rights and Legal System' and, Grants-in-Aid for Scientific Research 'Commencement of the ASEAN Community and the Emergence of Heterologous Constitutional Profiles in the Region.' Both projects are funded by the Japan Society for the Promotion of Science (JSPS). The manuscripts submitted by the participants to the workshop were later revised and prepared for this unique publication.

The primary aim of the present research series is to analyze the theoretical background and practical experience of the constitutional review bodies in the context of comparative aspects with foreign constitutional review bodies. Also, it will seek to understand the concept and ideas on constitutionalism in Asia and constitutional review bodies' place in it. This workshop involved researchers from Japan, Korea, Singapore, Myanmar, and other jurisdictions. The participants had an opportunity to share their views with colleagues and learn from each other in terms of historical features, duties and functions, and selected cases of constitutional review bodies in different countries. This workshop also strengthened the relations between involved scholars and contributed to the creation of the international research network on Constitutionalism in Asia.

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CONTENTS

List of Authors

Justice. Hla Myo Nwe holds the position of Member of the Constitutional Tribunal of the Republic of the Union of Myanmar since 2013. She completed LL.B and LL.M degrees from Art and Science University, Yangon, Myanmar in 1976 and 1982 respectively. After graduating, she became a Tutor at her alma mater for two years and later joined the International Law and Treaties Department, Ministry of Foreign Affairs from 1980 to 2013, where she became Deputy Director General. During her diplomatic career, she served at Myanmar Embassies in Malaysia, the Philippines, Thailand, Singapore, Egypt and the United Kingdom. She was also assigned as the Co-Agent of the Republic of the Union of Myanmar over the Maritime Boundary Delimitation Case with Bangladesh at the International Tribunal for the Law of the Sea (ITLOS).

She has given numerous presentations at both international and local conferences, meetings and workshops relating to law. Her significant publication is the book, The First Case in the History of Myanmar by Settling the Dispute on the Maritime Boundary Delimitation. She also wrote many articles in local newspapers and law journals. Last year, she participated in the Second International Symposium of the Asian Association of the Constitutional Court and Equivalent Institutions (AACC) and she wrote the research paper on Constitutional Review in Myanmar.

She has also strongly advocated for the rights and protection of Myanmar nationals working overseas. During a career, spanning 45 years, she has developed a reputation for a tireless work ethic, dedication and commitment.

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In 2007-2008, she participated as a commissioner of the Drafting Commission of the Constitution of the Union of Myanmar. In this current position, Dr. Khin Phone Myint Kyu is engaged as a member of the ASEAN Law Association (Myanmar) and Curriculum and Syllabus Committee of Civic and Moral Subject for Basic Education. Her research interest is in the field of Family Law, Civil Law, and Public Law. She has published her research papers in the field of Family Law, Comparative Legal Education, Civil Law Legal Education, and Public Law.

Khin Khin Oo, Professor at the Department of Law, University of Yangon (Myanmar), received her LLB (1993), LLM (1997), and PhD in Law (2005) degrees from University of Yangon. Her teaching career has begun as tutor at Law Department of Dagon University in 1995; and afterwards she has been teaching and researching at a number of Myanmar universities' law departments. Her area of specialization is civil law – particularly criminal law, family law, constitutional law and administrative law, corporate law and child rights. In 2004, she did part of her research for PhD degree at International Institute for the Rights of the Child (IDE) in Sion, Switzerland. She was a

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He published many articles and books on Constitutional law and North Korean laws. His recent publications include; Understanding on Korean Unification Law (2018), and Peace and law (2018), Understanding on Constitutional Law of Korean Unification (2016), 70 Years of Korean Politics (co-author), Academy of Korean Studies Press (2015), Law and Policy on Korean Unification: Analysis and Implications (co-author), Korea Institute for National Unification (2014). Currently, he serves as Director at Center for Constitutional Law and Korean Unification Law, Seoul National University.

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Jaclyn has published in leading journals in her field, including the International Journal of Constitutional Law (I-CON), Oxford Journal of Law and Religion, Human Rights Quarterly, and the Singapore Journal of Legal Studies. She is the sole editor of Constitutional Interpretation in Singapore: Theory and Practice (Routledge, 2017) and co-editor of Pluralist Constitutions in Southeast Asia (Hart, 2019), and Regulating Religion in Asia: Norms, Modes, and Challenges (CUP 2019). Her work has been cited by the courts in Singapore and by the Supreme Court of India.

Jaclyn is the Director of NUS' Centre for Asian Legal Studies, and currently serves on the Singapore Law Society's Public and International Law Committee and the Singapore Academy of Law's Law Reform Committee. She is an elected Council Member of International Society for Public Law (ICON-S) and the co-founder of the Singapore Chapter of ICON-S. Jaclyn has held visiting positions at Frankfurt University, University of Münster, University of Trento, Melbourne Law School, the Woodrow Wilson School of Public and International Affairs at Princeton University and the Max Planck Institute for the Study of Religious and Ethnic Diversity. She is also a consultant with WongPartnership, a leading law firm in Singapore.

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LL.B in International Law from the University of World Economy and Diplomacy (Uzbekistan). Dr. Ismatov also worked as a visiting scholar at Melbourne Law School (Australia, 2019) and as a visiting intern at Institute for East European Law (Germany, 2013). He is a member of Australasian Association for Communist and Post-Communist Studies (AACaPS), and Asian Law and Society Association (ALSA). He is also the Editorial Board Member of the Asian Law Bulletin (ALB), and Uzbek Journal of Legal Studies (UJOLS).

In his current position, Dr. Ismatov is engaged in legal cooperation, research and education in Asia. Dr. Ismatov's research centers specifically on countries in transition from socialism to a market economy. In his publications (for ex.) "Equal Citizenship, Language, and Ethnicity Dilemmas in the Context of the Post-socialist Legal Reforms in Central Asia." (Palgrave Macmillan, 2020), he focuses on human rights, democracy, and the rule of law dilemmas in the post-socialist command type states. In another recent work, "Constitutional Judiciary's Role in Democratization Process in the Post-Soviet Central Asia. The Constitutional Court in Uzbekistan." *Asian Law Bulletin*, 2020, he ties the emergence of constitutional review institutions in 'new democracies' with a wider international political goals, and discusses how such situation eventually affects constitutionalism.

1. Future Perspective of the Constitutional Tribunal of the Republic of the Union of Myanmar

Justice. Hla Myo Nwe[*]

Abstract

There are different models of constitutional review systems all over the world. Likewise, the scope of jurisdiction of constitutional review bodies such as Constitutional Courts, Constitutional Tribunals, Constitutional Council, or Constitutional Chamber may be drawn wider or narrower. Myanmar had exercised decentralized constitutional review system under the 1947 Constitution. At present, Myanmar exercises the centralized constitutional review under the 2008 Constitution by conferring this power to the Constitutional Tribunal. The main objective of the Constitutional Tribunal is to interpret the provisions of the Constitution, to scrutinize whether or not laws enacted by the legislature and functions of executive authorities conform with the Constitution, to decide on constitutional disputes according to section 46 of the 2008 Constitution. The purpose of this paper is to analyze the structure and subjects of constitutional review exercised by the Tribunal, to express the Tribunal's standards of review when considering the constitutional matters, the policy of Tribunal and the effect of review of the Tribunal. It also includes the future perspective of the Tribunal concerning the Union Peace Accord of Myanmar and the role of Tribunal in the federal system.

[*] Member of the Constitutional Tribunal, Republic of the Union of Myanmar.

I. HISTORICAL BACKGROUND AND EVOLUTION OF CONSTITUTIONAL TRIBUNAL

The British Empire colonized Myanmar (by then Burma) between 1886 - 1947, and, therefore, Myanmar's legal system is rooted in the British common law tradition. On 4 January 1948, Burma proclaimed the first 1947 Constitution of Union. Under this Constitution, Myanmar had been exercising a decentralized constitutional review according to Sections 25, 151, and 153. Previously, the power of constitutional review was vested in the Supreme Court to interpret the Constitution, to decide the constitutional disputes, and to examine the constitutionality of laws.

On 3 January 1974, the Constitution of the Socialist Republic of the Union of Myanmar (hereafter, the 1974 Constitution) was adopted. Under Articles 200 and 201 of the 1974 Constitution, the *Pyithu Hluttaw* (House of Representatives), which was a unicameral legislative body, exercised constitutional review. Such a review represented a classic socialist notion that rejected the separation of powers and placed a legislature on the top of the state hierarchy. Therefore, similarly to many socialist states, the legislature did not produce quality constitutional review decisions but merely exercised a sporadic interpretation of statues.

The current Constitution (hereafter, the 2008 Constitution) was adopted on 29 May 2008. The Union Constitutional Tribunal (hereafter, the Tribunal) was established on 30 March 2011 as a separate and independent institution for the first time in the history of Myanmar. The Tribunal was formed as a part of legal reforms in the transition from the military rule to the democratic system. Thus, the operation of the Tribunal, the authority and organizational structure have been regulated by the Constitution. The Law of the Constitutional Tribunal was enacted on 28 October 2010 during the era of the State Peace and Development Council. Several amendments were made on 21 January 2013 and 5 November 2014 by the *Pyidaungsu Hluttaw*[1] (Union Parliament) by Law No. 4/ 2013 and Law No.46/ 2014. Myanmar's legal system is a common law system, but in some cases, particularly the formation of the Tribunal, show that it is mixed with some concepts of civil law system.

II. STRUCTURE OF REVIEW

At present, Myanmar has been exercising the centralized constitutional review model under sections 46 of the 2008 Constitution since it was established in 2011. Section 46 of the 2008 Constitution provides;

[1] The *Pyidaungsu Hluttaw* (Union Parliament) comprises two *Hluttaws* namely *Pyithu Hluttaw* ((House of Representatives) and *Amyotha Hluttaw* (House of Nationalities), see Section 74 of the 2008 Constitution.

> A Constitutional Tribunal is authorized to interpret the Constitution, to scrutinize whether or not laws enacted by the legislature, check the constitutionality of functions of executive authorities, to decide on the Constitution disputes, and to perform other duties prescribed in the Constitution.

The Tribunal has the final decision in matters of constitutionality. It is stated in Section 324 of the 2008 Constitution that "the resolution of the Constitutional Tribunal of the Union shall be final and conclusive."

In the case of *The President of the Union Vs Dr. Aye Maung and 23 Representatives of the Amyotha Hluttaw (House of Nationalities)*[2], the Tribunal held that the Attorney-General should not submit the reference case for reviewing the previous judgment since the resolution of the Tribunal is final and conclusive.

The Tribunal performs abstract review *ex-post* under Section 322 (b) of the 2008 Constitution by vetting the constitutionality of laws. A request for a concrete review can be made by an ordinary court dealing with the case at hand *ex officio*. Section 323 of the 2008 Constitution describes as follows;

> In hearing a case by a Court, if there arises a dispute whether the provisions contained in any law contradict or conform to the Constitution, and if no resolution has been made by the Constitutional Tribunal of the Union on the said dispute, the said Court shall stay the trial and submit its opinion to the Constitutional Tribunal in accord with the prescribed procedures and shall obtain a resolution. In respect of the said dispute, the resolution of the Constitutional Tribunal of the Union shall be applied to all cases.

III. THE SUBJECTS OF CONSTITUTIONAL REVIEW

Due to different legal cultures, political and historical circumstances, the constitutional review may take various forms. A Constitution may permit the legal dispersal of legislative power in the form of constitutional review. Constitutional review is the guardian of the Constitution and safeguards the fundamental rights of citizens.

Constitutional review is a necessary element or ingredient of the Constitution. It prohibits all sectors and state institutions from restraint arbitrariness, oppressiveness, and abuse of power. It keeps the democracy flourishing and democratic principles by reviewing all state organs and all government officials to be conducted within limited power. The main objective is to maintain the supremacy of the Constitution, to safeguard the fundamental rights of the citizens, and to strike down any law inconsistent with the Constitution. It is crucial to assess whether the constitutional review between three sectors (executive, legislative, and judicial) is acceptable and practicable.

The Constitutional Tribunal of the Union of Myanmar assesses *inter alia* the elements of constitutional review as:

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[2] Submission No.2/2012**,** Decisions of the Tribunal, 2012.

(1) there must be an actual case or cause of action or controversy that requires the exercise of judicial power;

(2) the subject act or issue is questionable or has valid reasons.

There is no single proportionality test adhering to the Tribunal, and the application of this test relies on a case by case basis. The policy of the Tribunal is to strictly adhere to the concept of peace, equality, justice, freedom, cooperation, and fair decision.

1. Parliamentary laws and Statutes

Parliamentary laws and statutes are usually subjects of constitutional review. Section 322 (b) of the 2008 Constitution granted the Tribunal the power to exercise *ex-post* review.

In the case of *Dr. Aye Maung and 22 representatives vs. The Republic of the Union of Myanmar*[3], the Tribunal delivered an unconstitutional ruling, striking down the provision of the Law Relating to Emoluments, Allowances and Insignia of the Region or State Level Persons, as the Tribunal stressed that Section 262(a) (iv) and 262 (e) of the 2008 Constitution defined the Minister of the National Races Affairs as the Minister of the Region or State concerned. The Tribunal ruled that these provisions clearly provide the Minister of the National Races Affairs and the other Ministers of the Region or State an equal in status without any discrimination. After the decision, the *Pyidaungsu Hluttaw* (Union Parliament) amended this law on 8 March 2013.

In the case of No.1/ 2015, *Dr. Aye Maung and 23 Representatives from Amyotha Hluttaw*, the Tribunal also ruled that provision of Section 11 (a) of the Law on Referendum for the Approval of the Bill Amending the 2008 Constitution which permits holders of the Temporary Identity Cards the right to vote, is unconstitutional with the 2008 Constitution.

Many countries have designed and developed a constitutional review to their own needs and domestic situation. The type and scope of review power may differ from one to another. This power ensures the rule of law and confirms whether the actions of the executive branch conform to constitutional guarantees. Some Constitutions grant an extensive range of review power. However, the Tribunal's power of review is limited. It is provided in Section 11 of the 2008 Constitution that the three branches are separated, to the extent possible, and they maintain a reciprocal control and ensure check and balance between each other.

2. Constitutional Amendments

The amendment of the Constitution is an alteration of specific provisions of the Constitution. Amendments are made to improve quality, add new provisions, or to invalidate existing.

[3] Submission No.2/2011**,** Decisions of the Tribunal, 2011.

In Niger, Senegal, and South Africa, constitutional courts have the power to review the constitutionality of constitutional amendments, but some constitutional courts do not have such power. In some countries such as India and Bangladesh, courts exercise decentralized constitutional review, whereas the supreme courts have the power to review the constitutionality on constitutional amendments. In Kyrgyzstan, constitutional amendments are subject to constitutional review.

In Myanmar's practice, amendment of the Constitution shall be proposed, processed, and decided by the Constituent Assemblies. The Tribunal has no implicit or explicit power to review the constitutionality of constitutional amendments.

The Constitutional amendments discussion has been under the process in Myanmar since February 2019. One of the *Pyidaungsu Hluttaw* members from the National League for Democracy (NLD), the current ruling party, urgently proposed to form a Joint Committee for amending the 2008 Constitution. After intense debate in the *Pyidaungsu Hluttaw*, the Joint Committee on Amending the 2008 Constitution was established with 45 members to make a detailed analysis of the proposed amendments of the 2008 Constitution.

Daw Nan Ni Ni Aye, a representative of *Amyotha Hluttaw* and 24 other representatives, submitted the case No. 1/2019 to the Tribunal. They requested to present a bill for the amendment of one particular Section of the Constitution. They claimed that since the bill is submitted in accordance with the Chapter 12 of the 2008 Constitution, it should be accepted and openly discussed at the *Pyidaungsu Hluttaw* in alignment with the provision of Section 435 of the 2008 Constitution, which stipulates the process of submitting to the *Pyidaungsu Hluttaw* the bill to amend the Constitution.

The Tribunal considered the following facts;

(i) whether or not there is a sufficient legal ground to claim for an interpretation of Section 435 of the 2008 Constitution;

(ii) there must be an actual case or cause of action obtaining for the exercise of judicial power;

(iii) whether the subject act is questionable or whether it has the valid reason to submit for constitutional interpretation;

(iv) whether or not the facts argued in the case are subjects that fall within the jurisdiction of the Tribunal;

(v) whether or not Section 435 of the 2008 Constitution requires interpretation;

The Tribunal found that Section 435 of the 2008 Constitution is a procedural provision, and the wording of that section is clear and complete, requiring no interpretation. It does not include any complicated and indecisive fact, either grammatically or in terms of terminology. After the Tribunal's review of legal issues and different methods relating to the interpretation, the Tribunal

decided that it had to give full effect to the plain language of this particular section, and the Tribunal had no authority to look into the consequences of interpretation. The Tribunal held that it was not permissible to interpret a specific provision that did not need an interpretation.

Submission No.2/2019 was initiated by Dr. Sai Sei Kyauk Sam, the representative of *Amyotha Hluttaw* from Shan State constituency and 24 other representatives, in order to obtain an opinion from the Tribunal concerning an urgent proposal to form a joint Committee on Amending Constitution composed of the *Pyidaungsu Hluttaw* members representing all political parties, proposed by its representative U Aung Kyi Nyunt from Magway Region constituency. They questioned the constitutionality of the formation of the Joint Committee under Chapter 12 of the 2008 Constitution.

The NLD members claimed the preliminary objection to the Tribunal stating that the submission of Submission No.2/2019 does not fall within the jurisdiction of the Tribunal since the formation of the Committee is decided by the Parliament's resolution. The Tribunal had to hear and determine the central legal issue whether the matter claimed in the submission fell within the jurisdiction of the Tribunal.

The applicants requested the Tribunal to decide whether or not the action of the legislative authority was in conformity with the 2008 Constitution. Under the 2008 Constitution, the Tribunal is authorized to check the constitutionality of the laws enacted by the legislature and the actions or measures of executive authorities. The power to conduct the constitutional review over the action or measure of the legislature is not vested upon the Tribunal. Thus, the Tribunal decided that the actions and resolutions of the *Pyidaungsu Hluttaw* are not within the competence of the Tribunal.

3. Parliamentary Resolutions

Parliamentary resolutions are also not subject to constitutional review in Myanmar as it is assumed that the constitutional review is a form of normative control, and a wide range of parliamentary resolutions are not to be covered within this framework.

A case named Submission No. 5/2014, submitted by U Aung Kyi Nyunt, and the other 26 representatives of *Amyotha Hluttaw* was cited here regarding the question of the constitutionality of proportional representation system for the election of *Amyotha Hluttaw*. The Tribunal pointed out that, firstly, the law proposed to adopt the proportional representation system in the *Amyotha Hluttaw* has not yet been enacted. Secondly, the decision remains to be settled at the *Pyithu Hluttaw* (House of Representatives) and *Pyidaungsu Hluttaw*. The parliamentary process has not yet been completed, and it requires to be finalized by the majority votes of both houses. The Tribunal has the power to review the constitutionality of enacted laws, but not bills, resolutions, and activities of the Parliament. For all these reasons, the Tribunal determined that the case had not covered the scope needed for the jurisdiction of the Tribunal.

In 2016, the Submission No.1/2016 presented by U Sai Than Naing, representative of the *Amyotha Hluttaw* and 22 other representatives, questioned one of the qualification clauses of members of the Tribunal, which make as eligible a person who is, in the opinion of the President, an eminent jurist. They also requested to interpret whether this provision is applicable only to three members chosen by the President under Section 321 of the 2008 Constitution.

The main issues of the case were;

(i) whether or not the involving the *Pyidaungsu Hluttaw* as a respondent in this case is contrary to the law;

(ii) whether or not the interpretation of the resolution which is decided and approved by the *Pyidaungsu Hluttaw* is contrary to the law, and whether or not the Tribunal has the jurisdiction over parliamentary resolution;

(iii) whether or not the new additional formation and expansion of the Tribunal's Law concerning Section 333(d) (4) of the 2008 Constitution is contrary to the 2008 Constitution.

The Tribunal decided that it had the power to check the constitutionality of the laws enacted by the legislature and the actions or measures of executive authorities. The authority to conduct the constitutional review over the actions or measures of the legislature is not vested to the Tribunal indeed. The Tribunal further decided that the actions and decisions of the *Pyidaungsu Hluttaw* are not within the competence of the Tribunal.

The Tribunal further ruled that Section 4 (b) of the Constitutional Tribunal Law, which only allows the President to nominate 'eminent jurist' as members, is contrary to the 2008 Constitution, and the submission was dismissed.

4. International Treaties and International Laws

As constitutions and laws are based on the history and culture of one country, each country has its unique systems and standards. But it does not mean that drawing out a universal constitutional value and principle is entirely impossible. One of the important duties of the constitutional courts and equivalent institutions includes harmonizing between the universal constitutional values and local values of one's country, during the recourse of adjudication.

International treaties are subjects of constitutional review in most countries such as Korea**,** Mongolia, Russia, Tajikistan, Turkey, Uzbekistan, Kyrgyzstan, and Kazakhstan. However, in Myanmar, international treaties are not subjected to the constitutional review. To ratify international treaties, firstly, the ministry concerned makes a complete assessment over the treaty, translates into Myanmar language, and submits it to the Union Attorney-General's Office to acquire legal opinions. Secondly, it is submitted to the Cabinet for approval. Thirdly, the ministry concerned seeks the final confirmation from the legislature.

Constitutions must adhere to the most fundamental norms of international law. Commonly, the executive branch is often assumed as the primary authority to ratify or withdraw from international agreements. However, some constitutions require legislative approval of treaties or even judicial involvement before the ratification of such treaties. Furthermore, some constitutions set limitations that may include mandatory or optional referendums.

Certain constitutions stipulate a provision that international obligations and treaties become part of the domestic law and that provisions of international treaties should be applied appropriately. Upon ratification of most international or regional treaties, countries implement explicitly-stated international or regional requirements through national mechanisms and institutions. In Myanmar, the recognition of the international treaty as part of the national legal system is connected with the ratification procedure. External factors, such as the role of international law and treaties, have a little influence or play a limited role in Myanmar.

