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ADAPTATION OF THE WORLD EXPERIENCE OF CONSTITUTIONAL JUSTICE
IN THE REPUBLIC OF KAZAKHSTAN

Abstract

The study contains an analysis of theoretical and practical issues of adapting the world experience of constitutional justice to the national legal system of the Republic of Kazakhstan. Based on general scientific and special scientific methods (historical and legal analysis, structural and functional, comparative legal, regulatory and others) the article discusses the experience of the best world practices, different jurisdictions, an attempt was made to create a model of constitutional justice that meets modern requirements in the Republic of Kazakhstan, aimed at the effective protection of human rights.

The institution of constitutional control, which is constantly in different phases of transformation, is adapting in the legal systems of the states of the young democracy. The article presents a study of the adaptation of world experience in the development of the institution of constitutional control into the national legal system of the Republic of Kazakhstan. Issues of imperfection of the current legislation of the Republic of Kazakhstan regulating public relations related to the organization of constitutional proceedings, as well as ensuring effective practice of its application, have been identified.

The study contains a number of practical proposals for improving the status and competence of the Constitutional Court of the Republic of Kazakhstan. In the orbit of the results - recommendations on expanding the powers of the constitutional control body to check for compliance with the Constitution of the newly adopted constitutional laws, as well as laws introducing amendments and additions (according to the mandatory procedure); to limit the powers of the President to challenge any existing legal acts in the Constitutional Court, to give the Constitutional Court the right to check for compliance with the Constitution of the existing international treaties of the Republic of Kazakhstan, as well as the official interpretation of the norms of constitutional laws on its own initiative, or at the request of the Supreme Court of the republic.

Keywords: the constitution, human rights, constitutional control, constitutional court, constitutional reform, appeals, challenge, interpretation.

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ҚАЗАҚСТАН РЕСПУБЛИКАСЫНДАҒЫ КОНСТИТУЦИАЛЫҚ СОТ ТӨРЕЛІГІНІҢ
ӘЛЕМДІК ТӘЖІРИБЕСІН БЕЙІМДЕУ

Аңдатпа

Зерттеу конституциялық сот төрелігінің әлемдік тәжірибесін Қазақстан Республикасының ұлттық құқықтық жүйесіне бейімдеудің теориялық және практикалық мәселелерін талдауды қамтиды. Жалпы ғылыми және арнайы ғылыми әдістер (тарихи-құқықтық талдау, құрылымдық-

функционалды, салыстырмалы-құқықтық, нормативтік және басқалар) негізінде үздік әлемдік практикалардың, әртүрлі юрисдикциялардың тәжірибесі қаралды, адам құқықтарын тиімді қорғауға бағытталған Қазақстан Республикасында Конституциялық сот төрелігінің қазіргі заманғы талаптарға жауап беретін моделін жасауға әрекет жасалды. Трансформацияның әр түрлі кезеңдеріндегі конституциялық бақылау институты жас демократия мемлекеттерінің құқықтық жүйелеріне бейімделеді. Мақалада конституциялық бақылау институтын дамытудың әлемдік тәжірибесін Қазақстан Республикасының ұлттық құқықтық жүйесіне бейімдеуді зерттеу ұсынылған. Конституциялық сот ісін жүргізуді ұйымдастырумен байланысты қоғамдық қатынастарды реттейтін Қазақстан Республикасының қолданыстағы заңнамасының жетілмегендігі, сондай-ақ оны қолданудың тиімді практикасын қамтамасыз ету мәселелері анықталды. Зерттеу Қазақстан Республикасы Конституциялық Сотының мәртебесі мен құзыретін жетілдіру бойынша бірқатар практикалық ұсыныстарды қамтиды. Нәтижелер орбитасында конституциялық бақылау органының жаңадан қабылданатын конституциялық заңдардың, сондай-ақ өзгерістер мен толықтырулар енгізетін заңдардың Конституцияға сәйкестігін тексеру жөніндегі өкілеттіктерін кеңейту жөніндегі ұсынымдар (міндетті рәсім бойынша); Президенттің конституциялық сотта кез келген қолданыстағы құқықтық актілерге дау айту, Конституциялық Сотқа Қазақстан Республикасының қолданыстағы халықаралық шарттарының Конституцияға сәйкестігін тексеру құқығын беру, сондай-ақ конституциялық заңдар нормаларын өз бастамасы бойынша не республика Жоғарғы сотының өтініші бойынша ресми түсіндіру жөніндегі өкілеттігін шектеу бойынша.

