IRSTI 10.15.01

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SOME HISTORICAL ASPECTS OF THE ESTABLISHMENT AND DEVELOPMENT OF THE CONSTITUTIONAL CONTROL INSTITUTION

The article is devoted to the history and the contemporary situation as well as the constitutional and legal consolidation of the principle of constitutionality of laws and other normative acts. The topicality of the article is, first of all, due to the fact that the history of the emergence and development of constitutional control in science remains controversial.

Conclusions on the origin of the idea of constitutional control in the historical aspect and its emergence are based on the scientific works of L.G. Malskaya, Kh.A. Abisheva, S.B. Bobotova, D.M. Baymakhanova and others.

The article considers Hans Kelsen's concept "about three postulates", which is still topical in our time. By analyzing them, the researcher comes to the conclusion that these three postulates underlie the organization and activity of the continental model of constitutional control bodies.

The author analyzes views on the history of the formation of constitutional control in the Soviet Union and in the Republic of Kazakhstan. Both Russian and Kazakh scientists' researches are taken as a basis for the six stages.

Key words: Constitution, Hans Kelsen, constitutional control, stage of development.

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Конституциялық бақылау институтының қалыптасуы мен дамуының кейбір тарихи аспектілері

Бұл мақала заңдар мен басқа да нормативтік актілердің конституциялығы қағидаттарының тарихы мен заманауи жағдайына, сонымен қатар оның конституциялық-құқықтық бекітілуіне арналады. Мақаланың өзектілігі ең алдымен, конституциялық бақылаудың пайда болу тарихы мен дамуы ғылымда дау тудыратынымен байланысты.

Конституциялық бақылау идеясының тарихи аспектідегі пайда болуы туралы қорытындылар Л.Г. Мальская, Х.А. Абишев, С.Б. Боботов, Д.М. Баймаханова және т.б. ғылыми еңбектеріне негізделеді.

Мақалада бүгінгі күні әлі де өзекті болып табылатын Ганс Кельзеннің «үш постулаттар» туралы тұжырымдамасы қарастырылады. Автор оларды талдай отырып, дәл осы постулаттар конституциялық бақылау органдарының континенталдық модельдерін ұйымдастыру қызметінің негізінде жатады деген қорытындыға келеді.

Автор Кеңес Одағы мен Қазақстан Республикасындағы конституциялық бақылаудың қалыптасу тарихы бойынша пікірлерге талдау жасады. Алты кезеңнің негізі ретінде ресейлік және қазақстандық ғалымдардың зерттеулері алынды.

Түйін сөздер: Конституция, Ханс Келсен, конституциялық бақылау, даму сатылары.

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Некоторые исторические аспекты становления и развития института конституционного контроля

Публикация посвящена истории и современному состоянию, конституционно-правовому закреплению принципа конституционности законов и иных нормативных актов. Актуальность статьи, прежде всего, связана с тем, что история возникновения и развития конституционного контроля в науке остается спорной.

Выводы о зарождении в историческом аспекте идеи конституционного контроля и его появлении базируются на научных трудах Л.Г. Мальской, Х.А. Абишева, С.Б. Боботова, Д.М. Баймахановой и др.

В статье рассматривается концепция Ганса Кельзена «О трех постулатах», которая не потеряло своей значимости и в наше время. Анализируя их, исследователь приходит к выводу, что именно эти три постулата лежат в основе организации и деятельности континентальной модели органов конституционного контроля.

Автором проведен анализ взглядов по истории становления конституционного контроля в СССР и в Республике Казахстан. За основу шести этапов взяты исследования как российских, так и казахстанских ученых.

Ключевые слова: Конституция, Ганс Кельзен, конституционный контроль, этапы развития.

The history of the emergence and development of all elements of the constitutional control practice requires comprehensive study. It is a controversial issue in science – when did this institution start its development.

