

F.A.Yerzhanova

*Ye.A.Buketov Karaganda State University
(E-mail: erzhanova_farida@mail.ru)*

Some aspects of judicial constitutional control in foreign countries

The article is devoted to the value and role of the institution of judicial constitutional control in foreign countries. It presents issues of specificity of judicial constitutional review, differences between the institutional forms of constitutional control, operating in various foreign countries. Considerable attention is paid to the forms and varieties of the Institute of constitutional review, to the problems of the preliminary and subsequent constitutional control in countries with different legal systems. This article discusses the conceptual issues about the role and place of judicial constitutional review in the system of state authority. On the basis of the analysis of constitutional and legal legislation of foreign countries the system of objects of judicial constitutional control is given, furthermore, the role of constitutional review as an important and necessary element in the overall constitutional system of power is displayed.

Key words: Constitutional legality, the system of state authority, constitutional review, judicial constitutional control.

Among various ways of legal protection of the main Law, judicial constitutional control holds a special place. Judicial constitutional control is combined activity of specialized judicial (supreme, constitutional courts) and quasi-judicial bodies (constitutional councils). They are obligated to protect the constitution from the legal acts, government bodies and government officials who try to violate it. Judicial control is not the only way to provide constitutional legality in the sphere of norm creation. Parliament control is the essential prerogative of the country's supreme legislative body. Control can also be executed by the head of the state, or any other body that is authorized by the Constitution. Even though the correlation between the judicial and other forms of control in different historical situations may vary, the judicial control draws special attention from theory and practice.

Above all, constitutional control means checking whether the laws or acts correspond to the constitution with a right to reject the parliament act, in case the body that was authorized to check the constitutionality, has deemed the legal act unconstitutional. This right of rejection contradicts the formally proclaimed supreme rule of the parliament. M.A. Nudel wrote: «The problem of the constitutional control is closely intertwined with the parliament's position. If parliament is supreme, there is no possibility to have a body outside the parliament that would carry out constitutional jurisdiction and consequently control the parliament's activity. Conversely, if parliament's supremacy is limited, constitutional control by a body outside the parliament is one of the means of supremacy limitation» [1; 10].

The term «control on the constitutional regulatory acts» needs clarification, because not only correspondence of these acts with the constitution is required, which is extremely important in itself, but as well as correspondence of the legal acts to the law and consistency with the law.

On the other hand, judicial constitutional control is, undoubtedly, a part of the mechanism of judicial authority, regardless of the way of its localization in the constitutional structure of power. However, the judicial constitutional control cannot be equated with the traditional judicial functions, since it is a political activity as well, carried out in the form of jurisdiction.

In foreign countries two main institutional forms, or models of judicial control. Under the first one (also known as «american») the judicial control is carried out by the general judicial system. The right of judicial control is given to every judicial court or only to the Supreme Court. Giving the right of judicial control to all the courts provides for better access to the court, albeit there are differences in opinions between the lower courts and the Supreme court. In these cases the position of the Supreme Court prevails.

Under the second model (also called «european» or «austrian») control is carried out by the specifically created court or quasi-judicial body. There is a variation of this model — the french model, when a specific body is given the right of review of constitutionality of legal bills (preliminary control), including the proposed but not yet promulgated ones. The significant practical difference between deeming an act that came into force as unconstitutional and banning an act, adopted by the parliament but not yet promulgated, is hard to discern.

The first model is characteristic to the American continents (USA, Canada, majority of countries of the Latin America). Constitutional control is done in the same way in Japan, India, Australia, and in some of the countries of the Western Europe — Scandinavian countries as well as Switzerland.

All Western Europe countries, that established institutions of the judicial constitutional control after the World War II, has turned away from the «American» model, preferring the «European» one. The competency of the courts is not limited to the control of the acts' constitutionality — they also judge concrete situations, regarding with election processes, disputes on competency between governmental bodies, federation members between each other and the federation. In some countries it is possible to appeal certain types of administrative acts that infringe the constitutional rights of citizens and organizations; in some countries the constitutional court is a special authority that addresses issues on the constitutionality of political parties and organizations creation and activity, as well as charges against the head of the state or other officials on violating the constitution. But the main activity of this body is the control of legal acts' constitutionality.