Түйін сөздер: конституция, адам құқықтары, конституциялық бақылау, конституциялық сот, конституциялық реформа, шағымдану, дау, түсіндіру.

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АДАПТАЦИЯ МИРОВОГО ОПЫТА КОНСТИТУЦИОННОГО ПРАВОСУДИЯ В РЕСПУБЛИКЕ КАЗАХСТАН

Аннотация

Исследование содержит анализ теоретических и практических вопросов адаптации мирового опыта конституционного правосудия в национальную правовую систему Республики Казахстан. На основе общенаучных и специальных научных методов (историко-правового анализа, структурно-функционального, сравнительно-правового, нормативного и других) рассмотрен опыт лучших мировых практик, разных юрисдикций, осуществлена попытка создать отвечающую современным требованиям модель конституционного правосудия в Республике Казахстан, направленного на эффективную защиту прав человека.

Постоянно находящийся в разных фазах трансформации институт конституционного контроля адаптируется в правовых системах государств молодой демократии. В статье представлено исследование адаптации мирового опыта развития института конституционного контроля в национальную правовую систему Республики Казахстан. Выявлены вопросы несовершенства действующего законодательства Республики Казахстан, регулирующего общественные отношения, связанные с организацией конституционного судопроизводства, а также обеспечения эффективной практики его применения.

Исследование содержит ряд практических предложений по совершенствованию статуса и компетенции Конституционного Суда Республики Казахстан. В орбите результатов – рекомендации по расширению полномочий органа конституционного контроля по проверке на соответствие Конституции вновь принимаемых конституционных законов, а также законов, вносящих изменения и дополнения (по обязательной процедуре); по ограничении полномочия Президента по оспариванию в Конституционном Суде любых действующих правовых актов, по наделению Конституционного Суда правом проверки на соответствие Конституции действующим

щих международных договоров Республики Казахстан, а также официального толкования норм конституционных законов по своей инициативе, либо по обращению Верховного суда республики.

Ключевые слова: конституция, права человека, конституционный контроль, конституционный суд, конституционная реформа, обращения, оспаривание, толкование.

Basic provisions.

The institution of constitutional control is an important mechanism for the protection of the constitution and the protection of human rights. The constitutional control bodies occupy key positions in maintaining the legal order and protecting constitutional values, ensuring a balance between the various branches of government and protecting the rights and freedoms of citizens.

The global paradigm of the evolution of the institution of constitutional control is represented by a large set of models - from the American judicial to specialize judicial and quasi-judicial European, Iberian and various mixed varieties.

In developed jurisdictions, constitutional control bodies effectively check regulatory legal acts, international treaties and actions of officials for compliance with the constitution, official interpretation of the constitution and organic laws' norms, resolve disputes about the correctness of the election of senior officials and representative authorities, and give conclusions about the correctness of the impeachment procedures of the head of state and senior officials.

For the science of constitutional law, the problem of adapting the best practices of constitutional control into the national legal systems of countries of immature democracy is of interest. As the evolution of the institution of constitutional control in modern states shows, a very important period is the period characterizing the level of compatibility of the best international practices with the national legal and political system. Obviously, not all successful practices can be applied without change, given the cultural, historical and social characteristics of each specific country. The process of accepting international standards of constitutional control by national legal systems requires the development of a regulatory framework, adaptation of existing laws and, possibly, amendments to the Constitution.