In our view, international law is not the only determining factor (the factor to be considered by the Tribunal when reviewing the constitutionality of law) in constitutional review; rather, like some constitutional courts, it is referred to as a norm to be respected in the course of judgment if it deems necessary. International law and norms are respected when the Tribunal exercises its power of constitutional review. We believe that it is about a search for just and good principles or shared norms.

When the Tribunal takes into account human rights values, own local values, international and foreign precedents have minimal effect in determining constitutional issues. Domestic laws need to harmonize with ratified international agreements, and the duties prescribed under international agreements are to be consistent with the one countries' constitutions.

5. Other Acts of Executive Authorities

The constitutional adjudication system is generally expected to guarantee the citizens' fundamental rights from the abuse of power, violation of due process, and delay in action. The constitution should prevent any action, inaction, or misuse of power by executive authorities, which harms individual rights. Under Section 322 (c) of the 2008 Constitution, the Tribunal has the power to veto the actions of executive authorities of the Union, Regions, States, and Self-Administered Areas.[4]

In the case of *Chief Justice of the Union vs. Ministry of Home Affairs*[5], the Tribunal ruled that the 2008 Constitution stipulated a separate and independent existence between the legislative,

[4] The Union is constituted by seven Regions, seven States and the Union territories. The capital of the Union, Nay Pyi Taw is the Union territory under the direct administration of the President. The Self-Administered Divisions and Zones are delineated in respective Regions and States. See Sections 49 to 56 of the 2008 Constitution.

[5] Submission No.1/2011**,** Decisions of the Tribunal, 2011.

executive, and judicial powers. The judicial power empowered to the courts and judges is clearly stated in the 2008 Constitution. Therefore, the exercise of judicial power is permitted only to the judges who are entrusted by the 2008 Constitution. The Tribunal delivered that the conferring judicial power to administrative officers of the General Administration Department of the Ministry of Home Affairs is incompatible with the 2008 Constitution.

The constitutional courts and equivalent bodies also have jurisdiction over the competence disputes among state agencies, between state and local governments, and among local governments. In Submission No.3/2012, *The Speaker of the Mon State Hluttaw vs. The Republic of the Union of Myanmar,* the Tribunal ruled that the *Pyidaungsu Hluttaw* has the right to enact laws related to the matters prescribed in Schedule One (Union Legislative List) referring to Section 96 of the 2008 Constitution. Similarly, the Region or State Legislature has the right to enact laws related to the matters provided in Schedule Two (Region or State Legislative List) referring to Section 188 of the 2008 Constitution. Accordingly, the Tribunal decided that the exercise of legislative power to enact the Development Committees Law by the Mon State Legislature as a whole or any part of the Mon State is permitted by the 2008 Constitution.

6. Emergency Decree

Emergency decrees are not subject to constitutional review in Myanmar. In emergencies, the President may exercise the executive power of a Region, State or Self-Administered Area concerned, and entrust the executive power to an appropriate body or a suitable person. Although the President has the right to exercise the legislative power exclusively for executive matters, he may not entrust the legislative power to the above-stated body or person.

7. Impeachment Proceeding

The authority to hear impeachment proceeding of the Head of State or Head of Government is the typical function of the constitutional review and is found in many constitutional courts of the world. In some countries, the power of impeachment is vested to the constitutional courts or equivalent bodies. The Tribunal of Myanmar has no jurisdiction power on any kind of impeachment process. The impeachment process can be initiated only by the *Pyidaungsu Hluttaw* (Union Parliament) in Myanmar.

8. Electoral Process and Dissolution of Political Parties

Individual constitutions allow the power of review over the results of general elections and the dissolution of political parties. Some constitutions enable the electorate to recall its representatives in the legislative sector before the end of their term. Some also confer the power to decide on election

disputes to constitutional review bodies. Constitutions of Indonesia, Mongolia, Turkey, and Kazakhstan offer examples of such category of constitutional review.

In Myanmar, the Tribunal is not involved in the electoral cases and dissolution of political parties. The Tribunal exercises the power of constitutional review according to Section 322 of the 2008 Constitution because the Union Election Commission has such power.

In Submission No.1/2014, the Tribunal decided that the submission fell outside the scope of its competence, and agreed that the Tribunal was not in the position to intervene into questioning the constitutionality of the appointment of Lisu and Rawan National Races Minister in Kachin State, and the appointment of Lisu National Races Minister in Shan state.

The Tribunal's judgment is mainly based on the following points;

(i) The process of the election is reviewed as (a) the respected State or Division as a whole is fixed as a single constituency for the national races who are entitled to elect their representative ministers to Region or State Parliament. (b)national races candidates who want to contest in the election are required to present their names to Region/ State Election Sub-Commission. (c)the objection to the candidate is permitted to be lodged.

(ii) Due to this electoral procedures, the applicants in the present case shall have taken up their objection to Election Sub-commission during the process of election. The two options are offered to the applicant; first, to settle this matter with Election Commission when the constituencies for Lisu and Rawan races are fixed; second, to do the same when the list of the candidate is presented.

(iii) Instead of resolving this matter in question with the then authorities concerned, the present case is only put up to the Tribunal over two years, after changing the previous Election Commission.

(iv) The Tribunal observes that Union Election Commission Law, adopted in 2010, provides that the decisions and activities of the Commission are final and conclusive in the matters such as (a) electoral functions (b) the appeal and revision against decisions of the respective of Election Tribunal (c) activities in accordance with the Political Parties Registration Law.

(v) It is evident that the arrangement of constituencies, acceptance of candidates, a convening of the election, recognition of members of the various *Hluttaw* are to be conducted by multiple levels of Election Commission. Those who are not satisfied with the activities of the Commission are allowed to lodge objections within the limited time.

(vi) The Commission, on its own volition, has the right to request the relevant documents or case file relating activities of the various Election Sub-commission and render a decision that shall be final and conclusive.

(vii) With respect to the current submission, it seems that the Tribunal is requested to check the activities of the previous Election Commission. It is also found that the matter presented to the Tribunal occurred before the enforcement of the Constitution and the enforcement of the Tribunal Law.

(viii) As the decision of the Union Election Commission is final and conclusive, provided under the Constitution, the Tribunal is not in the position to intervene.

9. Constitutional Complaint

The judicial remedy of a constitutional complaint is a highly effective means of protection of fundamental rights and freedoms. Some aim to safeguard the constitutional rights by a single court empowered to restore the individual rights affected by an act of executive authority.

There may be individual complaints against laws, regulations, international treaties, administrative acts as well as complaints against judicial decisions which harm fundamental rights provided by their constitution. Omissions of administrative bodies and their acts also lead to the individual complaint. Individual complaint is an effective remedy to protect individual rights. If the constitutional complaint cannot be submitted to the court, the effective protection mechanism of individual rights cannot be established. Any individual rights shall be well protected from possible infringement by executive authorities.

The individual's right to complain about the alleged infringement of rights serves to prevent not only the unconstitutional action of the executive sector but to maintain one's domestic values and freedoms guaranteed by the constitution. In Myanmar, according to Section 377 of the Constitution, every citizen of Myanmar shall have the right to apply writs for the protection of their fundamental rights to the Union Supreme Court and the Tribunal.

IV. STANDARDS OF REVIEW

The Tribunal's statutory foundations include the 2008 Constitution. While considering a case, the Constitutional Tribunal considers legal and factual grounds of each case. In doing so, the Tribunal assesses the conformity of law amid facts to the fundamental constitutional values such as (a) whether or not the law or act are in conformity with basic norms and domestic constitutional values; (b) whether or not the law or act has consequences or negative impact; (c) whether or not the law or act requires.

V. EFFECT OF REVIEW

1. Delivering the Decision

The Tribunal carries out speedy disposal after hearing for the interpretation, opinion, or decision so far as possible and expected to announce the day of the hearing. The Tribunal renders interpretation and opinion with the consent of more than half of the members and passes decisions with the permission of more than half of the members, including the Chairperson.[6]

The Tribunal may apply the relevant provisions of the Code of Civil Procedure, the Code of Criminal Procedure and the Evidence Act whenever it is deemed to be relevant and appropriate with an aim to settle disputes under the Section 37 (a) of the Constitutional Tribunal Law. It also points out that the Tribunal applies the principle of *mutatis mutandis*.

According to Section 34 of the Constitutional Tribunal Law, the Tribunal may invite the Attorney-General of the Union as the *amicus curiae* if it deems necessary. The Tribunal may summon any person or organization concerned to testify and secure an opinion. All judgments are to be published except for the judicial deliberations of Tribunal's judges carried out within the Tribunal. The members have the right to give their dissented opinion, and it shall be recorded and kept confidential. Majority decisions or judgments shall be adopted by the Tribunal.

Concurring and dissenting opinions are the expression of plural methods and the reasons on which concurrence or dissents are assessed by logical, critical analysis by all judges. It means all judges of the Tribunal can give their own opinions freely without any interference from other authorities.

2. Legal Effect and Enforcement

Section 324 of the 2008 Constitution and Section 24 of the Constitutional Tribunal Law provide that the decision of the Tribunal shall be final and conclusive. The judgment upon the submission transferred from an ordinary court under Section 12 (g) of the Law on Constitutional Tribunal shall be effective in all similar cases. It signifies that the right to appeal or the right to revision by the parties is not allowed.

Section 35 of the Constitutional Tribunal Law provides that all the judgment passed by the Tribunal shall be declared in State Gazette. Decisions shall be bound and published for reference and kept as precedent cases.

All types of unconstitutional decisions have *erga omnes* effect. Section 198(a) of the 2008 Constitution states that if any provision of the law enacted by the *Pyidaungsu Hluttaw* (Union Parliament), the Region *Hluttaw*, the State *Hluttaw*, the Leading Bodies of the Self-Administered

[6] Section 22 of the Constitutional Tribunal Law.

Division or the Self-Administered Zone or any existing law is inconsistent with any provision of the Constitution, the Constitution shall prevail. Moreover, according to section 446 of the 2008 Constitution, existing law shall remain in operation in so far as they are not contrary to the Constitution until and unless they are repealed or amended by the *Pyidaungsu Hluttaw*. Generally, the decisions of unconstitutionality have prospective effect, and unconstitutional statute or provisions shall lose its effect, but further legislative action is required in practical aspects to be conducted by concerned executive authorities. The decisions of the Tribunal shall have a legal impact since its adoption and published in the official gazette.

VI. SPECIFIC LEGAL REMEDIES

Any extraordinary remedies, which are provided in the constitution, in addition to the decisions of the constitutional court, may include, *certiorari*, *mandamus*, *prohibition*, *quo warranto*, *habeas corpus*, and others. The legal remedies are discretionary and not compulsory. In most constitutional courts, the remedies are available within the jurisdiction of an individual application, but it is not under the subject of constitutional review.

Myanmar's Constitution does not mention what kinds of remedies can be invoked by the individuals applying writs to the Tribunal. The legislature could decide the remedies in the form of laws, or sometimes remedies could be specified in the regulation of the Tribunal, but up to now, such action has not taken place. The Tribunal, when decides cases, may take the opportunity to declare and determine what remedies are permitted, but we do not have such a case.

VII. THE RELATION BETWEEN THE UNION PEACE AGREEMENT AND THE ROLE OF THE TRIBUNAL IN THE FUTURE

The constitutional review is a cornerstone of judicial power. It plays an essential role in mediating the political process, a high-profile function of reviewing legislation for constitutionality, the essence of the Constitutional Court for encouraging peaceful resolution of political disputes and facilitating consolidation in democratic countries. It can be seen in the democratic transitional experience of some countries as in the South Africa case and South Korea case.

It can be seen that in most of the countries, constitutional courts are created during their democratic transition. The significant experience of South Korea, Thailand, Mongolia, and South Africa proves the role of the constitutional court to maintain the political stability in democratization.

Myanmar is undergoing a process of democratization, and it had convened three sessions of the Union Peace Conference, known as 21st Century Panglong Conference, and adopted a total of 51 basic principles to be included in the Union Peace Accord.

The second session was held on 29 May 2017, and 37 agreements were signed as a part of the Union Peace Accord. It affirmed the mandatory establishment of a separate and independent Tribunal. Currently, there are different views with respect to the establishment of the Constitutional Tribunal. Therefore, the 21st Panglong Conference affirms *inter alia* the establishment of a separate and independent Tribunal aimed to strengthen a federal democracy system. The Tribunal would become the judicial body to guard the implementation, compliance, and effective application of the terms and conditions of the Union Peace Accord.

The 21st Panglong Conference agreed *inter alia* that the Union must be based on democracy and federalism. Myanmar makes a lot of effort to expeditiously implement the steps towards amending the 2008 Constitution under the auspices of the 21st Century Panglong Conference[7]. It is also aimed to establish perpetual peace and national reconciliation.

The *Pyidaungsu Hluttaw* has taken the initiative towards the amendment of several provisions in the 2008 Constitution. The Joint Committee on Amending the 2008 Constitution is trying to draft amendments to the 2008 Constitution step by step and moving towards the Union based on democracy and federalism. The Committee received more than 3700 recommendations for amendments from various political parties and intended to draft an amendment bill based on its findings. In this regard, it can be found that seven political parties positively proposed 63 amendment recommendations concerning the Tribunal.

VIII. THE ROLE OF THE TRIBUNAL WITHIN THE FEDERAL SYSTEM

A greater depth of understanding of constitutional review in the federal system is crucial. The involvement of the type of constitutional review and the principles of interpretation that have been applied in other federations to resolve federal constitutional questions are also to be brought before the Tribunal. Potential issues for constitutional review will be escalated, and more strengths, weaknesses, and challenges should be assessed by the constitutional court in a federal system.

If we look at the federal features of the Constitution, especially in terms of legislative power, we will see that it recognizes two levels of government, each of which has constitutional authority in its own right and also divides legislative power between levels of government. The Federal Constitution provides rulings for resolving any conflict when each level of government exercises power. Under these circumstances, the role of the Tribunal becomes more vital. The allocation of exclusive or concurrent power may lead to more controversial issues.

[7] This conference is the Peace Conference of the Union held in 21st century and which is hostorically based on the Panglong Conference held in 1947. The historical Panglong Conference, 1947, that conducted series of negotiations between General Aung San and other ethnic leaders in 1947. All these leaders unanimously agreed and decided to unitedly struggle for independence from British colony in order to establish the Union of Burma as a whole.. In order to reflect this very important historical event,the 21st Century Panglong Conference is held to negotiate between the ethnic leaders and all stakeholders enabling to establish the peace in the entire Union of Myanmar and reform the democracy federal state.

The federal system may prescribe the three-fold distribution of power by recognizing the constitutional powers of local government as the components of a federal system includes legislative, executive, and sometimes judicial institutions at each level of government, and the power is distributed among them. In this case, the Tribunal may take more responsibility, and the scope of the constitutional review system shall be enlarged. The Tribunal shall encounter more challenges as the potential advantages and disadvantages of federalism take place.

IX. DISTRIBUTION OF LEGISLATIVE POWER

A list of legislative competences and concurrent powers are distributed to the provinces and the Federation. As the concurrent powers represent a more integral and flexible model of federalism, the challenge will become more complex.

The scope and functions of the Tribunal becomes broader especially in order to;

(a) specify which level of government has supremacy in the case of any incompatible or conflict arises or the question of supremacy rests with the national or federal level. Sometimes the Tribunal has to play a more active role over concurrent matters of the national government and federal government.

(b) Sometimes, the constitutional court has to be involved in the conflict to identify and resolve whether it falls within residual or concurrent powers.

The federal system places a special responsibility on the constitutional review at the apex of the judicial system, which must have an irrefutable reputation for independence, neutrality, and competence. If the guarantees to the sub-national units are breached, they have to recourse to constitutional review. It will, therefore, become an essential role for the Tribunal to give sufficient safeguards to protect the development of power.

Therefore, the scope and functions of the Tribunal will be more expansive (a) to oversee the possible abuse of power by State Institutions (b) to control the mechanism for strict scrutinization which is implemented to prevent the attenuate of federal power (c) to check any arbitrary acts conducted by the federal government (d) to grant more constitutional review power and to avoid unnecessary federal intervention and suspension (e) to play an advisory role on federal intervention or any other misappropriation (f) to check and balance the deterrence of constitutional amendments.

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2. The Functions and Duties of the Constitutional Tribunal of Myanmar

Khin Phone Myint Kyu*

Abstract

This paper first provides an overview of how Myanmar institutionalized constitutional review in the post-colonial, socialist, and post-socialist eras. As a core focus, it investigates the functions and duties of the Constitutional Tribunal in the context of specific references to the case study law. It demonstrates structural dilemmas existing in the domain of constitutional review in contemporary Myanmar. This paper intends to shed light on how the Tribunal performs the functions and duties in judicial practice. This paper also concludes with the author's solutions and recommendations aimed at the enhancement of Tribunal's capacity and effectiveness.

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INTRODUCTION

Myanmar promulgated three constitutions since independence. First was the post-colonial 1947 Constitution of the Union of Burma. The 1974 Constitution of the Socialist Republic of the Union of Burma was adopted during the socialist era. The present 2008 Constitution of the Republic of the Union of Myanmar (hereinafter, the 2008 Constitution) was adopted under the military government. This Constitution is the basic law of the country and guarantees the fundamental rights of the citizens. Moreover, it establishes the state structure.

Two former constitutions did not stipulate a separate and independent court to settle constitutional disputes. According to section 151 of the 1947 Constitution, it was the Supreme Court to exercise the constitutional review. In particular, it decided upon constitutional disputes and interpretation. Moreover, the Parliament could grant the Supreme Court the additional power to exercise the judiciary effectively.[1] Furthermore, section 4 of the 1948 Union Judiciary Act provided extensive powers to the Supreme Court to supervise all courts in the Union, and settle civil and criminal cases.

However, after the adoption of the 1974 Constitution, the Pyithu Hluttaw (People's Parliament) became an official organ to review and decide constitutional issues under Article 200 and Article 201 of the 1974 Socialist Constitution. Indeed, the nature of Parliament usually exercises the power of passing laws; however, the Parliament of the Socialist Republic of the Union of Burma practiced the constitutional review. Therefore, this 1974 Constitution is a typical characteristic of Socialist Myanmar. It demonstrates the 'socialist legality' and the reason for taking the power of constitutional review (judicial review) by the Pyithu Hluttaw was that the representative of classes of people (e.g., representatives of peasant and workers) presided as the judges in legal proceedings. Legal scholars could not preside as a judge but could offer only legal suggestions to the judges.

In 1988, the general discontent among the people had risen due to economic decline, leading to a countrywide civil disturbance. Administrative machinery broke down and, on 18th September 1988, the State Law and Order Restoration Council (SLORC) took over the power of the State. It suspended the 1974 Constitution and abolished the Pyithu Hluttaw as well as various responsible councils, along with the Council of People's Justice and the Central Court.

The SLORC, in order to adopt a new constitution, mobilized the National Convention in 1993; however, three years later, it was suspended when the National League for Democracy (NLD) boycotted it. A National Convention was again called in 2004 to adopt the Constitution. Four years later, in 2008, they adopted the Constitution. Hence, Myanmar had remained without an effective constitution from 1988 to 2008. Three years later, in 2011, the Constitutional Tribunal was set up under Section 46 of the 2008 Constitution.

[1] Section 153 of the 1947 Constitution of the Union of Burma.

I. THE CONSTITUTIONAL TRIBUNAL of THE UNION

The Constitutional Tribunal of the Union Law (hereinafter, the Tribunal Law) was enacted in 2010, whereas it started performing its functions in 2011.[2] This body stands as a separate judicial institution to exercise exclusive jurisdiction over constitutional disputes.[3] The Tribunal bears authority to make decisions in disputes relating to the Constitution between Pyidaungsu (Union) and Regions, between Pyidaungsu and States, among Regions, among States, and between Regions or States and Self-Administered Areas and among Self-Administered Areas themselves.[4] The Constitution establishes separation of powers among three branches: legislative, executive, and judicial. If the disputes concerning these three branches' functions and duties which are conferred by the Constitution arise among them, the Constitutional Tribunal settles such kinds of disputes.

II. FUNCTIONS AND DUTIES OF THE CONSTITUTIONAL TRIBUNAL OF THE UNION

In Myanmar, apart from the Tribunal, there is a Supreme Court, courts of the lower level, courts established by law[5], and Courts-martial.[6] The Tribunal is exclusively competent over constitutional disputes and does not preside over civil or criminal cases.

Under the section 322 of the 2008 Constitution and section 12 of the Tribunal Law, the Tribunal has the authority to interpret the provisions of the Constitution, review the constitutional disputes arising out of the activities of executive organs, and vet the law passed by the legislature. Moreover, the Tribunal has the authority to review the pending cases in ordinary courts. In 2013, the Law amending Tribunal Law added several novelties, reporting back to the President, the Pyithu Hluttaw speaker, and Amyotha Hluttaw speaker, who chose the members of the Tribunal.

Before this amendment was enacted, the President had argued that such a reporting requirement would infringe upon the ability of the Tribunal to adjudicate constitutional issues independently and that the bill was contrary to the principle of independent administering of justice.[7] However, the President's argument was rejected by members of the Pyidaungsu Hluttaw. As a result of conflict, this amendment passed without the President's signature. In particular, the Constitution provides that "if the president does not send the Bill back to the Pyidaungsu Hluttaw together with his signature and

[2] State Peace and Development Council Law No. 21 under Section 443 of the Constitution of the Republic of the Union of Myanmar, 2008.

[3] Section 293(c) of the Constitution of the Republic of the Union of Myanmar, 2008.

[4] Section 46, *ibid.*

[5] Juvenile Court, Municipal Court, Traffic Court and so on.

[6] Section 293. of the Constitution of the Republic of the Union of Myanmar, 2008.

