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Some aspects of constitutional and legal regulation of the organization and functioning of the Constitutional court of the Republic of Kazakhstan

This paper explores the issues of constitutional and legal status of the body of the judicial constitutional control that operated in the Republic of Kazakhstan at the stage of formation of the national institution of constitutional control. Based on the analysis of two laws adopted in 1992, as well as the provisions of the first Constitution of Kazakhstan of 1993, the article deals with issues related to the organization and activities of the Constitutional Court of the Republic of Kazakhstan. A lot of attention is paid to the procedural issues of the functioning of the Constitutional Court, as well as to certain aspects of the constitutional and legal status regulation of the Constitutional Court of the Republic of Kazakhstan. The author reveals the fundamentals of the constitutional and legal regulation of the proceedings, the procedure for examining cases, characterizes the subjects of treatment and participants of the constitutional proceedings; shows the specifics of the decision-making of the Constitutional Court of the Republic of Kazakhstan on the basis of a comparative legal analysis of the legislation.

Keywords: Constitution, Constitution of the Republic of Kazakhstan, constitutional review, judicial constitutional review, Constitutional Court of the Republic of Kazakhstan, powers of the Constitutional Court, the legal status of the Constitutional Court, constitutional legal proceedings.

Constitutional control is a fairly young institution for the constitutional law of the Republic of Kazakhstan, as well as for the constitutional law of states formed as a result of the Soviet Union collapse. The institutionalization of constitutional control in Kazakhstan began with the creation of a constitutional justice organ in the republic.

Analysis of the legal foundations of the status of the RK's first specialized body of constitutional justice allows, in particular, to trace the evolution of the establishment and development of the institution of constitutional control in Kazakhstan.

The Constitutional Court of the Republic of Kazakhstan is the product of democratic reforms that took place in the country in the early 1990s. Its emergence fits into a system of values such as the rule of law, the protection of citizens' rights and freedoms, the separation of power, etc. At the same time, the very idea of the Court and its model were based on the experience of the European constitutional justice.

Having proclaimed itself an independent democratic state, the Republic of Kazakhstan faced the need for a significant reform of the public authorities system and the establishment of entirely new bodies for the country. The principle of separation of power, the institutions of the President and constitutional justice were introduced in the country after it gained state independence as the basis for a new organization of state power. The Constitutional court of Kazakhstan — the first in the history of our country body of judicial constitutional control — was established in 1992. The creation of this Court was solidified in the 1993 Constitution of the Republic of Kazakhstan [1].

The Constitutional Court was a specialized institution of judicial constitutional review. The formation of the Constitutional Court in Kazakhstan confirmed the republic's desire for democratic reforms, the embodiment of the idea of a state based on the rule of law, the principle of separation of powers and the creation of a strong judiciary.

Thus, the creation of the Constitutional court in Kazakhstan was an important step on the way to the formation of domestic constitutional control. The Constitution of the Republic of Kazakhstan in 1993 [1], the laws «On the Constitutional court of the Republic of Kazakhstan» in 1992 [2] and «On Constitutional legal proceedings in the Republic of Kazakhstan» of 1992 [3] contained the basic ideas and principles of the functioning of the Kazakhstan institute of constitutional justice.

The constitutional foundations of the legal status of the Constitutional court were contained in two chapters of the Basic Law of the Republic of Kazakhstan, adopted in 1993, which defined its tasks, the procedure for forming, powers and the basis for the procedures applied therein — in Chapter 16, «Courts», and in section IV «Guarantees of compliance with the Constitution» to Chapter 21 «Ensuring the stability of the Constitution and protecting its provisions» [1].

The tasks set by the domestic legislator before the Constitutional court included the following: ensuring the accurate and unswerving execution of the Basic Law in the activities of state bodies, institutions, organizations, officials; ensuring compliance of the legislation with the Constitution; identification and cancellation of legal acts contradicting the Constitution, international treaties; prevention of unconstitutionality of newly adopted acts.