It is in this way that the adaptation processes of the institution of constitutional control are developing in the Republic of Kazakhstan, which has tested both main varieties of the European model in its legal system - Austrian (Kelsen) and French. If, in accordance with the first Constitution of independent Kazakhstan in 1993, the Austrian version of constitutional control, personified by the Constitutional Court, was introduced, then after the adoption of the 1995 Constitution, the Constitutional Court was transformed into the Constitutional Council on the model and likeness of the French constitutional control body. As a result of the constitutional reform of 2022, the Constitutional Court was recreated as a response to public inquiries and expectations, which began to exercise its powers on January 1, 2023. The reconstruction of the Constitutional Court in Kazakhstan in 2022 was aimed at increasing the level of legal protection of citizens, strengthening control over compliance with the Constitution and strengthening democratic institutions in the country. However, the new legislation of the republic on constitutional control does not effectively regulate public relations in the field of constitutional justice. To increase the effectiveness of legislation on constitutional control in the Republic of Kazakhstan, it is necessary to expand the powers of the Constitutional Court, simplify procedures, ensure the independence of constitutional control bodies, create mechanisms for the execution of decisions, and improve the qualifications of personnel.

Introduction. The phenomenon of constitutional control from the moment of its inception to this day is of unquenchable interest, and moreover, it causes discussion in the scientific environment of the world's constitutionalists. As a rule, the demand for constitutional and administrative justice as the most effective mechanisms for protecting human rights is updated during periods of changes in the socio-political, geopolitical situation in different countries and in the world as a whole. This human rights mechanism becomes especially in demand when new challenges arise, for example, the expansion of authoritarian trends, the spread of corruption risks. Since constitutional justice is aimed at protecting the rights and freedoms of citizens, and normative legal acts may violate these rights, challenge mechanisms

must be effectively integrated into the justice system. It is natural that the function of detecting and canceling acts by constitutional justice bodies that violate the constitutional rights of citizens is aimed both at revising such acts and improving legislation, as well as developing doctrinal postulates.

The institution of constitutional control is not static; it is in constant development, since a priori it is intended to ensure the rule of the constitution and the protection of human rights. This fact is confirmed primarily by the transformation of models of constitutional control around the world from static judicial to specialized judicial and quasi-judicial its varieties. Moreover, in the latest political and legal history, there are many examples of testing different models of constitutional control with a different set of competencies by the countries of young, immature democracy.

The purpose of this study is to analyze the theoretical and practical issues of adapting the world experience of constitutional justice to the national legal system of the Republic of Kazakhstan.

Materials and methods. In preparing the article, the scientific works of foreign and Kazakhstani scientists in the field of constitutional law on this issue were studied, which formed the theoretical basis of the study. The priority topic in legal science of the institution of constitutional control, which tends to universalize, is considered in a diverse palette by scientists from all over the world. In the range of research, of particular interest are the scientific works of scientists from those countries that belong to the category of developed jurisdictions.

For the topic of this study, due to the similarity of legal systems, the scientific works of the constitutional control activities of the constitutional justice bodies of the post-Soviet states are of great interest. In post-Soviet countries, the study and analysis of the activities of constitutional control bodies are in demand in connection with the introduction of states into the legal system only in the early 90s, while in non-CIS countries this legal institution has been developing for more than two centuries.

The problems of imperfection of the current legislation of the Republic of Kazakhstan, regulating public relations linked to the organization of constitutional proceedings, as well as ensuring effective practice of its application, actualize the need for a critical analysis of the current law of modern states. The study of the modern phenomenon of specialized judicial control of the constitutionality and legality of regulatory legal acts of legislation was carried out on the basis of the method of historical and legal analysis of a wide range of constitutional, legislative and other regulatory legal acts of a significant number of states. The theoretical basis of the research is monographs, dissertations, reports and theses at scientific conferences of specialists in the field of constitutional justice.

The solution of research problems is based on the use of modern methodological approaches, the use of special scientific methods. The application of the historical method made it possible to determine the questions of the genesis and evolution of the institution of constitutional control. The structural and functional method used in writing this work is based on the study of the internal structure of individual articles of the constitution and laws, the legal norms included in them in terms of their functional and intended purpose, the role they play. The comparative legal method made it possible to conduct a comparative analysis of the legislation of the Republic of Kazakhstan and a number of foreign countries with different levels of effectiveness of legal regulation in order to identify shortcomings in legal regulation, study positive foreign experience and prepare recommendations for improving national legislation. In the context of comparative analysis, the experience of the best world practices was used; jurisdictions of different countries were chosen to analyze the development of the institution of constitutional control in order to create a model of constitutional justice that meets modern requirements in the Republic of Kazakhstan, aimed at effectively protecting human rights. In order to create such a model, the study critically analyzed the current constitutional legislation of different countries, as well as the practice of its application.

