DOI 10.31489/2020L2/13-23

UDC 324.4

M.S. Beibitov[1], B.A. Taitorina[2], G.T. Baisalova[3], I.Zh. Azretbergenova[4]

[1]Joint-Stock Company «Center for Military Strategic Research», Nur-Sultan Kazakhstan;
[2]S.D. Asfendiyarov Kazakh National Medical University, Almaty, Kazakhstan;
[3]D.A. Kunaev Eurasian Law Academy, Almaty, Kazakhstan
[4]Hasi Veli Üniversitesi, Ankara, Turkey
(E-mail: beibitov.m@mail.ru, binur.a@mail.ru, gulzira_06041967@mail.ru, iazret@mail.ru)

Legal field of the institution of constitutional review: past and present

The article considers a historical retrospective of the formation and development of constitutional control in the context of the traditions of constitutionalism. The phenomena of constitution, constitutionalism, constitutional control are analyzed in the hypostasis of the most important attributes of any democratic, progressive state. The tendency of the modern period of the development of constitutionalism is highlighted — a two-vector characteristic: in the paradigms of practical and theoretical constitutionalism. It is subjected to the analysis and theoretical justification of the multifaceted interpretation of the meaning of constitutional control. To achieve the goal of the study, the authors of the article subjected to the conceptual analysis the genesis and evolution of the institution of constitutional control in the world practice of constitutionalism. Based on theoretical sources and empirical material, the problems of the emergence and development of a state-legal institution are investigated: legal concepts, sources of organization and functioning of varieties of models of constitutional control existing in the modern period in the countries of the world. Based on the periodization of the evolution of the institution of constitutional review in the countries of the world, the main trends and specific features of the development of this institution at all stages of historical development are characterized. As a result of summarizing the achievements of world practice, three main models of constitutional control are distinguished: American, continental and mixed.The authors of the study substantiated the real significance for domestic constitutionalism of creating in practice the system of constitutional control of the Republic of Kazakhstan.

Keywords: control, constitutional control, history, retrospective, constitutional court, constitutional council, interpretation.

Introduction

Most of written constitutions countries of the world and containspecial rules and regulations governing the legal status of the institute of the constitutional control [1; 81]. A historical retrospective of the formation and development of constitutional ideas and institutions testifies to their relevance to the concept of constitutionalism, which leads from the ancient Greek constitutions. The Athenian state with pecial to the mission was formed as part of the national assembly in order to sift through new laws and proposed amendments in order to ensure the primacy of law and reduce the number of unfit bills (the first historical premise of judicial constitutional control [2; 5].

Researchers note: classical constitutionalism has its roots in the unique history of the legal culture of the West, the western tradition of law [3; 11] and is based on private property, restriction (self-restriction) of state power in favor of civil society and individual freedom, which acquires the legal form of subjective public law. However, the impossibility of the mechanical use of Western constitutional models in solving the problems of constitutionalism in modern states, which belong to the group of the so-called countries of young democracy, which has not received an integral characteristic, but only has a multivariate element set, is obvious. The main features of constitutionalism include its basing on the sovereignty of the people; recognition of the Constitution as the supreme law, and not as a policy political document; representative board prescribed by the Constitution; legally guaranteed principles of the rule of law, public administration on a democratic basis, as well as the principle of limited government, separation of powers with a system of checks and balances; the existence of an institution of constitutional review; the impossibility of suspension or cancellation of the constitution, its rigidity and supremacy with respect to other legal acts; guaranteed and protected by the state constitutional rights and freedoms of man and citizen, etc. Constitutionalism is a political and legal phenomenon, the legal (legal) essence of which is determined, first of all, by the regulatory framework of this system, which is the Constitution (constitutional law). The Constitution has a mixed political and legal nature, as well as constitutional relations arising on the basis of its norms, which can also

be described as political and legal at the same time [4; 114], since they regulate the process of organizing and exercising power by the people, state and elements political system . The political nature of constitutionalism stems from the close relationship of politics with constitutional and legal institutions and realities.

The phenomena of constitution, constitutionalism, constitutional control are certainly among the most important attributes of any democratic, progressive state. The tendency of the modern period of the development of constitutionalism is a two-vector characteristic: in the paradigms of practical and theoretical constitutionalism.

Currently, the state's efforts and civil society institutions aimed at creating e real practical constitutionalism. The main idea of the present period is to give the main law of the country the character of an actual constitution capable of promoting the development of constitutionalism. The most important forms of influence of the Constitution on the practical constitutionalism is th tsya : 1) at chreditelnaya — firstly, the very existence of the constitution as a special legal source of evidence of the establishment and availability of constitutionalism, and secondly, the constitution enshrines, gives legal entity content basis of the status, constituting constitutionalism; 2) organizational — the basic law ensures at the highest level systemic unity, the balance of all components of constitutionalism;3) programmatic which consists in determining the direction of state and social development for a long period of time, which has two sides. The opposite form of the influence of practical constitutionalism on the constitution can be described as corrective, perfecting: the basic law must correspond to reality, the state of constitutionalism in practice. Those or other new solutions, constructions in this field that arise in life, in the case of their significance, prospects should find their expression, consolidated in the constitutional norm.

