



KAZAKHSTAN



PAPERS





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**Republic of Kazakhstan: constitutional review
and the judiciary in the division of the highest values of a person, his life, rights and
freedoms**

Dear colleagues, ladies and gentlemen!

On December 16, 1991, the Constitutional Law "On the State Independence of the Republic of Kazakhstan" was adopted. That day marked the beginning of the country's official entry into a new era - the era of state and society building based on the rule of law, the priority of human and civil rights and freedoms, the separation of State power into branches and other universally recognized values.

The first article of the current Constitution of 1995 sets out the beginning of the new state and social structure as follows "The Republic of Kazakhstan proclaims itself as a democratic, secular, legal and social state whose highest values are a person, his life, rights, and freedoms."

Much has been done in the past thirty years of independence to transfer this constitutional provision into everyday life.

An example of this is the **establishment, functioning and improvement of the institution of constitutional control, as well as the fundamental change in the purpose and organization of the administration of the judiciary.** They constitute the supporting



structures, institutional pillars and mechanisms of law enforcement and human rights activities of the state.

The Constitutional Control Institute was first established in 1991-1992. At that stage, the *then-Soviet courts* were undergoing a thorough reform *with a consistent transformation of the socialist justice system into a judicial branch*.

For the first time in the history of Kazakhstan, the established constitutional review body in the form of the Constitutional Court, in Article 10 of the Constitutional Law "On the State Independence of the Republic of Kazakhstan" was defined as "the highest body of judicial protection of the Constitution." The laws on the Constitutional Court and on the constitutional proceedings confirmed the status of the Constitutional Court precisely "as a body of judicial power". This is evidenced by many norms, including its competence, the legal status of judges, the procedure for proceedings and guarantees for the exercise of powers. Article 24 enshrines "symbols of the judicial power of the Constitutional Court", constitutional proceedings are defined as "a form of exercising judicial power", Article 32 gives the Constitutional Court the right to impose fines and apply other procedural protection measures ...

Later, Article 95 of the first Constitution of Kazakhstan 1993 proclaimed that the judicial power in the Republic of Kazakhstan belongs to the Constitutional Court, the Supreme Court, the Supreme Arbitration Court and lower courts established by law. The Constitutional Court is the highest body of judicial power for the protection of the Constitution of the Republic of Kazakhstan.

In section IV "Guarantees of Compliance with the Constitution", Chapter 21 "Ensuring the Stability of the Constitution and Protection of its Provisions", there were three articles regulating the mission of the Constitutional Court - judicial protection of the Constitution and ensuring its supremacy (Article 130), legal force and consequences of a decision on unconstitutionality (Articles 131 and 132).

Let me draw your attention to the fundamentally important provisions of the status of the Constitutional Court (in 1995 they were not transferred to the Constitutional Council). The court was granted the right to consider claims on compliance with the Constitution of



normative acts adopted by the Prosecutor General of Kazakhstan, guiding clarifications of the Supreme Court and the Supreme Arbitration Court,

as well as cases on the constitutionality of law enforcement practice affecting the constitutional rights of citizens (Article 10 of the Law on the Constitutional Court).

A wide range of subjects of appeal was identified, including the courts and the Attorney General. This right was also granted to citizens - on issues directly affecting their constitutional rights, if they are not subject to other courts (Article 18 of the Law on Constitutional Judicial Proceedings).

It was during this period that the initial steps were taken to form the judiciary as one of the branches of state power. And this was one of the main tasks and goals in building of a new Kazakhstan.

Already on November 23, 1990, the law "On the Judicial System of the Kazakh SSR" was adopted. It took the first steps to eliminate the direct dependence of courts and judges on representative and executive bodies, and the term of office of all judges was increased. However, the establishment and functioning of the courts remained under the jurisdiction of the respective Councils of People's Deputies, and the provision of the activities of the courts was entrusted to the Ministry of Justice of the Kazakh SSR.

Real measures to transfer the "Soviet justice system" to the quality of the "judicial power" independent from the state were carried out by constitutional acts - the Declaration on State Sovereignty of the Kazakh SSR and the Constitutional Law on State Independence. For the first time, the affiliation of the judicial branch of power on issues of its competence to the Supreme Court and the Supreme Arbitration Court of the Republic of Kazakhstan was established. A number of provisions were confirmed and specified in the first Basic Law - the 1993 Constitution of Kazakhstan.

The strategy of concrete actions is embodied in the "State program of legal reform in the Republic of Kazakhstan", approved by the President of the Republic in February 1994.

As we can see, at the most critical, acute and emotional moment of the deep transformation of the social and state system, for the first time, a powerful institution of



constitutional review, which had no experience of its own, was introduced into the judicial system at the highest level, which had just embarked on the path of deep reform.

In the practice of that time, such administration of judicial constitutional review and justice did not add constructivism to the common cause of ensuring the supremacy and direct action of the Constitution.