Results and discussion. The Institute of Constitutional Control in World Theory and Practice of Constitutionalism arose in 1803 in the bowels of judicial precedent - the Marbury V. Madison case, when for the first time in the world history of law, the Supreme Court of the United States of America announced the repeal of the Judicial System Act in connection with the establishment of the fact of the

contradiction of this law of the American Constitution. The Chief Justice of the US Supreme Court, John Marshall, already then formulated the main essence of the new legal institution: "it is the judiciary that has the right and obligation to say that there is a law" [1]. Given the pre-constitutional period of world history, it should be mentioned that the genesis of the institution of constitutional control was discovered at the beginning of the 17th century in Great Britain - in the activities of the Privy Council to invalidate acts of the legislature of the British colonies that contradict the laws of the English parliament [2]. The political and legal phenomenon of the institution of constitutional control in the modern period is of great interest to researchers. The tradition of exercising constitutional control is rapidly developing, spreading throughout the world. Transforming from the original American model of judicial constitutional control carried out by courts of general jurisdiction, into the Austrian and French varieties of the European model of specialized constitutional control, into various mixed models, constitutional control as a political and legal institution has become in demand by almost all countries, both developed and young democracy. According to modern researchers, the constitutional control bodies play the role of a "negative legislator" in the practice of constitutionalism - they cancel the effect of an unconstitutional act, cancel the by-law [3].

The literature substantiates the position: "the bodies of control over the constitutionality of law can be perceived as bodies that restrain other bodies of state power from expansion at the cost of constitutional values, rights and freedoms of the individual" [4]. Immersing themselves in the analysis of normative acts and specific situations, "in their analysis of the content of the constitution, the constitutional control bodies are inevitably objectively doomed to take into account all the elements of the situation that developed at the time of consideration of the case - economic, social, political, and international" [5]. It is natural that the evolution of constitutional control is characterized by an increase in the intensity of the use of this legal institution by states depending on the change in world political systems. As a rule, the essence of constitutional control is revealed in two ways: firstly, through the correlation of categories of power, and secondly, through the concept of legal protection of the constitution [6]. It is about the bodies of constitutional justice that the opinion is justified that "the courts exercising the powers to revise the constitution, that is, the right to cancel legislative and executive actions on the basis of a conflict with constitutional norms,.. significantly shape the political landscape "[7]. In the modern period - on the third wave of democratization - an increase in the number of constitutional courts around the world is recorded in the guise of an important element of the new constitutionalism [8]. In Central Asian countries, constitutional justice bodies function as an important state legal institution based on internationally recognized principles and rules of justice [9, p. 22]. Literally in all states of Western Europe, Asia, Africa, Latin America, the institution of constitutional control is perceived as a democratic arsenal of opposition to authoritarianism in the era of neo-constitutionalism.

The study of the evolution of the constitutional control phenomenon in the world theory and practice of constitutionalism made it possible to identify the specifics of existing models - American, European, mixed. In the paradigm of judicial and specialized bodies' powers of constitutional control, the authority to check laws and other regulatory legal acts for compliance with the constitution is highlighted. In different jurisdictions, legislation provides for specific ways to ensure compliance of the current legislation with the constitution. The national legal systems of the post-Soviet space are dominated by the tradition of the reception of the Austrian model of constitutional control, in which constitutional control is carried out by specialized constitutional courts that are part of the system of supreme state bodies in the constitutional system of power separation. Protection of constitutional rights and freedoms of citizens and ensuring the supremacy of the constitution in the legal system are the priority tasks of absolutely all bodies of constitutional justice, regardless of the chosen model of constitutional control.

An important result of a comparative analysis of world practice to improve the institution of constitutional control of the Republic of Kazakhstan is the justification of proposals to expand the powers of the Constitutional Court of the Republic by granting the right to a specialized body of constitutional control to check for compliance with the Constitution of newly adopted constitutional

laws and amendments and additions to them on a mandatory procedure; and on limiting the powers of the President to challenge any existing legal acts in the Constitutional Court. It seems necessary at the legislative level to expand the framework for democratization of the legal institution of constitutional control of the republic, to grant the subjects of the appeal the right to submit appeals to the Constitutional Court on verification of compliance with the Constitution and constitutional laws of the current regulatory legal acts of the highest authorities and central departments. There is also an objective request for the need to give the Constitutional Court of the Republic of Kazakhstan the right to check for compliance with the Constitution of the existing international treaties of the Republic of Kazakhstan.