A close relationship exists between the constitution and theoretical constitutionalism: the basic law must take into account all the progressive achievements of scientific thought in this field, and all the constructions of constitutionalism regulated by the basic law must find their theoretical justification, explanation.

Materials and methods

The study is based on monographs and articles of Russian and foreign authors and uses a comparative method. A comparison is made between various models of the institution of constitutional review in the countries of the world in historical retrospective. When conducting a problem analysis, the following methods were applied: analysis and synthesis, induction and deduction, formalization, comparative analytical, scientific generalization, legal modeling, comparative legal, logical methods.

Results

In all countries of the world, there is a whole system aimed at ensuring the supremacy of the fundamental law, called the system of legal protection of the constitution, in which constitutional norms that play a dominant role in the implementation of the supremacy of the Basic Law have priority. And nstitut constitutional control as base th forms of legal protection of the fundamental law of the country has a relatively independent character, is necessarily determined by a link mechanism on the grounds that in its absence, we can conclude that there is no and the system of legal protection. The theory of the foundations of constitutional law as legal remedies is considered not so much by state bodies as institutional and procedural guarantees of constitutional legality on the part of the legislative, executive and judicial branches of government, a special procedure for the development, adoption, amendment of the constitution, the responsibility of senior officials for its violation.

With uschnost constitutional control in general can be opened in two ways: — First, by means of the categories of power ratio and, — secondly, through the concept of the legal protection of the constitution. The lack of a unified approach in the definition of the concept and essence of constitutional control is associated with the fact that this institution is a very complex and multifaceted phenomenon, which, as noted, cannot be described identically using only one form of its manifestation. Leading theoreticians of constitutional law define constitutional control as: checking laws from the point of view of compliance with their constitution; the legislatively established procedure for monitoring compliance of acts with the Basic Law of the state; the activities of parliaments, constitutional courts or special bodies to verify the compliance of international agreements and domestic legislation with the norms and principles of the constitution, as well as the actions of all legal entities to resolve disputes related to competence in states with a federal structure, determine the results of elections and referenda, and assess the constitutionality of political parties to resolve dis-

putes between government bodies; checking, stating and eliminating, by appropriate legal means, deviations from the constitution and laws, etc. [5; 24, 6; 13, 7; 16, 8; 9].

The multifaceted interpretation of the meaning of constitutional review has a full theoretical justification. Scientists distinguish at least three basic theories that are fundamental to the assertion of the need for constitutional control and the implementation of its essence: organic, based on the fact of reception of the constitution as an act of constituent power, in accordance with which all other acts of lower-level authorities should be brought; institutional, postulating compliance with the «rules of the game» established for authorities, in which none of these bodies should exceed their own powers, thereby «encroaching» on the powers of others; natural-legal theory, or the theory of social contract, actualizing the provision on the title role of the constitution in establishing rules for governors and governed, primarily guarantees of human and civil rights; constitutional control here is designed to monitor their compliance [9; 75]. All these theories, mutually complementing each other, allow us to correctly assess and determine the role and significance of constitutional control, its necessity in the structure of constitutionalism. Already A. de Tocqueville defined the purpose of constitutional control as the direction of political or extra-parliamentary conflict in the legal framework [10; 290].

The genesis of the institution of constitutional review dates back to the 17th century. The first precedents, universally recognized by constitutional scholars and cited as the primary sources of modern judicial control, appeared in British constitutional practice. At the beginning of the 19th century, in Great Britain, Judge Edward Coke formulated a concept based on the famous Bonham case of 1610, which came into practice on the basis of the rule of common law: «In many cases, common law takes precedence over acts of Parliament and allows them to be recognized as null and void: because, when an act of Parliament does not comply with general law and common sense, and in itself is contradictory or unenforceable, common law takes precedence over it and allows such an act to be recognized legally null and void» [11; 24].

The homeland of constitutional review is considered to be the American continent. The emergence of the institution of constitutional review is determined by the well-known doctrine of the Chief Justice of the US Supreme Court, J. Marshall (1803–1835), formulated in connection with the case of Marbury V. Madison (1803): «It is the judiciary that has the right and the duty to say that there is a law» [12; 24]. At the same time, history presents other, earlier, pre-constitutional precedents related to the practice of individual states. Actually, the idea of constitutional control appeared earlier, at the beginning of the XVII century in Great Britain: the Privy Council recognized the laws of the legislatures of the colonies as invalid if they contradicted the laws of the English parliament, or common law [13; 32]. The term judicial constitutional control is a semantic analogue of the American «judicial review», which literally translates as judicial supervision [14; 62].

Thus, the emergence of a new state-legal institution, and consequently, of legal concepts, and the sources of its organization and functioning, have their origins in the states of the American continent: in the English colonies in America, later in the independent United States of America, in Mexico (Constitution of 1857), Colombia (Constitution of 1886), some others. And only in the twentieth century did the named institute become extremely widespread, and especially significant after the Second World War: «essentially a phenomenon unknown to Europe until recently», quickly gained momentum with a new heyday in the 70s and early 80s x years [15; 79; 16].