Legislation on the Constitutional Court paid considerable attention to the procedural issues of its activities. In total, the Constitutional court of the Republic of Kazakhstan consisted of eleven judges, including the Chairman, his deputy and nine members of the court. The Constitutional court was elected by the Supreme Council of the Republic of Kazakhstan. The tenure of judges of the Constitutional court was ten years. The President of the Republic of Kazakhstan, in agreement with the Presidium of the Supreme Council of the Republic of Kazakhstan, submitted to the Supreme Council the candidatures of the Chairman, his deputy and members of the Constitutional court. At the meetings of the Committee of the Supreme Council of the Republic of Kazakhstan, candidates for the positions of judges of the Constitutional court were previously discussed.

As in many countries that have adopted the European model of constitutional control, some qualifications have been established for the judges of this body. The following requirements were established for candidates for judges of the Constitutional court of the Republic of Kazakhstan: citizens of Kazakhstan not younger than 35 years and not older than 60 years who live on the territory of the Republic of Kazakhstan, having a higher legal education and at least 10 years of work experience, can be elected to the Constitutional court. The Chairman of the Constitutional court of the Republic of Kazakhstan must master the state language of the Republic of Kazakhstan and the language of interethnic communication and live on the territory of the republic for at least 10 years.

The head of this body was the Chairman, who had a deputy. Deputy performed certain functions of the Chairman of the Constitutional court and replaced the Chairman of the Constitutional court if he was absent or unable to fulfill his duties (art. 13 of the law «On the Constitutional court of the Republic of Kazakhstan») [2].

The Secretariat of the Constitutional court of the Republic of Kazakhstan was headed by the Secretary of the Constitutional court, elected amongst the judges for a five-year term (as according to the art. 14 of the law «On the Constitutional court of the Republic of Kazakhstan») [2].

In accordance with articles 100–104 of the Basic Law of the Republic of Kazakhstan in 1993 [1], the judges of this body were subject to guarantees of independence and immunity, grounds for dismissal, stipulated by the Constitution for all judges, as well as the requirements for incompatibility with their positions. Thus, the judge could not be arrested, subjected to a drive or measures of administrative penalty imposed in court, brought to criminal responsibility without the consent of the body that elected him. He could not be detained, except in the cases of detention at the crime scene (art. 103).

The state ensured the personal safety of the judges and their families. Judges could not belong to political parties and trade unions, take part in any political activity, have a representative mandate, perform other paid work, except for scientific, pedagogical or creative work. For example, in accordance with art. 102 of the 1993 Constitution of the Republic of Kazakhstan [1], the position of a judge was incompatible with the deputy mandate, holding positions in other state bodies, membership in a public association pursuing political goals, entrepreneurial activity.

The subsequent constitutional control was exercised by the Constitutional court based on the appeals of special subjects.

The Constitutional court instituted proceedings on the proposals of the subjects provided for in the law. Article 18 of the law «On Constitutional legal proceedings in the Republic of Kazakhstan» contained a list of subjects eligible to appeal to the Constitutional court of the Republic of Kazakhstan: 1) Supreme Council of the Republic of Kazakhstan, Presidium of the Supreme Council, Chairman of the Supreme Council, Committees of the Supreme Council, deputies of the Supreme Council, Prime Minister of the Republic of Kazakhstan, courts, Prosecutor General, republican bodies of public associations; 2) regional, Alma-Ata and Lenin city representative and executive bodies; 3) Academy of Sciences — on issues of compliance of laws with the Constitution of the Republic of Kazakhstan; 4) citizens — on issues directly affecting their constitutional rights, if they are not subordinate to other courts [3].

Citizens could also apply to the Constitutional court in order to ensure the implementation and protection of their constitutional, human, citizen rights and freedoms. In this case, only ambiguous applications of the Constitution provisions and laws by courts or other state authorities that led to the violation of constitu-

tional rights and freedoms of the subject of the right to constitutional treatment could serve as the basis for citizens' appeal.

The Constitutional court of the Republic of Kazakhstan carried out the subsequent constitutional control of laws and other legal acts of the Supreme Council of the RK, acts of the President, the Cabinet of Ministers, international treaty obligations and other obligations that did not enter into force.

