

【Translated Article】

Constitutional Control in Uzbekistan: Current State and Development Perspective*

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Abstract

This article looks into potential ways to improve constitutional control and increase its effectiveness. The research subject focuses on the legislative foundations of constitutional justice in Uzbekistan, particularly on the essence of constitutional control and legal mechanisms of its implementation. The article indicates the disadvantages and problems of the implementation of constitutional control in Uzbekistan. Author notes that the constitutional control of Uzbekistan is rooted in the European model of constitutional justice, but it needs further improvement of its mechanism. In order to analyze the current condition, the author briefly shows the formation history of constitutional control. Analysis of the current state results in the following observations; First, Constitutional Court needs to improve its legal framework and the practice of exercising constitutional control. Second, the absence of the constitutional complaint makes constitutional review ineffective.

This paper also examines the possibility of introducing a constitutional complaint that would grant citizens and legal entities the right to apply to the Constitutional Court. The author claims that careful consideration of foreign experience is of particular importance while introducing a constitutional complaint.

The article describes the specifics of constitutional complaint's application. It proposes an individual complaint's admissibility after a lower-level court has issued a judgement in a case dealing with allegedly violated citizens' constitutional rights. The author recommends a preliminary examination of citizens and legal entities complaints and a specific time limit for lodging complaint. It is proposed to abandon the preliminary

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questioning practice by judges of the Constitutional Court and authorize the Court's structural divisions to analyze complaints and verify their admissibility. Mentioned novelties aim to improve constitutional control, increase its effectiveness in ensuring constitutional legality and protecting citizens' fundamental rights and freedoms.

Thus, the proposed adoption of the new constitutional law on Constitutional Court of the Republic of Uzbekistan in the new edition will strengthen constitutional control, constitutional legality, improve constitutional proceedings, and, ultimately, effectively protect citizens' rights and freedoms.

Conclusion sheds light on reasons for constitutional control's ineffectiveness and offers proposals for its improvement in the form of a constitutional complaint, and its admissibility criteria.

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I. Introduction

Uzbekistan's constitutional control has a task to ensure the Constitution's supremacy and laws, ensure constitutional legality. In a broad sense, the constitutional review can be exercised by the President, parliament, government, courts of general jurisdiction, the ombudsman, justice and prosecution authorities, and other competent law enforcement agencies. The constitutional control analyzed in this article refers to a special judicial body of the Constitutional Court of the Republic of Uzbekistan (hereinafter, the Court).

Scholars pay considerable attention to the evolution of constitutional control in many countries, including in the CIS. Notably, the formation and development of constitutional control in Uzbekistan follows general CIS tendencies within statehood formation in the post-Soviet space.

Research on the development of constitutional control in Uzbekistan has not yet received sufficient academic attention. The state and development of constitutional control in Uzbekistan is addressed in scientific articles of academician A.Kh.Saidov,¹ B.Sh. Mirbabaev,² O.Z.

¹ Саидов А.Х. «Контроль за конституционностью нормативно-правовых актов законодательной и исполнительной власти – важный механизм защиты прав и свобод человека» // Хокимият тармоқларини тармоқларини бўлиниш принпипина

Mukhamedzhanov.³ Apart from the mentioned authors, the constitutional review has not become the subject of serious scientific analysis. Some authors have covered the issue⁴ in the framework of their research on constitutional courts' practice in post-Soviet countries.

Russian scientist O.V. Brezhnev,⁵ and assistant professor of Nagoya University of Japan A. Ismatov⁶ devoted their articles directly to constitutional control's analysis.

The study of constitutional control offers a closer look at its essence and provides fresh perspectives to assess constitutional justice implementation and identify legal gaps objectively.

Modern constitutional control's developmental trends necessitate taking a closer look at the issue to expand its democratic settings (i.e. constitutional complaint) in protecting human rights, and increase the role of Court in ensuring constitutional legality.

Currently, the parliament considers adopting a new Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" and introducing a constitutional complaint. In this regard, it is necessary to research the current state of constitutional control, identify future directions for its development, in the context of the forthcoming expansion of the Court's authority.

This article is devoted to the study of constitutional judicial review and aims to demonstrate the reasons for inefficiency and identify promising directions for improving the Court. The research is based on the Constitution's norms, the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan", and academic articles of domestic and foreign scientists-constitutionalists.

II. The Current State of Constitutional Control

Analyzing the formation of the system of constitutional control, Professor T.Ya.Khabrieva (Russia), claims that "The constitutional reform gave impetus to the practical functioning of

амалга ошириш ва инсон ҳуқуқларини ҳимоя қилишда конституциявий суднинг роли: Ўзбекистон ва хорижий мамлакатлар тажрибаси: халқаро илмий-амалий конференция материаллари. – Т.: Baktria press, 2016. С.37-43.