In order to more fully reveal the essence and evolution of the concept of constitutional control, it is necessary to begin the study of the problem by considering the evolution of the world constitutional process, dividing it into four main stages: 1) the period from the end of the 18th century to the end of the First World War; 2) the period between two world wars; 3) the period from the end of World War II to the end of the 80s; 4) the modern period, which began at the turn of the 80–90s [17; 51–55, 67, 96, 165].

Analyzing the mechanism of legal protection of the constitution, two main concepts about the main elements of the mechanism of legal protection of the constitution should be distinguished. The first of them calls constitutional justice the determining element of the system of protection of the fundamental law. The German scientist K. Hesse, along with such legal means as the special procedure for adopting the constitution, the responsibility of senior officials, calls such safeguards as preventive and repressive guarantees, including the deprivation of fundamental political rights, the possibility of banning political parties, the institution of emergency and others [18; 325]. Zh.I. Hovsepyan's point of view is interesting: along with judicial constitutional control and constitutional responsibility, this mechanism operates control carried out by the parliament, referendum, veto of the head of state [19; 30].

The second concept, at the core of the constitutional legal protection mechanism, determines the activities of the competent state bodies to verify, identify, ascertain and eliminate inconsistencies of normative acts of the constitution — i.e. constitutional control (Yu.L. Shulzhenko, L. Favoreu and others) [8; 9; 17; 160; 12; 24]. The general rule is that the control of the constitutionality of laws should be carried out outside the legislative and executive branches of government [20; 15].

It is advisable to consider the dialectics of the development of the constitutional control model through a historical tour of the four main stages of the global constitutional process. The first stage of constitutional development, covering the period from the end of the 18th century until the end of the First World War, was marked by the emergence of constitutional control among other constitutional and legal phenomena, namely its so-called American model. Legal sources of organization and implementation of constitutional jurisdiction determine its purpose. Throughout this phase, the American model of constitutional review remains the only one. A feature of the American system of constitutional control is its attraction to such sources of law as custom, doctrine and precedent. Judicial precedent enjoys a high rating among these sources. Attention should be paid to the fact that the sources of the right to judicial review contain information about earlier examples, as opposed to the well-known version of the emergence of the institution of constitutional review related to the 1803 Madison-Marbury case. We are talking about earlier examples, the most striking of which seems to be a competent interpretation of constitutional authority by the judge of the US Supreme Court, J. Jay in 1793. In addition, in the literature there are examples of pre-constitutional precedents of judicial constitutional review related to the practice of individual states [13; 36; 19]. Zh.I. Hovsepyan notes that the first precedents that are crucial for the formation of the institution of constitutional control in the United States are relevant to the period of the chairman of the US Supreme Court J. Marshall (1803–1835) in terms of characterizing the forms (sources) of constitutional control in the United States [16; 44]. During this period, there has been a consistent expansion of the scope of constitutional review, which initially came down to the approval of constitutional review in relation to the legislature, which was manifested in the consolidation of the right to verify the constitutionality of state laws. In the future, general judicial constitutional review extends to federal legislation, which contributes to the solution of a two-fold task: firstly, to protect the state competence from attempt by the federal government; secondly, to promote the implementation of the principle of separation of powers in relation to its legislative and executive branches.

The American model of constitutional control, evolving, crossed the borders of the state and in the future, having undergone only some minor changes, was established in a number of Latin American countries (Argentina, Bolivia, Brazil, Colombia), English dominions (Canada, New Zealand, Australia, South Africa) and in the Scandinavian countries (Denmark, Norway, Sweden). Carried out by the courts of general jurisdiction, the American model of constitutional control in various modifications remained dominant in the second stage of the global constitutional process, in the historical period between the two world wars. However, already at this stage, there is a tendency for the emergence of a fundamentally new model of constitutional justice on the European continent — in the context of the transition from absolutism to constitutional monarchy. The concept of this model, called the European one, is justified by Austrian state experts G. Kelsen and K. Eisenmann. To be more precise in formulations, this model is called Austrian in the doctrine, because it was in Austria that the urgent need for regulating relations between the center and the provinces, between the imperial administration and the administrations of the imperial provinces during the introduction of the Constitution of 1848 first appeared. In fact, all subsequent stages of evolution the institutes of constitutional control are associated with the Austrian (or «Kelsen», as it is also called) modification, which began its intensive development in 1920. Its development of constitutional justice stands out justice and implemented a specialized body — the Constitutional Court. It is proved that decentralized constitutional control in the continental legal system could not function due to the lack of doctrine and practice of stare decisis, uniting the system through the rule of precedent. Therefore, the need arose to create a specialized constitutional court that could carry out abstract subsequent control of the constitutionality of laws adopted by parliament in order to ensure their compliance with the constitution as the highest normative act of the state [21; 15]. Let us clarify that the new system of constitutional control in the period under review was established in a narrow circle of states — in Austria, Czechoslovakia, Spain, and Ireland. But in the 40s the emergence of Nazism naturally entailed a crisis of constitutionalism and the constitutional process, which was gaining momentum, was interrupted. Therefore, as the researchers note, the geographical distribution of the institution of constitutional control in the interwar period was rather limited [22; 135].

