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THE COURT APPEAL AS A LEGAL REASON FOR VERIFICATION OF THE LAW CONSTITUTIONALITY

Abstract. The article is devoted to the actual problem of the judicial request, as a legal reason for checking the constitutionality of the law.

Analyzing paragraph 2 of Article 17 of the Constitution of the Republic of Kazakhstan, the author comes to the conclusion that the constitutional control, which is carried out by the courts, is the second form of abstract constitutional control.

At the same time, the idea that specific constitutional control takes place in cases when in the resolution of a specific case courts are faced with situations where the law or other normative legal act reveals provisions violating the constitutional rights and freedoms of citizens is justified. These findings are supported by materials from practice, in particular, by the analysis of the Decision of the Constitutional Council of the Republic of Kazakhstan of February 27, 2008, No. 2.

The article contains an analysis of poorly studied aspects, which can refer to the appeals of courts to the Constitutional Council as a subject of appeal.

Key words: the Constitutional Council, the court, constitutional law, abstract constitutional control, specific constitutional control.

The Constitutional Council of the Republic of Kazakhstan is one of the most important elements of the mechanism of protecting the rights and freedoms of citizens. The exercise of the function of protecting the rights of citizens is carried out by the Constitutional Council in many directions; one of them is the consideration of appeals from courts on verification the constitutionality of laws and other regulatory legal acts of the Republic of Kazakhstan.

Article 78 of the Constitution of the Republic of Kazakhstan establishes that: "Courts are not entitled to apply laws and other legal acts that infringe on the rights and freedoms of a person and citizen enshrined in the Constitution. If the court decides that the law or other legal act to be applied infringes on 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 the proposal of recognition of this act as unconstitutional" [1].

In the theory of constitutional law, the constitutional control is classified on different grounds for different types, including *abstract*, carrying out independently of a specific case, and *specific*, which takes place only in connection with a specific court case. The constitutional control which is carried out on the appeal of courts is the second form.

Abstract constitutional control is carried out in accordance with paragraph 2 of Article 17 of the Constitution of the Republic of Kazakhstan, which establishes that "the Constitutional Council, in accordance with subparagraphs 2), 2-1), 3) paragraph 1 of Article 72 of the Constitution, considers for compliance with the Constitution:

1) prior to the Presidential signing of the laws adopted by Parliament;

2) resolutions adopted by the Parliament and its Chambers;

3) international treaties of the Republic before their ratification" [1].

Specific constitutional control is implemented during the resolution of a particular case, when courts are faced with situations which have a violation of the constitutional rights and freedoms of citizens in a

law or other legal act. In these situations, courts apply to the Constitutional Council on recognizing the act as unconstitutional.

The practical value of the specific constitutional control that is implemented in such procedure is that quick response to a real violation of the specific law of a particular person allows protecting his rights and freedoms as soon as possible. The entire legislative process and all procedures on drafting bills, their discussion and examination before adopting new laws are aimed at the adoption of qualitative laws. The state assigns a special role to the process of adopting laws concerning the rights, freedoms and obligations of citizens. In accordance with Article 20 of the Law "On Normative Acts", public councils are obligatorily involved in the process of drafting legal acts concerning the rights, freedoms and obligations of citizens; they are sent a draft legal act concerning the rights, freedoms and obligations of citizens in order to provide recommendations on the draft of legal act. The recommendations are obligatory appendix to the draft of legal act before its adoption, including each subsequent approval of the draft by relevant government bodies [2]. In addition, the drafts are approved by the relevant government bodies and organizations (Article 21 of the Law "On Normative Acts"), and also the scientific expertise, which main purpose is "to assess the quality, validity, timeliness, lawfulness of the draft, compliance of rights of a person and citizen established in the constitution of the Republic of Kazakhstan with the draft" (paragraph 2 of Article 30 of the Law "On Regulatory Acts").

However, in spite of all great work on each adopted law in the process of its direct application, controversial moments, shortcomings and complex collisions that can infringe on the rights and freedoms of particular citizens and exert negative influence on the overall state of protection of the rights and freedoms of citizens of the Republic of Kazakhstan are revealed. In this situation, courts applying to the Constitutional Council control the entire complex of rights and freedoms of citizens of the country and become the "hope" of a particular person for justice and the triumph of law.

Thus, for example, on the basis of the exhibition of the Kapshagai city court of the Almaty region on the recognition of the first and fourth parts of the Article 361 of the Criminal Code of the Republic of Kazakhstan as unconstitutional, that introduce criminal liability for the act of self-mutilation by a group of individuals held in institutions providing isolation from society, in order to destabilize the normal activities of institutions or obstruction of the lawful activity of the staff of institutions, as well as for the same acts committed by the group in collusion or with the use of violence, dangerous for life and health, the Constitutional Council of the Republic of Kazakhstan adopted Resolution No. 2 dated February 27, 2008 on the first and fourth parts (concerning the establishment of qualifying features of the first part) of the Article 361 of the Criminal Code of the Republic of Kazakhstan (as amended by the Law of the Republic of Kazakhstan No. 240-III dated March 26, 2007 "On amendments and additions to certain legislative acts of the Republic of Kazakhstan on the issues of the penitentiary system") as unconstitutional and unliable to execution [3].

