

PROBLEMS AND PROSPECTS FOR IMPROVING THE ACTIVITIES OF THE CONSTITUTIONAL CONTROL BODY ON COURT APPEALS

Aizhan A Dossayeva, Al-Farabi Kazakh National University
Gulnara R Usseinova, Al-Farabi Kazakh National University
Dina M Baimakhanova, Al-Farabi Kazakh National University
Ualikhan A Akhatov, Al-Farabi Kazakh National University

ABSTRACT

At the stage of state of law formation, the priority task for the country is to determine its constitutional control, which will help balance the needs of the population and the state as a whole. Therefore, the topic is relevant. The purpose of the article is to study the problems and prospects for improving the activity of the constitutional control body on court appeals in the Republic of Kazakhstan and foreign countries. To achieve this goal, the authors used general theoretical and specific scientific methods of research. Given the fact that every independent country is free to formulate its state policy, there is a historical practice of determining its own constitutional control, which differs from other countries. Many factors influence this, in particular, the level of the country's economic development, its place in the arena of international and legal relations. Based on the analysis, the author draws the conclusion that it is the introduction of an individual appeal against the unconstitutionality of a legal norm or legal act by each citizen directly, that will promote the realization of the rights and freedoms of citizens secured and guaranteed by the Constitution.

Keywords: Constitution, Constitutional Control, Constitutional Court, Constitutional Council.

INTRODUCTION

Constitutional control is the control over the compliance of the constitution's provisions with laws and other regulatory acts, which is carried out by constitutional courts or specially authorized state bodies. This article examines the problems and prospects for improving the activities of the constitutional control body on court appeals in the Republic of Kazakhstan and foreign countries.

Some scientists believe that there is only one system of law. It is formed by the Constitution, which is the supreme law and all laws, including common law, derive their power from the Constitution and are subject to constitutional control (Jesse, 2016). The same point of view is shared by Tusupova, who says that the Constitution has the highest legal force, direct action and is applied throughout the country? Laws and other legal acts should not contradict the Constitution (Tusupova, 2014).

To guarantee the constitutionality of state power, it is necessary to protect the fundamental rights of people and ensure that the Constitution remains its effectiveness in the political system. Therefore, each state body is able to independently perform its duties without interference in other sectors within the framework provided for by the Constitution. So the state bodies check each other, reaching balance in power (Chon, 2014). Many scientists believe that constitutional control by constitutional subjects is mandatory. Constitutional control, in addition

to human rights, also has a beneficial effect on both economic regulation and the democratic process (Dyevre, 2015).

Constitutional control, the ability to monitor the constitution; have spread throughout the world in recent decades. About 38% of all constitutional systems had constitutional control in 1951. By 2011, 83% of the world's constitutions granted constitutional bodies the opportunity to monitor the constitution's implementation and repeal legislation on constitutional incompatibility (Ginsburg & Versteeg, 2013).

According to S. Boris, constitutional control is carried out in many countries at present either by any court of general jurisdiction (USA) or only by the Supreme Court (India, Japan) or the Constitutional Court or the Tribunal (Russia, Spain, Italy) or the Constitutional Council (France, Kazakhstan). The idea of constitutional legal protection consists in the termination of the legal effect of any normative or administrative act that does not correspond to one of the constitutional norms. This can mean the cancellation, the verification of the act or the revocation of its validity. This should be the result of a court decision or the adoption of a legislative or administrative decision.

In some countries, the Constitutional Court is not the only body protecting and guaranteeing constitutionality, but this function is also provided to other bodies. In some federal districts, such courts are formed at the level of federal units. Unlike countries where the protection of constitutionality is applied by ordinary courts, where these courts also protect the rule of law, in most countries where there are constitutional courts, these bodies only protect the constitutionality of laws (Belegu & Elezi, 2016).

The constitutional control is carried out in the form of individual or collective complaints, including empowering the person – the subject of human rights and freedoms, the opportunity to file a complaint with the Constitutional Court about violations of their rights and freedoms, laws, rules, judgments (Nastaeovich & Saniyazdanovich, 2015).