² Мирбабаев М.Ш. «Компетенция Конституционного суда Республики Узбекистан». Вестник Конституционного суда Республики Узбекистан. Выпуск 3. Ташкент. 1999. С.83-86.

³ Мухамеджанов О.З. «Судебно-правовая реформа и развитие конституционного правосудия в Республики Узбекистан». Журнал «Государство и право». 2018, №2, 84-92.

⁴ Арутюнян Г.Г. Конституционный контроль: характер функционирования и характер развития системы. Монография. - М., 1997.; Нечкин А.В. Органы конституционного контроля стран СНГ: порядок формирования и компетенция. //Научный ежегодник Ин-та Философии и права Урал. отд. Рос. акад. наук, 2018. Т.18, вып.4, с.75-96.; Гордеев И.В. Конституционная юстиция в государствах-членах СНГ. Автореферат диссертации на соискание ученой степени кандидата юридических наук 12 00 02 - конституционное право; муниципальное право. М.: Московский университет МВД России. 2007. 22 с.

⁵ Брежнев О.В. «Развитие института конституционного правосудия в Республике Узбекистан: проблемы теории и практики». Вестник Томского государственного университета. 2020. № 451. С. 185–195.

⁶ Ismatov Aziz. «The Constitutional Judiciary and its Role in the Democratization Process in post-Soviet Central Asia. The Constitutional Court in Uzbekistan». http://cale.law.nagoya-u.ac.jp/_userdata/alb5_01_Aziz.pdf. (Дата обращения 28.09.2020)

structures designed to carry out these functions, and entailed the establishment of new ones." ⁷ Nowadays, constitutional review exists in 164 out of 193 countries, of which 74 implement a European constitutional review model. ⁸ In particular, almost all post-Soviet republics have designed their constitutional courts according to the European model.

The constitutional control in Uzbekistan emerged after the collapse of the USSR and obtaining independence. It is particularly associated with adopting the 1992 Constitution of Uzbekistan and gradual transition from a quasi-judicial body - the Soviet Committee of Constitutional Review towards the Constitutional Court.

The Constitution integrates the Court within the judicial system. As a special judicial body, the Court expected to ensure the Constitution's supremacy and its direct effect. The Constitution determines the Court's status and guarantees its independence.

President of Uzbekistan initiated cardinal changes in the judicial and legal system and thus, paved the way for a new stage in constitutional control's development. Within the so-called '2017-2021 Action Strategy for Uzbekistan's development', fundamental judicial and legal reforms fall into one of five priority areas. This *inter alia* has resulted in the constitutional amendments of articles 80, 93, 108 and 109, which govern constitutional control effectiveness.

Following constitutional amendments, parliamentarians adopted a new version of the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan". The law contains several new provisions, the implementation of which guides a current state of constitutional control. This law was adopted as a Constitutional Law. Such a status increases enormously the Court's status and significance within the frames of the public system. From now on, the Court's judges are elected by the Senate upon the President's proposal. In turn, this proposal stems from the list of judges issued by the Supreme Judicial Council. Thus, apart from Parliament and President, there is a new specialized body – the Supreme Judicial Council that pertains authority to participate in the process.

Court's judges elect the Chairman of the Court and his deputy among themselves at one of its sessions. This practice certainly reinforces the principle of judicial independence and autonomy. Previously, the President enjoyed uncontested authority to nominate judges.

Constitutional courts' practice in foreign countries imposes higher requirements on judges of the constitutional courts. Considering this, the new law has increased the age limit for judgeship

⁷ Хабриева Т.Я. Избранные труды: в 10 т. Т. 2: монографии. Содерж.: Конституционный контроль. Правовая охрана Конституции. Теория современной конституции. – М., 2018. 448 с, р.14.

⁸ Арутюнян Г.Г. Конституционный контроль: характер функционирования и развития системы. Монография. – М., 1997. 197 с.

candidates from 30 to 35 years. A citizen of the Republic of Uzbekistan at least thirty-five years old from among specialists in politics and law, who has high moral qualities and the necessary qualifications, can be elected as a Constitutional Court judge.

It is not necessary to have legal education to become a judge of the Court. On the other hand, there was no single case when parliamentarians elected judge from among the experts in politics. Foreign practice demonstrates similar tendencies. For example, in Germany, "the Federal Constitutional Court is a purely legal court".⁹ A judge of the Constitutional Court of the Czech Republic can be appointed from among the citizens with higher legal education and relevant law expertise for at least ten years.¹⁰ In Korea, Spain, Italy, Serbia and Croatia, legal education is also a prerequisite for holding a judicial position.

