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THE DIFFERENCE BETWEEN THE CONCEPT OF JUSTICE IN THE CONSTITUTION OF AFGHANISTAN AND THE REPUBLIC OF KAZAKHSTAN

The pursuit of justice has remained a fundamental but elusive goal throughout human history, often subject to interpretation and debate among scholars of philosophy and law. Many countries enshrine the principle of justice in their constitutions, yet its precise meaning and application vary widely. In the constitutions of nations like the Republic of Kazakhstan and the Islamic Republic of Afghanistan, the concept of “justice” is notably vague, lacking clear definition or foundational research. In a recent research paper, the author undertook an examination of justice as articulated in the constitutions of Afghanistan and Kazakhstan. Employing a librarian method for information gathering and utilizing comparative analysis, the author sought to elucidate the understanding and treatment of justice within these constitutional frameworks. The findings of this investigation reveal a nuanced picture. In both cases, the concept of justice appears to prioritize the fairness of legal texts over their practical implementation. However, a notable distinction arises in the Constitution of Kazakhstan, where emphasis seems to be placed on actualizing justice rather than merely espousing its principles in legal documents. This brief comparison underscores the complexities inherent in conceptualizing and realizing justice within constitutional frameworks. It highlights the need for further research and analysis to bridge the gap between legal theory and practical application in the pursuit of justice within diverse socio-political contexts.

Key words: constitution, history, judiciary, law, people, human.

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Ауғанстан мен Қазақстан Республикасы Конституциясындағы әділет түсінігінің айырмасы

Әділдікке ұмтылу адамзат тарихында іргелі, бірақ қиын мақсат болып қала берді, көбінесе философия және құқық ғалымдары арасында түсіндіруге және пікірталасқа ұшырады. Көптеген елдер өздерінің конституцияларында әділеттілік принципін бекітеді, бірақ оның нақты мағынасы мен қолданылуы әр түрлі. Қазақстан Республикасы мен Ауғанстан Ислам Республикасы сияқты ұлттардың конституцияларында «әділеттілік» ұғымы айқын анықтамасы немесе іргелі зерттеулері жоқ, әсіресе анық емес. Жақында жазған зерттеу жұмысында автор Ауғанстан мен Қазақстан конституцияларында көрсетілген сот төрелігіне сараптама жасады. Ақпарат жинау және салыстырмалы талдауды қолдану үшін кітапханашы әдісін қолдана отырып, автор осы конституциялық шеңберлердегі әділеттілікті түсіну мен емдеуді түсіндіруге тырысты. Бұл зерттеудің нәтижелері нюансты суретті көрсетеді. Екі жағдайда да сот төрелігі ұғымы заң мәтіндерінің әділдігін олардың іс жүзінде жүзеге асырылуына басымдылық беретін сияқты. Дегенмен, Қазақстан Конституциясында ерекше ерекшелік бар, мұнда заң құжаттарында оның қағидаттарын жай ғана қолдауға емес, әділеттілікті жүзеге асыруға баса назар аударылады. Бұл қысқаша салыстыру конституциялық шеңберде сот төрелігін тұжырымдамалау мен жүзеге асыруға тән күрделіліктерді көрсетеді. Ол әр түрлі әлеуметтік-саяси контексттерде әділеттілікке ұмтылуда құқықтық теория мен практикалық қолдану арасындағы алшақтықты жою үшін одан әрі зерттеулер мен талдаулардың қажеттілігін көрсетеді.

Түйін сөздер: конституция, тарих, сот, құқық, халық, адам.

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Разница между понятием справедливости в Конституции Афганистана и Республики Казахстан