In European countries with specialized constitutional courts the main problem is not the problem of the hierarchical relations between the judiciary bodies, but the issue of including the constitutional court into the unified judiciary system. By formal juridical parameter, the constitutional courts do not compose a unified system with the general or other judicial authorities. In the constitutions of Austria, France, Spain, and Italy the activity of the constitutional courts (Council) is regulated in separate sections that do not coincide with sections of the judiciary. In Germany's Basic Law regulations on the federal constitutional court are located not in a dedicated section, but in the general section of «Justice».

Nonetheless, the Western doctrine interprets the constitutional courts as part of the judiciary authority, regardless of the way of its localization in the overall constitutional system of government.

American model does not know about preliminary control. French model, on the other hand, is mostly composed of preliminary control. In 2008, an article 61-1 was added to the French Constitution [2], which states, that in case any legal provision violates the rights and freedoms guaranteed by the Constitution, the State Council or the Court of Cassation can pass the issue to the Constitutional Council of France. In this regard, the literature indicates that Kazakhstan courts have wider access to constitutional review [3; 31]. Thus, the constitutional reform in 2008 only partially, indirectly changed the model of the French Constitutional preliminary control.

At the disposal of the other versions — both preliminary and subsequent controls, with the apparent dominance of the subsequent control. There are two kinds of subsequent control. First one — abstract control — is characterized by the fact that the court considers the constitutionality of the law without regard to any specific situations, because such doubts arise from persons having a legitimate right to appeal this issue to the Constitutional Court. This right belongs to groups of deputies of a certain size (in Austria — 1/3 of the deputies of each Chamber, in Germany 1/3 of deputies of the Bundestag, in Spain — 50 members of Congress or 50 senators), head of the state, parliament (or its chairman), and in federal states — to the supreme bodies of the federation members, in some countries — to groups of citizens. For each country, this list has its own characteristics. For example, in Austria the Constitutional Court has the right to raise the question of the constitutionality of the law on its own initiative.

Second kind — specific control — provides consideration of the constitutionality in a context of a particular case in the courts. Almost everywhere there is a rule according to which in case the court came to the conclusion that the applicable rule does not comply with the constitution, it is obliged to suspend the case and to send a corresponding request to the Constitutional Court. American model has only the specific control, but it is somewhat different, because the question of the constitutionality of the law is decided by the court hearing the case itself.

We think, the opinion described in the literature that even though both preliminary and subsequent controls have their pros and cons, many countries (especially in Latin America) do it differently: bodies of the constitutional control implement both preliminary and subsequent controls, should be supported. The combination of preliminary and subsequent controls, based primarily on the specifics of each individual state — is currently an effective and promising way of improving the activity of constitutional courts, to enhance their role and authority in society and in the system of governmental authorities [4; 29].

Constitutional courts have the ability to reject the complaints addressed to them. The results of their activity, significantly influence the political and legal life of their countries. Besides the ability to deem a legal act unconstitutional, the Federal court of Germany also has an ability called «conformable interpretation» — the court reserves the act in force, but gives it its own interpretation which is considered mandatory later on. In other words, the constitutional court correct the act by itself, and even though the interpretation is sup-

posed to correspond to the meaning and the objectives of the law, in reality the possibility of its adjustment is quite broad. Constitutional court has to «clean up» the old legislation, adapting it to the current situation.

In France the Constitutional Court was created right after the constitution adoption of 1958, but its activity has significantly intensified after 1974, when a group of deputies (or senators) with at least 60 people has received the right to appeal to the council. Previously only President of the Republic, Prime Minister, Chairman of the National Assembly and the Chairman of the Senate had that right. A complaint can be filed after the vote for the bill, but before the promulgation of it as a law.