The law stipulates that the same person cannot be elected as a judge of the Court more than two times. The maximum age for a judge's position is 70. Such limitations are consistent with the practice of foreign constitutional courts.

The range of eligible parties entitled to submit issues to the Court has been expanded recently and now includes the Cabinet of Ministers and the Commissioner for Human Rights of the Oliy Majlis of the Republic of Uzbekistan (Ombudsman). Hence, currently, the following subjects have the right to submit issues to the Court: the Legislative Chamber of the Oliy Majlis; Senate of the Oliy Majlis; President of the Republic of Uzbekistan; The Cabinet of Ministers; Commissioner of the Oliy Majlis for Human Rights (Ombudsman); Jokargy Kenes of the Republic of Karakalpakstan; a group of deputies - at least one-fourth of the total number of deputies of the Legislative Chamber of the Oliy Majlis; a group of senators - at least one-fourth of the total number of members of the Senate of the Oliy Majlis; Supreme Court; Attorney General. A question for consideration by the Constitutional Court may also be submitted on the initiative of at least three judges.

Expanding the circle of subjects who have the right to submit an issue to the Court is undoubtedly a positive norm that aims to expand access to constitutional justice.

The Constitutional Court of Uzbekistan is a constitutional control body oriented towards implementing subsequent control (ex-post). Simultaneously, with the new law's adoption, preventive control (ex-ante) has been partially introduced. The law entrusts the Court to determine the constitutional compliance with constitutional laws, laws on the ratification of international treaties - before their signing by the President of the Republic of Uzbekistan. Thus, recent

⁹ Конституционный контроль в зарубежных странах: коллективная монография. Под ред.: Е.А.Павлова, Е.А.Крестьянской. – М.: МГИМО-Университет, 2015. 341 с, p.14.

¹⁰ Ibid, p.36.

legislative novelties introduce a new form of constitutional control - preventive control over the constitutionality of constitutional laws and laws on international treaties' ratification.

It should be noted that preventive control is a new form of control, and its implementation raises several issues.

The law stipulates that the President must sign and promulgate the law within thirty days. According to the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan", the Court begins to study the issue no later than seven days, and the decision on the issue is taken no later than three months. The legislative norms governing the timing of adopting a decision by the Constitutional Court should be synchronized with the signing and promulgation of laws by the President.

The Constitutional Court also considers appeals of the Supreme Court, that originate in specific cases of lower courts regarding the compliance of the normative legal acts applied in particular cases with the Constitution. Previously, this right belonged to the Chief Justice of the Supreme Court only. Considering this body's collegial structure, such a right is vested with the Plenum of the Supreme Court.

The law prescribes that the Court, based on the generalized results of the constitutional proceedings practice, annually submits information on the state of constitutional legality in the country to the chambers of Parliament and the President of the Republic of Uzbekistan. It should be noted that such an informative function is a legislative novelty. Ensuring constitutional legality is a system of measures aimed at preventing violations of constitutional legality.

One of the important guarantees of the Court's independence is related to its financial framework. The law provides that the financing of the Constitutional Court activities is carried out at the public budget expense and is provided for in a separate line.

III. Prospects for the Development of Constitutional Review

The constitutional review in Uzbekistan is still far from being perfect. Certain problems hinder the implementation of effective constitutional review. Such problems include the passiveness of the constitutional control subjects, the absence of a constitutional complaint, and the imperfection of legal mechanisms for implementing constitutional control.

Assistant Professor of Nagoya University A. Ismatov (Japan) asserts that "a closer look at the modern system of constitutional control in Uzbekistan, especially at its static condition,

demonstrates serious concerns about the issue of protecting fundamental rights and promoting democracy”.¹¹

This situation actualizes the issues of further improving the activities of the Constitutional Court. Currently, a new draft Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" stipulates the expansion of the Court's authority in the form of increasing the number of eligible parties that have standing to bring complaints, and the introducing constitutional complaint.

Such tendencies aim to ensure effective protection of human rights and freedoms, determine the use of various forms of citizens' access to constitutional justice. The constitutional complaint is an effective instrument for guaranteeing the protection of constitutional rights and freedom of citizens. Undoubtedly, empowering citizens and legal entities with the right to submit an issue to the Court is an important step in democratizing society.

Introduction of a constitutional complaint may indeed become an important step towards strengthening constitutional justice.