In addition, in 1992, in the Kazakhstan's concept of purely judicial constitutional review, the absolute of a posteriori constitutional review triumphed.

Nevertheless, the Constitutional Court worked from the summer of 1992 to the autumn of 1995, and its decisions had contributed significantly to the strengthening of constitutionalism.

The Constitution of the Republic of Kazakhstan, adopted at the republican referendum on August 30, 1995, changed the model of the institution of constitutional review. It was the Constitutional Council of the Republic of Kazakhstan.

In December 1995, the President of the Republic signed decrees having the force of a constitutional law, "On courts and the status of judges in the Republic of Kazakhstan" (December 20) and "On the Constitutional Council of the Republic of Kazakhstan" (December 29).

The function of constitutional review, as we can see, was separated from justice and assigned to a quasi-judicial body. This made it possible to develop both institutions substantively in accordance with their missions in civil society and in a state with a presidential form of government.

Let me emphasize a few important points.

The stay of the Constitutional Council outside the classical trinity of power created the preconditions for the development of the doctrine of state power and its branches, in particular, constituent, constitutional, control, and, possibly, others.

Due to the extremely clear formation of competence, determination of the circle of subjects of appeal, exclude its interference in the activities of other government agencies.

Concentrate the resource of constitutional review precisely on ensuring human and civil rights and freedoms, while paying due attention to other areas of constitutionalism.



Combine the benefits of a priori and posteriori, abstract and concrete, proactive and mandatory types of constitutional review, as well as the general obligation of its final decisions with the possibility of determining the mechanism for their implementation.

Today, the Constitutional Council has established itself in society as an instrument of a firm and authoritative defender of the Basic Law's provisions, its accurate modernization through the official interpretation of the norms, upon the requests of the subjects established in the Constitution, verification for compliance with its values of the laws adopted by the Parliament, as well as current legal acts on the submissions of the courts.

In Kazakhstan, not being a supervising agency over other law enforcement agencies of the state, developing jointly with the expert community and publishing legal positions, making recommendations for improving the legislative guarantees of the rights and freedoms of Kazakhstan's people, the Council occupies a clear niche in the state mechanism. At the same time, it interacts with traditional and first-established government agencies (for example, ombudsmen for human rights, children's rights, the rights of entrepreneurs, etc.).

The competence of the Constitutional Council is gradually being expanded with the development of the powers enshrined in the 1995 Constitution and the accumulation of relevant experience in the human rights activity of the entire state, the development of civil society and the state.

For example, in 2017, during the third large-scale constitutional reform, *firstly*, the list of constitutional values requiring enhanced protection was expanded; *secondly*, mandatory a priori constitutional review over amendments to the Constitution has been introduced; *thirdly*, a posteriori constitutional review over the law in force has been expanded. This is done "in the interests of protecting human and civil rights and freedoms, ensuring national security, sovereignty and integrity of the state" (subparagraph 10-1) of Article 44 of the Constitution); *fourthly*, the independence and responsibility of the Constitutional Council has been strengthened.



A number of measures aimed at strengthening constitutional review have been introduced in the Constitutional Law “On the Constitutional Council of the Republic of Kazakhstan”, as well as in ordinary laws and by-laws.

In order to implement the fundamentally new provisions and norms of **Section VII of the Constitution “Courts and Justice”**, a large-scale judicial reform is being carried out in the country.

In connection with the limited time for the speech, I will highlight only some of its most important substantive directions.

This is the consolidation and implementation of fundamental novelties of justice as a direct form of the implementation of state power by the courts, provided they are independent from the bodies of the legislative and executive branches.

More than twenty years ago, *the functions of ensuring the operation of the courts* were removed from the jurisdiction of the Ministry of Justice (i.e., the executive branch) and transferred to the newly formed authorized body - the Committee for Judicial Administration under the Supreme Court (later - the Department for Supporting the Activities of Courts under the Supreme Court).

Ensuring the *independence and immunity of judges and high-quality selection of personnel* are carried out by the High Judicial Council - an autonomous state institution that is in the coordinates of the presidential power and operates in accordance with the law. It works closely with the Supreme Court, which also excludes the influence of the executive branch.

The unity of the judicial system was established by abolishing arbitration courts with the transfer of their functions to ordinary courts.

At the same time, specialized courts are gradually being established: specialized inter-district economic courts with competence to consider disputes in the sphere of business activities (February 2002); specialized inter-district juvenile courts, established in all regional centers and some large cities (2012); specialized inter-district criminal courts have been established in all regions of the country, the jurisdiction of which includes criminal cases on especially grave crimes, including jury trials (since the introduction of the



institution of criminal trial by jury in the Constitution in 2007). The scope of their cases is expanding.