The role of the Constitutional in the political life of the country has significantly increased, it is even called the «counter-power». This term is successful representation of the constitutional courts political role. They truly are a counter part to the parliament, by in a way controlling its legislative activity. The constitutional courts can annul an already existing law or prevent the act to come into force or create a regulation that would bind the legislator in his future actions, although formally the court has no right to dictate anything to the parliament. Parliament cannot cancel or override the decisions of the constitutional courts throughout the regular legislature procedure. Constitutional courts' legal acts' juridical force almost matches that of the constitutional regulations, and consequently, most of the times they are stronger than the acts of parliament (because the current legislation prevails in the activity of the previous one). All of the above hardly complies with the principle of the parliament supremacy, especially considering the fact that the parliament control of the acts is weakened by the constitutional courts.

In developing countries, where the democratic regime was more or less established, the institution of the judicial constitutional control has started to effectively exercise its functions and play an increasingly big role as in the system of power, and in the political life as a whole. The biggest example — the activity of the constitutional court of India. Indian lawyers have different opinions on this matter, but in general, it is acknowledged that the Supreme court has turned into one of the main institutions of power that greatly affects the political and legal growth of the country. It has earned authority not only in India, but also abroad. Its decisions on constitutional issues have impact on the activities of other countries' constitutional control bodies.

Constitutional control exercised by the courts of general jurisdiction, is characteristic for the countries of general law. Typically, it is centralized control, because the only body exercising the control is the highest court of the country (Ghana, Malaysia, Sri Lanka, etc.). In the Philippines, as in the model of the American legal system decentralized control is established - control is executed by all the courts of general jurisdiction. In a modified form such control exists in India: it is carried out by the states' high courts and the Supreme Court, which is not only the ultimate authority, but has exclusive jurisdiction in a number of constitutional issues as well.

The supreme court in the described countries consists only of professional judges that satisfy the higher requirements for their qualification. The main requirement — extensive experience in the judiciary and legal areas. The Supreme Court is formed by the appointment of its members by the head of state, acting on the advice of, or consultation with other government agencies. As a general rule, it is — an independent commission on judicial service. In India, the president is required to consult with the government in the appointment of the chief justice and in appointment of other members — with the chief justice. Thus, the legal discretion of the executive power in the formation of the body of constitutional control to a certain extent is limited, therefore the principle of tenure of judges of Supreme Courts. In India, in addition, there is a that law provides for the appointment of temporary judges for the Supreme Court.

Bodies of constitutional control have big competency on issues of different nature, including control on the election process, protection of the main rights and freedoms of the citizens, resolving disputes over authority between state bodies (in federative states — between the federation and its subjects), questions of parliament procedures etc. However, their main objective is to control the constitutionality of the legal acts, or, in other words — ensuring the rule of law in the field of lawmaking [5; 10]. If some of the mentioned responsibilities can be carried out by other bodies as well, the constitutional control is executed only by these bodies.

However, in some countries where the constitutional control exercised by the courts of general jurisdiction, the Constitution does not contain such explicit provisions (India, Namibia, Jamaica). A typical example is the Constitution of India, which, according to the Indian scientist on state D. Basu, «there is no explicit provision authorizing the courts to declare laws invalid» [6; 427].

Developing countries' legislations have a different towards the issues of the object of the constitutional control, i.e. about the types of legal acts that are under the jurisdiction of the bodies, responsible for the con-

trol. The main type of such acts are the laws passed by the parliament. In countries where distinguish ordinary and organic laws, the latter are also subject to constitutional control (Francophone Africa).

The case with constitutional laws is more difficult. In this case, the subject could be not the constitutionality of these laws, but the limits of the constituent power of parliament. In some developing countries this power is constitutionally limited. For example, the form of government, the state religion, multi-party system, etc. cannot be the subject for constitutional changes. Logically, if the parliament passes a law revising the relevant provisions of the constitution, such a law should be declared invalid by the body of constitutional control.