The experience of foreign countries clearly shows that constitutional review without constitutional complaint cannot be effective. Professor V. A. Kryazhkov (Russia) rightly noted, “the presence of such a procedure largely determines the meaning of the existence of the Constitutional Court, and, on the contrary, its absence would noticeably devalue constitutional justice”.¹²

The essence of a constitutional complaint lies in a citizen's right to check the constitutionality of a law that allegedly violates his rights and freedoms. At present, citizens have indirect access to constitutional justice by appealing to competent entities that have standing. Along with this, the Court's proceeding can be initiated if at least three judges of the Court agree with the arguments given in the citizens' appeal. In this case, the judges, on their initiative, can bring the issue to the Court's session. However, such initiation and further participation of the same judges in consideration of the same issue conflicts with the principle of judges' impartiality and objectivity. Therefore, the practice of initiating questions by the judges of the Court should be abandoned.

As it is obvious in constitutional courts' practice in foreign countries, many complaints made on formal grounds are inadmissible and unfounded. Therefore, most applications are dropped out at the preliminary stage of a case study. For example, the Federal Constitutional Law "on the

¹¹ Ismatov Aziz. «The Constitutional Judiciary and its Role in the Democratization Process in post-Soviet Central Asia. The Constitutional Court in Uzbekistan». http://cale.law.nagoya-u.ac.jp/_userdata/alb5_01_Aziz.pdf. (Дата обращения 28.09.2020)

¹² Кряжков В.А. «Российская модель конституционной жалобы». Конституционное и муниципальное право. 2012. №5, с.65-71. С.71, p.71.

Constitutional Court of the Russian Federation" stipulates that the Constitutional Court's Secretariat preliminarily considers citizens' applications. In Korea, the Constitutional Court's President may appoint a group of three judges to the Constitutional Court to preliminary review a constitutional complaint. Based on the preliminary consideration's positive results, the submitted constitutional complaint is then being forwarded to the Court's consideration. In Germany, sub-chambers were created within each chamber of the constitutional Court for preliminary verification of constitutional complaints and deciding on their admissibility.¹³

Another criterion for a constitutional complaint's admissibility is the exhaustion of all available legal remedies. For example, in Lithuania, an essential condition for applying to the Constitutional Court is a requirement to exhaust all instruments of legal protection.¹⁴

Hence, this paper suggests that a preliminary study of appeals is generally compliant with legal requirements. Certain requirements for the admissibility of a constitutional complaint should be envisaged. In particular, the appeal can be permissible if the law allegedly violates citizens and legal entities' constitutional rights and is being applied in a specific completed ordinary case. A constitutional complaint must be lodged no later than one year from the date of the end of considering the case in the instant Court. So, the end of the case's consideration in the instant court means that the person has used all available legal remedies before applying to the Constitutional Court.

Many countries' experience shows that empowering citizens with such a standing leads to a sharp increase in the constitutional courts' workload. For example, every year, the Constitutional Court of Germany receives more than 5000 applications from citizens,¹⁵ whereas in Russia, about 15000.¹⁶ Meanwhile, a significant part of requests is being dropped out at the preliminary study stage. Thus, in Germany, only about two per cent of complaints received have a chance for further review.

The introduction of the constitutional complaint into the Constitutional Court activities of Uzbekistan will gradually increase its workload. This process will also require establishing clear

¹³ Конституционный контроль в зарубежных странах: коллективная монография. Под ред.: Е.А.Павлова, Е.А.Крестьянской. – М.: МГИМО-Университет, 2015. 341 с, р.88.

¹⁴ Aušra Kargaudienė. «Individual Constitutional complaint in Lithuania: Conception and the legal issues». *Baltic Journal of Law & Politics*. Volume 4, № 1 (2011). <https://content.sciendo.com/view/journals/bjlp/4/1/article-p154.xml> (Дата обращения 28.09.2020)

¹⁵ Официальный веб-сайт Конституционного суда ФРГ. https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2019/statistik_2019_node.html (Дата обращение 14.09.2020).

¹⁶ Pan Mohamad Faiz Kusuma. *The Role of the Constitutional Court in Securing Constitutional Government in Indonesia*. P.39. https://espace.library.uq.edu.au/data/UQ_412310/s4282430_final_thesis.pdf (Дата обращение 28.08.2020).

application guidelines, admissibility criteria, and experienced professionals of the Court's structural units.

It is necessary to empower the Court's apparatus with the right to a preliminary analysis of applications received from citizens and legal entities and verify their compliance with the legislation's requirements.

The Court is a collegial body and all issues related to its authority are considered only at its session with all judges' participation. To make a decision, at least one-quarter of the total number of judges must be present at Court's session.