For example, the Constitution of the Republic of Azerbaijan provides for a fairly democratic nature of the rules established for the regulation of the protection relationship, it establishes the institution of an individual constitutional complaint or constitutional amparo. In accordance with clause V of Art. 130 of the Constitution of the Republic of Azerbaijan, everyone has the right to appeal to the Constitutional Court of the Republic of Azerbaijan by statutory acts of legislative and executive bodies, acts of municipalities and courts violating their rights and freedoms in order to resolve issues of their constitutionality and to restore violated human rights and freedoms (Mamedov, 2009).

The task of this study is to identify problems and prospects for improving the activities of the constitutional control body on court appeals in the Republic of Kazakhstan and foreign countries.

METHODOLOGY

During the research, the author used both general theoretical and specific scientific methods of cognition. Evolution of the legislation, as well as some problems of improving the activities of the constitutional control bodies are considered as part of an objective process, conditioned by the development and change of constitutional relations. The research is based on a historical method, a formal and dogmatic (special-legal) method, a method of concrete legal research, a method of logical analysis and other methods and techniques. The author used statistical data and sociological research data, which concern questions of constitutional control of Kazakhstan and foreign countries. The sociological method was used in studying the problems

of constitutional control of Kazakhstan and foreign countries, as it allows assessing the adequacy of legislation. A comparative and legal (comparative) method was also used. In combination with other methods, it allowed to solve problems posed by the author in assessing the problems of constitutional control of Kazakhstan and foreign countries.

RESULTS AND DISCUSSION

In the theory of legal science, constitutional control is characterized by the existence of the Constitution as the main supreme law, which determines the powers of state bodies and also establishes and guarantees the rights and freedoms of citizens. Adopting the whole array of the country's legal and regulatory framework that will comply with the country's Constitution is a rather complicated procedure involving both specialized and non-specialized state bodies whose task is to prevent the adoption of laws that are contrary to the Basic Law. The existence of specialized constitutional control in the country contributes to the stable development of legal relations and their legal regulation, forms a legal environment where the rights and freedoms of citizens are enshrined in the Constitution, they are guaranteed and not violated.

In countries as diverse as India, Israel, Canada, the United States, South Africa, France, Germany or Hungary, constitutional bodies have become major political subjects, with constitutional control affecting virtually all aspects of public and private life. For Latin American courts, there is also a traditional duty to control constitutionality (Dulitzky, 2015).

Control of constitutionality according to the American model is concrete, which means that this is done after the production of a legal dispute caused by the application of the law. Thus, the law can be analysed from the point of view of its conformity with the constitution, if it did not arise before the litigation. In the case of exercising constitutional control, the general principle is that the Supreme Court does not decide on any disputes or in abstract disputes. Thus, the requirement to review the constitutionality, which must be declared admissible, the applicant must be able to justify that he has an interest in making a claim and also to prove the importance of this issue and the relevance of the dispute to American society. Thus, the constitutionality of the law can be judged only if this decision is absolutely necessary to solve a specific case (Marin, 2013).

The American model provides that constitutional control is exercised by courts of general jurisdiction (Polovchenko, 2013). The American model is characterized by the following: the issue of the constitutionality (unconstitutionality) of a normative act is resolved in the context of the particular case's consideration (criminal, civil, administrative, etc.); the act, recognized unconstitutional, loses legal force. The US Supreme Court confirms or rejects the position of the court of general jurisdiction on the constitutionality of the act applied in the case (Vasilevich, 2014).

According to Greene, the US Supreme Court is a constitutional court, since it solves issues of public law and has an independent function of declaring the law (Greene, 2014).

The decisions of almost all the Constitutional Courts of Europe are final; they are not subject to appeal and are binding. They can be changed or cancelled only by the court itself or by changes in the Constitution (Tsurkan, 2012).

The turn from the German model of constitutional control in 1995, which presupposes the existence of a specialized body of constitutional control-the Constitutional Court, to the one conditionally called French, having a quasi-judicial tribunal-the Constitutional Council, raised the issue of the correlation of the principles of control and supervision in the powers of the Constitutional Council of Kazakhstan. Regarding the correlation of supervision and control in

legal science (not only in constitutional and legal), including the view that the separation of the notions of "control" and "supervision" is meaningless and the term "supervision" should be regarded as a traditional name of certain types of control (Kudilinsky, 2015).