The Law of the Republic of Kazakhstan «On the Constitutional court of the Republic of Kazakhstan» of June 5, 1992 established the following competence of the Constitutional court of the Republic of Kazakhstan [2]. All cases of the Republic of Kazakhstan Constitutional court were resolved according to priority. The highest priority was assigned to resolved cases on the compliance of the current laws of the Republic of Kazakhstan with the Republican Constitution, resolutions adopted by the Supreme Council of the Republic of Kazakhstan, normative acts of the President of the Republic of Kazakhstan, the Cabinet of Ministers of the Republic of Kazakhstan, ministries, state committees and departments of the Republic of Kazakhstan; acts of a regulatory nature adopted by the Prosecutor General of the Republic of Kazakhstan, guidance explanations of the Supreme Court of the Republic of Kazakhstan, as well as the Supreme Arbitration Court of the Republic of Kazakhstan; on compliance with the Basic Law of international agreements and other obligations of the Republic of Kazakhstan that have not entered into force. With lower priority the Constitutional court of the Republic of Kazakhstan verified the citizens complaints or the requests of the courts compliance with the Constitution of laws applied or to be applied in a particular case.

Constitutional court had two forms of constitutional appeal: constitutional submission and claims. The courts could file a submission to the Constitutional court, and other persons — a statement of a claim (as according to the article 21 of the law «On Constitutional legal proceedings in the Republic of Kazakhstan» [3]).

Appeals to the Constitutional court were submitted in a written form.

The submission and petition must include:

- the name of the Constitutional Court;
- the name, location, address and other necessary information about the applicant;
- the name, address and other details of the representative of the person applying and his/her powers, except for cases of representation by position;
- the name, location and address of the state body, official who signed or issued the normative act, the constitutionality of which is subject to verification; where appropriate, the same data on officials whose activities are being challenged;
- the circumstances on which the party bases its demand and evidence, confirming the facts stated by the party;
- the exact name, number, date of adoption, sources of publication and other requisites of the contested normative act;
- specific justification for the position on the constitutionality of the challenged normative act, or the activity of an official;
- the essence of the claim;
- the norms of the Constitution of the Republic of Kazakhstan and this law granting the right to appeal to the Constitutional court;
- the list of attached documents and the list of persons to be summoned to the Constitutional court, their addresses (art. 21 of the law «On Constitutional legal proceedings in the Republic of Kazakhstan»).

The appeal was forwarded to the judge of the Constitutional court to decide on the initiation of constitutional proceedings. Having checked the appeal, the judge, within five days, would solely either pass a ruling on the initiation of constitutional proceedings and therefore conduct the preparation of the case for Constitutional court meeting or pass a ruling on the refusal to initiate constitutional proceedings and returned the materials to the applicant (pp. 1–2 of article 22 of the law «On Constitutional legal proceedings in the Republic of Kazakhstan» [3]).

The judge had the right to refuse to initiate constitutional proceedings, if:

- the form and content of the appeal did not meet the requirements of article 21 of this law;
- the treatment originated from an improper body or person (subject);
- the appeal was filed by a representative of a party who did not have the authority to conduct a case to the Constitutional court, or the representative was a person not entitled to do that by this law;
- the claims stated in the appeal are not subordinate to the Constitutional court;

- the constitutionality of the issue mentioned in the appeal was checked earlier by the Constitutional court and there is a ruling of the Constitutional court, which retains its force;
- the claims stated in the appeal did not receive permission in the Constitution of the Republic of Kazakhstan (part 3 of article 22 of the law «On Constitutional legal proceedings in the Republic of Kazakhstan» [3]).

The constitutional proceedings had the following participants: 1) the parties — individuals and bodies whose petitions instituted constitutional proceedings; officials and bodies, on whose constitutionality of actions and decisions the constitutional proceedings have been instituted; 2) representatives of the parties — representatives by position, representatives by law, lawyers.

Issues that were submitted for consideration by the Constitutional court were subject to preliminary examination. The judge was obligated to prepare the case for consideration in two months. In order to prepare the case the judge needed to: identify the parties of the case, explain to them their procedural rights and duties provided by law, assist in obtaining evidence for submission to the Constitutional court; interrogate the applicant; request relevant documents and other information relevant to the case; interrogate the relevant officials and other persons; if necessary, involve scientists, practitioners as experts; commission the production of inspections, studies, examinations; determine the circle of witnesses, specialists, experts. Not later than ten days prior to the beginning of the meeting, the judge ensured the delivery of a copy of the case materials to the judges of the Constitutional court and the participants in the meeting; made a determination on the appointment of the case to the meeting, arranged for notification of the meeting participants and summoned the people needed to hold the meeting; prepared a draft decision based on the available materials; carried out other actions to ensure the correct resolution of the case.