[7] Section 19 (a), Ibid.

comments within the prescribed period, or if the President does not sign to promulgate, on the day after the completion of that period, the Bill shall become a law as if he had signed it."[8]

1. Interpreting the Provisions of the Constitution

Constitutional interpretation is one of the core functions in the domains of constitutional and judicial review. In Myanmar, the Constitution designates such authority with the Tribunal. To discuss more about the interpretation function, this section will refer to *the Attorney-General of the Union (on behalf of the President of the Union) v 1.the Speaker, the Pyidaungsu Hluttaw, 2. The Speaker, the Pyithu Hluttaw, 3. The Speaker, the Amyotha Hluttaw.*[9]

Despite provisions for the formation of organizations and appointment of their members at the Union, Region or State levels, and Self-Administered Division or Zone level, there is no specific definition of the term 'Union Level Organization' in the 2008 Constitution. The Attorney-General submitted on behalf of the President to the Tribunal with a request to interpret the 'Union Level Organization.' The definition of the term 'Union Level Organization' is prescribed in section 2(1) of the Law Relating to Pyidaungsu Hluttaw, section 2(h) of the Law Relating to Pyithu Hluttaw, and Section 2(h) of the Law Relating to Amyotha Hluttaw respectively as follows:

> Union Level Organization means the Union Government, the National Defense and Security Council, the Financial Commission, the Supreme Court of the Union, the Constitutional Tribunal of the Union, the Union Election Commission, the Office of the Auditor General of the Union and the Union Civil Services Board formed under the Constitution and as well as the Committees, the Commissions and the bodies formed by Pyidaungsu Hluttaw, Pyithu Hluttaw and Amyotha Hluttaw.[10]

Although the term 'Union Level Organization' is defined by the Laws Relating to Hluttaws, there is no interpretation of the term 'Union Level Organization' in the provisions of the Constitution. Therefore, in order to analyze the issues stated in the submission, the Tribunal needed to scrutinize the provisions of the Constitution.

According to the provisions of Chapter IV of the 2008 Constitution, the term 'Union Level Organization' means the organizations directly formed under the provisions of Constitution. The term 'organization' mentioned in the submission is different from the Committees, Commissions, and Bodies, which was merely formed by each Hluttaw. Hence, the term 'Union Level Organization' must be interpreted as the Organization derived directly from the Constitution.

After discussing the above matters, it is also necessary to consider the interpretation of Chapter IV of the Constitution titled Legislature. This chapter contains the following notions, "any of the Union

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[8] Section 105 (c), ibid.

[9] Submission No.1/2012.

[10] Section 2(1) of the Law Relating to Pyidaungsu Hluttaw, section 2(h) of the Law Relating to Pyithu Hluttaw, and Section 2(h) of the Law Relating to Amyotha Hluttaw.

Level Organizations formed under the Constitution" and "Organizations or Persons representing any of the Union Level Organization formed under the Constitution" as equal to "the Union Level Organizations or persons appointed by the President with the approval of the Pyidaungsu Hluttaw. However, Committees, Commissions and Bodies formed by each Hluttaw are regarded only as organizations of Hluttaw.

Therefore, the Tribunal had to interpret that "any of the Union Level Organizations formed under the Constitution" and "Organizations or persons representing any of the Union Level Organization formed under the Constitution" are the Union Level Organizations or Persons appointed by the President with the approval of the Pyidaungsu Hluttaw.[11] For all these reasons, the Tribunal granted the submission of the President and "the status granted to Committees, Commissions, and Bodies formed by each Hluttaw as Union Level Organizations is unconstitutional."

Another case was submitted in 2016. It is the Submission No. 1/2016 presented by U Sai Naing, a member of Amyotha Hluttaw. In this case, the applicants brought the submission to the Tribunal to request an interpretation of Section 333(d) (4) of the 2008 Constitution. This section states one of the qualifications of the members of the Tribunal as a "person who is, in the opinion of the President, an eminent jurist." The applicants also requested the Tribunal to interpret 'an eminent jurist' is whether or not applicable only to three members chosen by the President under Section 321 of the Constitution. The Constitutional Tribunal Law limits the application of 'an eminent jurist' only to three persons who were nominated by the President, not those by the speakers of Pyithu Hluttaw and Amyotha Hluttaw. However, this provision is not consistent with the Constitution. The Constitution allows the application of 'an eminent jurist' to all nine members. Therefore, the submission was dismissed by the Tribunal.

There is another case relating to the interpretation of the Constitution - *Daw Nan Ni Ni Aye (Amyothar Hluttaw's Representative) and 24 others*[12]. The applicant said that the Court needs to review the case in accordance with the special provisions if there is a special provision to review some cases in the 2008 Constitution or any other laws. As section 435 of the 2008 Constitution is a special provision for the amendment of the Constitution, the applicants submitted the application to be interpreted as this application is necessary to be received and discussed under section 435 of the 2008 Constitution. Therefore, the applicant submitted a suit for interpretation of the provision of section 435 of the 2008 Constitution.

The Tribunal referred to the statement of the legal scholars, N.S. Bindra and Maxwell[13]. They described that if the words of the statute are in themselves precise and unambiguous, no more can be necessary to interpret those words in their natural and ordinary sense.

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[11] Section 91 and 92(b) of the Constitution of the Republic of the Union of Myanmar, 2008.

[12] Submission No 1/2019.

[13] N.S. Bindra, the Interpretation of Statutes, 5th Edition, Law Book Co, Allahabad, 1970, p-718.

Therefore, as the provision of Section 435 is already clear and unambiguous, one can read and understand in accordance with the original meaning of that section. Therefore, such kind of provision is not necessary to be interpreted again. The Tribunal dismissed this submission.

2. Scrutinizing the Laws Enacted by the Pyidaungsu Hluttaw and Institutions with the Right to Make Laws at Various Levels and Functions of Executive Authorities at Various Levels Including the Union Level

According to section 322(b) of the 2008 Constitution and section 12(b) of the Tribunal Law, the Tribunal can scrutinize the laws enacted by the legislature for examining whether they conform with the Constitution or not.

The related case decided by the Tribunal on 14th December 2011 was *Dr. Aye Maung and 22 Representatives v. The Republic of the Union of Myanmar*[14]. In this case, the applicants presented a submission on the question of whether the term 'Minister of the National Races Affairs' used in section 5 of the Law of Emoluments, Allowances, and Insignia for Representatives of the Region or State is included in the term 'Ministers of the Region or State or not'. The main issues of that case were whether or not the status of Ministers of the National Races Affairs was equal to other Ministers of the Region or State and entitled to receive the same treatments.

Under section 262(a) (iv) of the Constitution, the Chief Minister of the Region or State shall obtain the list of Hluttaw representatives to carry out the affairs of each National Race in the Region or State as the Ministers of National Races Affairs from the relevant Election Commission.

Under section 262(e) of the Constitution, the Chief Minister of the Region or State submits the list of candidates to appoint the Ministers of the National Races Affairs together with the other Ministers candidate list, which is approved by the Region or State Hluttaw.[15]

The Tribunal held that section 262(a) (iv) and 262(e) of the Constitution defines the Minister of the National Races Affairs as the Minister of the Region or State concerned. Consequently, Section 262(g) (ii) of the Constitution allows the President to assign duties to the Hluttaw representatives who are the Ministers of the Region or State, to do the affairs of National races concerned. These provisions give the Minister of the National Races Affairs and the other Ministers of the Region or State an equal status without any discrimination.

According to section 12(b) of the Tribunal Law and by analyzing the submission mentioned above - No. 2/2012, the Tribunal can scrutinize the constitutionality of laws after legislation (*ex post facto*). In Myanmar, before promulgating a law, a bill is usually announced in the newspapers in order to ask for suggestions from citizens. If the Tribunal can scrutinize the constitutionality of those bills

[14] Submission No. 2/2011.

[15] Section 262(e) of the Constitution of the Republic of the Union of Myanmar, 2008.

at the time of the announcement in the newspapers, disputes related to the legislation will be reduced, and the enacted laws will become more convenient in practice.

Another power of the Tribunal is scrutinizing the constitutionality of the acts of central and local executive authorities. Such authority is prevalent in constitutional review. *The Chief Justice of the Union v. Ministry of Home Affairs*[16] case was decided on 14th July 2011. In the instant case, the Chief Justice of the Supreme Court, as an applicant, submitted the case to the Tribunal questioning the legality of conferring first class judicial power to the sub-township administrative officers as requested by the Ministry of Home Affairs.

Before the independence, the administrative officers jointly carried out the judicial functions with their original administrative functions. After independence, the High Court and the Supreme Court were established under Section 3 of the Union Judiciary Act 1948, respectively in accordance with Section 134 and 136 of the 1947 Constitution of the Union of Burma.

When the Revolutionary Council took power in 1962, the People's Judiciary system was adopted on 7th August 1972, and the Chief Court was established while other existing courts remained unchanged. During the period of the Revolutionary Council and the period of the Socialist Republic, executive and judicial power was separately and independently exercised. When the State Law and Order Restoration Council (SLORC) came into power in 1988, the existing State organs were abolished by Notification No. 2/1988, and the new Judiciary Law was promulgated. The Supreme Court, the State or Divisional Court, and the Township Court were formed.

The power of criminal jurisdiction was conferred on Sub-township administrative officers in areas that were needed. Similarly, during the period of State Peace and Development Council (SPDC), which was reconstituted by the SLORC in 1997, the Supreme Court conferred sub-township administrative officers the power of the Additional Magistrate. As the sub-township administrative officers exercised the First Class Magistrate power in the previous government, the Ministry of Home Affairs submitted the Supreme Court to empower the First Class Magistrate power to 27 sub-township administrative officers as judicial officers.

Upon the applicant's request, the court took into consideration whether the appointment of the sub-township administrative officers as judicial officers, conferring the first-class power of Magistrate and appointing sub-township administrative officers as juvenile judges are constitutional or not.

The Tribunal held that provisions of the 2008 Constitution stipulated that the legislative, executive and judicial power of the Union should be separate. The judicial power of the courts and judges is prescribed in the Constitution. Therefore, the exercise of judicial power is permitted only to those judges who are empowered by the Constitution. The conferring of judicial power to administrative officers of the General Administration Department of the Ministry of Home Affairs is not in conformity with the Constitution.

[16] Submission No. 1/2011.

3. Deciding upon Constitutional Disputes among Territories in the Country Including the Union Territories

The Tribunal has reviewed the disputes between the Union and different levels of local governments, and among local governments. The Tribunal examined the case of *Speaker of the Mon State Hluttaw v. The Republic of the Union of Myanmar*[17].

The petition submitted by the Speaker of the Mon State Hluttaw to the Tribunal included the issue of whether or not the Region or State Hluttaw should continue to exercise its legislative power empowered by the Schedule Two unless the repeal or amendment of the laws which were inconsistent with the Constitution.

When governments of the Regions or States perform their development activities or enact the law for respective Region or State, they should follow the guidance of the President[18]. The Development Committee Law (the SLORC Law No. 5/1993) - the union level law was required to be repealed urgently to allocate the legislative power to the Region and State. The laws passed by the Regions or States or Self-Administered Zone should also be consistent with the Constitution. (Schedule Two is the lists of laws which can be passed by States or Regions or Self-Administered Zone.)

Therefore, the Tribunal advised the applicants to exercise the enactment of laws and implementation of legislative powers permitted in Schedule Two only after the repealing or amending the provisions of existing laws.

4. Reporting Respectively with Regard to the Tribunal Members' Performance Relating to the Functions

Section 19(a) clearly states that the courts are to administer justice independently, according to the law, and adhering to judicial principles. The Tribunal is also a branch of the Judiciary. Therefore, it should administer justice independently and exist separately from the other two branches. Since sub-section (i) of section 12 requires that the Tribunal members are required to report back to the President, Speaker of Pyithu Hluttaw, and Speaker of Amyotha Hluttaw with regard to their performance of their functions, it seems that the other two branches interfere the Judiciary. Consequently, Section 12 sub-section (i) of the Tribunal Law affects the existence and jurisdiction of the Tribunal. Therefore, this sub-section (i) should not be added as the Tribunal's duty.

5. The Matters not decided by the Tribunal

The power to impeach the President and Vice-President of the State is the peculiar power of the constitutional review. But in Myanmar, the Tribunal does not exercise this power of impeachment.

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[17] Submission No. 3/2012.

[18] Guidance issued by the President of the Union on 8-6-2012 and 29-6-2012.

According to the section 71 of the 2008 Constitution, if it is required to impeach the President or any Vice-President, not less than one-fourth of the total numbers of representatives of respective either Hluttaw shall submit a charge to the Head of the Hluttaw concerned. Action should proceed when this charge is supported by not less than two-thirds of the total number of the representatives of the Hluttaw concerned. If one Hluttaw endorses the taking of the action, the other Hluttaw should form a body to investigate the charge. After investigation, if not less than two-thirds of the total number of representatives of the Hluttaw passed the resolution that the President or Vice-President unfit to continue in office, the Hluttaw will submit this resolution to the Head of the Pyidaungsu Hluttaw. And finally, the Head of the Pyidaungsu Hluttaw will declare the removal of the President or the Vice-President.

Some countries, for example, Indonesia, Kazakhstan, America, France, Albania, Korea, Croatia, Poland Slovenia, and Taiwan, exercise constitutional review to confer the power to decide the results of general elections or election disputes. But in Myanmar, the Tribunal does not interfere in the election cases and dissolution of political parties.

In the case of Daw Dwe Bu, a member of the Pyithu Hluttaw, Angyinyan Constituency, Kachin and 49 members of the Pyithu Hluttaw[19], that it has no jurisdiction over election matters. The Tribunal does not have the authority to deal with the election matters on the ground that these disputes are concerned with the previous Election Commission. The disputes arise before the enforcement of the 2008 Constitution and the establishment of the Tribunal. Furthermore, Section 9 of the Union Election Commission Law provides that the decision of the Union Election Commission is final and conclusive with regard to election matters. This lack of jurisdiction reduces the power of the Tribunal. Therefore, the power to decide the election matters should be added as one of the functions of Tribunal. Moreover, the Tribunal cannot decide on the activities of the legislature.[20]

CONCLUSION

The Tribunal can deliver decisions on the constitutionality of laws and administrative measures. The Tribunal's functions and duties are the interpretation, vetting, and scrutinizing the provisions of the Constitution and actions of executive authorities.

The Tribunal can interpret the provisions prescribed in the Constitution only when cases for interpretation are submitted. In my view, deciding the submitted cases causes that the Tribunal's jurisdiction becomes restricted and cannot expand its authority in performing its functions. Therefore, the Tribunal itself should have its own motion to try the constitutional matters as one of its functions.

[19] Submission No.1/2014.

[20] Submission No. 1/2019.

The Tribunal is an organ passing decisions on constitutional disputes. According to the provision of the functions and duties of the Tribunal, its members have to submit their reports on the duties and functions to those who nominated them. That provision could lead to constant political influence by either the President or the Speakers of Pyithu Hluttaw and Amyotha Hluttaw over each Tribunal member. Through submission of reports to the persons concerned, the President, Speaker of Pyithu Hluttaw, and Speaker of Amyotha Hluttaw may exert influence over the Tribunal members. Therefore, this kind of function should not be recognized because it causes interference over the Tribunal.

3. A Case Analysis of the Constitutional Tribunal of Myanmar

Khin Khin Oo*

Abstract

The Constitutional Tribunal of the Union of Myanmar was established under the auspices of 2008 Constitution together with the new democratic government. Constitutional review system under separate constitutional courts is new experience for Myanmar as Myanmar is the second common law country having such court. The present work carefully studied one famous case decided by the Tribunal in 2017. This case well demonstrated certain issues in formation of the Tribunal for hearing and deciding the cases.

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INTRODUCTION

The current 2008 Constitution of the Republic of the Union of Myanmar came into force when the new civilian government took over state power on January 31, 2011. The three branches of sovereign power, namely the legislative, executive, and judicial power, "are separated to the extent possible, and exert reciprocal checks and balances among themselves."[1] Under the Constitution, there is a separate chapter for the judiciary that establishes the Supreme Court, Court Martial, and Constitutional Tribunal. There are some relatively important provisions for these courts under the Constitution. The details of the organization and formation of the Supreme Court and its subordinate courts for the ordinary judiciary and the details of the organization and construction of the Constitutional Tribunal for constitutional adjudication are prescribed by the Union Judiciary Law and the Constitutional Tribunal of the Union Law respectively. The 2008 Constitution and Defense Services Act of 1959 provides the formation of Court-martial and military adjudication separately.[2] The purpose of this work is to study the case decided by the Constitutional Tribunal of the Union of Myanmar in 2016 and to analyze its jurisprudence in deliberation and adjudication in such cases.

I. ESTABLISHMENT OF THE CONSTITUTIONAL TRIBUNAL OF THE UNION OF MYANMAR

The Constitutional Tribunal of the Union (CTU) is a judicial organ with a particular jurisdiction which is established by the Constitution for constitutional review.[3] Notably, Myanmar is one of the two common law countries to have a constitutional court separate from its supreme court, after South Africa. One of the basic principles of the Union under the Constitution is to establish the CTU.

> A Constitutional Tribunal shall be set up to interpret the provisions of the Constitution, to scrutinize whether or not laws enacted by the *Pyidaungsu Hluttaw* (Union Parliament), the Region *Hluttaw*s and the State *Hluttaw*s (States Parliaments) and functions of executive authorities of *Pyidaungsu*, Regions, States and Self-Administered Areas are in conformity with the Constitution, to decide on disputes relating to the Constitution between *Pyidaungsu* and Regions, between *Pyidaungsu* and States, among Regions, among States, and between Regions or States and Self-Administered Areas and among Self-Administered Areas themselves, and to perform other duties prescribed in this Constitution.[4]

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[1] Section 11 (a) of the Constitution of the Republic of the Union of Myanmar, 2008. The Constitution will be hereinafter referred to as the Constitution.

[2] The Defense Services Act of 1959 was lastly amended by the SPDC Law 25/2010, Law Amending the Defense Services Act, 1959.

[3] Section 293 of the Constitution.

[4] Section 46 of the Constitution.

Under Section 320 of the Constitution, the CTU is composed of nine members, including the Chairperson. In this regard, the President, the Speaker of the *Pyithu Hluttaw* (House of Representatives), and the Speaker of the *Amyotha Hluttaw* (House of Nationalities) submit the candidates' lists, each consisting of three members to the *Pyidaungsu Hluttaw* (Union Parliament) for its approval. Out of nine, the President appoints one member as the Chairperson of the CTU.[5]

Again, Section 322 of the Constitution, stating the functions and duties of the CTU, provides more details than the Chapter I of the Constitution. The CTU interprets the provisions under the Constitution, reviews the constitutionality of laws enacted by different *Hluttaws,* and constitutionality of functions of executive authorities at different administrative levels. The CTU also decides constitutional disputes and fulfills other functions and duties assigned by the Union Parliament.

By using the power under Sections 336 and 443 of the Constitution, the State Peace and Development Council enacted the Constitutional Tribunal Law on October 28, 2010, to form the CTU and prescribe its duties and functions.[6] Section 38 of the CTU Law entrusts the Tribunal extraordinary power to issue necessary rules, declarations, orders, directives, and procedures to implement the statutory provisions. The CTU had later issued the Constitutional Tribunal of the Union Rules by Notification No 30/2011on June 28, 2011.[7]

II. MEMBERS OF THE CONSTITUTIONAL TRIBUNAL

The CTU of the first *Pyidaungsu Hluttaw* consisted of nine members and started to operate from March 30, 2011. Until December 31, 2015, the CTU had admitted 12 submissions and

out of which it decided eight and dismissed one.[8] One submission (Submission No. 1/2013) was closed, and the applicants withdrew two submissions (Submission No. 2/2014 and 3/2014). At one point, the legislature was not satisfied with the CTU's decision of *The President of the Union v. The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and the Amyotha Hluttaw* (Submission No 1/2012). The question was whether the status of the Committees, Commissions, and Bodies formed by each *Hluttaw* was Union-level organization (federal organizations) or not. The CTU answered the question negatively, thus, supporting the President's opinion. The

[5] Section 321 of the Constitution.

[6] This law came into force in January 31, 2011. The Law has 38 Sections of 14 Chapters. Some relevant provisions under the Law will only be discussed for the present purpose. The Law has been amended two times so far: the first amendment was made in January 21, 2013, and the second amendment in November 5, 2014. Hereinafter referred to as CTU Law.

[7] The Constitutional Tribunal Rules consisted of 21 Rules which correspond to the CTU Law and 8 forms which are to be used in the deliberation and adjudication process of Tribunal. Hereinafter referred to as CTU Rules.

[8] The term of a *Hluttaw* is five years. The period of the First *Pyidaungsu Hluttaw* started in March 30, 2010 and was completed in March 31, 2015.

members of Parliament refused to accept such a decision. They demanded the resignation of CTU's members, arguing the inefficient discharging of CTU's duties according to Section 334 (a) (v) of the Constitution.

In September 2012, after failed attempts to resolve the crisis based on the wording of the Constitution, the members of the CTU, who were appointed in 2011, collectively resigned and left the CTU dysfunctional until the reappointment of its new members in February 2013.

When the National League for Democracy government led by Daw Aung Sann Su Kyi won the General Election and took State power in 2016, under the provisions stated in Section 320 of the Constitution, Section 9 (d) of the Union Government Law, and Section 3 of the CTU Law, an entirely new bench of CTU members was appointed in March 2016. [9]

III. SUBMISSION 1/2016

There were four submissions decided by the CTU between 2016 and 2019; one submission each in 2016 and 2017, two submissions in 2019, and none in 2018. Particular emphasis will be given on the decision rendered on submission No. 1/2016.[10] The 23 representatives of the House of Nationalities brought the eminent person case before the CTU to interpret Section 333 (d) (iv) of the Constitution. The applicants asked the CTU whether the President has the right to use his discretion given by Section 333 (d) (iv) of the Constitution for only three CTU members nominated by himself or for all nine members, including six other members nominated by Speakers of *Amyotha Hluttaw* and *Pyithu Hluttaw*. This was the first submission before the new CTU under the National League for Democracy government during Second *Pyidaungsu Hluttaw.*

IV. RATIONALE BEHIND THE SUBMISSION

On March 31, 2016, the new CTU was filled up by nine new members under the Section 335 of the Constitution. The President, the Speaker of the *Amyotha Hluttaw* and the Speaker of the *Pyithu Hluttaw* put forward three candidates each to be the CTU members. Daw Khin Htay Kywe and U Twarl Kyin Paung were nominated by each *Hluttaw* to be CTU's members based on being eminent jurists under Section 333 (d) (iv) of the Constitution. During the selection process of the candidates at *Pyidaungsu Hluttaw*, the applicants of this submission challenged both candidates for incompatibility with the qualifications prescribed for CTU members. Despite the challenge,

[9] Notification 3/2016 was issued by President's Office of Republic of the Union of Myanmar on 30 March, 2016.