The great conquest of the constitutional reform of 2022 in the Republic of Kazakhstan is the restoration at the level of constitutional legislation of the right of citizens to appeal to the Constitutional Court in order to challenge regulatory legal acts in case of violation of constitutional human and civil rights. It seems necessary to improve this process.

As world experience shows, an important direction that determines the purpose of the institution of constitutional control is the authority of the official interpretation of the fundamental laws in the general hierarchy - constitutional, organic laws. The authority of the Constitutional Court of the Republic of Kazakhstan to carry out an official interpretation of the norms should be extended to constitutional laws either on its own initiative or at the request of the highest court - the Supreme Court of the republic.

The modern period of the evolutionary process of the institution of constitutional control, which began at the turn of the 80-90s of the XX century, is characterized by the intensity of the reception of the experience of developed jurisdictions by young states. The current models of constitutional justice are the object of meaningful adaptations, their hybrid varieties arise.

The Austrian version of the European model of constitutional control is most widespread in the countries of the world. Among the post-Soviet states that have adopted the Austrian model of constitutional justice, the Republic of Kazakhstan stands out. Since the acquisition of sovereignty after the collapse of the USSR, the Republic of Kazakhstan has distinguished itself among the post-Soviet republics by actively testing all the main varieties of the European model of constitutional justice. Established in 1989, the Constitutional Oversight Committee of the Republic was transformed in 1992 into the Constitutional Court (Austrian model), in 1995 the Republic of Kazakhstan adopted a quasi-judicial French model borrowed on the Constitutional Council of France, and in January 2023, after the constitutional reforms of 2022, a specialized judicial constitutional control body was recreated - the Constitutional Court, the legal status of which is regulated by the Constitution and the Constitutional Law of November 5, 2022. The President, chairmen of the Chambers and deputies of Parliament in the amount of at least one fifth of the total number, the Prime Minister have the right to apply to the Court with a request to check the constitutionality of laws before they are signed by the President, as well as decisions of the Parliament and its Chambers [10].

To begin with, the provision on the immutability of the form of government, distorted in the Constitution as a "presidential form of government," is questionable. Literally paragraph 1 of Article 2 of the Constitution of the Republic of Kazakhstan states: the Republic of Kazakhstan is a unitary state with a presidential form of government [10], which is, to put it mildly, a terminological oversight of the text' authors of the basic law of the state and society. Currently, there are only two main forms of government - monarchy and republic. The division of the republican form of government into two main varieties - presidential and parliamentary. The differences lie in the construction of the powers of the president and parliament. As a rule, in a classical presidential republic, the head of state heads the executive branch. The redistribution of powers between them can change the ratio of their power, but does not change the republican form of government itself. A parliamentary republic in Kazakhstan can only be created as a result of the adoption of a new Constitution. In this context, it should be borne in mind that in the course of further constitutional reforms, it is possible to carry out the reconstruction of Article 2 of the Constitution of the Republic. The Constitutional Court, as a specialized body of constitutional control, intended for the legal protection of the Constitution, should take an active part in this process.

An important authority of the constitutional control bodies, in addition to checking the acts and actions of officials for compliance with the Constitution, is the interpretation of the basic law. The

Constitutional Court of the Republic of Kazakhstan carries out an official interpretation of the norms of the Constitution on the appeal of the subjects of the President, the Prime Minister, the chairmen of the Chambers of Parliament, 1/5 part of the total number of deputies of Parliament. At the same time, the constitutional legislation of the Republic of Kazakhstan has not yet defined the subject of interpretation of laws. For comparison: in the constitutions of countries of developed democracy and even the post-Soviet republics, the subjects of interpretation of the basic law are determined, and, as a rule, this is a constitutional control body. For example, in the Republic of Uzbekistan, the Constitution stipulates that the official interpretation of laws is carried out by the Constitutional Court (Article 133 of the Constitution of the Republic of Uzbekistan) [11].