The consideration of cases in the Constitutional court of the Republic of Kazakhstan was held in a meeting chaired by the President of the Constitutional court. The consideration of each issue began with a speech by the judge-rapporteur, who stated the substance of the question, the reason and grounds for its consideration, the content of the available materials. Judges of the Constitutional court had the right to ask questions to the judge-rapporteur. After that, the parties or their representatives were heard. They could be asked questions by the judges of the Constitutional court. If necessary, testimonies of witnesses, experts' opinions, opinions of specialists, speeches of invited persons were heard and documents that were important for the consideration of the case were announced.

Upon completion of the study of the collected materials, the Constitutional court listened to the final speeches of the parties, if they wished to speak. The speeches should contain an analysis of the materials and evidence examined in the court session, as well as the conclusions and proposals that should be taken into account by the Court in the process of carrying out its decision.

The meeting of judges of the Constitutional court, as well as of ordinary courts, was held in the advisory room. The presiding judge gave the floor to each of the judges who wanted to speak on the issue under consideration. During the meeting, judges of the Constitutional court of the Republic of Kazakhstan could freely express their own position on the issue under consideration and ask other judges to clarify their positions.

Decisions of the Constitutional court could take the form of a conclusion, a message and a submission. The final decision of the Constitutional court on the merits of the case was called a decree. Decrees were passed by the Constitutional court on behalf of the Constitution of the Republic of Kazakhstan.

Decisions of the Constitutional court were made by open, and at the request of at least three judges - by secret ballot. The presiding judge cast his vote last in all cases. Nobody had the right to abstain or not to vote.

The decision of the Constitutional court of the Republic of Kazakhstan was considered adopted if the majority of those present at the meeting voted for it and if there was a quorum in the meeting. In case the votes were equal, the presiding judge's vote would determine the final decision.

In case a judge of the Constitutional court disagreed with the decision, he had the right to express his views either in written form and attach that to the minutes of the meeting or to express them verbally for the record to the protocol of the meeting. These notes are to be published as an annex to the decision of the Constitutional court.

According to art. 11 of «The Law on the Constitutional court of the Republic of Kazakhstan», the decree of the Constitutional court that establishes unconstitutionality of laws and other normative acts in whole or in part, abolished their effect on the territory of the Republic of Kazakhstan [2]. Furthermore, the decree also abolished effect of other normative acts that were based on an unconstitutional act. Decisions of courts

and other law enforcement agencies, based on a normative act that was declared unconstitutional, were not subjects to execution. The decree of the Constitutional court on the recognition of a regulatory act or its part as unconstitutional prevented their publication and entailed recognition of the invalid decisions on the introduction of such an act into effect.

It is a distinctive characteristic that the authority of the Constitutional court was based solely on its authority. There was not any special mechanism for the implementation of decisions of the Constitutional court. In accordance with article 34 of the law «On Constitutional legal proceedings in the Republic of Kazakhstan», decisions of the Constitutional court shall come into force immediately upon adoption [3]. Other decisions come into force from the moment of their announcement.

It is important to underline that the decisions of the Constitutional court were final, they were not subject to any appeals and protests. This means that no one could cancel them, question them from a legal point of view. Only the Court itself could reconsider the decision, when, for example, new circumstances opened, unknown at the time of the decision. Besides that, no other legal body had the right to oversee the decisions and constitutionality of the Constitutional court. Thus, the provisions of Article 29 of the law «On Constitutional legal proceedings in the Republic of Kazakhstan» established that the decision of the Constitutional court can be reviewed by it on its own initiative, in cases where the Constitutional court recognizes that: 1) the constitutional norm or the rule of law on the basis of which the decision was made has been a subject to a change; 2) new circumstances significant for the case that were not known to the Constitutional court at the time of the decision were revealed; 3) the decision of the Constitutional court was adopted with a significant violation of the procedure established by this law [3].