Стремление к справедливости оставалось фундаментальной, но неуловимой целью на протяжении всей истории человечества, часто являющейся предметом интерпретаций и дискуссий среди ученых философии и права. Многие страны закрепляют принцип справедливости в своих конституциях, однако его точное значение и применение сильно различаются. В конституциях таких стран, как Республика Казахстан и Исламская Республика Афганистан, понятие «справедливость» особенно расплывчато, ему не хватает четкого определения или фундаментальных исследований. В недавнем исследовании автор предпринял анализ правосудия, сформулированного в конституциях Афганистана и Казахстана. Используя библиотечный метод сбора информации и сравнительный анализ, автор стремился прояснить понимание и отношение к правосудию в этих конституционных рамках. Результаты этого исследования раскрывают неоднозначную картину. В обоих случаях концепция справедливости, по-видимому, отдает приоритет справедливости юридических текстов над их практической реализацией. Однако заметное различие возникает в Конституции Казахстана, где акцент, по-видимому, делается на осуществлении правосудия, а не просто на закреплении его принципов в юридических документах. Это краткое сравнение подчеркивает сложности, присущие концептуализации и реализации правосудия в конституционных рамках. Это подчеркивает необходимость дальнейших исследований и анализа, чтобы преодолеть разрыв между правовой теорией и практическим применением в поисках справедливости в различных социально-политических контекстах.

Ключевые слова: конституция, история, судебная власть, закон, люди, человек.

Introduction

The word justice is derived from “Jus,” which means law. Law in its general meaning. Although equivalent to the word justice, we have the word) төрелігін (In the Kazakh language, and we also have the words Adalet and Daadgari (عزگنداد) in Persian. Furthermore, in pre-modern societies, justice was an unchangeable law (Knight, 1963). Humans have been more or less familiar with the concept of justice since its inception, but it has never been able to define it comprehensively. Justice for man is like his lost thing, which he is always looking for, but he does not know the specifics of that lost thing. Humans, whether they are good or bad. They are thirsty for justice in various forms, from when a man wrote down his thoughts. They paid extensive attention to justice and described and explained it. From Greek philosophers to contemporary scholars, the concept of justice has been disputed and debated (HatmiNejad and Rasti 2006). Even some, like Will Durant, have said that the causes of the decline of human civilizations were injustice and oppression. In his book *History of Civilization*, he says: “Civilization cannot be destroyed by conquest, civilization is destroyed only from within, civility flourishes and flourishes in society by respecting the equality of human rights, and

discrimination dries up its roots, The health of nations is more important than the wealth of nations” (Durant 1885-1981 1935). With all the importance that the concept of justice has had for philosophers and scholars, there is still no comprehensive and universally accepted definition. Hence, from this concept, which is ambiguous in its purpose, scholars such as John Rawls and Abdul Karim Soroush have combined the concept of justice with the concepts of fairness and honesty to explain the concept of justice in a simple way.

By the way, with all the ambiguity and difficulties in defining justice, the countries oblige their judicial institutions to implement and behave justly. Kazakhstan and Afghanistan are among the countries that have made their legal and judicial institutions obliged to do justice. However, the justice desired by these two countries is not defined in their laws, especially their constitutions. These two countries are subject to the Roman-Germanic legal system. This is one of the commonalities of these two laws that can simplify the current research.

The main goal of this research is to comprehensively explain the concept of justice in the constitutional laws of the Republic of Kazakhstan and the Islamic Republic of Afghanistan, which is divided into the following objects:

- What is the definition of justice?
- How is the concept of justice expressed in the Constitution of the Republic of Kazakhstan?
- How is the concept of justice expressed in the Constitution of the Islamic Republic of Afghanistan?

Materials and Methods

In this article, qualitative research method is used. Therefore, the concept of justice in the constitution of two countries has been discussed in a comparative manner. First-hand sources such as the Constitution of Afghanistan approved in 2004, and the Constitution of Kazakhstan, approved in 1995, have been used. Most of the second-hand sources are articles and books that were written about the concept of justice in the constitutions of the two countries or their examples.

The problem of explaining the concept of the constitution in the countries of Afghanistan and Kazakhstan has been solved by the author by referring to the opinions and ideas of philosophers and scientists in the fields of philosophy, law, and sociology and from this theoretical framework..

- How is the concept of justice expressed in the Constitution of the Republic of Kazakhstan?

Both seem vague in definition. In the constitution of Afghanistan, instead of the concept of justice, the concept of social justice has been mentioned, while in the constitution of Kazakhstan, only the word justice has been used, which refers to individual values.

Literature review

Not much has been written about the concept of justice in the Constitution of Kazakhstan, what the author has found is a number of articles written in English, and due to language barriers, he could not reach Russian and Kazakh language articles, but he tried. Some articles that are related and whose language is Russian or Kazakh are first translated into English and then used.