Malskaya L.G. believes that «The idea of constitutionalism enshrined the fundamental legal basis, the axioms of law, which the court should bear in mind when taking a decision contra legem (Lat. «against the law»). Such first precedent dates back to 1610, when Judge Sir Edward Coke, referring to the principles of common law, recognized the law passed by the British Parliament as invalid. By summarizing, Judge Coke, in particular, stated: «It follows from our books that in many cases the common law forces us to correct the laws (acts of Parliament), and sometimes we have to recognize them as completely invalid. For if the law contradicts the right and reason, then the common law and law come into force, it is recognized as invalid» [1].

This precedent is one of the first judicial decisions that marked the emergence of the constitutional control signs. The same point of view is held by Abishev Kh., he noted that the precedent created by Judge Coke is a part of the legal direction of early constitutionalism, which continuation is the American model of constitutional jurisdiction [2].

Most academic constitutionalists believe that the idea of constitutional control appeared in the beginning of the XVII century in the UK and was connected with the activities of the Privy Council, which recognized the laws of the legislative assemblies of the colonies as invalid if they contradicted the laws of the English Parliament issued for these colonies or common law» [3].

After World War I, Europe developed its own model of constitutional control, which nowadays began to spread to other continents, in particular, the territory of the former Soviet Union. In any case, it was perceived by all or almost all post-*socialist* countries. The idea of the European model belongs to the Austrian lawyer Hans Kelsen, a participant of the development of the Austrian Federal Constitutional Law, 1920, and then to a member of the Constitutional Court of Austria [3].

The concept of Hans Kelsen has become firmly established in practice and still remains topical. Kelsen noted that the establishment of the so-called Constitutional Tribunal, aimed to control the constitutionality of laws, fully corresponds to the theory of separation of powers, and as the judgment he put forward three postulates:

Since the Constitution should be revered as a fundamental norm, it should be provided, perhaps, with a higher degree of stability by creating a difficult procedure for its revision. The Constitution concept should be interpreted in a broad sense, as “modern constitutions contain not only rules concerning bodies and procedure of legislation, but also a list of basic human rights and individual freedoms ... therefore the Constitution is not only a combination of basic procedural rules, but also the core of the material law”; [4]

The guarantee of the effectiveness of the Constitution should be based primarily on the

possibility of unimpeded cancellation of acts that contradict it;

But always "it is impossible to trust the cancellation of illegal acts to the very body that adopted them" [4].

These postulates underlie the organization and activity of the so-called continental, or European, or Austrian model of the constitutional control body. According to this model, the constitutional control institution is organized and operates in most European countries, including the former Soviet space, as well as in many other countries of the world. As noted by the well-known Russian constitutionalist Bobotov S.V.: "At the present time, most states that have adopted Kelsen model of constitutional control believe that constitutional litigation is within the three branches of power, because it rises above them due to the peculiarities of its functions aimed at ensuring the balance of power and their strict observance of constitutional norms and general principles of law. It is not by chance that one of the most promising areas in the activity of the constitutional control bodies is the interpretation of the Constitution and organic laws" [5]. In accordance with the concept of Hans Kelsen, unlike the American model of constitutional control, the European model is represented by a specialized judicial or quasi-judicial body.

Quasi-judicial bodies protecting constitution, relating to the European or Austrian model, are formed in France and in Kazakhstan.

The question arises: why did Kazakhstan turn to the European or Austrian model of constitutional control? And what was the need and specificity of the constitutional and legal consolidation of the principle of the constitutionality of laws? Before attempting to answer the indicated questions, it seems necessary to revise the history of the formation and development of the constitutional control body in our country and to uncover the factors underlying the current model of the Constitutional Council of the Republic of Kazakhstan.

According to Kazakhstani researcher Baymakhanova D.M., "Formation and development of the constitutional control body in the Republic of Kazakhstan took a rather long period. Since Kazakhstan has been part of the Soviet Union for many years, this issue cannot be considered only from late 1991's, in other words, from the moment of independence of the Republic of Kazakhstan. All these processes in the Union members and at the level of the Union have been interconnected, and it is impossible to separate the ideas of the development of constitutional supervision in our republic from the development of this idea in other republics and in the Union» [6].