The introduction of a constitutional complaint will particularly lead to an increase in judges' workload. This, in turn, will require an increase in the number of judges. In most countries, the number of judges of the Constitutional Court is nine, whereas, in some countries, the number of judges varies from 12 to 19.

The Court's current quantitative composition does not allow to cope with the expected growth of appeals successfully. The application of a constitutional complaint in the Constitutional Court's practice requires expanding the Court's composition to at least nine judges.

The next topical issue of the development of constitutional review is related to courts of general jurisdiction. The law requires the Constitutional Court to consider the Supreme Court's appeal, initiated by the lower courts, on the constitutional conformity of the normative legal acts in particular cases.

Article 116 of the Civil Procedure Code provides for the lower courts' obligation to suspend the proceedings before the Constitutional Court issues its decision in individual cases. However, there is no exact algorithm for a judge of general jurisdiction. In other words, there are no well-elaborated circumstances to doubt the constitutionality of a legislative act, the effect of which is decisive for the case in question. The law is silent on how a judge of the first instance should act if there is a doubt about the constitutionality of a normative legal act applied in a particular case. It is unknown whether a judge of an ordinary court should apply to higher authorities or send appeal directly to the Supreme Court? Currently, the Supreme Court's Plenum that guides upon eligibility to submit appeals to the Constitutional Court originating from ordinary courts' cases. This cumbersome system does not justify itself. Therefore, the courts of general jurisdiction are not inclined to apply to the Constitutional Court.

According to the Indonesian scholar Pan Mohamad Faiz Kusuma, "... if ordinary court judges doubt the constitutionality of laws and regulations relevant to the case, they can refer to the

Constitutional Court. The absence of this mechanism led judges of general courts to ignore the grounds of constitutionality.”¹⁷

It seems appropriate to empower judges of general jurisdiction to submit issues for consideration by the Constitutional Court. Such a step would be consistent with foreign practices (Germany, Italy, Korea, Russia).

The introduction of the constitutional complaint will contribute to the intensification of the Constitutional Court's activities and serve the implementation of Article 44 of the Constitution, where everyone is guaranteed judicial protection rights and freedoms. The importance of a constitutional complaint is not limited to enlargement of access to constitutional justice; it also serves as a legal mechanism to improve the quality and effectiveness of laws, ensure constitutionality, and further democratize the state's life society.

IV. Conclusion

The current development of constitutional control enshrined in the Constitutional Law "on the Constitutional Court of the Republic of Uzbekistan" of 2017 reflects many innovations. The number of eligible parties who have the standing to submit an issue to the Constitutional Court has been expanded. This step widens access to constitutional justice. This law also introduces a preventive control over the Constitution's compliance with constitutional laws and laws on international treaties' ratification. Nevertheless, the current state of constitutional review in Uzbekistan is static. The legal mechanisms for the implementation of constitutional justice need to be improved. Indirect access of citizens to constitutional justice is not an effective mechanism for ensuring effective protection of citizens' constitutional rights. The Court's judges' eligibility to initiate a constitutional review and their further participation in the proceedings contradicts the principle of impartiality and objectivity.

At present, policymakers plan to introduce constitutional complaint. Such a step will undoubtedly ensure effective protection of citizens' constitutional rights and freedoms and strengthen constitutional control.

While introducing a constitutional complaint, one should consider the following successful practices from constitutional courts of foreign countries;

¹⁷ Pan Mohamad Faiz Kusuma. The Role of the Constitutional Court in Securing Constitutional Government in Indonesia. P.39. https://espace.library.uq.edu.au/data/UQ_412310/s4282430_final_thesis.pdf (Дата обращения 28.08.2020).

- Developing criteria for the admissibility of a constitutional complaint. In particular, the appeal is admissible provided that the constitutional rights and freedoms of citizens in the specific complete case were allegedly violated;

- The constitutional complaint must be brought no later than the term provided by law.

- Introducing a procedure for preliminary analysis of applications received from citizens and legal entities, verifying their compliance with the legislation's requirements, giving this right to the structural units of the Constitutional Court apparatus.

Simultaneously, it is necessary to adjust the legislative norms that govern the Court's deadlines of adopting a decision. In particular, deadlines should be synchronized with the timing of the signing and promulgation of laws by the President. It is also necessary to abandon the practice of initiating questions by judges of the Constitutional Court, giving judges of general jurisdiction the right to submit questions to the Constitutional Court.

Thus, the adoption of the new version of the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" will serve to strengthen constitutional control, strengthen constitutional legality in the country, improve constitutional proceedings and, ultimately, effectively protect the rights and freedoms of citizens guaranteed by the Constitution of the country.