Discussion

There is a judgment in the literature that often the emergence and development of institutionalized elements of constitutional review was assessed more as a pure intellectual concept emanating from judges and legal professors than as a result of key characteristics of the Anglo-American (Anglo-Saxon) and Romano-German legal systems [23; 95].

The second stage of the constitutional process in terms of the development of the institution of constitutional review, despite everything, has become very fruitful, laying the foundations of a new system of constitutional review, the advantages of which are manifested in the very nature of the specialized body. If the second stage is characterized by geographic limitations, the next, third stage can be called stormy: the institution of constitutional control as a means of countering authoritarianism after the Second World War is widespread, having established itself in almost all states of Western Europe, Asia, Africa, and Latin America. Socialist and many other socialist-oriented states remain «uninhabited» for the institution of constitutional control: constitutional justice incompatible with the principle of unity of state power is rejected for purely theoretical reasons. On the indicated principle of unity, the supremacy and fullness of state power of the highest representative body, led by the party, whose political acts were of greater importance than legal acts, was established. In the states of socialist orientation, thus, activities for the implementation of constitutional control were carried out by the highest bodies of state power; even in those of them where judicial constitutional control (Royal Romania, Czechoslovakia and some other countries of Central and Southeast Europe) functioned before the establishment of the socialist system, these institutions were liquidated, and their functions were assigned to the exclusive competence of the highest representative bodies of state power [8; 161]. It should be noted that the exercise of the function of constitutional review was expressed here in the following forms: 1) directly by the highest representative body; 2) a permanent body of general competence of a representative body. The second option, which was tested in practice and confirmed its expediency, subsequently established itself in the East European countries in the status of specialized, constantly operating bodies of constitutional control.

Only in the conditions of the initial period of crisis of the totalitarian state-party system does a certain shift take place in these countries: contrary to the official legal doctrine, bodies of constitutional justice begin to form, albeit with limited competence. This process in the 70s of the twentieth century paves its way in Poland, Czechoslovakia, Yugoslavia, the Committee on Constitutional Oversight in the USSR. It is appropriate to quote from an analytical review of the relevance of the institution of constitutional review in Bulgaria: the constitutional justice of Bulgaria dealt with laws that contradicted more than half of the provisions of the 1991 Constitution [24; 197].

Thus, the practice of developing states has special features of the implementation of the idea of constitutional review at this stage. The genesis of the institute of constitutional control historically goes back to the colonial past — to the activity of judicial control of the Privy Council of Great Britain, which checked the regulatory acts of the colonial authorities for compliance with the laws of the metropolis. It is logical that in this case the American model of judicial constitutional review was accepted in an acceptable interpretation. As for the former French colonies, which did not have constitutional control in the colonial history, they copied the European model in its French version, which exercises control functions by quasi-judicial bodies.

The institute of constitutional control of the Afro-Asian countries underwent peculiar collisions at the third stage of the constitutional process, which perceived various elements from almost all existing models. In fact, the institution of justice here has become a formal institution. And only after the establishment of stable democratic regimes began to play a significant role in the system of government and in the field of politics.

The institution of constitutional control at the present stage of the world constitutional process, which began the countdown from the turn of the 80s and 90s, with the fall of dictatorial regimes, has acquired a truly universal character. The effectiveness of its development at this stage is closely related to the global level of the democratization process. The institute of constitutional control is booming in countries of mature democracy and is firmly established in countries that have embarked on the path of building a new, democratic statehood. The practical implementation of the principle of separation of powers, the implementation of the idea of a rule of law directly depends on how effectively the mechanism for protecting the constitution, the mechanism for containing and controlling the legislative and executive branches of government, and the mechanism for the independent functioning of the judiciary function. It is difficult to imagine a nowadays democratic state in which there would be no control over the constitutionality of normative acts, as well as

procedures for resolving constitutional conflicts defined by law. Many states, abandoning their totalitarian past, form a new statehood, relying on the best achievements of civilization. The establishment of constitutional review bodies was a response to legal nihilism inherent in totalitarian and authoritarian regimes.

According to the changes taking place in the global constitutional process, a tendency is developing towards the emergence and evolution of various mixed forms of constitutional control, which «blur» the line between the American and European models, the so-called hybrid systems. It is necessary to agree with the opinion that «there are no ideal models, including ideal models of constitutional justice. The system of separation of powers in different states is not the same, being adapted to specific forms of government and government, state-management traditions, political and legal culture» [25; 102]. That is why, in the light of the requirements discussed above, of particular interest is the reform of the constitutional proceedings carried out in Turkey in 2012, when the institution of a full constitutional complaint was introduced into the practice of the Constitutional Court [26; 121].

The creation of a system of constitutional control in practice was of real importance for domestic constitutionalism. In accordance with the development trends of the institution of constitutional review, which is a very motley kaleidoscope of models of constitutional review, the institution of constitutional review of the Republic of Kazakhstan arose and evolved. In addition to world constitutional traditions, he absorbed all the tendencies of the development of the Soviet state in the field of constitutional control when one of the republics was in its composition, and during the years of gaining and evolution of state sovereignty — both varieties of the European system of constitutional control, as evidenced by the facts of reception from the Austrian models of the provisions governing the status of the Constitutional Court into the Constitution of the Republic of 1993, and then from the French model — the provisions governing the status Of the Constitutional Council, in the Constitution of the Republic of 1995 [27; 239].