- In an article titled: Legal system of Kazakhstan in the Horde period its author (Ablaeva Elvira Bekbolatovna, Cand. of Sci. (Law Associate Professor of the Department of Humanitarian and Legal Disciplines of the University "Astana" (2019) in this article, he has mostly studied justice from its historical perspective and has discussed justice with a historical approach. And it does not express and explain the concept of justice in the Constitution of Kazakhstan.

- In another article under the title: (Search for Harmony of Freedom and Justice in the Republic of Kazakhstan) the author (Gulgina Alimzhanovna Gizatullina, Associate Professor, Candidate of Philology, Taraz State University, 2020,) has tried to define and explain justice from the economic and social point of view and the reconciliation between the two. What he is talking about is something other than the individual justice mentioned in the Constitution of Kazakhstan.

- On the other hand, Afghan writers have not written much about the concept of justice in the Afghan constitution. They have studied justice in its general form so that in the mirror of the constitution, one can refer to the author (Mohammad Akbar Zamin) who has discussed formal and informal justice in Persian writing entitled (A reflection on official justice and unofficial justice in Afghanistan) This writing does not have reliable sources and Most of them do not have an unbiased view of the explanation of this process of the formation of this type of justice, and it can be added that he had a little ethnic view of the issue.

- A book titled (an introduction to the Constitution Law of Afghanistan) written by an American author (Crown Quadrangle professor at Stanford law school) in this book, he talks about justice from its cultural point of view and about justice and its meaning in the cultural and judicial society of Afghanistan, he says that justice cannot be defined in the society For this, the cultural and judicial of Afghanistan defers the reader to study the cultural and judicial history of Afghanistan.

This article aims to give a more comprehensive description and explanation of the concept of justice in the constitutions of Afghanistan and Kazakhstan and to some extent resolve and supplement the above articles and a step towards further studies on this concept in the constitutions of the two countries.

Results and Discussion

The concept of justice

Scholars in the field of law and other humanities almost agree on the existence of justice, but they disagree on the definition and nature of this concept or phenomenon. Hence, we are going to present some definitions of justice. According to Aristotle, moderation is the criteria for distinguishing virtues from vices. In a unique sense, from the viewpoint of Aristotle, justice is equality between persons and objects, which means that the goal of justice is not always to provide mathematical equality. Still, there

should be a balance between the rights and obligations and profits and losses of persons. Moderation should be observed; in other words, justice is a virtue to which everyone should be given what they are entitled (Mirzaei, 2017: 4). But the question is how we will know that something we give to a person is what he is entitled to.

John Rawls, in his book entitled "Justice as Fairness." In his view, the most reasonable principles of justice are the principles on which people have a mutual agreement under fair conditions. This book expands on Rawls' treatise entitled *The Concept of Justice*. And primarily seeks to introduce principles that confirm the general liberal perception of fundamental rights and freedoms. And only those inequalities in wealth and income are permitted that benefit the most deprived people (Rawls 1921-2002, 2001). Rawls considered justice as fairness, a political matter rather than a metaphysical one. He believes the best liberal account of justice is to consider it a political conception (Galisanka, 2019, p. 1). In his book "Justice as Fairness," Rawls defines justice as a free society consisting of free citizens. These citizens enjoy their fundamental rights and cooperate with an equal economic system. Another scholar named John Gardner says that unfairness is injustice when it is more critical, but injustice is not merely fair (Gardner, 2020: 4).

On the other hand, Abdul Karim Soroush is a university professor and religious intellectual. In his book called "The courtesy of power, the courtesy of justice," unlike the philosophers of the past, he does not consider justice as a moral virtue but calls it a set of moral integrity. And thinks it is possible to reach this concept through the truth. He believes that the concept of justice eludes us in terms of definition and that it is tough to implement in practice (Abdul Karim Soroush, 2009, p. 16).

In addition, many scientists and philosophers have defined this concept in various ways, which we will discuss later. According to Immanuel Kant, it is assumed that human beings are potentially accessible, rational, and responsible, and this hypothesis forms the basis of all correct theories about justice and morality as one (Rosen, 1993:32). David Hume, one of the famous Scottish philosophers, calls justice an essential element of a minimum analysis of human socialization (Harrison, 1981: 12).

Apart from the opinions and individual opinions of scholars and scientists in the field of law or philosophy, we also have the views of law schools, such as positivism and natural law.