Let us consider the stages in the development of constitutional control bodies in the Soviet Union and in the Republic of Kazakhstan.

Different authors in their studies make attempts to develop the gradation of this process. One of the first researchers was Ovsepyan Zh.I., who singled out the main stages.

I stage – (mid 20's – early 30's). In the first years of the formation of the Soviet Union the highest judicial body – the Supreme Court was in some way attached to the procedure of constitutional control, which was provided in accordance with Art. 30, 43 (paragraph 6) of the Constitution of the USSR in 1924 and Art. 2 Lit. A Provision on the Supreme Court, published in the development of Art. 43 of the Constitution. Officially, the function of constitutional control was assigned to 2 bodies: the Presidium of the Central Executive Committee of the USSR and the Supreme Court of the Union "as an auxiliary body of the Presidium of the CEC", which was some kind of consultant to the Presidium of the CEC on the constitutionality of laws. But the historical practice of the Supreme Court of the USSR, which took place in 1920's and early 1930's, as the supreme judicial body of general competence vested with the functions of constitutional and control activity and which was part of the representative system, soon became ineffective and the function of constitutional control in the activities of the Supreme Court was virtually nullified from early 1930's [7].

II stage – (mid 30's – early 80's). This period is characterized by the absence of "Soviet" judicial and quasi-judicial constitutional control, and foreign experience was successfully criticized as allegedly anti-democratic. But during this period, the Soviet Constitutions of 1936 and 1977 stipulated that control over compliance with the Constitution of the USSR and ensuring compliance of the Constitutions of the Union republics with the Constitution of the USSR belongs to the jurisdiction of "its supreme bodies of state power and administration" (paragraph "g", Art. 14 of the Constitution 1936, paragraph 11 of Art. 73 of the Constitution 1977). In addition, in the last Constitution of the USSR 1977, similar functions on the verification of constitutionality and legality, were assigned to the Presidium of the Supreme Soviet of the USSR – the permanent body of the Supreme Council, which exercised the functions of the supreme state body power (paragraph 4 of Art. 121 of the Constitution of the USSR 1977). But in practice these constitutional norms were ineffective [7].

III stage – (mid 80's – until the collapse of the USSR in 1991). From early 1980's, we can speak of a gradual transition to a normal, although not yet free from narrow-class approaches, development of the institution of foreign judicial constitutional control, a reassessment of its experience from the perspective of a new political thinking. Special literature proves the enormous importance of the constitutional control institution for the effective and stable functioning of free democratic regimes. During this period, some Soviet authors began to justify the proposal to establish a specialized body of constitutional control in the USSR – either as an organic part of the Supreme Council, or as a judicial or quasi-judicial body. Such body was created at the level of the Union in 1990 – the Committee for Constitutional Supervision of the USSR (its Chairman was Alekseyev S.S.). This body worked relatively actively, it adopted several specific cases on the compliance of certain normative acts with the Constitution [7].

Kazakhstan also envisaged the formation of a similar body of constitutional supervision – the Committee for Constitutional Supervision of KazSSR on the basis of the adopted Law of the KazSSR dated September 22, 1989 "On Amendments and Additions to the Constitution of the KazSSR 1978". However, this body was never created. "The high intentions of the Constitution remained only formally. The creation of the Committee was hampered by various reasons, including the unpreparedness of the party bureaucratic power structure for new political and legal transformations, recognition of the priority of law" [8].

Baymakhanova D.M. continued the process of staging, which contains the following stages.

IV stage – (late 1991's – mid 1995's). This stage corresponds directly to the development of our republican constitutional supervision. The process of formation and development of the sovereignty of the Republic of Kazakhstan put forward the task of organizing constitutional control in Kazakhstan among other tasks of strengthening statehood [9].

V stage – (August 1995 – March 2017).