The analysis showed that the legislation of the Republic of Kazakhstan does not provide for the procedure for checking international treaties for compliance with the Constitution. This situation is fraught with conflicts between national and supranational law. In foreign countries, in practice, there is a procedure for preliminary verification of international treaties for constitutionality before their ratification. This circumstance makes it possible to exclude cases of contradictions between international obligations and domestic constitutional law.

As a result of the next constitutional reform of 2022, the constitutional control body of the Republic of Kazakhstan was again reorganized from a quasi-judicial specialized body in the French version - the Constitutional Council to the Constitutional Court in the Austrian (Kelsen) variety of the European model. There is an increase in the demand for this political and legal institution. Only during 2023, the Constitutional Court considered 39 appeals, of which 36 cases were considered on appeals for compliance with the Constitution of regulatory legal acts, 2 - according to the Rules of Court, on the official interpretation of the Constitution, and an additional decision was adopted on the official interpretation of an earlier decision when the Constitutional Council and the official interpretation of the Constitution [12].

The activities of the Kazakh body of constitutional justice have noticeably intensified; the circle of subjects of appeal to the Constitutional Court of the republic has expanded. However, as practice shows, the subjects of the appeal, including new subjects - the Prosecutor General, the Commissioner for Human Rights - have never used their right of appeal during the year. The absence of appeals from such key actors as the Prosecutor General and the Commissioner for Human Rights indicates potential problems in the system of legal protection and the implementation of constitutional rights. Probably, the lack of initiative to use constitutional control mechanisms is due to the low level of legal culture and initiative among state bodies.

Conclusion. It is no coincidence that the phenomenon of constitutional control from the moment of its inception to this day is of unquenchable interest, and moreover, it causes discussion in the scientific community of the world's constitutionalists. As a rule, the demand for constitutional justice as one of the most effective mechanisms for protecting human rights is updated during periods of changes in the socio-political, geopolitical situation in different countries and in the world as a whole. This human rights mechanism becomes especially in demand when new challenges arise, for example, the expansion of authoritarian trends, the spread of corruption risks. Since constitutional justice is aimed at protecting the rights and freedoms of citizens, and normative legal acts may violate these rights, challenge mechanisms must be effectively integrated into both types of justice. It is natural that the function of detecting and canceling acts by constitutional justice bodies that violate the constitutional rights of citizens is aimed both at revising such acts and improving legislation, as well as developing doctrinal postulates.

The institution of constitutional control is not static; it is in constant development, since a priori it is intended to ensure the rule of the constitution and the protection of human rights. This fact is confirmed primarily by the transformation of models of constitutional control around the world from static judicial to specialized judicial and quasi-judicial its varieties. Moreover, in the latest political and legal history, there are many examples of testing different models of constitutional control with a different set of competencies by the countries of young, immature democracy. A striking example is the Republic of Kazakhstan, which arose on the world map as an independent state as a result of the collapse of the USSR. Since gaining sovereignty in 1991, Kazakhstan has very successfully tested the

Austrian model of a specialized constitutional court (1993-1995), then switched to a specialized quasi-judicial model of a constitutional council modeled on France, distorting it by significantly reducing the list of subjects of circulation and reducing legal instruments of constitutional control (1996-2022), and in 2023 recreated the version of the Constitutional Court.

Over the years of independence, numerous constitutional reforms have been carried out in the Republic of Kazakhstan. In total, during these reforms, the basic law adopted in 1995 was mercilessly amended: there are more than 1000 amendments. Meanwhile, the authors of the reforms went unnoticed the terminological oversight of the creators of the constitution in the wording of paragraph 1 of Article 2, which establishes the form of government: "The Republic of Kazakhstan is a unitary state with a presidential form of government" [1]. The wording is clearly incorrect, since there are only two forms of government - monarchical and republican. The bodies of constitutional justice should exercise their powers to bring this provision of the Kazakh Constitution into line with the canons of the general theory of law.

The assessment and adaptation of the international experience of constitutional control into the national law of Kazakhstan is important. The effective reception of the experience of developed jurisdictions will contribute to the improvement of the Kazakh institution of constitutional control in accordance with world standards.

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