In countries, where the constitution does not limit the constituent power of the parliament, there is an issue whether or not the body of constitutional control can review and invalidate the constitutional laws. This case can lead to a conflict situation where the parliament opposes the body of constitutional control, as it happened in India. It should be noted that the Supreme Court of India has repeatedly changed its position on the limits of the constituent power of the parliament. Originally it deemed necessary to separate constitutional and regular laws: constitutional laws are adopted by the parliament as a part of the constituent power, and regular laws are based on legislative power. Interpreting, for example, art. 13 of the Constitution, which prohibits and adoption of laws denying or restricting the basic constitutional rights, the court found that the statement in this article, the concept of «law» applies only to regular laws, and therefore the constitutionality of any amendment cannot be questioned. However, in 1967 the court reconsidered this decision, admitting that the term «law» is relevant for the constitutional laws as well, therefore admitting that they can be declared invalid. In order to overrule such a decision parliament adopted the 24th amendment to the constitution, securing it the unlimited right to amend the constitution. While recognizing the amendment valid, the court indicated that the parliament cannot change the core structure of the constitution. In this regard, the Indian Parliament has made a provision to the art. 368 of the constitution stating that «there is no limitation of the constituent power of parliament to change the way you add, alter or cancel the provisions of this constitution». The constitutionality of this provision was reviewed by the Supreme court in 1980, and it deemed it unconstitutional as it could jeopardize the «core or essential features or its basic structure». It was emphasized that constitutional control is one of the fundamental features of the Indian constitutional system and it cannot be abolished by amending the constitution. It should be noted that this position of the Supreme Court of India was rejected a number of other general law countries.

In countries that have experienced the influence of the Anglo-Saxon doctrine and practice, the law is interpreted not only in the narrow sense — as an act of parliament, but also in a more wide sense, i.e. any norm of written and unwritten law is recognized as law and therefore is a subject to judicial protection. Therefore, the constitution of such countries do not contain a list of regulations that may be subject to constitutional review. Control function of the courts of general jurisdiction is universal — it applies to all regulations, including on delegated legislation.

In a number of other countries, constitutional law establishes a list of regulations (in addition to the law), which may be subject to constitutional review. In a vast amount of countries, the international treaties and agreements are subject for the constitutional review.

As in developed countries, the judicial constitutional control in developing countries varies by the time of implementation, its forms and legal consequences. The range of subjects that have the right to appeal to the constitutional review body is different, and the procedures of the appeal are different as well. All these features appear in the original, national-specific features inherent in the institution of judicial constitutional control in each country. The existing system of constitutional review is difficult to classify under one criterion.

Judicial constitutional review in general law countries is characterized by a defining feature — the presence of the subsequent and predominantly specific control. Preliminary control can only review the courts execution of the consulting function. Constitution of these countries stipulate that the head of state can ask the Supreme Court to give an opinion on any question of law or fact, including a bill (India, Malaysia). However, a preliminary review has rarely occurred, for example, in India from 1950 to 1981, the president asked the opinion of the Supreme Court [6; 433] only 7 times.

In some of these countries from this group abstract control (Malaysia, Namibia). Constitutional control with this system is always optional, i.e. it depends on the will of relevant subjects.

The legal consequences of the control and the legal nature of the decisions taken by its body has a huge influence for identifying the role of the judicial constitutional control in the system of authorities. In the countries under review, the judicial control by its nature is a decisive one. The body of the constitutional control decides on the compliance or non-compliance of normative act with the constitution, in the latter

case, the act is declared invalid. The decision is final and legally binding. In some countries, these provisions are clearly formulated by the constitutional law (Benin, Mauritania, Guinea, Congo). For instance, art. 124 of the Benin constitution states that the law recognized by the constitutional court to be unconstitutional can be neither promulgated nor adopted. Court decisions cannot be appealed and are binding for all public, administrative and judicial authorities. However, in general law countries, the constitutions do not contain such provisions. Regarding the Indian constitution, D.Basu says that: «any violation of these restrictions makes the law invalid. It is the courts that decide whether or not any constitutional restriction has been violated» [6; 427].

Despite the fact that the decision of the body of constitutional review is final, it can be overridden in certain cases. In some countries, the constitution gives parliament the right to revoke the decisions of the constitutional control. For example, the Namibian constitution provides that the decisions of the Supreme court are binding for the lower courts, if they are not canceled by the Supreme court itself or by an act of parliament, adopted in a proper manner (art. 80).