[10] This 1/2016 case will be hereinafter referred to as the eminent person case.

the Parliament approved all nine nominations under the Section 328 of the Constitution. [11]

V. CAUSE SHOWN IN THE EMINENT PERSON CASE

Section 333 of the Constitution provides the required qualifications for membership of the Tribunal. The President, the Speaker of the *Pyithu Hluttaw,* and the Speaker of *Amyotha Hluttaw* can select three nominees each, who have political, administrative, economic, and security outlook; and are being loyal to the Union and its citizens. Neither of them should be members of Parliament nor members of a political party. All nominees should meet the standard personal qualifications set for the members of the House of Representatives except age limitation. In connection with professional qualifications, he or she has served as Judge of the Region or State Court for at least five years; or has served as either Judicial Officer or Law Officer for ten years at Region or State level; or had practiced as an advocate for 20 years; or is, in the opinion of the President, is an eminent jurist.

The applicants of this submission raised the question whether the qualification of being "person who is, in the opinion of the President, an eminent jurist" mentioned in Section 333(d) (iv) of the Constitution was relevant to the three candidates selected by the President, or all nine candidates. The applicants made their allegation based on Section 4 (b) of the CTU Law as there were differences between Section 333 (d) (iv) of the Constitution and Section 4 (b) of CTU Law. According to Section 4 (b) of CTU Law, the President can select a member among three Tribunal candidates on the criterion of 'eminent jurist,' despite lacking other professional qualifications required by CTU Law. For all these reasons, the applicants alleged that appointment of mentioned two members being eminent jurists was unconstitutional.

VI. REASONS AND JUDGEMENT GIVEN BY THE CTU

The CTU awarded its decision with its reason on January 19, 2019. The Tribunal approached the issue intertextually, and also looked into the whole context of the Constitution.

The CTU reasoned that;

> Since the President is the Head of the Union and Executive under Sections 16 and 58 of the Constitution, he is entrusted with such special privilege. If such privilege was limited for those three candidates only who were selected by the President himself, this limitation would not be consistent with the intent of the Constitution.

[11] The *Pyidaungsu Hluttaw* shall have no right to refuse the persons nominated for the members of the Constitutional Tribunal of the Union by the President unless it can clearly be approved that they are disqualified. Section 328 of 2008 Constitution.

Moreover, the Director General from the Union who acted as *amicus curiae* pleaded that;

> There is neither confusion nor ambiguity in Section 333 (d) (iv) of the Constitution, and the professional qualification of "being an eminent jurist in the opinion of the President" equally applies not only to those three candidates selected by the President, but also to those other six candidates selected by both Houses.

The Tribunal ruled on the submission as follows:

> One of the functions of the Tribunal is to interpret the Constitution under Section 322 (a) of the Constitution. The question raised in the submission, however, did not fall within the scope of Section 322 (a) of the Constitution. According to the paragraphs 8, 9, and 12 of the submission, the applicants asked the CTU not to interpret Section 333 (d) (iv) of the Constitution. Rather, the applicants sought the Tribunal's interpretation of the Section 333 (d) (iv) of Constitution with reference to Section 4 (b) of CTU Law for an inconsistency clause between the Constitution and the CTU Law. If there were a contradiction between the Constitution and any other legislation, the Constitution must prevail that ordinary law. The effects of law is clearly provided by Section 198 (a) of the Constitution. [12]

The CTU dismissed the submission.

VII. DISCUSSIONS

Individual constitutional sections prescribe the required qualifications for members of union-level organizations. Although age limitation and professional expertise vary from one position to another, most of the required qualifications are common and similar to those for Parliamentarians under the Section 120 of the Constitution. Moreover, the Constitution allows the President to appoint or nominate persons of whom he thinks 'eminent' in their professional capacity as heads or deputies in some specific union-level organizations. These union level positions are Chief Justice and Judges of the Supreme Court and High Courts, the Attorney General and Auditor-General, and their Deputies. Under respective sections, [13] the President is the sole authority either to appoint or to nominate the above-mentioned posts with the approval of the Union Parliament. Under Section 333(d) (iv) of the Constitution, however, there are three nominating authorities, i.e., the President, the Speaker of the *Pyithu Hluttaw* and the Speaker of the *Amyotha Hluttaw* for three CTU members each.

The Tribunal, however, stated in its judgment as follows;

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[12] Decision on the Eminent Person case delivered on January 19, 2017, p 13.

[13] Sections 237(a) (iv) (dd), 239 (a) (iv) (dd), 242 (a) (iv) (cc), 244 (a) (iv) (cc), 301 (d) (iv) (cc) and 310 (d) (iii) of the Constitution.

> Being an eminent jurist in the opinion of President is one of the required professional qualifications for certain constitutional positions such as members of CTU, including the Chairperson, Chief Justice and Judges of the Supreme Court and High Courts, Union Attorney General, Union Auditor General, and their respective deputies.
> In other words, the Constitution empowers the President to use his discretion in selecting and nominating the candidates of whom he thinks eminent persons for those constitutional positions.

It is argued that in the instant case, the CTU decided without considering any other two nominating authorities of Speakers from both Houses, rather than the power of the President appeared under section 333(d) (iv). The reasons for the decision should be more concrete and precise.

The second discussion point is Myanmar's acceptance of the doctrine of natural justice. Myanmar has been a common law country with a tradition of applying the principles of natural justice for a long time.[14] The principles of natural justice consist of two rules: the right to a fair hearing (*audi alteram partem* - listen to the other side) and the rule against bias (*nemo judex in causa sua* - no man is a judge in his own cause). The rule against bias is strictly applied to any appearance of a possible bias, even if none exists. "Justice should not only be done but should manifestly and undoubtedly be seen to be done."[15] Therefore, a judge may not be a relative, friend, or business associate of a party, or he may not be personally hostile as a result of happening either before or during a trial. The requirements of bias rule are embodied to the statutes in some jurisdiction as well.[16]

Under Section 320 of the 2008 Constitution, the CTU is formed with nine members, including the Chairperson.[17] This formation method is elaborated and supplemented by the CTU Law. Section 20 of the CTU Law says that "All the members [nine members] including the Chairperson, shall hear and decide in relation to the submission…" It, however, continues to provide for conditional situations, such as "… In doing so, if all the members cannot attend due to any duty or any other cause, the submission shall be heard by at least six members, including

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[14] It is essential that everything which might engender suspicion and distrust of a Tribunal should be cleared and there must be a feeling of confidence in the administration of justice. Please see *Daw Lay and three others vs. U Maung Gyi*, 1951 BLR (HC) 34; *Union of Myanmar vs. Maungn Shwe@ Maung Shae and one other*, 1966 BLR (CC) 616.

[15] *R vs. Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256, [1923] All ER 233; *Union of Myanmar vs. Maung Shwe @ Maung Shae and one other*, 1966 BLR (CC) 616.

[16] For instance, the Section 18 of Act on the Federal Constitutional Court of Germany provides that

Justices are barred from exercising their judicial duties if they are a party to the case, or are or were married to a party, or are or were in a civil partnership with a party or have already been involved in the same case due to their office or profession.

Another good example of Myanmar legislation is Anti-Corruption Law Section 24. The person who concerned with the complaint matter or has hatred of the complainant or the accused or related to the complainant or the accused shall not be the members of the Investigation Board formed by the Anti-Corruption Commission.

[17] Section 320 of the Constitution.

the Chairperson." [18] Under Section 22 (c) of the CTU Law, the CTU passes its final decision by the consent of more than half of the members, including the Chairperson.

There is an ambiguity whether all nine members of CTU including Chairperson must attend at the Tribunal in hearing and deciding the submission or at least six members including Chairperson could hear and decide the submission due to certain important circumstances which may affect its decision. For an instance, one of the members of the Tribunal were vacant from the office or any Tribunal member were the party to the submission directly or indirectly, etc.

Hereinbefore discussed 'eminent person' case was substantially connected with H.E. Daw Khin Htay Kywe and H.E. U Twarl Kyin Paung, who are two existing members of CTU. During the hearing process, however, all nine members of the Tribunal body, including the mentioned two members, heard the submission and dismissed the case.[19] The reason given by the CTU is that the Constitution and CTU law require all tribunal members to attend in formation of the Tribunal and also in hearing and deciding the submission.

The statement provided by the *U Htwe @ A. E. Madari vs. U Tun Ohn & One* case would be recited here as follows

> Sections of the Constitution should not be interpreted in a narrow and technical manner but should on all occasions be interpreted in a large, liberal, and comprehensive spirit. Construction most beneficial in the widest possible amplitude of its powers should be adopted. The Constitution, though written, should be interpreted in such a way as will be subject to development through usage and convention.[20]

There are different definitions between Tribunal and Court under Section 2 (c) and (f) of CTU Law.[21] However, the Section 293 of the Constitution under the Judiciary Chapter provides that courts of the Union are formed as the Supreme Court of the Union and its subordinate courts, the Courts-Martial and the Constitutional Tribunal of the Union. Therefore, one may suggest that the CTU is the judicial body having particular jurisdiction of constitutional interpretation and adjudication. Since the principle of natural justice pertains equally to decisions decided by the judicial body and quasi-judicial judgments decided by the administration, Tribunal might consider adopting the natural justice principles for those submissions brought before it, when and where necessary.

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[18] Most of the legislations indicate the formation of the Court or Tribunal or Council with an odd number of its members. It is more likely to cast their vote based on organizational performance considerations. It may have some unknown reason behind the fixing of this even number of Tribunal members.

[19] https://www.constitutionaltribunal.gov.mm/my/judgment/765

[20] *U Htwe @ A. E. Madari vs. U Tun Ohn & One*, 1948 BLR (SC) 541.

[21] Tribunal means the Constitutional Tribunal of the Union formed under the Constitution. Court means the Supreme Court of the Union, High Courts of the Region or State, Self-Administered Division Courts, Self-Administered Zone Courts, District Courts, Township Courts and other Courts established by law.

CONCLUSION

The Constitution of Myanmar came into force when a new semi-civilian government headed by President U Thein Sein took over state power in 2011. The Constitutional Tribunal of the Union was established under the Constitution together with the new democratic government. Enacting constitutional amendments has been one of the election pledges made by the National League for Democracy since 2015, along with establishing the rule of law, and initiating a peace process. However, only in February 2019 did the *Pyidaungsu Hluttaw* form a Joint Committee comprising of 45 representatives to amend the Constitution. Some *Hluttaw* representatives, who are the Defense Services personnel and members of the Union Solidarity and Development Party, mainly claimed that this move for a constitutional amendment was procedurally unconstitutional. The 25 *Amyotha Hluttaw* representatives, including Sai Hseng Kyauk Sam, sent the submission 2/2019 to the Tribunal for its decision. The CTU rejected the submission on the ground of lacking the jurisdiction.

On the other hand, the peace process is being implemented based on a Nationwide Ceasefire Agreement (NCA). The legality and constitutionality of the NCA and several related agreements may be an essential legal issue in the near future. In this sense, the CTU must improve some constitutional provisions on its capacity and independence, and to develop the legislation and its jurisprudence.

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4. A Constitutional Review Model: The Case of Korea*

Hyowon Lee**

Abstract

Since the establishment of the Constitution in 1948, the Republic of Korea had gone through various constitutional adjudication systems. However, Korea had failed to run these systems efficiently and normatively as the right means of protecting the Constitutional order.

Then the current Constitution, revised in 1987, introduced the Constitutional Court. The Constitutional Court is currently recognized as an indispensable component to protect people's basic rights and to realize 'rule of law' and constitutionalism. The Constitutional Court has jurisdictions regarding constitutional review such as the adjudication on constitutionality of statutes, on impeachment, on dissolution of a political party, on competence dispute between government institutions or local and federal organs, and on constitutional complaint.

This constitutional adjudication system has developed its own distinct characteristics which differ from that of Germany and the United States, namely the two prominent models of constitutional adjudication. From its birth until now, the Constitutional Court has judged around 37,080 cases and 1,709 cases (4.6%) among these were decided to be unconstitutional. Most of the cases are either on the constitutionality of statutes or on the constitutional complaints. Meanwhile, the two most important and unprecedented cases of the Constitutional Court would be the dissolution of the Unified Progressive Party in 2014 and the impeachment of the incumbent President in 2017.

Despite aforementioned attainments, the Constitutional Court of Korea has further tasks to fulfill. The Constitutional Court needs to practice its authorities within the limits of the Constitution, respect diversity, strengthen its independence, protect democratic legitimacy and harmonize its decisions with the Supreme Court.

* This article was funded by the 2020 Research Fund of the Seoul National University Asia-Pacific Law Institute, donated by the Seoul National University Law Foundation.

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INTRODUCTION

The Korean Constitution sets forth the basic values and order of the state nation. To be specific, it defines the governing organization in one part and guarantees the basic rights in the other. Since the Constitution is the supreme legal norm of the society, no governmental authority shall violate the Constitution. The phrase 'governmental authority' or 'governmental power' in this context includes the three of the legislative power, the administrative power and the judicial power.

By protecting the basic rights from the abuse of governmental power, mandating the government to practice its power within the limit of the Constitution, the Constitutional Court protects the constitutional order. Especially, by subjecting governmental power to the basic rights and securing procedural legitimacy in practice of governmental power, the Constitutional Court also realizes the substantial principle of 'rule of law'. This function of the Constitutional Court is realized through the constitutional adjudication system, in which the Court makes a final and ultimate decision on various constitutional matters based on the constitutional principles.

This is the reason why the Constitutional Court is recognized as an indispensable component of national governance in Korea, along with the representative system, the separation of powers, the election system and the local-governing system. The important role the Korean Constitutional Court and its constitutional adjudication system share in Korean society is also an interesting example for scholars and lawyers of international society.

I. CONSTITUTIONAL ADJUDICATION: ITS HISTORICAL DEVELOPMENT AND THE CURRENT SYSTEM

The Constitutional Court of Korea has developed a distinctive constitutional adjudication system which clearly differs from both the German system and the U.S. system. Examining its historical development and reviewing the current system would be necessary to understand Korean constitutional adjudication thoroughly.

1. Historical Development

The first Constitution which was enacted in 1948 established two different organs to deal with constitutional matters: the Constitutional Committee to decide on the constitutionality of statutes and the Court of Impeachment to decide on the impeachment cases. Ten Justices composed the Constitutional Committee – five of the Justices were Supreme Court Justices and the other five were members of the National Assembly – and the Vice President was the Chairman of the Committee. The Committee existed for 10 years but dealt with only six cases during the period. Two cases of statutes were decided to be unconstitutional – Article 18(1) and 24(1) of the Agricultural Land Reform Act and Article 9(1) of the Special Measure Decree on Punishment of Crimes Under National Emergency.

In this case, above three provisions were decided to be unconstitutional because they infringed the right to trial to the Supreme Court.

In 1960, the fourth Constitution stated that the Constitutional Court shall be established. However, the May 16 Military Coup D'etat took place only one month after the enactment of the Constitutional Court Act and the Constitutional Court was never built in reality.

The Constitution of 1962 abolished the Constitutional Court and mandated constitutional adjudication to the Supreme Court. Within 10 years thereafter, only two cases of statutes were decided unconstitutional by the Supreme Court. In the first case, Article 2(1) of the National Compensation Act was decided unconstitutional since it infringed the right to claim for damages and the right to equality. In the second case, Article 59(1) of the Court Organization Act was decided unconstitutional as it violated the jurisdiction of the Supreme Court over adjudication on constitutionality of statutes. Another important decision in this period would be the case on the criminal law clause on rape. The clause which limited the object of 'rape' to 'women' and thus concluded that not any male person could become a victim of the rape crime was decided to be constitutional. Also, according to the decision of the Supreme Court, the capital punishment in criminal law shall be constitutional.

Finally in 1972, the Supreme Court lost its authority for constitutional adjudication and the eighth Constitution reintroduced the Constitutional Committee. This constitutional adjudication system gave the Constitutional Court the authority to decide on the three sorts – the constitutionality of statutes(at the request of the Supreme Court), the impeachments and the dissolution of political parties. This system existed without any change under the ninth Constitution, but not any decisions were made in the period of the eighth and ninth Constitution. Namely, the Constitutional Court had its power only in name.

2. Current System

The current Constitutional Court was introduced in 1987 by the tenth Constitution. The tenth Constitution which is the current Constitution bestowed upon the Constitutional Court five sorts of constitutional review – the adjudication on constitutionality of statutes, the impeachment, the dissolution of political parties, the competence dispute between government institutions or local and federal organs, and the constitutional complaint.

The Constitutional Court decided on a total of around 37,080 cases from its establishment in 1988 until July 2019. Among them, 1,709 cases were decided to be unconstitutional, which is around 4.6% of the whole decisions. In detail, there were 929 cases on constitutionality of statutes of which 388 cases were decided to be unconstitutional, 2 cases on impeachment of which 1 case was upholding, 2 cases on dissolution of a political party of which 1 case was upholding,[1] 107 cases on competence

[1] The second one was a retrial in which the subject matter was the very same with the first trial.

dispute of which 19 cases were decided unconstitutional, and 28,765 cases on constitutional complaint of which 1,300 cases were decided to be unconstitutional.[2]

The Constitutional Court is recognized as an indispensable component to protect the people's basic rights from abusive practice of public power and to realize constitutionalism and rule of law substantially. In particular, the introduction of the constitutional complaint is assumed to be an important event in the history of Korean constitutionalism. Through this system, individuals can file a case by him or herself directly without prior procedure going through other governmental organs.

II. ORGANIZATION OF THE CONSTITUTIONAL COURT

Korean constitutional adjudication system is based on the German model and has adapted some factors from the system of the United States. This results a distinct system of Korean Constitutional Court and one of the most characteristic point is that constitutional review is assigned to a separate court of the Constitutional Court. The function of the Constitutional Court and the Supreme Court may collide with each other in some case.

1. Justices and the Chief Justice

The Constitutional Court is composed of nine Justices who shall be qualified to be court judges are appointed by the President. Among the nine, three are selected by the National Assembly and the other three are selected by the Chief Justice of the Supreme Court. As a result, though the President appoints the nine Justices, only three of them are selected by the President him/herself. The term of Justices in offices is six years and can be renewed, though there has not been any Justice in the history to be re-appointed. The retirement age of a Justice is 70.

The Chief Justice of the Constitutional Court is appointed by the President among the Justices, but with the consent of the National Assembly. The Chief Justice represents the Constitutional Court and takes charge of the affairs of the court. Being the chairman of the Council of Justices, the Chief Justice directs the Full Bench of the Court. The term of the Chief Justice in office is six years and the retirement age is 70. Other treatments and remuneration would be the same as the Chief Justice of the Supreme Court.

The status of the Justice is strictly protected and guaranteed for the independence of the Constitutional Court. Justices rule independently following their conscience and in conformity with the Constitution and relevant Acts. 'Conscience' in this context shall not be understood as a personal or subjective one, but rather a professional and objective one. Additionally, Justices are not removed from office except when in case of impeachment against him/herself or a being sentenced of

[2] http://www.ccourt.go.kr/cckhome/kor/info/selectEventGeneralStats.do

imprisonment without prison labor or heavier. Not any Justice would be suspended from office or have his/her salary reduced or suffer any other unfavorable treatment except by disciplinary action. There institutions are all to protect the Justices from external power that force them to decide against their professional conscience.

2. Procedure of Judgement

The process of a constitutional adjudication begins when a petition is filed to the Constitutional Court by submitting a written request, either in person, by post or via online and mobile phone. In the Full Bench consisting of all nine Justices, the presence of seven or more Justices is required to hear a case, and it takes a majority vote for a decision. However, six or more Justices' agreeing votes are required in cases falling under any of the followings: deciding a statute unconstitutional, impeaching the impeached, dissolving a political party, upholding a constitutional complaint and overruling the precedent of the Constitutional Court on interpretation and application of the Constitution or laws.

There are both oral and written arguments. In the adjudication of impeachment, dissolution of a political party and competence dispute, arguments are conducted orally. On the other hand, in the adjudication on the constitutionality of statutes and constitutional complaint, arguments are conducted through papers. Additionally, the Constitutional Court can examine evidence or demand for submission of relevant materials if necessary.

When the Full Bench concludes a hearing, the Justices involved prepare and sign a written decision. In this process, all Justices shall express their opinions on the written decision. The Constitutional Court shall pronounce the final decision within 180 days after receiving the case for adjudication. However, the time limit is non-compulsory and exceeding the period does not infringe the right to trial in conformity with the Constitutional Court Act. The expenses for adjudication by the Constitutional Court shall be borne by the state.

The Constitutional Court adopts the principle of compulsory attorney representation. Thus claimants or respondents must have an attorney as his or her counsel and have the attorney to pursue the proceeding. In case an individual has no financial ability to retain an attorney, he or she can be provided assistance from a court-appointed counsel.

III. ADJUDICATION ON CONSTITUTIONALITY OF STATUTES

The adjudication on constitutionality of statutes is frequently filed and discussed. The diverse ways of a case of the constitutionality of a certain statute being raised toward the Constitutional Court and diverse sorts of decisions made by the Court are very important in understating Korean constitutional adjudication system.

1. Jurisdiction

The Constitutional Court can nullify a statute by deciding it unconstitutional. Through this system, the work of legislative branch is examined and the checks-and-balances mechanism is realized.

The Constitutional Court has its authority on concrete normative control, rather than an abstract normative control. This means that the Constitutional Court can decide on the constitutionality of a statute only when the constitutionality of the statute is relevant to the judgement of a judicial case which is ongoing in ordinary courts such as the Supreme Court[3]. Additionally, only a statute that is already enacted and has gone into effect can be an object of the adjudication. Thus an adjudication on constitutionality of statutes is not an ex ante constitutional review, but an ex post one.