The emergence of the institution of constitutional control of the Republic of Kazakhstan is associated with Soviet constitutional legislation, headed by the Constitution of the RSFSR of 1918. Soviet law introduced other principles of governance into the practice of state building contrary to the traditions of democracy. Constitutional control was carried out by the All-Russian Congress of Soviets, vested with the supreme authority in the country, between the congresses — the All-Russian Central Executive Committee of Soviets (All-Russian Central Executive Committee) and its Presidium, the government represented by the Council of People's Commissars (Sovnarkom). After the creation in 1922 of a single union state of the Union of Soviet Socialist Republics, the Central Executive Committee of the USSR and the Presidium of the CEC of the USSR transferred to the Supreme Court of the USSR the function of constitutional control as part of the function of general supervision. The Prosecutor's Office has been added to the list of bodies authorized to exercise this type of control. In the 20–30s there was a positive development of the institution of constitutional review.

According to the provisions of the Constitution of the USSR of 1936, Kazakhstan received the status of a union republic with all the ensuing consequences expressed in the reform of state bodies, which in fact copied the mechanism of union bodies, taking into account the subordination of the former to the latter, including the functions of constitutional control. The following Constitution of the USSR of 1977 and the Constitution of the Kazakh SSR of 1978 in all respects corresponded to each other and preserved the continuity of the provisions on constitutional review carried out both horizontally and vertically.

The historical stage, called perestroika, is marked by the creation of a special body — the Committee for Constitutional Oversight of the USSR, the adoption of the law «on Constitutional Oversight in the USSR». The Constitutional Oversight Committee was entrusted with the function of preliminary control of the constitutionality of USSR bills, including the constitutions of the Union republics, presidential decrees, laws of the Union republics, decrees and orders of the Cabinet of Ministers of the USSR, international treaties and other obligations of the USSR and Union republics before ratification, approved guiding explanations of the Plenum of the Supreme Court of the USSR, acts of the Prosecutor General of the USSR and the Supreme Arbitration Court of the USSR, other regulatory legal acts of state bodies and public organizations, in respect of which was not carried out public prosecutor's supervision. The norms of the constitution and law provided that the Committee for Constitutional Oversight of the USSR is a supervisory body whose functions are only to identify constitutional violations, and constitutional control in its entirety is carried out by the Supreme Soviet of the USSR and the Cabinet of Ministers of the USSR. The Constitutional Oversight Committee of the USSR ceased to exist after the conclusion of the Bialowieza Agreement on the establishment of the Commonwealth of Independent States on December 8, 1991. It should be noted that the Kazakh USSR did not manage to create its own constitutional control body.

The Constitutional Law of December 16, 1991 «on the State Independence of the Republic of Kazakhstan» contains provisions on a specialized judicial body of constitutional review — the Constitutional Court of the Republic of Kazakhstan (Kazakhstan adopted the Austrian model of constitutional review). The laws «on the Constitutional Court of the Republic of Kazakhstan» and «on the Constitutional Judicial Procedure of the Republic of Kazakhstan» in 1992 regulate in more detail the status, competence of the Constitutional Court and procedural legal relations arising in the course of constitutional proceedings. The high professionalism of judges in the exercise of their powers and, accordingly, the effectiveness of the final results provided the Constitutional Court of the Republic of Kazakhstan with a correspondingly high rating. The professional composition of the Constitutional Court, which began its work on July 2, 1992, was elected by the Supreme Council of the Republic of Kazakhstan by a majority of votes of the total number of deputies. High demands were placed on candidates for the post of judge of the Constitutional Council.

The «track record» of the Constitutional Court is rich in precedents for the repeal of unconstitutional acts, and this fact contributed to the rating of the state body that defended the Constitution, proclaiming the highest value of the state of man, his rights and freedom. The Constitutional Court professionally reacted to the processes of depoliticization and deideologization, resolving exclusively legal issues when considering cases, not getting involved in political intrigues and submitting only to the Constitution [27; 245].

Before the adoption of the 1995 Constitution, there was a serious choice — to preserve the Constitutional Court that existed in those years or create a new body of constitutional justice — the Constitutional Council. A.A. Taranov considers: «1) Kazakhstan implements its own model of checks and balances in the organization of republican state authorities; 2) the preference for the model of constitutional review represented by the Constitutional Council meets the expectations of the Parliament, the President and the Government; 3) the current procedure for initiating constitutional proceedings can be updated by introducing, amending and supplementing the procedural rules governing: — the principles of constitutional proceedings; — stages of constitutional proceedings; general and special conditions for the consideration of certain types of decisions related to: 1) adoption of final and additional decisions, 2) as well as other decisions provided by law; 3) procedural support for the enforcement of decisions» [28; 36]. As practice shows, the choice of the French model of constitutional justice, adapted to the Kazakhstani experience of constitutional construction, is acceptable for Kazakhstan. The main advantage of the Constitutional Council is that it exercises both preliminary and subsequent constitutional review in relation to the laws of the republic, that is, the constitutionality of laws adopted by Parliament can be checked by the Constitutional Council both before they enter into force and after entry into force. Constitutional courts, as a rule, do not consider the constitutionality of laws before they enter into force. The Constitutional Council is endowed with sufficient powers to enable it to play a key role in ensuring constitutional legality, to be the arbiter of last resort in case of disputes over the constitutionality of laws and other regulatory legal acts, international treaties of the republic.