In the current era, positivist legal theories dominate legal philosophy. According to them, law and

justice do not have mandatory relationships. This range of jurists and philosophers believe that legal validity does not depend on justice; they usually use the word fairness instead of justice (Mayer, 2008: 22).

The followers of the natural law school believe that the phenomenon of justice is separate and independent from human societies, and there are rules superior to the will of the legislator. The government must always seek to achieve those unique and special rules. One of the theorists of this school, St. Augustine, believes that an unjust law is not a law at all, and others are not obliged to follow it (Lieberman, 2015: 5).

So far, we have examined the definitions of the concept of justice from the perspective of different scholars. We have also mentioned the views of other legal schools so that the path of the reader's understanding of the following titles will be more precise.

The concept of the word justice in the constitutional law(2004) of Afghanistan:

The Constitution of Afghanistan on 5 Dec 2003 by the Loya Jirga ("Loya" is a Pashto word and means "big," and "Jirga" is a Persian word and means council. The meaning of Loya Jirga in the political and historical tradition of Afghanistan is a complex society from the heads of nations and tribes and members of the ruling government, who, even once in a while, by invitation and suggestion, The government was formed and gave opinions on important issues of the country, including which was mentioned, they have focused on establishing and approving basic laws (Danish, 2010)) of the Constitution approved in a tent Loya Jirga. For the approval of this law, the approval commission was appointed on the date. It was established on 5 Oct 2002 by order of the Transitional Presidency of Afghanistan. The work of this commission is until the end of the year ended, and on 23 May 2003, a 35-person inspection commission was formed by order of the head of state. As a result, the Loya Jirga of the Constitution, consisting of 502 people, elected and appointed representatives from 22 provinces until 5 Dec 2003 to discuss and approve this law. On 6 December 2003, Hamid Karzai, the head of the Islamic Transitional Government of Afghanistan, approved it. Its implementation was announced (Danish, 2010: 64).

Apart from the general information we have about this law. Now we will examine the concept and word of justice from the point of view of this law. The definition and explanation of the concept of justice in the laws of Afghanistan, especially the

constitution of Afghanistan, has been neglected by this country's legal scholars, who have written little about it. To explain this concept, it is necessary to discuss the philosophers and the basis of this concept and, in general, from the language of the scholars of this field, i.e., from the non-Afghan legal doctrine and philosophers. Because in Afghanistan, the famous jurists who wrote in this law section have not fulfilled the rights of the mentioned content. For example, the concept of justice, whether general or specific, as stated in the constitution, is not discussed in the book *Afghanistan's Constitutional Law* by Mr. Sarwar Danesh.

Altogether, the word justice has been used in the Afghan constitution four times. Twice this word is used with the word social, and two more times, it is used separately in different articles. Article 6 of this law focuses more on the duties of the government. The government must create a prosperous and progressive society based on social justice. The explanation of its concept and description cannot be found in any law or legal doctrine in Afghanistan.

Sometimes even other articles of the constitution can be seen against this concept. For example, the third paragraph of this article is written like this: "Afghanistan nation consists of Pashtun, Tajik, Hazara, Uzbek, Turkmen, Baloch, Pasha, Nuristani, Imaq, Arab, Kyrgyz, Qazalbash, Gujar, Brahui, and other ethnic groups." The arrangement of the ethnic groups, from Pashtun to Brahui and other ethnic groups, is implicitly formed based on the population of these ethnic groups. The law could have started this arrangement based on the letters of the alphabet from the Uzbek people, which begins with the letter A, and ended with the Gujar people, which starts with the letter G. It should be noted that in Afghanistan, the population census based on the number of ethnic groups has not yet been conducted comprehensively and impartially.

In addition, The first and last population census in Afghanistan was conducted in 1979. Still, this information was not collected from the application of the ethnicity question of the people in that census. The most important source of population information in Afghanistan before the 1979 census was the 1972 population demography server of the Ministry of Planning with the help of the United States. The Atlas of Afghan Villages is one of the results of this survey. Since 1979, no new census has been conducted in Afghanistan. However, after the Bonn Conference and the establishment of the Islamic Republic of Iran in 2001, the implementation of the census project was placed on the agenda of the new

government, and for its implementation, serious and extensive measures were taken with the help of the United Nations Population Fund by the Central Bureau of Statistics, but due to the deterioration of the security situation. Until today, the government has not been able to carry out this project (Khalidi, 2015: 1).