There are three ways a case of the constitutionality of statutes could be filed to the Constitutional Court. Firstly, an ordinary court can request the Constitutional Court directly and by its own decision for adjudication in case the ordinary court regards a statue or any provision of the statute unconstitutional.

Next, the ordinary court can answer the call of the party when it decides the call is persuasive. In this case, the party cannot request for constitutional adjudication by himself or herself and the request should be done only through the ordinary court.

Finally, when the ordinary court does not find the call of the party persuasive and reject the call, the individual party may file a constitutional complaint directly. The filing is available only when the ordinary court has already rejected the call and this complaint is filed not against the court's judgement but only against the statute itself.

2. Characteristics

In terms of the adjudication on constitutionality of statutes, the jurisdiction differs in accordance with the legal status of the statute to be examined. When the statute is an Act or laws enacted by the National Assembly, the jurisdiction belongs to the Constitutional Court. When administrative decrees or regulations or actions created by the administrative branch are to be examined, the jurisdiction belongs to the Supreme Court. However in both cases, the statutes can be on adjudication only when the constitutionality of statutes is at issue in a trial.[4]

Additionally, any statute of provision thereof decided as unconstitutional shall be ineffective from the day in which the decision is made. Only when the statute or provision is related to criminal punishment, the statute or provision shall be ineffective retroactively. The statute or provision decided

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[3] In this paper, civil, criminal, administrative, family courts, namely all the courts other than the Constitutional Court would be called 'ordinary' in comparison with the Constitutional Court,

[4] Article 107 (2) of the Constitution; Article 41 (1) of the Constitutional Court Act.

as unconstitutional cannot be applied to a trial it is concerned.[5] The Court's decision of unconstitutionality shall bind the ordinary courts, other state agencies and local governments.[6]

Lastly, the Constitutional Court does not decide its judgement in only two sorts of 'constitutional' or 'unconstitutional'. Instead, the Court can conclude that the statute is 'partially constitutional and partially unconstitutional', or 'not conforming to the Constitution'. The specific type of a decision depends on the purpose and necessity to transform the decision upon consideration of the contents of the statutes. To prevent confusion caused by the absence of law caused due to the unconstitutionality decision and to maintain legal stability, the Constitutional Court may refrain itself from deciding a statute unconstitutional and instead decide that the statute does not conform to the Constitution.

IV. ADJUDICATION ON IMPEACHMENT

The impeachment has reinforced the function of Constitutional Court in Korean society in recent years. Not many Constitutional Courts around the world are assigned of the authority to impeach high ranking governmental officials and this system along with the dissolution of a political party enhances the influence of the Constitutional Court in Korea.

1. Jurisdiction

If the high-ranking public officials including the President of Korea violate the Constitution or other laws in the performance of their official duties, the National Assembly may pass a motion for their impeachment. The Constitutional Court has exclusive jurisdiction over impeachment proceedings brought against certain high-ranking public officials. The subjects of impeachment are as the followings: the President of Korea, the Prime Minister, members of the State Council, Executive Ministers, Justices of the Constitutional Courts, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act.[7]

Any person whom a motion for impeachment has been passed shall be suspended from exercising his or her power until the Constitutional Court makes a final decision on the impeachment case. When a request for impeachment has reasons for upholding, the Constitutional Court shall pronounce a decision that the accused person be removed from public office and the impeached person cannot become a public official for five years.[8] Additionally, the decision of impeachment does not exempt the person from civil or criminal responsibility.

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[5] Article 47 (2) of the Constitutional Court Act.

[6] Article 47 (1) of the Constitutional Court Act.

[7] Article 65 (1) of the Constitution.

[8] Article 54 (1), (2) of the Constitutional Court Act.

2. Major Cases

There were two cases of adjudication on impeachment in Korean history. Both of them were against the incumbent Presidents and in one of the two cases the President was impeached.

In the first case which was filed in 2004, the Constitutional Court decided to reject the impeachment of President Noh Moo-hyon from office. The Court reviewed that he had violated the obligation of political neutrality of public officials which was written in the Act on the Election of Public Officials the Prevention of Election Malpractices and some other constitutional obligations.

However, the Court decided that "the act of violation of law by the President cannot be deemed to be an evidence of the betrayal of public trust in the President to the extent that the public trust vested in the President should be deprived of prior to the completion of the remaining presidential term, there is no valid ground justifying the removal of the President from office", [9] which means that such violations were not sufficient enough to justify the removal of the President from office.

In 2017, the Constitutional Court decided to uphold the impeachment of President Park Geun-hye from office. She had violated the Constitution and law in the performance of duties, and the subject matter in this case was whether to concede 'the existence of a valid ground' or not. The Constitutional Court regarded that 'the existence of a valid ground' meant that the violation of the Constitution and law was grave enough to justify the removal of the President from office.

The Constitutional Court stated "the President's acts of violating the Constitution and the law are a betrayal of the people's confidence, and should be deemed to be grave violations of the law unpardonable from the perspective of protecting the Constitution. Since the negative impact and influence on the constitutional order brought about by the President's violations of the law are serious, we believe that the benefits of protecting the Constitution by removing the respondent from office overwhelmingly outweigh the national loss that would be incurred by the removal of the President"[10] which means that the violation were grave.

V. ADJUDICATION ON DISSOLUTION OF A POLITICAL PARTY

The Dissolution of a Political Party which was long considered to be a dead or nullified system had its first case in 2013. Through this one case, complicated legal principles and precedent logics were introduced, such as the meaning of freedom of political party, the protection of the basic democratic order, and the status of the members of the dissolved party.

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[9] 2004. 5. 14. 2004 Hun-Na 1. In this case, 9 Justices, all of the registered members rejected the petition for the impeachment.

[10] 2017. 3. 10. 2016 Hun-Na 1. In this case, 8 Justices, all of the registered members upheld the petition for impeachment adjudication. At that time, 1 Justice was on the occurrence of a vacancy.

1. Jurisdiction

If the objectives or activities of a political party do not accord with the basic democratic order, the Government may request adjudication of dissolution of the political party to the Constitutional Court. This jurisdiction is assigned to the Constitutional Court to protect the Constitution from the destruction of.

In one side, the Constitutional Court protects democracy from abusive freedom of political party. The Constitution guarantees the existence and activities of all political parties, and protects their rights to the utmost extent. However, at the same time, the Constitution has established a constitutional limitation on the freedom of activities of political parties so that they do not jeopardize the basic democratic order.

On the other hand, through this system of Constitutional Court deciding the dissolution, political parties might be protected from arbitrary decisions of the Government. That is, a political party can be dissolved only in certain situations as mentioned above and through this system the Constitutional Court can double-checking the governmental request whether the government has decided reasonably or not.

The Ministry of Justice, on behalf of the Executive, files for dissolution of a political party. The Constitutional Court goes through oral proceedings on adjudication of dissolution of a political party. It is required that six or more Justices agree for the dissolution in order for the Court to make a decision.[11]

Regarding two effects of judgements – the confirming effect and the formative effect - the decision of dissolution of a political party has formative force. When the decision of dissolution of a political party is pronounced, the party loses its status as a political party and its privileges. The assets of the dissolved political party are reverted to the National Treasury.[12] Meanwhile, it is prohibited to form a new party that has similar principles to the dissolved party or a substitute party and not any other party is permitted to use the name of the dissolved party.[13]

2. Major Case

In 2013, after deliberation by the State Council, the Government filed a petition to request dissolution of the Unified Progressive Party to the Constitutional Court. Related to this part, the Constitution provided “if the objectives or activities of a political party are against the basic democratic order, the government may bring an action against it in the Constitutional Court”.[14]

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[11] Article 113 (1) of the Constitution ; Article 30 (1) of the Constitutional Court Act.

[12] Article 59 of the Constitutional Court Act ; 48 (2) of Political Party Act.

[13] Article 41 (2) of Political Party Act.

[14] Article 8 (4) of the Constitution.

The subject matters of review in this case were firstly, whether the party's objectives and activities violated the basic democratic order, secondly, whether the party should be dissolved, and finally, whether the lawmakers affiliated with the party should be stripped of their seats when dissolution of the party. Deciding that the Party's objectives and activities violated the basic democratic order, the Constitutional Court decided to dissolve the Unified Progressive Party in 2014.[15]

The Constitutional Court affirmed that the objectives or activities of the party had generated a concrete risk of causing substantial harm to the basic democratic order of our society, and thus were in violation of the basic democratic order. Also the Court added that the decision to dissolve the party was an inevitable solution to effectively remove the risk posed to the basic democratic order, and therefore was not in violation of the principle of proportionality.[16] About the third point, the Constitutional Court stated that the members of the National Assembly belonging to the party are forfeited of their seats in the National Assembly regardless of how they were elected, which means it did not matter whether they were elected as majority representation or as proportional representation.

VI. ADJUDICATION ON COMPETENCE DISPUTE

The Constitution announces the separation of powers. In order to distribute public powers to the right organ and to have different branches to watch over each other, the resolution of conflicts between state agencies and local governments about authorities and duties is an important constitutional matter. Additionally, this principle of checks and balances between public powers is also a coordinating mechanism to protect the basic rights.

1. Jurisdiction

There are three kinds of adjudications in competence disputes. Firstly, there would be the competence dispute between state agencies such as the National Assembly, the Executive, and ordinary courts. The second would be the competence dispute between a state agency and a local government. Finally solving the conflict between local governments such as Metropolitan City, Province, City, Self-governing District is also a competence dispute.[17]

The claimant may request adjudication on competence dispute if the respondent's action and inaction infringes or is clearly in danger of infringing the competence conferred to the claimant by the Constitution or Acts. The Constitution has endowed the Constitutional Court with the jurisdiction on the adjudication on competence disputes to realize the separation of powers and local self-governing system.

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[15] 2014. 12. 19. 2013 Hun-Da 1. In this case, 8 Justices upheld the petition and 1 Justice expressed a dissenting opinion.

[16] The Unified Party applied for a retrial, but the Constitutional Court rejected in 2016(2016. 5. 26. 2015 Hun-A 20).

[17] Article 62 (1) of the Constitutional Court Act.

2. Characteristics

Adjudication on competence dispute resolves disputes regarding existence or scope of the competence of state agencies or local governments. The Constitutional Court proceeds an adjudication in a neutral status according to the Constitution and related laws. Adjudication system on competence dispute has the following characteristics.

Firstly, the decision on competence dispute shall be made in accordance with majority of nine Justices. This means with only five Justices agreeing on one conclusion is enough to write a judgement, unlike in other constitutional reviews. As mentioned above, at least six Justices need to agree on the unconstitutionality of statutes or impeachment or dissolving or accept constitutional complaints.[18]

Then, when the respondent's action violates the claimant's competence seriously and clearly, the Constitution Court may confirm the invalidity of the action which caused the competence dispute. However, if the action has defects that are not serious and clear, the Constitutional Court may annul the action. Thus, although the respondent's action is not just, it may still be in effect.

Finally, the decision on competence dispute by the Constitutional Court shall bind all state agencies and local governments. However, the decision to nullify an action shall not alter the effect of already made actions,[19] since legal stability should be protected and legal confusion should be prevented.

VII. CONSTITUTIONAL COMPLAINT

Any individual whose basic rights are guaranteed by the Constitution can file a constitutional complaint to the Constitutional Court when his or her right has been infringed by public powers. In constitutional complaint case, an individual becomes the claimant which is different from other constitutional reviews. The introduction of constitutional complaint system has contributed to the revitalization of constitutional adjudication system in Korea.

1. Jurisdiction

The subject of constitutional complaint is very broad and comprehensive. It is defined that 'exercises or non-exercises of all kind of public powers' can be the subject of constitutional complaint and this also includes the legislation of the National Assembly. Here, even the neglects of legislation are included. That is, in case the National Assembly is mandated to legislate an Act about certain matter but do not legislate any legal statute, the basic rights are infringed and an individual can file a

[18] Article 113 (1) of the Constitution.

[19] Article 67 (2) of the Constitutional Court Act.

constitutional complaint to the Constitutional Court.

2. Characteristics

In principle, a decision of an ordinary court is excluded from constitutional complaint by the Constitutional Court Act.[20] That is, judicial decision is not included in 'exercises or non-exercises of all kind of public powers'. One exemption would be when the ordinary court applies statutes that are already nullified by the Constitutional Court. In this case, the Constitutional Court can adjudicate a judgment of the ordinary court. This allegedly aims to guarantee the independence of the judiciary and resolve legal disputes quickly, but many scholars insist that the judgment of ordinary court be included in adjudication of constitutional complaint to protect basic right being infringed by ordinary courts.

If any other law offers any other means of relief, not any individual may file a constitutional complaint without having exhausted all such processes.[21] This is called the principle of subsidiarity. This is important because most of actions made by administrative agencies are subjects of administrative litigation in ordinary court. Since the claimant has to file an administrative litigation in advance and the decisions of ordinary courts are excluded from adjudication on constitutional complaint, many actions of administrative agencies are in fact excluded from constitutional review.

When a constitutional complaint is filed a panel which consists of three Justices conducts a prior review. The panel screens legal requirements for constitutional complaint. When the panel does not reach an unanimous decision of dismissal, it decides to refer the motion to the Full Bench. When a dismissal is not decided within 30 days after request of adjudication on constitutional complaint, it shall be deemed that a decision to transfer it to the Full Bench is made.[22]

CONCLUSION

The Constitutional Court in Korea has allegedly functioned as an organ protecting basic rights and safeguarding justice since its establishment in 1988. The Constitutional Court has following tasks to solve to accomplish its role in a stable and complete way.

The qualification for Justices of the Constitutional Court should be broaden to non-legal scholars and professionals who have insight into humanities, social community and state. The Constitutional Court Act stipulates that only those who are qualified as judges are eligible for Justices. The Constitutional Court plays a key role to embody the constitutional value and to realize justice and national integration. Thus the Constitutional Court Act should be revised to open the door to non-legal professionals.

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[20] Article 68 (1) of the Constitutional Court Act.

[21] Article 68 (1), (2) of the Constitutional Court Act.

[22] Article 72 (4) of the Constitutional Court Act.

It is desirable that all Justices are selected by the National Assembly in order to strengthen democratic legitimacy of the Constitutional Court. The current system gives the President of Korea excessive authority in appointing the Justices. Considering the fact that the President appoints the Chief Justice of the Supreme Court, six Justices and the Chief Justice of the Constitutional Court are selected under the influence of the President.

The Constitutional Court shall exercise its authorities in harmony with the Supreme Court. In the Constitution, the status and power of the Constitutional Court is defined in Chapter 6 of the Constitution and the status and power of the Judiciary is defined in Chapter 5 of the Constitution. This means that the Constitutional Court is a separate and independent branch from the judiciary. The Constitutional Court shares the authority to interpret the Constitution and laws with the Supreme Court in equal status or level. Both constitutional institutions should cooperate and collaborate in exercising their authorities respectively for coherency.

The Constitutional Court shall make greater efforts to sustain its judicial independence, especially from political influences and populism. Even if the Constitutional Court functions as political-judicial authority, it shall exercise jurisdiction according to ‘rule of law’ and constitutionalism and not merely confirm political majority opinions.

Above four tasks are to be improved for the Constitutional Court to carry out its role of protecting constitutionalism stably and actively. With strong effort of related social sectors and positive interests of all the members of our society, constitutional adjudication system of Korea would develop further to protect basic rights and realize social justice.

5. Constitutional Review in a Strong State: The Case of Singapore

Jaclyn L Neo[*] and Marcus Teo[**]

Abstract

This paper examines how Singapore's courts have navigated their role in constitutional adjudication within the context of a strong state. Singapore's courts have generally adopted an attitude tending toward deference to the political branches in constitutional adjudication, which stems from the common law conception of judicial power and their position as actors within a dominant party democracy. Courts, however, have nevertheless consistently sought to uphold and entrench their judicial independence. Moreover, they have developed and applied doctrines of public law for at least three purposes: to ensure that representative democracy remains the basis of legitimate power in Singapore; to maintain the principle of legality alongside due deference as a limit on all exercises of power; and to structure harmonious and deliberative political discourse in society. In doing so, Singapore's courts have defended and defined a clear role for themselves as constitutional adjudicators, suited to Singapore's legal and political context.

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I. INTRODUCTION

The exercise of the judicial power in public law adjudication – namely, adjudication on disputes involving constitutional or administrative law issues – is perhaps the most important, yet most contentious, aspect of every legal system. To find that ideal conception of the judicial role and power, courts engaging in public law adjudication must balance between different ideals – between formalism and substantivism, universalism and contextualism, judicial courage and deference – to find a solution that works for their society. Further, since societies are ever-changing, and since public law must adapt to such changes, the court's quest in this regard is a never-ending one.

This paper examines judicial review in Singapore, in particular how Singapore courts have navigated their role in adjudicating the constitutionality of legislative and executive actions within the context of a strong state. Although Singapore was a British colony and inherited a Westminster form of parliamentary government upon independence, it did not adopt the United Kingdom's doctrine of parliamentary supremacy. Instead, the Constitution of the Republic of Singapore[1] (the "Constitution") proclaims that the Constitution is the supreme law of the land. It goes further to proclaim that any law inconsistent with the Constitution shall be void to the extent of the inconsistency. This doctrine of constitutional supremacy hews closer to the American model of constitutional review asserted by the Supreme Court in *Marbury v. Madison*,[2] which in more recent times has been called a "judicial supremacy" model.[3] However, despite the possible textual support for such assertive judicial review powers, the Singapore courts have tended to take a more cautious approach towards judicial review. The Singapore courts have only struck down a law once for being unconstitutional, though this was later overturned on appeal to the highest court of the land.[4] Cases involving judicial review of executive and administrative action have had more success, with several applicants succeeding in obtaining judicial review remedies. Nonetheless, as studies have shown, the rate of success in these cases has not been particularly high.[5] Notably, the judicial review of executive and administrative acts is often carried out based on administrative law principles derived from the common law, though they may at times be mixed with constitutional claims.

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[1] (1999 Rev Ed).

[2] *Marbury v. Madison* 5 US 137 (1803).

[3] Stephen Gardbaum, 'Reassessing the new Commonwealth Model of Constitutionalism' (2010) 8:2 *International Journal of Constitutional Law* 167 at 171.

[4] See *Taw Cheng Kong v. Public Prosecutor* [1998] 1 SLR(R) 78 (HC), *cf Public Prosecutor v. Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA).

[5] See Lynette J Chua & Stacia L Haynie, "Judicial Review of Executive Power in the Singaporean Context, 1965–2012" (2016) 4:1 *Journal of Law and Courts* 43. In this article, the authors studied cases from 1965-2012 and concluded that "[o]ut of the 87 decisions in the High Court, 33% succeeded against the government, meaning that the court ruled at least partially in favor of the applicant, whereas 12 out of the 31 decisions, 39% in the Court of Appeal succeeded." The authors further observed that "These are substantial figures in the Singaporean context given the dearth of successful constitutional challenges and the criticisms in law and courts literature."

It is difficult to assess comprehensively why the rate of success for judicial review in Singapore has been low. One cannot discount the possibility that some of these are unmeritorious cases. At the same time, other factors such as a judicial philosophy that tends towards deference to the political branches could be in play. Such deference to the political branches stems partly from a strong adherence to the common law conception of judicial power *vis-à-vis* the other branches of government. Strategic reasons may also come to play especially in the context of a dominant party state like in Singapore where the policy space that judges have to manoeuvre is limited. This deference can be further disaggregated: there is stronger deference to parliament and a slightly weaker deference to the executive. This scheme of deference fits closely with the common law approach to judicial review. While in Singapore judicial review is asserted as part of judicial power, a tradition that traces back to the American tradition of judicial review, this remains constrained by the legal system's English roots where parliament and parliamentary intent tends to be given preeminent status.

Part I examines the different models of public law adjudication within common law jurisdictions. Part II provides a brief overview of Singapore's judicial system. It examines the underlying structure and features that ensures judicial power and judicial independence, within the context of a supreme Constitution. Part III then explains how Singapore's courts have asserted judicial power in public law adjudication, to define and limit exercises of legislative and executive powers, and to structure political discourse, in Singapore.

II. THREE MODELS OF JUDICIAL REVIEW IN THE COMMON LAW

The first model of constitutional review is one of a subordinate court exercising powers to ensure legality of governmental action. This is the model traditionally associated with the courts in the United Kingdom which work within a long history of parliamentary supremacy, which is "deeply rooted in Britain's cultural and legal tradition."[6] Under this model, judicial review is highly limited and there is no review of legislative acts for legality. Traditionally, courts in the UK employ common law principles to supervise the acts of inferior tribunals and the executive. This *ultra vires* doctrine had long been premised upon the narrative of the courts upholding parliamentary intent. As Ariel Bendor and Zeev Segal observe, "[j]udicial activism at large arguably requires a condition-sine-qua-non, i.e., convincing judges of their authority and responsibility to rebut governmental decisions without harming their impartial status."[7] Until recently, UK courts have been reluctant "to intervene in matters that fall into the "no-man's land" of law and politics, e.g., issues dealing with political questions, which might be due to their perception of their limited role in the legal system."[8] The courts could and

[6] Ariel L Bendor & Zeev Segal, "Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model" (2002) 17:4 American U. Int'l Law Review 683.

[7] *Ibid* at 704.

[8] *Ibid*.

have however sought to advance rights-protection through interpretation. In more recent times, the UK Supreme Court has been arguably even more assertive in supervising the legality of executive action,[9] but this still occurs within the context of upholding parliamentary supremacy. Furthermore, even those who have sought to argue for a stronger basis of judicial review have done so within the confines of upholding parliamentary supremacy. For instance, Mark Elliott's proposal for a modified *ultra vires* principle still relies on parliamentary supremacy as the main conceptual device for grounding judicial review. He posits that courts give effect to Parliament's general intention that, when it creates decision-making powers, it only intends to grant such powers as are consistent with the rule of law.[10] Such proposals and recent developments constitutionalize judicial review, such that the UK model could be considered 'constitutional', albeit in a very limited sense.