This stage appeared due to the adoption and implementation of the new Constitution of the Republic of Kazakhstan in 1995. According to the Constitution, a new body of constitutional control – the Constitutional Council was established. The adoption of the Constitution in 1995 determined of institutions of the political system and civil society in the country.

Reasons for reforming the constitutional control body have been studied in the works of Kazakhstani government scientists from different perspectives. For example, Sartayev S.S. and Nazarkulova L.T. noted: "Stability of state institutions is especially important when finding a Kazakh society at the initial stage of democratization. Therefore, the establishment of a body of constitutional justice that exercises subsequent control over the constitutionality of laws and elections, some believed, is fraught with negative consequences and it threats the political stability" [9]. Continuing this idea, the authors of the monographic study *Constitutional control in Kazakhstan* stressed that for "the transit societies the French model of constitutional justice is more acceptable – it is the Constitutional Council exercising preliminary control over observing the norms of the Constitution, which does not have the right to initiate cases independently and does not consider definite litigation" [8]. In our opinion, these reasons can be called external causes.

The internal causes were analyzed by Baymakhanova D.M. She noted that the reason for the transformation of the Court into the Council can be formulated as follows: improvement, search for the effective model of the body of constitutional control. What do we mean by searching for the effective model of this body?

а) simplification and democratization of the order of formation of this body;

б) clarification of its competence, in some areas it has been substantially expanded, and in some areas have been severely narrowed;

в) simplification of the procedure for considering specific cases [6].

Developing the provisions of the Constitution of the Republic of Kazakhstan 1995, the Constitutional Law of the Republic of Kazakhstan dated December 29, 1995 No. 2737 "On the Constitutional Council of the Republic of Kazakhstan" was adopted.

Stage VI – (March 2017 – to the present days). This stage corresponds to the constitutional reform on the redistribution of powers between the branches of power dated March 2017, which was initiated by the President of the Republic of Kazakhstan in his Address. "The essence of the proposed reform is a serious redistribution of power, democratization of the political system as a whole. In the new conditions, the priorities for the President will be strategic functions, the role of the supreme arbiter in relations between the branches of power. The Head of state will also be focused on foreign policy, national security and the country's defense capability. At the same time, the role of the Government and Parliament will significantly increase" [10].

After the popular discussion of the draft Law of the Republic of Kazakhstan "On Amendments and Additions to the Constitution of the Republic of Kazakhstan", the amendments were adopted. There was a redistribution of powers between the bodies of state power of the Republic of Kazakhstan – the President, Parliament, Government, etc.

Amendments were introduced in a number of norms of the Constitution of the Republic of Kazakhstan 1995. Amendments relating to the powers of the Constitutional Council are included in Art. 44 and 91. The Constitutional Law of the Republic of Kazakhstan "On Amendments and Additions to Certain Constitutional Laws of the Republic of Kazakhstan" No. 75-VI dated June 15, 2017 introduced the corresponding amendments to the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan".

In the process of nationwide discussion, these provisions, among other amendments to the Constitution, were the subject of discussion among the scientific community. Thus, the Chairman of the Constitutional Council of the Republic of Kazakhstan, Professor Rogov I.I. noted that the President of the Republic is proposed to give powers to the protection of human and civil rights and freedoms, to ensure national security, the sovereignty and integrity of the state, to send appeals to the Constitutional Council on consideration of an enacted law or other legal act, including governmental to compliance with the Constitution [11]. In turn, a member of the Constitutional Council, Professor Malinovsky V.A. stressed that the President has the right to initiate consideration of the current legal acts in the Constitutional Council in the cases defined by the Constitution. A body of constitutional control is entrusted to give an opinion on the amendments to the constitution for compliance with the requirements specified in paragraph 2 of Art. 91 of the Basic Law [12].

As a result of the reform, the status of the Constitutional Council of the Republic of Kazakhstan was strengthened through the expansion of the objects of constitutional control, which strengthens the principle of constitutionality of laws and other normative acts.

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