"An Account of the Kingdom of Caubul and Its Dependencies in Persia, Tartary, and India" written by Elphinston, Mountstuart. In this book, the word Afghan is used only for specific people (Elphinstone, 2009: 114). And it does not include other Afghan tribes. Even the author does not mention the country called Afghanistan, but the title of his book is the kingdom of Kabul. This book was written exactly two years before the birth of Amir Abd al-Rahman Khan, who named today's geographical country Afghanistan, which is still a matter of debate.

In Article 16 of the Constitution, the same problem is repeated again, and this implication shows the deliberateness and careful choice of words on the part of the legislator. According to the mentioned cases, this law has been passed contrary to its purpose. One of the cases mentioned in the introduction of this constitution states that by understanding the injustices and disorders of the past. But the content of Articles 4 and 16 repeats these injustices again. We should remember that Skipping the constitution's preamble is not simple. Because The preamble of the Afghan constitution provides essential information about the source of the system's legitimacy (Leda Ehler et al., 2013: 7).

Article 22 of the Constitution states that any kind of discrimination and privilege among Afghan nationals is prohibited. However, in Article 4, firstly, the legislator implicitly considers the Pashtun people to be larger than other ethnic groups in terms of population. Then, in Article 16, Pashto is placed at the top as the language that has the most speakers compared to other languages. After that, in Article 20, it is concluded that since most of the people are Pashtuns and the language of these people is the most spoken, the national anthem should be in the Pashto language. Hence, Giving privileges to a nation without any basis is against Article 22 of the Constitution, which we mentioned earlier. What was said is against social justice. Although the word social justice itself and its meaning are debatable.

Friedrich von Hayek is a German economist, philosopher, and winner of the Nobel Prize in Economics. Regarding social justice, he believes that social justice is a myth. He rejected social justice and gave reasons for its rejection. which are some

of the things that exist by themselves. Or if they do not exist, we cannot create them. Because if we try to create them, they will escape from us and disappear. In other words, they either have a natural birth or die due to cesarean section. A simpler example is this shadow. I am sitting here; the shadow is behind me if I turn or turn to see the shadow. My shadow returns. That is, as long as it is ignored. There is. But when I turn to see if it is there or not. He runs away from me (Soroush, 2009: 17).

Hayek, In his book titled "New studies in philosophy, politics, economics and the history of ideas," says, "In his book, he says," but I must at first briefly explain, as I attempt to demonstrate at length in volume 2 of my law, legislation, and liberty, about to be published, why I have come to regard 'social justice' as nothing more than an empty formula, conventionally used to assert that a particular claim is justified without giving any reason. Indeed to convince intellectuals that the concept of 'social justice, which they are so fond of using, is intellectually disreputable. Some, of course, have already tumbled so this, but with the unfortunate result that, since 'social' justice is the only kind of justice they ever thought of, they have been led to the conclusion that all uses of the term justice have no meaning content." (Hayek, 1978: 57)

Considering Hayek's theory about social justice. This word and concept is not only vague in the Afghan constitution but also contrary to it in various articles of this law, such as the fourth, sixteenth, and twentieth articles. In the mentioned articles, the legislator is looking for ethnic justice, not social justice. Because the society of Afghanistan does not believe that everyone is Afghan. Not everyone believes that Pashto has the most speakers in the country. Not everyone wants their national anthem to be in the same language.

In Article 119, the person who will be a judge says the following oath. "In the name of the great God, I swear that I will ensure the right and justice according to the rules of the holy religion of Islam, the texts of this constitution, and other laws of Afghanistan, and I will perform the duty of the judge with complete trust, honesty, and impartiality." If it is noticed, justice according to the rules of the holy religion of Islam and justice according to the texts of the constitution, which is social justice, contradict each other. Although the word "beliefs and precepts" did not exist in the previous basic laws, instead of "beliefs and precepts," "the fundamentals of the holy religion of Islam" was mentioned (Danish, 2010, p. 237). which helped to make the content of

the law clear. Because the precepts are not the same in all Islamic schools of jurisprudence, but they all agree on the fundamentals of Islam religion.