A second model of judicial review is commonly associated with the United States' Supreme Court, which could be called the "judicial supremacy" model. While parliamentary supremacy "prioritizes the democratic decision-making claims of the political branches at the expense of at least potentially inadequate protection of rights", in contrast, "judicial supremacy prioritizes the protection of rights ... in a way that grants too much power to the judiciary at the expense of democratic decision making."[11] In this judicial supremacy model, there is a justiciable bill of rights upheld by the Supreme Court as a fetter on legislative and executive power.

A third model is the Commonwealth model of constitutionalism, which could be positioned between the model of judicial supremacy and judicial subordination. The Commonwealth model posits the following features: a legalized bill or charter of rights; some form of enhanced judicial power to enforce those rights by assessing legislation for consistency; and a formal legislative power to have the final word on what the law of the land is by ordinary majority vote.[12] This is a model that better describes the current position in the UK where after the United Kingdom's *Human Rights Act* came into force on 8 October 2000, courts were empowered to review legislative acts for compatibility with the relevant human rights but did not have the power to strike them down. The thinking behind this model is that it draws an intermediate balance between two models: parliamentary supremacy, on the one hand, and judicial supremacy, on the other. Stephen Gardbaum argues that the model provides a better balance between two "foundational values", namely "the recognition and effective protection of certain fundamental or human rights and (b) a proper distribution of power between courts and the elected branches of government, including appropriate limits on both."[13]

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[9] See e.g. *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent)* [2019] UKSC 41.

[10] See Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001).

[11] Gardbaum, *supra* note 3 at 171.

[12] *Ibid* at 171; see also Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism', (2001) 49 *American Journal of Comparative Law* 707.

[13] Gardbaum, *supra* note 3 at 171.

Notably, different models may apply to describe the institutional design of constitutional review but not the actual practice of constitutional review in a particular country. Singapore arguably sits uneasily between the commonwealth constitutional model and the parliamentary supremacy model, even though its institutional structure could even be said to have been modelled after the American model of judicial supremacy.

Another important observation is that these models were derived from constitutional systems with general courts having the power to review the constitutionality or legality of governmental actions. None of the courts within these common law systems are specialist constitutional courts, which may be staffed by non-legally trained officials, and which hear only constitutional matters.[14] This has great significance since judges in a generalist court, like the Supreme Court of Singapore, need to have more expansive expertise and their case load involves a greater range of issues. Thus, while the legitimacy of generalist courts may be impacted by their constitutional review decisions, this is not necessarily the case. In contrast, the legitimacy of constitutional courts squarely hinges upon their constitutional review decisions.

In the next section, we will examine the constitutional structure of the courts before going on to examine recent cases demonstrating the cautious and somewhat more deferential approach that the Singapore courts have taken in constitutional cases.

III. SINGAPORE'S COURTS AND JUDICIAL REVIEW

As mentioned, constitutional review in Singapore is exercised by generalist judges in a generalist court, which is staffed by legally-trained Judges which adjudicate on all civil and criminal matters. The Supreme Court is made up of the High Court, which hears all substantive public law disputes at first instance; and the Court of Appeal, which exercises appellate jurisdiction over the decisions of the High Court, and which is the highest court of Singapore. Only the Supreme Court can exercise the power of judicial review – although there other courts in Singapore which are subordinate to the Supreme Court (such as the State Courts), Article 93 vests the judicial power only in the Supreme Court, and only the Supreme Court has the power to grant orders sought by applicants in judicial review proceedings.[15] But within the Supreme Court, the power of judicial review is not "centralised" within a specific tribunal or coram. Rather, it is "decentralised",[16] meaning that any Judge sitting on the High Court can judicially review any law or executive act, and find it unconstitutional or illegal, with all such decisions being finally appealable to the Court of Appeal.

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[14] Alec Stone Sweet, "Constitutions, rights, and judicial power" in Daniele Caramani ed, *Comparative Politics* (Oxford University Press, 2017) at 159-160.

[15] *Supreme Court of Judicature Act* (Cap 322, 2007 Rev Ed) s 18(2) and 29A, read with the First Schedule. By contrast, Singapore's State Courts lack the power of judicial review (*State Courts Act* (Cap 321, 2007 Rev Ed) s 19(3)(b)), and cannot hear substantive constitutional challenges (*Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 SLR(R) 209 (CA) at [11] and [32]).

[16] For a discussion of "centralised" vs "decentralised review", see Stone Sweet, *supra* note 14 at 159-160.

Article 4 of the Constitution states that all legislation inconsistent with the Constitution shall, to the extent of that inconsistency, be void. The power of constitutional review is not explicitly provided for in the Constitution, but has been asserted and affirmed by the courts.[17] For instance, in *Chan Hiang Leng Colin v. Public Prosecutor*, one of the earliest constitutional review cases, the then Chief Justice Yong Pung How, sitting as the High Court, stated that:

> "The court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides."[18]

Furthermore, in *Nagaenthran a/l K Dharmalingam v. Public Prosecutor*, the Court of Appeal stated:

> "In a constitutional system of governance such as Singapore's, the courts are ordinarily vested with the power to adjudicate upon all disputes. … [J]udicial review forms a part of this power to adjudicate, and concerns that area of law where the courts review the legality of government actions: … In the normal course of events, all controversies, whether of fact or of law, are resolved by the courts. This work is done in accordance with the applicable rules of adjectival and substantive law, and it is the function of the courts to determine what the facts are and also to apply the relevant rules of substantive law to those facts. Judicial review concerns an area of law in which the courts review the lawfulness of acts undertaken by other branches of the government."[19]

The courts have also affirmed their co-equal status with the other branches of government,[20] such that constitutional review is seen as a "core aspect" of their judicial power[21] and part of their judicial function under a scheme of separation of powers in Singapore.

Singapore's Supreme Court generally only carries out "concrete", *a posteriori* judicial review, based on actual cases or controversies brought before it by individual applicants who have *locus standi* to do so;[22] it generally will not perform "abstract" review of hypothetical scenarios, and will not review

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[17] *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149] (HC); *Yong Vui Kong v. Public Prosecutor* [2011] 2 SLR 1189 at [84]-[85] (CA).

[18] *Chan Hiang Leng Colin*, *supra* note 15 at [50] (HC).

[19] *Nagaenthran a/l K Dharmalingam v. Public Prosecutor* [2019] 2 SLR 216 at [46] (CA).

[20] *Tan Seet Eng v. Attorney-General* [2016] 1 SLR 779 at [90] (CA).

[21] *Nagaenthran*, *supra* note 19 at [71].

[22] This generally requires the applicant to either have had his personal rights violated (*Tan Eng Hong v. Attorney-General* [2012] 4 SLR 476 at [115] (CA)); have suffered "special damage" by virtue of a public right being violated (*Vellama d/o Marie Muthu v. Attorney-General* [2013] 4 SLR 1 at [33] (CA)); or be able to show that a "very grave and serious breach…of legality" has occurred (*Jeyaretnam Kenneth Andrew v. Attorney-General* [2014] 1 SLR 345 at [62] (CA)).

legislation or executive acts *a priori*.[23] The only exception to this rule involves the President's power under Article 100 of the Constitution to seek an advisory opinion on "any question as to the effect of any provision of [the] Constitution which has arisen or appears to him likely to arise". If this Article is invoked (though it rarely is),[24] an *ad hoc* Constitutional Tribunal consisting of 3 Judges of the Supreme Court will be constituted to issue an advisory opinion on the hypothetical constitutional question posed to it by the President.

Judicial independence is key to the proper assertion of the judicial power, because it helps ensure that judges are not disincentivised from checking exercises of legislative and executive power, and adjudicating disputes between people and the State.[25] The Constitution contains express safeguards for judicial independence including setting out clear rules for judicial appointment, security of tenure and remuneration.[26] Supreme Court judges are appointed by the President on the advice of the Prime Minister, who must consult with the Chief Justice on the issue. Judges have security of tenure and remuneration up until the age of 65 – they can only be removed by a counsel of their peers, and only on grounds of misbehaviour or inability. However, such measures to ensure judicial independence are not extended to all judges. Lower court judges, namely the District Judges of the State Courts, do not enjoy such protection.[27] Neither do Judicial Commissioners and Senior Judges – people qualified to be Judges of the Supreme Court who are on *de facto* probation before being confirmed as Judges;[28] and people who were once, but have since retired from being, Judges of the Supreme Court,[29] respectively – although they also sit on the Supreme Court.

The judicial power and function in Singapore rests upon a scheme of separation of powers, which has been recognized by the courts as being part of the Constitution's basic structure. In *Mohammad Faizal bin Sabtu v. Public Prosecutor*, Chan Sek Keong CJ noted that under "[t]he Singapore Constitution…the sovereign power of the State is distributed among three organs of state, *viz,* the Legislature, the Executive and the Judiciary", and that "[t]he principle of separation of powers…is therefore part of the *basic structure of the Singapore Constitution*".[30] This idea that a Constitution has a "basic structure" which stands above and beyond its text derives from the Indian Supreme Court decision of *Kesavananda Bharati v State of Kerala*.[31] In this case, the court held that amendments to the Constitution which are procedurally-proper but which derogate from the Constitution's essential

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[23] For a discussion of "concrete" vs "abstract, and *a posteriori* vs *a priori* review, see Stone Sweet, *supra* note 14 at 160.

[24] Article 100 has only ever been invoked once, in *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803.

[25] Chan Sek Keong, "Securing and Maintaining Judicial Independence" [2010] 22 *Singapore Academy of Law Journal* 229 at [3].

[26] See Constitution Art 95.

[27] See Michael Hor, "The Independence of the Criminal Justice System in Singapore" [2002] SJLS 497 at 504.

[28] Constitution Art 95(4)(a); Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) [Thio, *Treatise*] at 02.114.

[29] Constitution Art 95(4)(b).

[30] *Mohammad Faizal bin Sabtu v. Public Prosecutor* [2012] 4 SLR 947 at [11] (HC) (emphasis added)

[31] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461 (Indian SC).

features (or the "identity" of the Constitution itself) would be unconstitutional and invalid. This basic structure doctrine has been hugely influential in constitutional courts across the world,[32] although the Singapore courts have yet to conclusively embrace the doctrine.[33] As Jaclyn Neo points out, while Singapore courts have agreed that it is a legal fact that Singapore's Constitution has a basic structure, they have yet to determine what legal doctrine would follow from that legal fact.[34]

IV. JUDICIAL REVIEW IN A STRONG STATE IN SINGAPORE

Judicial review has to be contextualized. Courts do not operate in a vacuum but within specific political conditions. Tom Ginsburg has argued that "political and institutional structure…are the keys to understanding the development of judicial review…the extent of political diffusion determines how successful courts can be in asserting the power [of judicial review]".[35] Accordingly, where there is a concentration of political power like in Singapore, there will presumably be less space for courts as there is generally less division in the policy space. Singapore's ruling party, the People's Action Party (the "PAP"), has won every general elections and formed the government since Singapore's independence in 1965. In other words, it has been in power for almost 60 years. During this time, it has dominated politics in Singapore, without a strong opposition in place. The PAP has never had less than 90% of the seats in Parliament.[36] This has critical constitutional implications. Under Article 5 of the Constitution, Parliament need only achieve a two-thirds majority of votes to amend "the provisions of [the] Constitution".[37] The Singapore Parliament can exercise (and has in practice exercised) the power to amend the Constitution on a frequent basis. Thus, Singapore has been called "fundamentally undemocratic"[38] and "competitively authoritarian",[39] and served as Mark Tushnet's primary example for "authoritarian constitutionalism", which he describes as a model where "liberal freedoms are protected at an intermediate level, and elections are reasonable free and fair."[40]

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[32] See Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press, 2017) at 39-70.

[33] See *Yong Vui Kong v. Public Prosecutor* [2015] 2 SLR 1129 at [69] (CA); *Ravi s/o Madasamy v. Attorney-General* [2017] 5 SLR 489 at [65]-[66] (HC).

[34] Jaclyn L Neo, "Towards a "Thin" Basic Structure Doctrine in Singapore", *I-CONnect Blog* (17 Jan 2018), available at: http://www.iconnectblog.com/2018/1/towards-a-thin-basic-structure-doctrine-in-singapore-i-connect-column/

[35] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003) at 19.

[36] Although the PAP has garnered as little as 60% of the popular vote in some elections, Singapore's electoral system operates on a first-past-the-post system, which, together with the Group Representative Constituency system (see *infra* note 57 and accompanying text), creates a "winner takes all" situation whereunder a political party which garners more than 50% of votes in a constituency wins all (3-6) of the seats therein (see Thio, *Treatise*, *supra* note 28 at 02.083 and 03.012).

[37] The only express limits on Constitutional amendments are those found in Articles 6-8 of the Constitution, concerning control over the Singapore Armed Forces and the Singapore Police Force.

[38] Sebastian Reyes, "Singapore's Stubborn Authoritarianism", *Harvard Political Review* (29 Sep 2015), available at http://harvardpolitics.com/world/singapores-stubborn-authoritarianism/

[39] Steven Levitsky & Lucan A Way, "The Rise of Competitive Authoritarianism" (2002) 13:2 *Journal of Democracy* 51 at 52.

[40] Mark Tushnet, "Authoritarian Constitutionalism" (2015) 100 Cornell Law Review 391 at 396.

Thus, as Yap Po Jen observes, a system like Singapore, which has a dominant party within the legislature and with such powers of the legislature in relation to constitutional and statutory amendment, may stultify attempts by courts to play a more active constitutional role through judicial review.[41] This is compounded by a deferential philosophy that could at least be said to partially stem from the courts' common law roots. This is reflected for instance in how the courts insist that they should not assess the merits of legislative or executive acts,[42] that they lack institutional competence to consider polycentric matters or evaluate socio-economic policy,[43] and that they should encourage "good government through the political process and public avenues rather than redress bad government through the [judicial process]".[44]

Indeed, Jack Lee points out in a 2015 article that there really have been only three cases in which the courts disagreed with the government's interpretation of the Constitution.[45] The first is *Chng Suan Tze v. Minister for Home Affairs*, a 1988 judgment where the Court of Appeal decided that, contrary to the government's assertion, it had the power to objectively review the exercise of ministerial discretion to detain persons without trial under the Internal Security Act.[46] The second case was decided in 1998 where the High Court ruled in *Taw Cheng Kong v. Public Prosecutor* that the provision in the Prevention of Corruption Act which extended extra-territorial reach to citizens of Singapore taking bribes overseas violated the equal protection clause (Article 12(1)).[47] This was however overturned by the Court of Appeal.[48] The last occasion he mentions was in 2013, when the Court of Appeal held in *Vellama d/o Marie Muthu v. Attorney-General* that the government's assertion that the Prime Minister had absolute discretion whether and when to call for by-elections where a casual vacancy had arisen in a single-member constituency was incorrect. The Court interpreted Article 49 of the Constitution, which states that where a seat "has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election" to mean that the Prime Minister must call for a by-election although he has a wide remit to determine the appropriate time for the by-election to take place.[49] Another important case where the court disagreed with the government, which was decided after Lee's article was published is the case of *Tan Seet Eng v. Attorney-General*.[50]

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[41] Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press, 2017) at 19-20.

[42] *Tan Seet Eng*, *supra* note 20 at [91]-[93].

[43] *Ibid.*

[44] *Jeyaretnam Kenneth Andrew*, *supra* note 22 at [48] and [50].

[45] Jack Tsen-Ta Lee, "Foreign Precedents in Constitutional Adjudication by the Supreme Court of Singapore, 1963–2013" (2015) 24:2 *Washington International Law Journal* 253 at 261.

[46] *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525 (CA).

[47] *Taw Cheng Kong HC*, *supra* note 4.

[48] *Taw Cheng Kong CA*, *ibid*.

[49] *Vellama*, *supra* note 22 at [54]-[82] (CA).

[50] *Tan Seet Eng*, *supra* note 20 at [95] and [97].

In this case, the Court of Appeal invalidated preventive detention orders issued by the government on the basis that they did not fall within the scope of the empowering legislation.

These cases nevertheless demonstrate the potential for judicial review to place constitutional limits on political power. The Singapore model appears to be grounded in a view that judicial review should be exercised only in extreme cases. This may be reflected for instance in a 2016 speech where Chief Justice Sundaresh Menon stated that "[j]udicial review is the sharp edge that keeps government action within the form and substance of the law".[51] However, a significant activity that could be missed if one only looks at outcomes is the continuing normativization of constitutional law in Singapore. This refers to the phenomenon where beyond the specific findings in the case, there are many more cases where the courts have developed jurisprudential doctrines that would serve to imbue constitutional review with more normative depth.[52]

In this regard, Singapore's courts have provided a strong legal basis in the way they conceptualized their role within the constitution. First, law defines the *basis* of all legislative and executive power in Singapore. Thereunder, courts maintain and affirm Singapore's commitment to "representative democracy" as its fundamental governing principle. Second, law defines the *limits* of power in Singapore. Here, notwithstanding the due deference they accord to the elected branches of government, courts apply the principle of "legality" as a hard limit on all exercises of legislative and executive power in Singapore. Third, law can *structure* political discourse in society without defining its content. Here, courts use "balancing" as a tool to ensure harmonious and deliberative political discourse in society.

1. Representative Democracy and the Basis of Power

The first role of law in public law adjudication in Singapore is the protection of representative democracy. At the heart of representative democracy is the citizen's right to vote. Without such a right, citizens simply cannot be sure that their government represents them in any meaningful sense. In the case of *Vellama d/o Marie Muthu v. Attorney-General*,[53] the centrality of representative democracy and the right to vote to Singapore's system of government came to the fore. At issue there was whether, upon the resignation of an MP from a Single-Member Constituency, the Prime Minister had an obligation to call a by-election to fill that seat. Article 49 of the Constitution states that vacant parliamentary seats "shall be filled by election in the manner provided by...any law relating to Parliamentary elections". This provision was the outcome of a previous constitutional amendment in 1963, which removed express wording requiring such a by-election to be called within three months

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[51] Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 *Singapore Academy of Law Journal* 413 at [30].

[52] See Jaclyn Neo, "Unwritten Constitutional Norms: Finding the Singapore Constitution", *Singapore Law Gazette* (May 2019), available at: https://lawgazette.com.sg/feature/unwritten-constitutional-norms-finding-the-singapore-constitution/.

[53] *Vellama*, *supra* note 22.

of the vacancy of that seat. During the 1963 debates leading up to that constitutional amendment, the Government had clearly contemplated that the removal of such express wording would free the Government of the day from any obligation to hold by-elections for such vacant seats.[54] The Court of Appeal in *Vellama* held that in a Westminster system, citizens had a right to be represented. This in turn meant that the Prime Minister had a duty to call for a by-election when seats in Single-Member Constituencies fell vacant, within a "reasonable time" of such vacancy.[55] Within this affirmation of representative democracy is an implied a right to vote. Indeed, in a later case of *Yong Vui Kong v. Public Prosecutor*,[56] the Court of Appeal recognized that if there was a basic structure to the Singapore Constitution, the right to vote could possibly form part of that basic structure.

The impact of this reasoning in *Vellama* concerning the right to be represented, however, has arguably been narrowed in *Wong Souk Yee v. Attorney-General*, which involved facts similar to *Vellama*, save that the parliamentary seat vacated was one in a Group Representation Constituency ("GRC"). The GRC scheme was introduced in 1988, which requires certain (in, fact, the majority of) electoral constituencies to elect their MPs in groups of 3-6 rather than as individuals, and requires each such group to contain an MP from a racial minority group.[57] The case arose when a minority MP resigned her seat to contest in the presidential elections. The Court of Appeal held that the Prime Minister had no duty to call for a by-election when "one or more of [the members of a GRC] has vacated his or her seat"[58] because the statute only provided for a by-election when all members of the GRC had vacated their seats. Yet, while this latter decision may be criticised on other grounds,[59] it is important for our purposes that the Court there was prepared to decide on the basis that, in principle, "the right to representation forms part of the basic structure of the Constitution".[60]

2. Principle of Legality

The principle of legality has been developed as a basis of judicial review in Singapore, although its content remains rather limited.[61] The principle of legality as understood in Singapore stems from a paragraph in the Court of Appeal's decision in *Chng Suan Tze v. Minister of Home Affairs*, that "all power has legal limits".[62] This means first that all exercises of governmental power must be subject to "limits", which means that "subjective or unfettered discretion" cannot exist. Secondly, these limits

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[54] *Ibid* at [61]-[72].

[55] *Ibid* at [80]-[85].

[56] *Yong Vui Kong*, *supra* note 33 at [69]-[70].

[57] Constitution Art 39A.

[58] *Wong Souk Yee v. Attorney-General* [2019] 1 SLR 1223 at [78] (CA).

[59] Namely, that it neglects the Group Representation Constituency system's purpose of maintain racial representation in Parliament.

[60] *Wong Souk Yee*, *supra* note 58 at [78].

[61] See Jaclyn L Neo, "All Power Has Legal Limits: The Principle of Legality as a Constitutional Principle of Judicial Review" (2017) 29 *Singapore Academy of Law Journal* 667.