The final nature of the decisions adopted by the bodies of constitutional control, as a rule, means that they can not be appealed. Such a provision was enshrined in art. 131 part 6 of the Constitution of the Republic of Kazakhstan, 1993 [1]. At the same time, the Basic Law of the Republic of Kazakhstan in 1993, admitted the possibility of the use of objection of the President of the Republic of Kazakhstan or the Chairman of the Supreme Council of the Constitutional court's judgments. It was possible to overcome the objections of the higher bodies of state power by re-adopting this decision by the Constitutional court with an absolute majority (two-thirds) of the total number of judges. In this case, the decision must come into force from the moment of its adoption (art. 131, para. 5 [1]).

It should be noted that the 1993 Constitution of the Republic of Kazakhstan provided for similar requirements for at least two-thirds of the total number of deputies of the Supreme Council (art. 129) for the procedure for amending the Constitution and for adopting constitutional laws [1].

In some foreign countries (in Portugal, Romania), decisions of constitutional justice bodies on unconstitutionality can be rejected by decisions of parliaments adopted by two thirds of votes. For example, according to paragraph 4 of art. 279 of the Constitution of Portugal in 1976, if the Constitutional court decides on the unconstitutionality of the norm contained in an international treaty, then this international treaty can only be ratified if the Assembly of the Republic approves it by a majority of two thirds of the deputies present at the sitting, and their number should be greater than the absolute majority of plenipotentiary deputies [4].

In accordance with the provision established in art. 145 of the 1991 Constitution of Romania, in case the Constitutional court recognizes the unconstitutionality of laws and regulations of the Chambers of Parliament, these acts are sent for reconsideration. If the law is adopted in the previous wording by a majority of not less than two thirds of the number of members of each chamber, the objection to unconstitutionality is rejected, and the promulgation by the President of the country becomes mandatory [5].

Thus, the study of the constitutional and legal legislation that regulates the organization and activities of the Constitutional court of the Republic of Kazakhstan allows us to reveal the main features of the institution of constitutional review in the Republic of Kazakhstan at the third historical stage of the evolution of its development that followed such periods as the era of Soviet construction and the transition stage [6; 24].

Analysis of the legal status of the institution of constitutional justice in Kazakhstan shows that it had both common features typical for the body of constitutional control and supervision, as well as national and state peculiarities. At the same time, the functioning of the Constitutional court proved to be difficult, influenced by various political interests and goals, different understandings of the legal nature and purpose of this body.

The creation of the country's first specialized judicial body of constitutional control during the formation of the constitutional bases of the Kazakhstan's model of constitutional review played an important role in ensuring the supremacy of the Republic of Kazakhstan's Main Law, protecting human and civil rights and freedoms, and protecting the foundations of the constitutional system. This dictates the need for an ap-

proach to the Constitutional court as a constitutional and legal institution, whose activities were connected with the whole system of state power, ensuring the single constitutional space of the country.

Kazakhstan implements its own model of checks and balances in the organization of republican bodies of state power [7; 36], and the choice of the model of constitutional control was carried out in accordance with the peculiarities of the 1995 Constitution of the Republic of Kazakhstan, which took into account the experience of constitutional reform of the branches of power in France [7; 33].

In conclusion, it can be noted that the institution of judicial constitutional control in Kazakhstan for its short period of existence has dynamically evolved as an independent element of the system of public authorities, which is designed to ensure observance of the Constitution and laws by all state authorities, officials and citizens in the country. As indicated in the literature, the Constitutional court, according to experts, made a significant contribution to the formation of the doctrine and practice of Kazakhstan's constitutionalism [8; 28].

In general, the legislation on the Constitutional Court settled procedural issues quite clearly and in detail. The stages of the constitutional proceedings were clearly distinguished by cases; their movement was regulated in details. Particular attention was paid to establishing deadlines and forms of control at various stages of the consideration of cases. Adequate conditions were created for the availability of the constitutional production and efficiency of the Court.

The characteristics of the main provisions enshrined in the laws on the Constitutional Court of the Republic of Kazakhstan give grounds for conclusion that conditions have been created for the qualified and independent activity of the constitutional justice body of Kazakhstan.

Further development of the institution of constitutional control in the Republic of Kazakhstan is related to the organization and activities of the Constitutional Council.