Conclusion

The Constitution secured the most important institutions of real practical constitutionalism: a democratic way of developing and adopting a constitution; its supreme legal force and the related need for constitutional review; the role of the constitution as a legal, political and ideological document; stability of the basic law and at the same time the variability of some of its norms; the transition from instrumental to social constitutions, based on the recognition of modern universal values, the relationship of the rights and obligations of a person, the collective (to which he belongs), the state and society. It is difficult to overestimate the role of the institution of constitutional control in ensuring the high status of the Constitution — such an approach as a whole meets the modern world doctrine of constitutionalism.

Summarizing the achievements of world practice, three models of constitutional control can be reasonably distinguished: American, continental and mixed. In the American model, control is not distinguished from general justice. The continental model, referred to in the literature as «European» or «Kelsen», presupposes the establishment of specialized bodies, organizationally separated from the judicial system and considering exclusively constitutional issues. This model has two main varieties: a) the Austrian continental model, when constitutional issues are considered by the constitutional courts (Italy, Spain, Germany, Bulgaria, Russia, Estonia, Moldova, Turkey and others); b) the French continental model based on the Constitutional model Council.

The mixed — European-American model concentrates the elements of two main models: control powers are concentrated in the constitutional or Supreme Court, but at the same time all ordinary courts are also

vested with powers in this area (Portugal, Greece, Guatemala, Brazil, Indonesia). At the same time, the problem of delimiting constitutional jurisdiction is important.

In terms of the practical application at the present stage of the experience of states with a developed system of constitutional control, the prevailing European model is in various modifications, effectively overcoming some of the shortcomings of the American system of constitutional justice, primarily such as the connectedness of the court when combining the functions of constitutional control with the functions of general justice; length of proceedings; the binding nature of decisions made only for the parties in a particular case; providing the opportunity to challenge the unconstitutionality of regulations and actions only to private individuals.

The European model of constitutional review seeks to eliminate these gaps, contradicting its essence, while relying on the fundamental principle: the law is the source of law and lower judges are not authorized to exercise constitutional review.

The discussion polemic about the place occupied by the bodies of constitutional justice in the mechanism of state power, about the nature of the judicial and specialized bodies of constitutional control was filled with new content. Opinions on this issue are multiple, often contradictory: some scholars believe that these bodies should nevertheless be attributed to the judiciary; others — they express the opinion that it is advisable to consider them in a broad sense, covering, on a par with judicial, parliamentary, presidential, and prosecutorial control; the third point of view calls for the role of constitutional control bodies to be regarded as a function ensuring compliance with the powers of the legislative, executive, and judicial authorities; the fourth group of constitutionalists defines the activity of bodies of constitutional control as a special branch of power — the control, etc. Each point of view has the right to support, if not recognition, which is justified by the universal nature of the activities of modern bodies of constitutional review.

The concept of constitutional review, the genesis of which dates back to pre-constitutional precedents of the 17th century, was enriched by new trends throughout the world constitutional process. The control institute was extremely widespread in the 20th century, and it was especially significant after the Second World War and in the modern period, geographically covering all continents and continents, almost all countries of the world.

The special features of judicial constitutional review are due not only to the expansion of its geography, but also to the innovations that arise in the process of its functioning. In parallel with the process of the implementation of judicial constitutional control in the American version by many countries, this institution is especially widespread in connection with the emergence and development of the European system (the Austrian and French models), which involves the exercise of constitutional control functions by special judicial and quasi-judicial bodies that do not fully coincide with general justice bodies. At the present stage, high-quality novelties of constitutional review are connected, firstly, with the preference of the Austrian model, and secondly, with the formation of new, integrated, «intermediate» forms established by the practice of France, Canada, Sweden.

References

1 Ginzburg T. The Global Spread of the Constitutional Review / T. Ginzburg // Oxford Handbook on Law and Politics / Ed. by K.E. Whittington, R.D. Kelemen, G.A. Caldeira. — Oxford: Oxford University Press, 2008. — P. 81–98.

2 Leoni B. Freedom and the Law. — Princeton, NJ: Van Nostrand, 1961. — P.77–78; Cappellet-tiM., Cohen W. Comparative Constitutional Law: Cases and Materials. — Charlottesville, VA: Bobbs- Merrill, 1979. — P. 5–6.

3 Берман Г. Западная традиция права: эпоха формирования / Г. Берман. — М.: Изд-во МГУ; Изд. группа, 1998. — 624 с.

4 Кравец И.А. Формирование российского конституционализма (проблемы теории и практики) / И.А Кравец. — М.: Изд-во ЮКЭА, 2002. — 360 с.

5 Нудель М.А. Конституционный контроль в капиталистических государствах / М.А. Нудель. — М.: Юрид. лит., 1968. — 223 с.