[62] *Chng Suan Tze*, *supra* note 46 at [86].

are "legal", meaning that "the *courts* should be able to examine the exercise of discretionary power".[63] Today, in Singapore, the notion that there must be some legal limits on the legislative and executive power, enforceable by courts, is well-established. In the context of the executive power, the principle of legality comports clear limits. For instance, in *James Raj s/o Arokiasamy v. Public Prosecutor*, the Court of Appeal held that although an accused person's right to counsel could be delayed for a "reasonable time" by the police for the sake of expeditious and efficient police investigations, such a delay would be unconstitutional if it unreasonably hindered the accused person's "undoubted right to legal representation".[64]

In Singapore administrative law, the principle of legality also imposes the limits of illegality, irrationality and procedural impropriety on executive powers. Those three grounds of administrative law judicial review apply uniformly, regardless of the subject-matter expertise or institutional competence of the executive decision-maker in question: in *Chng Suan Tze*, the Court of Appeal affirmed that, while "[t]hose responsible for national security are the sole judges of what action is necessary in the interests of national security", "the normal judicial review principles of 'illegality, irrationality or procedural impropriety'" were always available;[65] and subsequently, in *Tan Seet Eng v. Attorney-General*, the Court of Appeal affirmed that those three grounds of judicial review were always available to the court, "even for matters falling within the category of 'high policy'", and that when enforcing those grounds of judicial review, "the question of deference to the Executive's discretion simply does not arise".[66] Likewise, those three grounds of judicial review will also apply to all executive decision-makers regardless of their constitutional authority: in *Nagaenthran a/l K Dharmalingam v. Public Prosecutor*, the Court of Appeal held that the "rule of law" entailed that any executive decision-making power, constitutional or otherwise, should always be subject to review on grounds of illegality, irrationality and procedural impropriety – and further, that any legislation which might purport to exclude such grounds of judicial review would be unconstitutional and invalid.[67]

3. "Balancing" and the Structure of Political Discourse

The third important development in public law adjudication in Singapore is the structuring of political discourse in society. Courts have on occasion invoked the idea of "balancing" when determining whether legislative and executive power has been exercised constitutionally. In *Review Publishing v. Lee Hsien Loong*, the Court of Appeal hypothesized *obiter* how it might address the question of whether the tort of defamation should recognise a defence of *Reynolds* privilege (i.e. a

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[63] *Ibid* (emphasis added).

[64] *James Raj s/o Arokiasamy v. Public Prosecutor* [2014] 3 SLR 750 at [31] and [39] (CA).

[65] *Chng*, *supra* note 46 at [89] and [119].

[66] *Tan Seet Eng*, *supra* note 20 at [99] and [106].

[67] *Nagaenthran*, *supra* note 21 at [51] and [69]-[74].

defence in defamation suits for defendants who can show that their statements meet a standard of "responsible journalism"), which turned on the extent to which Article 14(2) preferred freedom of speech over the protection of reputation. The Court would have to "strik[e] [a] *balance* between freedom of expression and protection of reputation" by making "a value judgment which depends upon local political and social conditions".[68] Whether and how this balance should be struck would be a fact-specific inquiry, involving how Singapore's "political, social and cultural values", the public policy on the "media's role in society" and Singapore's "political culture" stood at the given time.[69] Thus, the court used "balancing" as a metaphor to suggest that law had to remain socially-legitimate and contextual, and reactive to continued political discourse on the matter.[70]

The use of "balancing" tests in constitutional rights adjudication, however, is not without controversy, because courts who use such tests are sometimes seen as deciding contentious political debates and ruling on the merits of legislative or executive acts – as compared to simply upholding "representative democracy" or the "principle of legality", which are now fairly uncontroversial norms of constitutionalism in Singapore. For this reason, the use of "balancing" tests has often been criticised as undemocratic and invocative of the judiciary's "counter-majoritarian difficulty". These critics, in turn, argue that such political and policy-laden issues should be left firmly to the democratic process for resolution. [71]

However, such criticism may not hold much water against the balancing tests used by Singapore's courts, which have been used not determine political debates in the abstract and remove civil society's ability to resolve those debates itself, but rather to ensure that the law takes a calibrated approach to the facts of each case before the court, and remains reactive in general to Singapore's evolving socio-political culture. Through balancing, courts can confine clashes between rights and public policy to the particular facts of individual cases and resolve them for the purposes of that case only: one value outweighs the other, but plural value systems are still recognised, since on different facts the other value might triumph instead. Thusly, the court "demonstrates respect for the dignity of the disputing parties",[72] and "keeps everyone in the game, thereby enhancing its legitimacy".[73] Moreover, courts carrying out "balancing" help "identify and thoughtfully explicate the policy concerns implicated with clarity and purpose" through its reasoning process, and can identify issues which the government or

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[68] *Review Publishing v. Lee Hsien Loong* [2010] 1 SLR 52 at [270]-[271] (CA) (emphasis added).

[69] *Ibid* at [272]-[285].

[70] For a discussion of how it did this, see Thio Li-ann, "Between Apology and Apogee, Autochthony: the 'Rule of Law' Beyond the Rules of Law in Singapore" (2012) *Singapore Journal of Legal Studies* 269 at 290-294.

[71] See Jaclyn L Neo, "Balancing act: The balancing metaphor as deference and dialogue in constitutional adjudication" in Jaclyn L Neo ed., *Constitutional Interpretation in Singapore: Theory and Practice* (Singapore: Routledge, 2016) [Neo, "Balancing"] at 96 for a summary of these critiques.

[72] Sundaresh Menon, "Taming The Unruly Horse: The Treatment Of Public Policy Arguments In The Courts" (Speech given at the High Court of Sabah and Sarawak, Kota Kinabalu, 19 Feb 2019) at [57].

[73] Neo, "Balancing", *supra* note 71 at 95.

civil society may want to deliberate further and determine more conclusively, thereby "enlarg[ing] the space for democratic debate and civic participation, and enrich[ing] the public life of the country".[74] So understood, the use of balancing does not allow courts to decide on the merit of the content of legislative or executive acts, but merely to resolve disputes in a way that structures harmonious and deliberative political discourse on pertinent issues.

CONCLUSION

A society's public law cannot be abstract and unchanging, but must accord with the fundamental values and practices of that society as it evolves over time. The role of the court, therefore, is to develop and apply public law in this manner.[75] Singapore's courts have done this by, first, upholding and entrenching their independence; and second, by using their judicial power to ensure that representative democracy remains the basis of all legitimate exercises of power in Singapore, to maintain the principle of legality alongside due deference as a limit on all exercises of power, and to structure harmonious and deliberative political discourse in society. As the Court of Appeal noted in *Tan Seet Eng v. Attorney-General*, such "judicial modesty must go hand in hand with judicial courage" to enforce the law, for "while it is one thing to say that the court must not substitute its view as to the way in which [legislative or executive power] should be exercised, it is quite another to say that the…exercise of [such power] may not be scrutinised by the court at all."[76] Thus, the notion of judicial "deference" within Singapore public law adjudication must be understood with some nuance. Singapore's courts will always accord "weak" or "minimal" deference to legislative or executive acts:[77] they will not assess those acts based on their merits,[78] and will place the burden of proving the unconstitutionality and legality of those acts on applicants raising such challenges.[79] However, Singapore's courts are reluctant to accord "strong" or "substantial" deference – in the sense of abstaining, in total or in significant part, from adjudicating upon legislative or executive acts at all[80] – if doing so would go against the "principle of legality", which has been called a "basic principle in constitutional and administrative judicial review" in Singapore.[81]

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[74] Menon, *supra* note 72 at [57]-[59]; see also Neo, "Balancing", *ibid* at 96-97.

[75] See Thio Li-ann, "Principled pragmatism and the 'third wave' of communitarian judicial review in Singapore" in Jaclyn L Neo ed., *Constitutional Interpretation in Singapore: Theory and Practice* (Singapore: Routledge, 2016) for an overview of how Singapore's courts have done this over time.

[76] *Tan Seet Eng*, *supra* note 20 at [95] and [97].

[77] See Alison L Young, "In Defence of Due Deference" (2009) 72:4 *Modern Law Review* 554 at 562-563; Aileen Kavanagh, "Defending deference in public law and constitutional theory" (2010) 126 *Law Quarterly Review* 222 at 228; Neo, "Balancing", *supra* note 71 at 89-90.

[78] *Tan Seet Eng*, *supra* note 20 at [91]-[93].

[79] *Lim Meng Suang v. Attorney-General* [2013] 3 SLR 118 at [104] (CA).

[80] Young, *supra* note 77 at 560-562; Kavanagh, note 77 at 228; Neo, "Balancing", *supra* note 71 at 89-90.

[81] Chan Sek Keong, "Judicial Review – From Angst to Empathy" [2010] 22 *Singapore Academy of Law Journal* 469 at [8].

6. The Constitutional Review Models from Transitional Countries: A case of Russia

Fumito Sato*

Abstract

The Russian Constitutional Court was established in 1991 as the consequence of the profound political and social transformation of Soviet society. Since then, the Constitutional Court performed the role of reformer of Russian constitutional order, generator of contemporary 'living constitutionalism.' This paper briefly examines the history, composition, authorities, and the essential attributes of judicial precedents of this unique institution, and evaluates its performance. One of the core distinctions of the Russian Constitutional Court, compared with its Asian counterparts, is that it cooperates with the international judicial organization in the field of human rights protection. This paper sheds light on the relationship between the Russian Constitutional Court and the ECtHR and attempts to reveal the contradictory position, which the Constitutional Court holds under today's complicated political situation in Russia.

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INTRODUCTION

In Russia, the Constitutional Court (hereinafter, the Court) is a relatively young institution. It was established in 1991 at the last stage of *Perestroika* based on the Austro-German model[1]. During the Soviet era, the integral principles and concepts of constitutional adjudication like separation of powers, independence of the judiciary, human rights, and constitutionalism were denied as products of bourgeois ideology. The Supreme Soviet of the USSR, the state's highest body, and its Presidium were vested with the power to ensure observance of the Soviet Constitution[2]. However, until the late 1980s, this function had not been invoked[3].

The establishment of this Court was one of the most prominent developments, which symbolized the systemic transformation from the communist regime in the field of law. Since then, the Court, an institution enshrined in the Constitution of 1993 as a keystone of the 'rule of law state,' contributed tremendously to transform old socialist legal order into the new one. One of the Judges of the Court, Nikolai Bondar' explicated that the Court performed a role of "reformer of Russian constitutionalism, generator of contemporary "living" constitutionalism,"[4] and the Constitutional control changed the Constitution from a mere legal act into "living law."[5]

The main aim of this paper is to elaborate on the basic attributes of the Russian Constitutional Court, its composition, and authority. Furthermore, this paper will shed light on the underlying features of the Court's activity. Such a pre-context will enable the author to eventually assess the actual condition of "judicial constitutionalism" in Russia.

I. OVERVIEW OF THE RUSSIAN CONSTITUTIONAL COURT – ITS HISTORY, COMPOSITION, AND AUTHORITY

1. Brief history prior to the establishment of the Constitutional Court of 1994

When the Supreme Soviet of the RSFSR established the Court in 1991, it was expected that this new institution would oversee not only the legislative body but also the Presidency and the judiciary. As an example, citizens could submit a constitutional complaint to this Court against alleged encroachment of their constitutional rights, when a "law application practice" (*pravoprimenitel'naja praktika*) infringed such rights[6]. The concept of a "law application practice" means a well-established

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[1] Ведомости Съезда народных депутатов РСФСР и Верховного Совета РСФСР. 1991. № 19. Ст. 621.

[2] The Presidium of the Supreme Soviet of the USSR was vested with the power to control the observance of the Constitution of the USSR and guarantee the conformity of constitutions and laws of union republics to the Constitution and laws of the USSR (Article 121, section 4 of the Constitution of the USSR of 1977).

[3] In 1988, the Supreme Soviet of the USSR invoked this authority against decisions of the Azerbaijan and Armenian SSRs regarding the Nagorno-Karabakh conflict and the Declaration of the state independence of the Estonian SSR.

[4] Бондарь Н. С. Судебный конституционализм: доктрина и практика. 2-е изд. М., Норма. 2016. С. 95.

[5] Там же, С. 118.

[6] Article 66 of the Act on the Constitutional Court of the RSFSR of 1991. См. Коваленко К. А. Понятие «сложившаяся правоприменительная практика» в федеральном конституционном судопроизводстве// Журнал конституционного

judicial practice. One of such examples included a "guiding explanation of the Plenum of the Supreme Court" that interpreted legal norms in an abstract manner regardless of concrete cases[7]. The Court, therefore, in this respect, played the role of the quasi-higher court over the ordinary courts. Simultaneously, the Court was competent to examine the constitutionality of the individual acts and decisions of the Russian President both on the request from select state authorities and the Court's own initiative[8].

In the fall of 1993, President El'tsin suspended the operation of the Russian Parliament based on the presidential decree, following a conflict between him and the legislature. The Constitutional Court, on its initiative, held that decree unconstitutional. The President, in turn, suspended the activity of the Court[9]. Soon after this *coup d'état*, in December 1993, the current Constitution of the Russian Federation was enacted through a national referendum. Even though the Court was not dissolved and former judges still maintained their terms of office, the composition and authority of the Court went through certain modifications[10].

In 1994, the Court lost its authority to independently initiate the examination of the President's decisions. Within the procedure of a constitutional complaint, the Court could only examine the constitutionality of laws that allegedly violated fundamental rights of citizens. The Court lost its authority to review the "law application practice," and hence cannot control the judicial practice of ordinal courts again. Simply speaking, the Court lost its status as the highest body of the judicial branch.

2. Judges and the Chairman of the Russian Constitutional Court

The Court consists of 19 judges[11]. The Federal Council appoints judges upon the proposals from the President[12]. The judge's term of office is not restricted, excluding the requirement to retire at the age of 70[13]. Initially, the Court's judges voted and elected the Chairman of the Court in the plenary session[14]. In 2009, after the Constitutional Court Act was amended on the proposal of President Medvedev, the Federal Council obtained authority to appoint the Chairman of the Court upon the Russian President's proposal. The Chairman's term of office is six years. In 2010, this position was

правосудия. 2012. № 1.

[7] Article 56, section 1 of the Act on the Judiciary of the RSFSR of 1981. The guiding explanation was issued in the form of the Decision of the Plenum of the Supreme Court.

[8] Article 74, section 2 of the Act on the Constitutional Court of the RSFSR of 1991.

[9] Подробнее см. Авакьян С. А. Конституция России: природа, эволюция, современность. 2-ое изд. М., РЮИД. 2000. С. 171-184.

[10] СЗ РФ. 1994. № 13. Ст. 1447.

[11] Article 125, section 1 of the Constitution of the Russian Federation of 1993.

[12] The Federal Council is the Upper House of the Federal Assembly (Parliament), composed of the representatives of legislative and executive bodies of each constituent entity of the Russian Federation.

[13] Article 12 of the Act on the Constitutional Court of the Russian Federation of 1994 (revised by the Federal Constitutional Law on 5 April 2005 No.2-FCL).

[14] Article 23, section 1 of the Act on the Constitutional Court of the Russian Federation of 1994 (before the amendment thereof by the Federal Constitutional Law on 2 June 2009 No.2-FCL).

exempted from a retirement age restriction[15].

3. Structure and location of the Court

Previously, the Court's structure included a plenary session and two chambers. As an example, the Plenary Session had competence to examine the conformity of constitutions or charters of the constituent entities of the Russian Federation to the Federal Constitution. Unlike the relationship between sections and grand chambers of ECtHR, the plenary session of the Russian Court could not quash the rulings of a chamber. In 2010, the two chambers were abolished. Now, it is only the session that is eligible to examine every case that the Court recognizes as "permissible"[16].

Initially, the Court was located in Moscow. Since 2008 the Court has been relocated to Saint Petersburg. It now operates in the building of the Governing Senate (*Pravitel'stvujushchij Senat*), the former Supreme Court of the Russian Empire.

4. Authority of the Court

The authority of the Russian Court is similar to the Federal Constitutional Court of Germany. First, according to the Constitution and the Constitutional Court Act, the Court resolves cases concerning the conformity to the Constitution of the Russian Federation of legal regulations (federal laws, legal acts of the President, constitutions of republics, charters, and laws of constituent entities of the Russian Federation)[17] and international agreements of the Russian Federation, which have not entered into force[18], i.e. abstract norm control[19]. Second, the Court exercises a concrete norm control, or in other words, performs a constitutional review of law arising in specific cases forwarded by ordinary courts[20]. Third, the Court tests the constitutionality of law applied in a specific case in response to complaints of citizens against the alleged violation of constitutional rights and freedoms, i.e., constitutional complaint[21]. Forth, the Court resolves competence disputes between; federal bodies, federal bodies and bodies of constituent entities of the Russian Federation, and state bodies of

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[15] СЗ РФ. 2009. № 23. Ст. 2754.

[16] Article 21 of the Act on the Constitutional Court of the Russian Federation of 1994 (revised by the Federal Constitutional Law on 3 November 2010 No.7-FCL).

[17] Article 125, section 2, item a) - c) of the Constitution of the Russian Federation of 1993; Chapter 9 of the Act on the Constitutional Court of the Russian Federation of 1994.

[18] Article 125, section 2, item d) of the Constitution of the Russian Federation of 1993; Chapter 10 of the Act on the Constitutional Court of the Russian Federation of 1994.

[19] Petitions for abstract review can be lodged by the President of the Russian Federation, the Federal Council (the Upper Chamber), the State Duma (the Lower Chamber), more than one-fifth of MP of each Chamber, the Federal Government, the Supreme Court, Legislative and executive bodies of the constituent entities of the Russian Federation.

[20] Article 125, section 4 of the Constitution of the Russian Federation of 1993; Chapter 13 of the Act on the Constitutional Court of the Russian Federation of 1994.

[21] Article 125, section 4 of the Constitution of the Russian Federation of 1993; Chapter 12 of the Act on the Constitutional Court of the Russian Federation of 1994.

constituent entities of the Russian Federation[22]. Fifth, the Court gives interpretations of the Constitution[23]. The Court also gives conclusions on compliance with the procedure for accusing the President of the Russian Federation of treason or the commission of another grave offense, i.e., the examination on impeachment procedure of the President[24]. Furthermore, it examines the treaties on the admission of foreign countries or a part of them into the Russian Federation as its new constituent entity[25]. In addition, the Court also reviews the constitutionality of the implementation of decisions of international human rights protection organizations[26].

Unlike the German Court, the Russian Court cannot handle issues related to a ban on political parties. As mentioned earlier, the scope of the constitutional complaint is also limited only to the review of the constitutionality of laws, and the Court does not examine the application of laws by the executive or judicial branches. A relatively weak authority of the Court is the outcome of the political confrontation with the President in 1993.

5. Legal force of a Judgement

The Court's ruling is final and cannot be appealed. A ruling has a general binding force and, in principle, a prospective effect. That means legal regulations which had been declared unconstitutional lose their force for the future. However, in case of a constitutional complaint, a judgment of the Court has a retroactive effect on the case, in which the judgment was rendered. In such situations, a retrial in the civil or criminal procedures follows whenever a retrial is necessary to give remedy for victims. Accordingly, in order to implement rulings of the Court, cooperation from legislative and judicial branches is essential. In this respect, however, the Chairman of the Court sometimes blames the non-implementation of its rulings by them[27].

II. THE PRACTICE OF THE CONSTITUTIONAL COURT

Now, the Russian Court annually renders about 30 to 40 judgments. Furthermore, it also renders

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[22] Article 125, section 3 of the Constitution of the Russian Federation of 1993; Chapter 11 of the Act on the Constitutional Court of the Russian Federation of 1994.

[23] Article 125, section 5 of the Constitution of the Russian Federation of 1993; Chapter 14 of the Act on the Constitutional Court of the Russian Federation of 1994.

[24] Article 125, section 7 of the Constitution of the Russian Federation of 1993; Chapter 15 of the Act on the Constitutional Court of the Russian Federation of 1994.

[25] This authority is vested to the Constitutional Court, not by the Constitution or the Act on the Constitutional Court but the Act on the procedure for admitting to the Russian Federation and forming in its composition a new constituent entity of the Russian Federation, enacted in 2001. This procedure was for the first time applied in the case of the annexation of Crimea in March of 2014 (Постановление Конституционного Суда РФ от 19 марта 2014 г. N 6-П). The proceeding of the case was criticized by the professor of the High School of Economics, Elena Luk'janova, and this issue became a popular topic among the general public. См. Лукьянова Е. А. #КРЫМНАШ: Спор о праве и о скрепах двух юристов и их читателей. М., Кучково поле. 2015.

[26] Chapter 13^1 of the Act on the Constitutional Court of the Russian Federation of 1994. This authority will be analyzed in section 4.

[27] Дмитрий Медведев провел судебные слушания// Коммерсантъ, 16 июля 2008; Валерий Зорькин стал думским лоббистом// Коммерсантъ, 21 январь 2009.

'decisions.' According to the Constitutional Court Act, the merit of a case is resolved in the form of a judgment, and a procedural issue is settled in the form of a decision[28]. During its activity, however, the Court developed the practice of decisions[29]. Some decisions reveal the meaning of Constitutional provisions, especially by demonstrating interpretations of legal norms which do not contradict the Constitution. Such interpretation is expected to be considered and respected in ordinary courts. Therefore, one may assert that the Court of 1994 was set up as the legislature's watchdog, while in practice, it has also been trying to affect the judiciary's practice.

In order to illustrate the basic features of practices of the Court, its activity of 2015 will be taken as an example. During this year, a total of 14622 cases were lodged to the Court, and it rendered 34 judgments. Among them, only one judgment did not recognize any violation of the Constitution. In 19 cases, the provisions of legal norms were regarded as unconstitutional. In 17 cases, the Court revealed interpretations of laws which conformed with the meaning of the Constitution. In 14 cases, the Court explicitly demanded the legislature to amend legal regulations. Furthermore, the Court rendered 3111 decisions[30].

1. Basic trends of the rulings

The Court has played a crucial role in reforming Russian old socialist legal order. It is this Court that had introduced in Russia the case law system. According to this system the specific cases reveal the meaning of legal norms and make these norms obligatory in the form of precedents. The old fashioned, inquisitorial, criminal proceeding was also reformed based on many judgments of the Court. In general, the Court contributed to eliminating obstacles and enhancing the level of human rights protection.

On the other hand, the 1993 political confrontation seriously affected the activity of the constitutional adjudication in cases touching upon the separation of powers[31]. When the Court comes across with issues on the Presidency or cases with political interest, it generally stands on the side of the Presidency.

The most prominent example is the 1995 Chechen case[32]. In this case, the Court endorsed the

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[28] Article 71 of the Act on the Constitutional Court of the Russian Federation of 1994.