The Constitutional Council of Kazakhstan is a state body that ensures the supremacy of the Constitution throughout the territory of the Republic. Laws and international treaties recognized by the Council as not in conformity with the Constitution cannot be signed or, accordingly, ratified and put into effect. The Council has the right to cancel laws and other normative legal acts recognized as unconstitutional, as they infringe upon the rights and freedoms of a person and citizen, secured by the Constitution. Decisions of the Constitutional Council are mandatory throughout the Republic, final and not subject to appeal (Omejec, 2015).

The influence of the decisions of the Constitutional Council of Kazakhstan on the process of norm-setting is multifaceted. Often in the actions of the Constitutional Council, the attention of the subjects of the legislative initiative is drawn to certain aspects of the legal regulation requiring legislative measures, which were subsequently included in the plan of legislative activity of the Government (Nastaeovich & Saniyazdanovich, 2015).

Beginning from March 10, 2017, the powers of the Constitutional Council were extended by a separate Law. In particular, from now on, before making amendments to the Constitution and submitting them to the Parliament or to a republican referendum, the Council must give opinions on the compliance of these changes with Clause 2, Article 91 of the Constitution of Kazakhstan.

On the petitions of the courts, the Constitutional Council recognized the norms of certain laws and other acts as unconstitutional, including the lease agreement of the Baikonur complex and the agreement on the interaction of law enforcement agencies of Kazakhstan and Russia on the territory of the Baikonur complex, the Criminal Code, the laws "On Notaries", "On state registration of rights to real estate and transactions with it" and others. It is especially worth noting that this law is used by both local courts and the Supreme Court of the country. According to 16 appeals of the courts, the norms of laws and other regulatory acts are recognized as relevant to the Constitution (Malinovsky, 2013).

Considering the appeals of the courts, the Constitutional Council protects the constitutional rights and freedoms of a person and citizen indirectly through the recognition of an act or a part thereof that does not comply with the Constitution. This makes the Constitutional Council favourably different from similar bodies in other countries. Thus, the Constitutional Council of France is deprived of the authority to examine the court's representations (Ostapovich, 2015). In Kazakhstan, courts have broader access to constitutional control (Malinovsky, 2013).

During the existence of the Constitutional Council, more than 180 appeals have been submitted to it, most of which are addressed to the chairmen of the Chambers of Parliament. In accordance with Article 78 of the Constitution of the Republic of Kazakhstan, courts have addressed the Constitutional Council 66 times (Malinovsky & Ormanova, 2015).

According to Tlembaeva, the shortcomings of the current model in Kazakhstan can be attributed to the lack of citizens' rights to constitutional justice. As the experience of many modern states shows, real protection of the rights of citizens can be guaranteed only when citizens are entitled have the right to petition and have the protection of their rights and freedoms by the bodies of constitutional control. All this allows us to conclude that there is a need to further improve the Kazakhstani model of constitutional control (Tlembaeva, 2016).

Nastaeovich also says that to increase the effectiveness of the Constitutional Council of Kazakhstan, as evidenced by the opinions of Kazakhstani scientists, it is necessary gradually, as the development of civil society and the state, to build the capacity of the Constitutional Council by expanding access to the institution of constitutional control (Nastaeovich & Saniyazdanovich, 2015).

CONCLUSION

The analysis showed that today, in different countries of the world, in the overwhelming majority, two models of constitutional control dominate. In particular, this is the American model of control and the European one. The American model is characterized by the fact that the performance of the constitutional control's function does not rely on a specialized state body, in particular, the Constitutional Court or the Constitutional Council. The exercise of constitutional control is vested in the courts of general jurisdiction. Positive of this model is its availability for citizens to protect their constitutional rights. The European model of constitutional control is marked by its other judicial structure. Thus, in the judicial system, specialized courts are formed. As a rule, this is the Constitutional Court, the main task of which is the exercise of constitutional control. A positive characteristic of this model can be called a clear specialization of the Constitutional Court, whose activities are based on the letter of the law, as well as on many years of practice and wide experience of resolving such disputes in various spheres, are regulated by the Constitution.