Even if the same basics of Islam were written. The contradiction could not be resolved. For example, cutting off a thief's hand when it is proven. According to Sharia, the thief's hand should be cut off. According to Sharia and Islamic rules, this punishment is fair, but the social justice of today's Muslims does not think it is fair to cut off a thief's hand.

Therefore, a difference should be made between social justice, which is the subject of discussion, and religious justice, which should be considered in the future constitution of Afghanistan. These words and concepts clear and hidden aspects should be addressed more.

The word and concept of justice in the Republic of Kazakhstan's constitution

In the Constitution of the Republic of Kazakhstan (<https://www.akorda.kz/en/constitution-of-the-republic-of-kazakhstan-50912>), the word justice is used only two times in Article 75 and Article 77 of this law. with the phrase, "Justice in the Republic of Kazakhstan shall be exercised only by a court." in other places in this law, justice is mentioned. But it is possible to trace the principles of justice implied under other parts of the constitution. For instance, the third paragraph of Article 77 of this constitution is stated as follows:

1. a person is considered to be innocent of committing a crime until his guilt is recognized by the court judgment that has entered into legal force;
2. no one may be subjected to a repeated criminal or administrative liability for the same offense;
3. no one's court jurisdiction, provided for him by law, can be changed without his consent;
4. everyone has the right to be heard in court;
5. laws that establish or strengthen liability, impose new duties on citizens, or worsen their situation do not have retroactive effects. If, after committing the offense, the responsibility for it is canceled or mitigated by law, the new law shall be applied;
6. the accused is not obliged to prove his innocence;
7. No one is obliged to testify against himself or his spouse (-s) and close relatives, whose circle is determined by law. Priests are not obliged to testify against those who confided in them at confession;
8. Any doubts about the guilt of the person shall be interpreted in favor of the accused;
9. Evidence obtained unlawfully is not legally binding. No one can be convicted solely based on his own confession;

10. The application of criminal law by analogy is not allowed.

If we look at the first paragraph of Article 75 of this law and the third paragraph of Article 77. See the executive nature of justice rather than the justice in the content of the law itself, which is justice or not. For this reason, the Kazakhstan legislator defined justice only within the jurisdiction of the courts. Hence, the difference between the concept of social justice in the Constitution of Afghanistan and the concept of justice in the Constitution of Kazakhstan is that in the Constitution of Afghanistan, the concept of justice has more of a content aspect than an implementation aspect. In the eighth paragraph of Afghanistan's preamble, the part we mentioned earlier. The basis of Afghanistan's constitution is social justice, which means that not only the implementation of the law should be based on fair principles, but the law itself should also be fair in terms of content.

The description of Articles 75 and 77 of the Constitutional Council of Kazakhstan refer to these articles, especially Article 77 and the principles of justice, to the Universal Declaration of Civil and Political Rights.

Implicitly, the legislator of Kazakhstan considers the concept of justice to be dependent on the principles of justice, which are rooted in the Universal Declaration of Civil and Political Rights. Justice and its concept can only be found in the framework of the courts. And its traces cannot be seen in legislation and other government activities. At least, this can be inferred from the text of the Constitution of Kazakhstan.

In addition, justice and its meaning in the Constitution of Kazakhstan, like the Constitution of Afghanistan, have not been discussed and researched among academics.

Conclusion

From what was previously discussed about the concept of justice in the constitutions of Afghanistan and Kazakhstan, it can be concluded that justice in the constitution of Afghanistan has several references. Sometimes it has to be found in the social life form. Sometimes in the law itself and sometimes in religious texts. Apart from that, the legislator has not been able to clarify the ambiguity between these three sources in the explanation of justice. Not only has this issue not been discussed more among the academic communities, but also, nothing has been written about the concept of justice by the Constitutional Council. Furthermore, the former ambiguities should be considered more about justice in drafting the new constitution in Afghanistan. On the other hand, the lawmaker of Kazakhstan has well explained the source of the principles of justice and has left its implementation to the courts. But justice can only be seen in court proceedings. Justice has not been discussed in the content of the law, which should be further researched. So it can be said that the concept of justice in the Constitution of Afghanistan focuses more on the content of the law and its correspondence to it than the implementation of justice. Still, the opposite is true in the Constitution of Kazakhstan.

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