[29] Витушкин В. А. Определения Конституционного Суда Российской Федерации: особенности юридической природы. М., Норма. 2005; Петров А. А. Решения Конституционного Суда Российской Федерации: конституционно-правовое исследование: монография. Иркутск, Фонд «Право и Демократия». 2012; Сивицкий В. А. О динамике типологии решений конституционного суда Российской Федерации// Журнал Высшей школы экономики. Право. 2012. № 2; Смирнов А.В. Взаимосвязь видов решений Конституционного суда Российской Федерации, их оснований, целей и способов правого толкования// Журнал конституционного правосудия. 2012. № 3.

[30] Информационно-аналитический отчет об исполнении решений Конституционного Суда Российской Федерации, принятых в ходе осуществления конституционного судопроизводства в 2015 году (электронный ресурс). Available at: http://www.ksrf.ru/ru/Info/Maintenance/Informationks/Pages/ReportKS2015.aspx (Accessed: 31 August 2019).

[31] The conclusion of the Constitutional Court, which declared the El'tsin's decree unconstitutional, only heightened the tension between the President of the State and the Parliament, and, at the end, lives of hundreds of persons within the Parliamentary building were lost by a bombardment of the President's tanks.

[32] Постановление Конституционного Суда РФ от 31 июля 1995 г. N 10-П.

theory of so-called presidential "implicit powers."[33] According to this theory, the President has authority (and in the instant case, president could order to the Ministry of Defense to send troops to the domestic regions, i.e., to the Chechen Republic), which can be deduced from the abstract provision of the Constitution. The President can invoke such authority without any statutory empowerment. In the Chechen case, Article 80, section 2, which enables the President to "adopt measures to protect the sovereignty of the Russian Federation, its independence and state integrity," justified the troops' development into Chechnya in the 'extraordinary situation' without the permission from the upper chamber of the Parliament.

The December 21, 2005 judgment is another bright example. In this case, the Court altered its old precedent of 1996, which demanded the constituent entity of the Russian Federation (in this case, Altai region) to select its governor through direct elections by the local population[34]. The judgment of 2005 justified a new appointment procedure of governors, according to which the President of the Russian Federation nominated candidates, and a local parliament appointed a governor among them. This new procedure was proposed by the President Putin in 2004 in the context of confronting the terrorism accident, known as the Beslan School Siege. The 2005 judgment replaced the old precedent of 1996, which protected the political interest of former President El'tsin by a new one, which supported Putin's federal reform[35]. The Court justified the precedent change by stating that interpretation of the Constitution would be changed according to the transformation of its surrounding social and historical contexts, including "concrete socio-legal conditions."[36] According to this logic, the transformation of ordinary laws endorses the change of the interpretation of the Constitution, which has higher authority than any other legal act. The 2005 judgment was, therefore, vehemently criticized as distorting the idea of the supremacy of the Constitution by Judge Anatolij Kononov in his persuasive dissenting opinion[37].

2. Method of judicial review

At this point, it would be beneficial to make a cursory glance at methods of judicial review of the Court. As a consequence of the introduction of German-style constitutional review, the Russian Court accepted the principle of proportionality in order to assess the conformity of law to the Constitution[38]. Article 55, section 3 of the Constitution is the legal basis of this principle. It states that "the rights and freedoms of human and citizen may be limited by the federal law only to such an extent to which it is

[33] Комментарий Эбзеева Б. С., Комментарий к постановлениям конституционного суда Российской Федерации. т. 1. М., Норма. 2001. С. 244-245.

[34] Постановление Конституционного суда РФ от 18 января 1996 г. N 2-П.

[35] См. Авакьян С. А. Почему «наместники» лучше «баронов»// Российская Федерация Сегодня. № 24. 2004.

[36] Постановление Конституционного Суда РФ от 21 декабря 2005 г. N 13-П.

[37] Особое мнение судьи Конституционного Суда РФ А. Кононова в Постановлении КС РФ от 21 декабря 2005 г. N 13-П.

[38] См. Толстых В.Л. Конституционное правосудие и принцип пропорциональности// Российское правосудие. № 12. 2009.

necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring the defense of the country and security of the State."

In Russia, like other countries, the proportionality test consists of four criteria. First, the objectives of the legislation are examined as to whether it pursues a legitimate aim. In practice, the legitimacy of objectives is, in most cases, positively recognized by the Court. Second, the test of suitableness or rational basis test is applied. In 2013, the Court held a provision of the Labor Code unconstitutional because it barred the person from working as a teacher when he or she was convicted of a criminal offense, which did nothing to do with an educational profession[39]. The third test is about necessity. If there are less restrictive alternatives, the legal restraints are regarded as unconstitutional. For example, in 2002, a prohibition against attorney's right to participate in the hearing of civil trial when he or she does not have access to the state secret was regarded as unconstitutional because there are other less restrictive options as in-camera hearings[40]. The last test relates to proportionality in a narrow sense.

There is some criticism among scholars about the actual practice of applying proportional test by the Court[41]. The Court, for example, tends to acknowledge traditional and conservative values like "special role of women for child-raising" as constitutionally relevant. Such a social value is applied as a rationale for the constitutional review in order to justify the constitutionality of the legislations without any sufficient justification[42]. It is also criticized that the Court acknowledged the principle of proportionality on the surface, but it actually often did not apply it and reviewed cases only by "measuring by eye."[43]

III. FIREWALL FOR CONSTITUTIONAL IDENTITY ? RUSSIAN CONSTITUTIONAL COURT AND EUROPEAN COURT OF HUMAN RIGHTS

Lastly, a new function of the Courts, which was assigned in the middle of 2010s in connection with Europe, must be mentioned here. One of the prominent distinctions of Russian legal order from those of Asian countries is that Russia ratified the European Convention on Human Rights (ECHR) in 1998, and Russian state authorities are now under the jurisdiction of European Human Rights protection[44].

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[39] Постановление Конституционного Суда РФ от 18 июля 2013 г. N 19-П.

[40] Определение Конституционного Суда РФ от 10 ноября 2002 г. N 314-О.

[41] Троицкая А. Пределы прав и абсолютные права: за рамками принципа пропорциональности? Теоретические вопросы и практика Конституционного Суда РФ// Сравнительное конституционное обозрение. № 2. 2015. С. 57.

[42] Белов С. Пределы универсальности конституционализма: влияние национальных ценностей на практику принятия решений конституционными судами// Сравнительное конституционное обозрение. № 4.2014. С. 50.

[43] Белов С. А. Ценностное обоснование решений как появление судебного активизма Конституционного Суда Российской Федерации// Сравнительное конституционное обозрение. № 2. 2012. С.147.

[44] Nußberger A. The Reception Process in Russia and Ukraine in H. Keller and A. Stone Sweet (eds.) *A Europe of Rights: The*

The first judgment of the European Court of Human Rights (ECtHR) against Russia was rendered in 2002. Since then, the number of cases submitted to and pending in the ECtHR kept increasing year by year. In 2010, the number of pending cases reached more than 40000. Because of multiple problems in the domestic court system, many Russian citizens regard the ECtHR as an effective remedy for the protection of rights and legal interests.

In the first decade of this century, ordinary courts, headed by the Supreme Court of the Russian Federation, were reluctant to refer to the precedents of ECtHR[45]. It was not uncommon that judges lacked basic knowledge of its application, though Article 15, section 4 of the Constitution makes international treaties and agreements of the Russian Federation a component part of its legal system. In this context, the Court acted as a mediator between Russia and Europe. The Court frequently quoted provisions of the ECHR and judgments of ECtHR, considered itself as the translator of European precedents into Russian law[46]. The general measures, which are introduced into Russia based on judgments of ECtHR, are also supported by the assistance of rulings of the Court. For instance, the Court introduced a permanent moratorium on death penalty sentences in 2009[47]. We can also take a case of 2010, which recognized a judgment of ECtHR as a ground for opening a retrial in civil litigation[48].

In some cases, the Court refers to case-law of ECtHR while ignoring its original context in order to justify a restriction of fundamental rights and freedoms[49]. The Court, however, earnestly invoked the Convention, especially in cases when the right to a fair trial, provided in Article 6 of the European Convention, was violated. Such activities of the Court contributed to decreasing cases, lodged from Russia, and pending before the ECtHR. In other words, the Court, to some extent, succeeded in "bringing human rights into the home."[50]

Since 2010, the friendly atmosphere between the two Courts disappeared, and dissonance has come to the fore. This new situation was prompted by the judgment of ECtHR on the famous Markin case in 2010, in which discrimination against male military personnel was examined. The applicant, Konstantin Markin requested childcare leave for three years, which was guaranteed for female soldiers. Russian Army, however, rejected his request, and Russian courts also did not recognize his action. He,

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Impact of the ECHR on National Legal Systems, OUP, 2008.

[45] About implementation of ECHR in Russia, see, Burkov A. The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996-2006, Ibidem-Verlag, 2007; Бурков А. Конвенция о защите прав человека в судах России. М., 2010.

[46] Коротеев К. Место Европейской Конвенции о защите прав человека и основных свобод в аргументации решений Конституционного Суда РФ// Сравнительное конституционное обозрение. 2013. № 4. С. 69-70.

[47] Определение Конституционного Суда Российской Федерации от 19 ноября 2009 г. N 1344-О-Р.

[48] Постановление КС РФ от 26 февраля 2010 г. N 4-П.

[49] Например, см. Постановление КС РФ от 7 июня 2012 г. N 14-П.

[50] E. Pamfilova depicted the main task of Russia in the 2000s in terms of European human rights protection as "bringing human rights into the home." См. Памфилова Э.А. Главная цель международного права – «принести права человека домой». Под ред. Буркова А. Л. Применение Европейской конвенции о защите прав человека в судах России. Екатеринбург, Изд-во Урал ун-та. 2006.

therefore, applied to the ECtHR. This issue was also reviewed by the Court in 2009[51]. The Court did not recognize the violation of equal treatment between men and women. ECtHR, however, in its ruling, examined the reasoning of the Court thoroughly, rejected its reasoning in detail, and held that decision of the Russian Army infringed applicant's right protected by the Convention[52].

The Chairman of the Court, Valerij Zor'kin, immediately responded to the ruling by publishing his article in the state official newspaper, the Russian Gazette. He asserted that in Russian legal order, international treaties and agreements were subordinate to the Constitution, and the interpretation of the Constitutional Court must not be overturned by the interpretation of the Convention by ECtHR. He emphasized as a conclusion that Russia reserved a power to establish "a protective mechanism," which defended Russia form violation of its state sovereignty[53].

Since this statement, discussion over "the protective mechanism" repeatedly emerged, especially among the discourse of politicians[54]. Finally, in 2014 the first step towards its realization was taken. The legislature introduced a new procedure. According to it, domestic courts were obliged to raise questions to the Court on the constitutionality of legal norms, when its examination is required in order to review the cases based on the decision of international human rights protection organizations[55]. In this procedure, it is expected that if a legal norm, which was regarded as constitutional by the Court, was, however, declared as encroaching on human rights by ECtHR, then domestic courts, in the retrial of that case, were to ask the Court for an opinion.

This new procedure attracted public attention and invited criticism as an attempt to overturn the jurisdiction of ECtHR. This new authority of the Court, however, leaves room for acceptance as a tool to find out an acceptable way in terms of the domestic constitution to implement the individual and general measures posed on Russia by rulings of the ECtHR[56]. This amendment of the Constitutional Court Act still may be regarded as a way to seek a compromise and consensus with the European legal order. In 2015, we witnessed the second attempt for establishing "the protective mechanism," and its core attributes, however, differ from its first step in 2014, as was mentioned above.

In July 2015, in response to the petition for abstract norm control, the Court held that a ruling of ECtHR, which was based on the unconstitutional interpretation of the European Convention, was not obligatory for Russia[57]. Subsequently to this judgment, the Constitutional Court Act was once

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[51] Определение КС РФ от 15 января 2009 г. N 187-О-О.

[52] Markin v. Russia, 7 October 2010.

[53] Зорькин В. Предел уступчивости// Российская газета. 29 октября 2010.

[54] Торшин А. Выбор России// Российская газета. 12 июля 2011; Исаева М. Сергеева И. Сучкова М., Россия и Европейский Суд: реформы или конфронтация? // Арбитражный и гражданский процесс. № 10-11. 2011.

[55] СЗ РФ. 2014. № 23. Ст. 2922. This amendment of the Act on the Constitutional Court is the direct outcome of the judgment of the Constitutional Court on 6 December 2013, which handled the case raised from the Leningrad Regional Court based on the retrial of the Markin case. См. Постановление КС РФ от 6 декабря 2013 г. N 27-П.

[56] Вайпан Г. Трудно быть богом// Сравнительное конституционное обозрение. 2016. № 4.

[57] Постановление КС РФ от 14 июля 2015 г. N 21-П.

amended. The federal executive bodies, which are in charge of defending the interests of the Russian Federation in international human rights protection organizations, and in this context, the Ministry of Justice, are vested with a new authority. The Ministry of Justice is, now, able to ask the Court about the possibility to constitutionally implement a decision of international human rights protection organizations, purporting to contradict the Russian Constitution[58]. Furthermore, the Constitutional Court Act explicitly provides that the Court renders a judgment regarding "impossibility" to implement an unconstitutional decision of international human rights protection organization[59].

Though this new 'protective mechanism' is denounced as ignoring duty to recognize the compulsory character of the jurisdiction of the European Court by Russian liberals and the Venice Commission of COE[60], the Court has already invoked this authority two times on the request of the Ministry of Justice. In a case, when uniform disfranchisement of prisoners, based on Article 32, section 3 of the Constitution, was regarded as a violation of the ECHR[61], the Court stated that it was impossible to provide prisoners with the right to elect and be elected without a constitutional amendment. At the same time, the Court, in its ruling, suggested the legislative way to evade from this impasse without any constitutional reform[62]. In this case, the Constitutional Court demonstrated its readiness to cooperate with Europe[63]. In the second case, when the implementation of damages of the so-called *Jukos* case was examined[64], the Court simply rejected the possibility of its implementation[65].

According to the 2015 judgment, the Court now undertakes the task of defending the 'constitutional identity' of the Russian Federation. This function resembles to a firewall on the computer, which monitors and drives back the inventions from outside. The concept 'constitutional identity' can contain variable meanings and nuances, starting from liberal up to conservative or traditional ones, as was often seen in Western and Central Europe[66]. However, a closer look at the practice of the Russian Court, especially in this decade, shows that the Court has assumed a role of defending values, which is something different from what the Court tried to pursue during the period of systemic transformation.

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[58] Chapter XIII.1 of the Act on the Constitutional Court of the Russian Federation of 1994(revised by the Federal Constitutional Law on 12 December 2015 No.7-FCL). СЗ РФ. 2015. № 51. Ст. 7229.

[59] Article 104.4 of the Act on the Constitutional Court of the Russian Federation of 1994.

[60] CDL-AD (2016)005.

[61] *Anchugov and Gladkov v*. Russia, 4 July 2003.

[62] Постановление КС РФ от 19 апреля 2016 г. N 12-П.

[63] Дедов Д.И. Решение системной проблемы социальной адаптации// Российский ежегодник ЕСПЧ. № 3. 2017. С. 14; Морщакова Т. О некоторых актуальных проблем конституционного правосудия// Сравнительное конституционное обозрение. 2017. № 3. С. 120. About criticism against this judgment, см. Пушкарская А. Конституционный суд впервые разрешил не исполнять решение ЕСПЧ// Коммерсантъ. 19 апреля 2016.

[64] *OAO Neftyanaya kompaniya Yukos* v. Russia, 31 July 2014.

[65] Постановление КС РФ от 19 января 2017 г. N 1-П.

[66] See Arnaiz A. S. and Llivina C. A. (eds.) *National constitutional identity and European integration*, Intersentia, 2013.

CONCLUSION

The Russian Constitutional Court has been demonstrating judicial activism since its establishment in 1991. It does not hesitate to render judgments, which hold legal regulations unconstitutional. Russian citizens recognize the positive role of the Court in the field of human rights protection. The fact of the trust of citizens is well supported by numerous complaints lodged with the Court. This might be considered as good evidence of the notion that even in the states with a hybrid regime, the constitutional judiciary can play a decisive role and be active in certain fields of law.

Nevertheless, one must not overlook the fact that activism of the Constitutional Court ceases to exist when cases interact with political interests[67]. For example, the Court did not pay attention to the "chilling effect" in its rulings when issues on freedom of expression were examined. Cases on the principle of horizontal and vertical separation of powers were also resolved in favor of the Presidency and the central government.

In addition, the Court took a task to safeguard Russian 'state sovereignty' and 'constitutional identity' against 'inventions' from outside. This task was assigned by legislative measures. Nevertheless, one has to admit that its basic concept was already elaborated by the judgment of the Court based on the enthusiastic contribution of the Chairman Zor'kin[68]. In this aspect, we are now witnessing endeavors of the 'guardian of the Constitution' to seek its '*raison d'etre'* seriously in order to survive under the complicated political situation in Russia.

[67] Коротеев К. Указ. соч., С. 80.

[68] Например. см. Зорькин В.Д. Взаимодействие национального и наднационального правосудия: новые вызовы и перспективы// Журнал конституционного правосудия. № 5. 2012.

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.

Workshop on the "Emergence and Features of the Constitutional Review Bodies in Asia: A Comparative Analysis of Transitional Countries' Development" (Pre - Centenary Celebration of University of Yangon)

Place:	Myanmar- Japan Legal Research Center, University of Yangon, Myanmar.
Date:	October 22, 2019 (Tuesday)
Organized by:	Center for Asian Legal Exchange (CALE), Nagoya University Department of Law, University of Yangon
Funded by:	- JSPS Core-to-Core Program: Asia-Africa Science Platforms *"Advancing Research in Asian Constitutionalism – Establishing a Transnational Research Network to Promote Human Rights and Legal System"* - JSPS Grant-in-Aid for Scientific Research –KAKENHI-(B) "*Commencement of the ASEAN Community and the Emergence of Heterologous Constitutional Profiles in the Region*"

Myanmar established the Constitutional Tribunal (the Tribunal) in 2011 under the auspices of the 2008 Constitution. Many intended to refer to this achievement as a product of peaceful transition from military to civilian rule and a process of a state-controlled democracy launched in Myanmar aftermath the 2011 'democratic' parliamentary elections. Notably, up to this moment, the constitutional history of Myanmar demonstrated not even a single precedent when policymakers would create an independent agency and vest it with the authority of constitutional review.

Presently, the primary functions of the Tribunal include the constitutional interpretation and examination of the constitutionality of statutes promulgated by the union and local level parliaments. The Tribunal also has an authority to examine the actions of the union and local level executive authorities. Whenever constitutional disputes occur, including those related to the rights between the union and local authorities, the Tribunal is *de jure* competent to involve and issue a decision. In its work, the Tribunal only deals with the enacted statutes and does not examine bills before enactment. The Tribunal is authorized to conduct abstract and concrete review.

Between 2011-2019, the Tribunal has produced about 15 cases. A closer look at the legal analysis, argumentation and justification of reasons in these cases demonstrate certain structural issues in the constitutional review system of Myanmar. Whereas a handful of cases had demonstrated that the Tribunal could act as an independent adjudicator in the past, recent activities make it evident that the Tribunal's role in the political deliberations is unequivocal.

The general philosophy of constitutional review presupposes that constitutional courts are established to limit or balance the activities of executive and legislative branches. In such circumstances, scholars and practitioners expect that constitutional courts would work as neutral arbitrators among the two branches. Simultaneously, the vital role of the constitutional court is to protect fundamental rights.

The primary aim of the present seminar is to analyze the theoretical background and practical experience of the Tribunal in comparative aspect with foreign constitutional review bodies. In addition, it will seek to understand the concept and ideas on the constitutionalism in Myanmar and the tribunal's place in it. This seminar will involve both; the domestic and researchers from, Japan, Korea, Singapore and other jurisdictions. The participants will have an opportunity to share own views with fellow colleagues and learn from each other in terms of historical features, duties and functions, and selected

cases of constitutional courts in different countries including; Korea, Singapore, Russia, and Uzbekistan. This seminar aims to strengthen the relations between involved scholars and contribute to the creation of the international research network on the Constitutionalism in Asia.

Program:

10:00-10:10 Opening

Opening Remarks: Kaoru Obata (Professor of Graduate School of Law, Nagoya University)

10:10-12:00

Session I. The Characteristics of the Constitutional Review in Myanmar.

Moderator: Khin Mar Yee (Part-time Professor of Department of Law, University of Yangon)

10:10-10:30

1) Keynote Speech "Future Perspective of the Constitutional Tribunal of Myanmar"

Justice. Hla Myo Nwe (Member of the Constitutional Tribunal of Myanmar)

10:30-10:50

2) "The Duties and Functions of the Constitutional Tribunal of Myanmar"

Khin Phone Myint Kyu (Professor of Department of Law, University of Yangon)

10:50-11:10

3) "Case Analysis of the Constitutional Tribunal of Myanmar"

Khin Khin Oo (Professor of Department of Law, University of Yangon)

11:10-12:00 Q&A/ Discussion

12:00-13:30 Lunch break

13:30-16:00

Session II. The Constitutional Review Models from other Asian Jurisdictions

Moderator: Kaoru Obata (Professor of Graduate School of Law, Nagoya University)

13:30-13:50

1) "A Case of Korea"

Hyowon Lee (Professor of School of Law, Seoul National University)

13:50-14:10

2) "A Case of Singapore"

Jaclyn Neo (Associate Professor of Faculty of Law, National University of Singapore)

Marcus Teo (Teaching Assistant of Faculty of Law, National University of Singapore)

14:10-14:30

3) "A Case of Russia"

Fumito Sato (Vice-Director/ Professor of CALE, Nagoya University)

14:30-14:50

4) "A Case of Uzbekistan"

Aziz Ismatov (Assistant Professor of CALE, Nagoya University)

14:50-15:05 Tea Break

15:05-16:00 Q&A/ Discussion

CALE Discussion Paper No.19

EMERGENCE AND FEATURES OF THE CONSTITUTIONAL REVIEW BODIES IN ASIA : A COMPARATOVE ANALYSIS OF TRANSITIONAL COUNTRIES' DEVELOPMENT

Editors Aziz Ismatov and Emi Makino

Published by Center for Asian Legal Exchange (CALE)
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Issue date August, 2020

Printed by Nagoya University Co-operative Association