In September 2004, specialized administrative courts were established to deal with cases arising from the administrative powers of state bodies. However, the real revolution in this area took place quite recently. On July 1 of this year, Administrative Procedural and Process-Related Code was put into effect, adopted on June 29, 2020. Administrative procedure, together with criminal and civil procedure, is now becoming a full-fledged form of administration of justice and the protection of citizens' rights and legitimate interests against unlawful acts and decisions by the executive authorities.

Consideration of disputes related to investment activities is entrusted to the court of the capital Nur-Sultan according to the rules of the court of first instance, and investment disputes involving large investors - to a specialized collegium of the Supreme Court.

As we can see, the introduction of specialized courts provides additional protection to the growing number of constitutional rights and freedoms of citizens and their especially vulnerable groups.

Along with the above measures, the following is carried out:

gradual expansion of the court's authorization of investigative actions affecting constitutional human rights and freedoms, the introduction of pre-trial (mediation) and alternative (arbitration courts) forms of dispute resolution;

tightening of qualification requirements for the professional qualities of a judge and mechanisms for selecting candidates for judicial positions, the new Code of Judicial Ethics is in force, training is being improved, at the same time the social and material conditions of the activity and life of judges are being strengthened, life-long maintenance of retired judges has been introduced;

ensuring accessibility and openness of justice, simplifying judicial procedures, implemented a transition to a three-tier justice system, abandoning the institution of judicial supervision;



the widespread use of modern electronic and information communication technologies, virtually all courtrooms are equipped with audio and video recording systems, official Internet resources of courts have been activated.

Large-scale projects are being carried out with international organizations to introduce the best practices of the world into the work of Kazakhstan's courts. There is an International Council of respected lawyers at the Supreme Court. A separate jurisdiction has been established in the Astana International Financial Centre Court, providing for the participation of foreign judges and the application of procedural principles and rules of common law of England and Wales. The International Arbitration Centre (IAC) contributes to improving the resolution of commercial disputes.

Since the adoption of the 1995 Constitution in October 2020, the VIII Congress of Judges, the main body of the "Union of Judges of the Republic of Kazakhstan", has been held. As a rule, the President of the Republic takes part in them. Each congress summarizes the results of the previous period and identifies specific measures to promote judicial reform.

The Chairman of the Constitutional Council of Kazakhstan, Ex-Chairman of the Supreme Court Kairat Mami believes that as a result of the implementation of State policy, the judiciary has today acquired all the necessary essential characteristics, mechanisms for the implementation of State power, which turns it into a stabilizing force in the country, capable of effectively protecting the rights and freedoms of citizens, to protect society from social conflicts, ensuring the interests of the progressive and safe development of the State.¹

The current legislation creates the preconditions for **a constructive combination of the activities of the Constitutional Council and courts, while allowing the use of the possibilities of the constitutional review institution to strengthen the judiciary and vice versa.**

The Constitutional Council has several decisions (regulatory decisions and provisions of annual addresses) on the rights of citizens, the concept of the judiciary, the judicial

¹ Mami K.A. Independent and responsible government in sovereign Kazakhstan. In the book: Formation and development of modern Kazakhstan's statehood (first-hand). - Nur-Sultan, 2019. - P. 250-273.



system, guarantees of courts' independence and responsibility, substantive and procedural law and others.²

At the same time, the courts are called upon to play a primary role in ensuring the constitutionality of the working law, human and civil rights. According to Article 78 of the Constitution, "The courts are not entitled to apply laws and other regulatory legal acts that infringe the rights and freedoms of a person and citizen enshrined in the Constitution. If the court finds that the law or other regulatory legal act to be applied infringes upon the rights and freedoms of a person and citizen enshrined in the Constitution, it is obliged to suspend the proceedings and apply to the Constitutional Council with a view to declare this act unconstitutional." Thus, the judiciary is endowed with this exclusive duty precisely in terms of protecting of human and civil rights and freedoms. This institution is of particular importance in the absence of citizens' right to appeal to the Council.

However, if earlier every third case in the Council was initiated by the courts, then in recent years their number has sharply decreased and, now with rare exceptions, has practically ceased. Thus, the level of protection of citizens has decreased, and, of course, the guarantee of paragraph 1 of Article 1 of the Constitution.

A special law has been drafted by the Constitutional Council to remedy this situation. It provides additional opportunities for the participants in the proceedings to request ordinary courts to introduce a referral to the Constitutional Council. And for the court - a more attentive attitude to such requests and their maximum satisfaction.

The draft law was approved by the Venice Commission, with its support, the Council held several special seminars with the participation of foreign experts. We hope that our initiative will receive a final positive decision.

I would like to thank the participants for their attention and wish them health and success.

² Mami K.A. The Constitutional Council's interaction with the courts. - In the book: Constitutional review in Kazakhstan: doctrine and practice of establishing constitutionalism. - Almaty, 2015. - P. 328-337.