In the author's opinion, the question of determining whether a complaint is based on the unconstitutionality of a regulatory act or not, which is submitted not by state bodies but by citizens, should be decided not on the level of courts of general jurisdiction, but by already specially created body which main task is the exercise of constitutional control. The circle of subjects that can initiate constitutional proceedings to verify the constitutionality of the law should expand. The Constitution guarantees citizens the rights and freedoms. Consequently, the right to directly protect these rights and freedoms must be provided directly to citizens. Thus, the citizens' opportunity to individually and directly address a state body that solves the issue of the regulatory acts' constitutionality will contribute to the full provision of individual rights and freedoms guaranteed by the Constitution.

REFERENCES

- Belegu, B. & Elezi, Z. (2016). Constitutional control of the constitutional court of the Republic of Kosovo. *Revista de Stiinte Politice*, 50, 146-152.
- Chon, J.I. (2014). Effect of constitutional review on the legislature and the executive branch for last 25 years in Korea. *Journal of Korean Law*, 14, 131-139.
- Dulitzky, A.E. (2015). An Inter-American Constitutional Court - The invention of the conventionality control by the Inter-American Court of human rights. *Texas International Law Journal*, 50, 46-52.
- Dyevre, A. (2015). Technocracy and distrust: Revisiting the rationale for constitutional review. *International Journal of Constitutional Law*, 13(1), 59-65.
- Ginsburg, T. & Versteeg, M. (2013). Why do countries adopt constitutional review? *The Journal of Law, Economics & Organization*, 30(3), 588-596.
- Greene, J. (2014). The supreme court as a constitutional court. *Harvard Law Review*, 128, 142-150.
- Jesse, D. (2016). Why a constitutional court appeal for Oscar pistorius may succeed: Opinion-constitutional law. *De Rebus*, 561, 43-52.
- Kudilinsky, M.N. (2015). Control as a kind of state and management activity: To the correlation of concepts "control" and "supervision". *Sociology and Law*, 1, 38-49.

- Malinovsky, V.A. & Ormanova, S.S. (2015). *Practical course on constitutional control in the Republic of Kazakhstan*. Almaty: Publishing House "Ai San Service".
- Malinovsky, V.A. (2013). The constitutional councils of Kazakhstan and France: Some boundaries of comparison. *Law and the State*, 59(2), 30-37.
- Mamedov, N.F. (2009). Institute of judicial constitutional control in the Republic of Azerbaijan. *Bulletin of the Chelyabinsk State University*, 18(7), 50-57.
- Marin, S.C. (2013). The origins of the American model of constitutional review. *Research and Science Today*, 5, 218-224.
- Nastaeovich, A.M. & Saniyazdanovich, M.K. (2015). The role of the constitutional council of the republic of kazakhstan on human rights. *Asian Social Science*, 11(16), 317-325.
- Omejec, J. (2015). Principle of the separation of powers and the constitutional justice system. *Conference of bodies of Constitutional control of Central Asia "The Role of the Constitutional Court in Safeguarding the Supremacy of the Constitution"*, p. 8.
- Ostapovich, I.Y. (2015). *The constitutional council of the Republic of Kazakhstan: Theory and practice*. Ust-Kamenogorsk.
- Polovchenko, K.A. (2013). Institute of judicial constitutional control in post-Soviet states. *Bulletin of MGIMO University*, 3(30), 117-124.
- Tlembaeva, Z.U. (2016). The role of constitutional control in ensuring the supremacy of law. *Actual Problems of Russian Law*, 8(69), 47-54.
- Tsurkan, O. (2012). The essence and models of constitutional control. *Law and Life*, 7, 48-55.
- Tusupova, A.Z. (2014). Sources of constitutional law of the Republic of Kazakhstan. *Bulletin of KazNU. Legal Series*, 2(70), 41-51.
- Vasilevich, G.A. (2014). The constitutional model of judicial constitutional control and its implementation in practice. *Bulletin of BDU*, 2, 56-62.