The essence of this court appeal was that the court saw the form of expression of opinion (protest) in the commission of acts of self-mutilation and considered it as a way to protect their rights by persons deprived of their liberty. Analysis of the situation and the norm of the law (in this case, the amending of the first part of Article 361 of the Criminal Code) showed that it had an unjustifiably broad interpretation of its content, and therefore arbitrary criminal prosecution, which, in the opinion of the Constitutional Council, does not meet the criteria for the legal restriction of constitutional rights and freedoms of a person and citizen, does not meet the requirements of paragraph 1 of Article 39 of the Constitutional Law and is not conditioned by the constitutional goals set forth therein.

This example allowed protecting the rights of persons in prison, protecting them from punishment for protest. Of course, in our opinion, this case is not indisputable. It creates a precedent for inadequate protest by convicts. But, it is indicative from the point of liberalization of criminal and criminally-remedial legislation and from the point of view of all social groups.

As mentioned above, consideration of court appeals by the Constitutional Council has a significant impact on the process of strengthening all instruments of protecting and guaranteeing citizens' rights and freedoms.

Appeal of the court to the Constitutional Council is a form of expressing the professional position or opinion of the direct law enforcer on the compliance of the Constitution or another normative act applied in a specific case.

Scientific literature emphasizes that "the institution of the court appeal is legal, which means the emergence of relations between subjects based only on the right, ordered by right, for the limited purpose of the right" [4, p. 227]. Another scholar considers that "the institution of the court appeal on verification of the constitutionality of the law can be viewed in two ways: on the one hand, it is a certain set of norms of constitutional and procedural law, which determines its specific nature as an inter-branch institution, and on the other – as the activity of the court on approval of an enforceable act and the act of constitutional control. On the basis of the enforceable act, the consideration of a particular case is suspended, the latter initiates the activity of a specialized body to the constitutional control on verification the constitutionality of the contested norms by the court of law" [5, p. 39].

The appeal of the court to the Constitutional Council is a specific constitutional and legal institution, which has such characteristics as the subject of an appeal. Therefore, according to M.S. Beibitov, appealing to the Constitutional Council, the court acts, on the one hand, as a body of justice in a particular case, on the other hand, as a subject of constitutional and legal relations occurring in connection with the process of verification the constitutionality of the law applied or to be applied in this case [4, p. 229].

Article 20 of the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the RK" establishes that one of the subjects of constitutional proceedings are the courts of the Republic [6].

Appeals to the Constitutional Council are submitted only in written form. The appeal form requires compliance with a number of procedural parameters. The appeal should indicate:

1) the name of the Constitutional Council;

2) the name, location, address and other necessary information about the applicant;

3) the name, address and other information about the representative of the applicant and his / her powers, except cases of rank representation;

4) the name, location and address of state bodies, officials who have signed or issued acts related to the procedure of the election of the President, deputies of the Parliament and the republican referendum, if the appeal contains an issue about the correctness of the procedure;

5) the name, date of adoption of laws, if the appeal contains an issue of compliance of the Constitution of the Republic with laws adopted by the Parliament;

6) the name, date of adoption of the resolutions of the Parliament and its Chambers, if the appeal contains an issue of compliance of the resolutions of the Parliament and its Chambers with the Constitution of the Republic;

7) the name, date and location of signing the international treaties of the Republic, officials who have signed them on behalf of the Republic of Kazakhstan or its state bodies, if the appeal contains an issue of compliance of the Constitution with international treaties of the Republic;

8) the norms of the Constitution of the Republic, if the appeal contains an issue of their official interpretation;

9) the name, location and address of the state body, official who have signed or issued the act, the name, number, date of adoption, sources of publication and other requisites of the law or other normative legal act, if the appeal contains an issue of recognizing the act as unconstitutional, if the court finds that a law or other normative legal act subject to application infringes on the rights and freedoms of a person and citizen enshrined in the Constitution;

10) the name, composition of the commission formed by the Parliament in accordance with paragraph 1 of Article 47 of the Constitution and its conclusion; name, date of adoption and content of acts related to the consideration of the issue of amotion from office of the President of the Republic by the Parliament;

11) information on the number of deputies who have initiated the issue on suspension of the President; information on the results of voting in the Chambers of the Parliament; information on the results of the investigation of the charges against the President; information on the conclusion of the Supreme Court on the validity of the charges; name, date of adoption and content of acts related to the consideration of the issue of the suspension of the President of the Republic by the Parliament;

12) the essence of the appeal;

13) other facts, circumstances and evidence that serve as the basis for the appeal and confirm its validity;