6 Маклаков В.В. Конституционный контроль в буржуазных и развивающихся странах: учеб. пос. / В.В. Маклаков. — М.: ВЮЗИ, 1988. — 408 с.

7 Шуберт Т.Э. Понятие и становление конституционного контроля в СССР / Т.Э. Шуберт // Актуальные проблемы правовой перестройки: сб.ст. аспирантов и соискателей ВНИИСЗ. — М., 1990. — С. 15–19.

8 Шульженко Ю.Л. Конституционный контроль в России / Ю.Л. Шульженко. — М.: Ин-т государства и права, 1995. — 175 с.

9 De Tocqueville A. Democracy in America / A. De Tocqueville. — New York: Vintage Books, 1945. — Vol. 1. — Ch. XVI: Causes which mitigate the tyranny o f the majority in the United States. — P290.

10 Coxe B. An Essay on Judicial Power and Uncon stitutional Legislation / B. Coxe. — Philadelphia, PA: Kay and Brother, 1893. — P. 24.

11 Конституционное (государственное) право зарубежных стран: учеб.: [В 4-х т.] — Т. 1, 2 / отв.ред. Б.А. Страшун. — М.: Изд-во «БЕК», 2000. — 784 с.

12 Favoreu L. Les cours constitutionnelles. — Paris, 1992. — 161 p.

13 Черниловский З.М. От Маршалла до Уоренна: Очерки истории Верховного Суда США / З.М. Черниловский. — М.: Юрид. лит., 1982. — 224 с.

14 Гандалоев Р.Б. Институт конституционного контроля Верховного Суда США в историческом развитии / Р.Б. Гандалоев, Д.И. Борисов // Вестн. Москов. ун-та МВД России. — 2019. — № 2 (62) — С. 62–64.

15 Cappelleti M. The Expanoling Role of Judicial Reviene in Modern Societies / M. Cappelleti // The Role of Cours in Society. Martimes Nijinoff Publishers. A. member of the Kluneer Academic Publishers Groop. — Dorolrecht-Boston-Lancaster, 1988. — Chapter 7. — P. 79.

16 Овсепян Ж.И. Судебный конституционный контроль в зарубежных странах: автореф. дис. ... д-ра юрид. наук / Ж.И. Овпесян. — М., 1968. — 52 с.

17 Сравнительное конституционное право / Отв ред. В.Е. Чиркин. — М.: Манускрипт, 1996. — 729 с.

18 Хессе К. Основы конституционного права ФРГ / К. Хессе. — М.: Юрид. лит., 1981. — 368 с.

19 Овсепян Ж.И. Судебный конституционный контроль в зарубежных странах. Правовая защита конституции. — Ростов н/Д.: Литера-Д, 1992. — 320 с.

20 Haratyunyan G. The Constitu tional Review and Its Development in the Modern World / G. Haratyunyan, A. Mavcic. — Yerevan; Ljubljana: Hayagitak, 1999. — P. 12–35.

21 Cornel ia V.F. Constitutional Courts and Democratic Values: A European Perspective / Cornel ia V.F. — New Haven, CT. — London: Yale University Press, 2009. — P. 3–29.

22 Мишин А.А. Конституция США. Политико-правовой комментарий / А.А. Мишин, В.А. Власихин. — М.: Международные отношения, 1985. — 336 с.

23 Танчев Е. Рождение и развитие конституционного контроля / Проблемы конституционного контроля в сравнительно-правовой перспективе и с позиций болгарской правовой системы / Е.Танчев // Сравнительное конституционное обозрение. — 2012. — № 1. — С. 85–103.

24 Schwartz И. The Struggle for the Constitutional Justice in Post-Communist Europe / И. Schwartz. — Chicago, IL: University of Chicago Press, 2000. — P. 164–193.

25 Саломатин А.Ю. Идеальная модель органа конституционного правосудия (компаративистский анализ верховных и конституционных судов ведущих стран мира) / А.Ю. Саломатин // Изв. высш. учеб. завед. Поволжский регион. Общественные науки. — 2014. — № 2 (30). — С. 101–111.

26 Кузнецов Д.А. К вопросу о конституционной жалобе как эффективном средстве национальной правовой защиты на примере Конституционного суда Турецкой Республики / Д.А. Кузнецов // Актуальные вопросы развития российской государственности и публичного права: материалы II Всерос. науч.-практ. конф. 20 мая 2016 г. / отв. ред. Е.В. Трофимов. — СПб.: СПб ин-т (филиал) ВГУЮ (РПА Минюста России), 2016. — С. 104–133.

27 Тайторина Б.А. Государственный контроль в конституционной системе разделения власти в Республике Казахстан: моногр. / Б.А. Тайторина. — Алматы, 2011. — 396 с.

28 Таранов А.А. Конституционный суд или совет: выбор модели конституционного контроля / А.А. Таранов // Юрист. — 2007. — № 2. — С. 32–36.