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Ф.А. Ержанова

Қазақстан Республикасы Конституциялық Сотының ұйымдастырылуы мен қызметінің конституциялық-құқықтық реттелуінің кейбір аспектілері

Қазақстан Республикасындағы конституциялық бақылау институты ғылыми мақаланың зерттеу пәні болып табылады. Автор аталған институттың Қазақстандағы дамуы мен қалыптасуының белгілі бір тарихи кезеңіндегі мәнін көрсетеді. Бұл ғылыми жұмыста Қазақстан Республикасындағы конституциялық бақылаудың отандық институтының қалыптасуы кезеңінде әрекет еткен соттық конституциялық бақылау органының конституциялық-құқықтық сұрақтары зерттеледі. Зерттеу нысаны болып Қазақстандағы соттық конституциялық бақылау органының өкілеттіктерін реттеген нормативтік құқықтық актілер табылады. Мақалада 1992 жылы қабылданған екі заңға және 1993 жылғы Қазақстанның бірінші Конституциясының ережелеріне талдау жүргізу негізінде Қазақстан Республикасының Конституциялық Сотының ұйымдастырылуы мен қызметтеріне қатысты сұрақтар қарастырылды. Конституциялық Соттың қызмет етуінің процессуалдық сұрақтарына және де Қазақстан Республикасының Конституциялық Сотының конституциялық-құқықтық мәртебесін реттеудің жекелеген аспектілеріне ерекше назар аударылған. Автор Қазақстан Республикасының

Конституциялық Сотымен жүзеге асырылатын сот өндірісінің негізгі сатыларының конституциялық-құқықтық реттелуін сипаттаған. Мақалада сот өндірісін конституциялық-құқықтық реттеудің негіздері анықталды, конституциялық сот өндірісінің қатысушылары мен жүгіну субъектілерінің құрамы сипатталды; Сот өндірісін қарауына ұсынылатын сұрақтардың дайындалу тәртібі анықталып, істі қарау процедурасына және Қазақстан Республикасының Конституциялық Сотының шешім қабылдау сатыларының кейбір ерекшеліктеріне талдау жасалды.

Кілт сөздер: Қазақстан Республикасының Конституциясы, конституциялық бақылау, соттық конституциялық бақылау, Қазақстан Республикасының Конституциялық Соты, Конституциялық Сот құзыреті, Конституциялық Соттың құқықтық мәртебесі, Конституциялық Сот ісін жүргізу.

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Некоторые аспекты конституционно-правового регулирования организации и деятельности Конституционного Суда Республики Казахстан

Предметом исследования научной статьи является институт конституционного контроля в Республике Казахстан. Автором показана сущность данного института на одном из исторических этапов его становления и развития в Казахстане. В настоящей работе исследованы вопросы конституционно-правового статуса органа судебного конституционного контроля, действовавшего в Республике Казахстан на этапе формирования отечественного института конституционного контроля. Объектом изучения являются нормативно-правовые акты, регламентировавшие полномочия органа судебного конституционного контроля в Казахстане. На основе анализа двух законов, принятых в 1992 году, а также положений первой Конституции Казахстана 1993 года, в статье рассмотрены вопросы, касающиеся организации и деятельности Конституционного Суда Республики Казахстан. Большое внимание в статье уделяется процессуальным вопросам функционирования Конституционного Суда, а также отдельным аспектам регулирования конституционно-правового статуса Конституционного Суда Республики Казахстан. Автором охарактеризовано конституционно-правовое регулирование основных стадий судопроизводства, осуществляемого Конституционным Судом Республики Казахстан. В статье раскрыты основы конституционно-правовой регламентации судопроизводства, охарактеризованы состав субъектов обращения и участников конституционного судопроизводства; раскрыт порядок подготовки вопросов, вносимых на рассмотрение Суда; проанализирована процедура рассмотрения дел, а также некоторые особенности стадии принятия решений Конституционного Суда Республики Казахстан.

Ключевые слова: Конституция Республики Казахстан, конституционный контроль, судебный конституционный контроль, Конституционный Суд Республики Казахстан, полномочия Конституционного Суда, правовой статус Конституционного Суда, конституционное судопроизводство.

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