The question of the juristic nature of the acts of the constitutional control body is solved differently in developing countries — it mainly depends on the applied form of control, and the current legal system. In general law countries, decisions of the courts of general jurisdiction, which execute mainly subsequent control, often contain not only the conclusion whether or not the normative act complies with the constitution, but also a new legal norm. These norms (court precedents) are an important source of law. Thus, by performing the function of constitutional control, the courts of general jurisdiction exercise normative function as well.

References

- 1 *Нудель М.А.* Конституционный контроль в капиталистических странах. — М.: Юрид. лит., 1968. — 224 с.
- 2 Конституция Франции // Конституции зарубежных государств: Великобритания, Франция, Германия, Италия, США, Япония, Бразилия: учеб. пособие / Сост. В.В. Маклаков. — 7-е изд., перераб. и доп. — М.: Волтерс Клувер, 2010. — 656 с.
- 3 *Малиновский В.А.* Конституционные советы Казахстана и Франции: некоторые грани сравнения // Государство и право. — 2013. — № 2. — С. 28–32.
- 4 *Шульженко Ю.Л., Чиркин В.Е.* Конституционный суд России между прошлым и будущим // Государство и право. — 2011. — № 12. — С. 24–30.
- 5 *Туманов В.А.* Судебный контроль за конституционностью нормативных актов // Советское государство и право. — 1988. — № 3. — С. 9–14.
- 6 *Басу Д.* Основы конституционного права Индии. — М.: Прогресс, 1986. — 664 с.

Ф.А.Ержанова

Шет елдерде соттық конституциялық бақылаудың кейбір қырлары

Мақала шет елдерде соттық конституциялық бақылау институтының рөлі мен мәніне арналған. Әртүрлі шет мемлекеттердің конституциялық бақылауын жүзеге асыратын сот органдарының ерекшеліктері мен олардың институционалдық нысандарының өзара айырмашылығы жөнінде сұрақтар қарастырылған. Автор құқықтық жүйесі қалыптасқан мемлекеттерде алдын ала және кейінгі жүзеге асырылатын конституциялық бақылаудың өзекті мәселелеріне, нысандары мен оның түрлеріне сипаттама берген, сондай-ақ мемлекеттік билік жүйесінде соттық конституциялық бақылаудың рөлі мен орнын анықтайтын тұжырымдық мәселелерді қарастырған. Шет елдердің конституциялық-құқықтық заңнамаларына жүргізілген талдаулар негізінде соттық конституциялық бақылаудың объектілерінің жүйесі, биліктің жалпы конституциялық жүйесінің маңызды және қажетті элементі ретінде конституциялық бақылаудың рөлі көрсетілген.

Ф.А.Ержанова

Некоторые аспекты судебного конституционного контроля в зарубежных странах

Статья посвящена значению и роли института судебного конституционного контроля в зарубежных странах. В ней раскрыты вопросы специфики судебных органов конституционного контроля, различия между институционными формами конституционного контроля, действующими в различных странах зарубежья. Значительное внимание автором уделено формам и разновидностям института конституционного контроля, проблемам осуществления предварительного и последующего конституционного контроля в странах с различными правовыми системами. Автором рассмотрены концептуальные вопросы о роли и месте судебного конституционного контроля в системе государственной власти. На основе анализа конституционно-правового законодательства зарубежных стран показаны система объектов судебного конституционного контроля, роль конституционного контроля в качестве важного и необходимого элемента в общей конституционной системе власти.

References

- 1 Nudel M.A. *Constitutional control in the capitalist countries*, Moscow: Juridical Literature, 1968, 224 p.
- 2 *Constitution of foreign countries: United Kingdom, France, Germany, Italy, USA, Japan, Brazil: study guide*, Comp. V.V.Maklakov, 7 th ed., revised and expanded, Moscow: Wolters Kluwer, 2010, 656 p.
- 3 Malinovsky V.A. *Law and the State*, 2013, 2, p. 28–32.
- 4 Shulzhenko J.L., Chirkin V.E. *State and Law*, 2011, 12, p. 24–30.
- 5 Tumanov V.A. *The Soviet State and Law*, 1988, 3, p. 9–14.
- 6 Basu D. *Fundamentals of Constitutional Law of India*, Moscow: Progress, 1986, 664 p.