М.С. Бейбітов, Б.А. Тайторина, Г.Т. Байсалова, И.Ж. Әзретбергенова

Конституциялық бақылау институтының құқықтық саласы: өткені мен бүгіні

Мақалада конституционализм дәстүрлері контекстіндегі конституциялық бақылаудың қалыптасуы мен дамуының тарихи ретроспективасы қарастырылған. Кез-келген демократиялық, прогрессивті мемлекеттің маңызды атрибуттарының гипостазында конституция, конституционализм, конституциялық бақылау құбылыстары талданады. Қазіргі заманғы конституционализмнің даму тенденциясы — екі векторлы сипатамаға бөлінген: тәжірибелік және теориялық конституционализм парадигмалары. Конституциялық бақылаудың мағынасы жан-жақты түсіндірудің талдауы мен теориялық негізделуіне бағынады. Зерттеу мақсатына жету үшін мақала авторлары конституционализмнің әлемдік тәжірибесіндегі конституциялық бақылау институтының генезисі мен эволюциясын тұжырымдамалық талдаудан өткізген. Теориялық дереккөздер мен эмпирикалық материалдардың негізінде мемлекеттік құқықтық институттың пайда болуы мен дамуының мәселелері зерттелген: құқықтық тұжырымдамалар, әлем елдерінде қазіргі кезеңде қалыптасқан конституциялық бақылау модельдерінің түрлері мен қызмет ету көздері. Әлем елдеріндегі конституциялық бақылау институтының эволюциясының кезең-кезеңіне сүйене отырып, бұл институттың тарихи дамудың барлық кезеңдеріндегі дамуының негізгі тенденциялары мен ерекшеліктері сипатталған. Әлемдік тәжірибенің жетістіктерін қорытындылау нәтижесінде конституциялық бақылаудың негізгі үш моделі бөлінеді: американдық, континенталды және аралас. Зерттеу авторлары Қазақстан Республикасының

конституциялық бақылау жүйесінің тәжірибесінде отандық конституционализмді құрудың маңызын дәлелдеген.

Кілт сөздер: бақылау, конституциялық бақылау, тарих, ретроспективті, конституциялық сот, конституциялық кеңес, түсіндіру.

М.С. Бейбитов, Б.А. Тайторина, Г.Т. Байсалова, И.Ж. Азретбергенова

Правовое поле института конституционного контроля: прошлое и настоящее

В статье рассмотрена историческая ретроспектива становления и развития конституционного контроля в контексте традиций конституционализма. Феномены понятий «конституция», «конституционализм», «конституционный контроль» проанализированы в ипостаси важнейших атрибутов любого демократического, прогрессивного государства. Выделена тенденция современного периода развития конституционализма — двувекторная характеристика: в парадигмах практического и теоретического конституционализма. Подвергнута анализу и теоретическому обоснованию многогранная трактовка значения конституционного контроля. Авторы статьи для достижения цели исследования подвергли концептуальному анализу генезис и эволюцию института конституционного контроля в мировой практике конституционализма. На основе теоретических источников и эмпирического материала исследованы проблемы возникновения и развития государственно-правового института: правовые концепции, источники организации и функционирования существующих в современный период разновидностей моделей конституционного контроля в странах мира. На основе проведенной периодизации процесса эволюции института конституционного контроля в странах мира охарактеризованы основные тенденции и специфические черты развития данного института на всех этапах исторического развития. В результате обобщения достижений мировой практики выделены три основные модели конституционного контроля: американская, континентальная и смешанная. Авторы исследования обосновали реальное значение для отечественного конституционализма создания на практике системы конституционного контроля Республики Казахстан.

Ключевые слова: контроль, конституционный контроль, история, ретроспектива, конституционный суд, конституционный совет, толкование.

References

1 Ginzburg, T. (2008). The Global Spread of the Constitutional Review // Oxford Handbook on Law and Politics / Ed. by K.E. Whittington, R.D. Kelemen, G.A. Caldeira. Oxford: Oxford University Press, 2008. P. 81–98.

2 Leoni, V. (1961). Freedom and the Law. Princeton, NJ: Van Nostrand; Cappellet- tiM., Cohen W. (1979). *Comparative Constitutional Law: Cases and Materials.* Charlottesville, VA: Bobbs. Merrill.

3 Berman, G. (1998). *Zapadnaia traditsiia prava: epokha formirovaniia [Western tradition of law: the era of formation]*. Moscow: Izdatelstvo MHU; Izdatelskaia hruppa [in Russian].

4 Kravets, I.A. (2002). *Formirovanie rossiiskoho konstitutsionalizma (problemy teorii i praktiki) [The formation of Russian constitutionalism (problems of theory and practice)]*. Moscow: Izdatelstvo YuKEA [in Russian].

5 Nudel', M.A. (1968). *Konstitutsionnyi kontrol v kapitalisticheskikh hosudarstvakh [Constitutional control in capitalist states]*. Moscow: Yuridicheskaia literatura [in Russian].

6 Maklakov, V.V. (1988). *Konstitutsionnyi kontrol v burzhuaznykh i razvivaiushchikhsia stranakh [Constitutional control in bourgeois and developing countries]*. Moscow: VYuZI [in Russian].

7 Shubert, T.E. (1990). Poniatie i stanovlenie konstitutsionnoho kontrolia v SSSR [The concept and formation of constitutional control in USSR]. *Aktualnye problemy pravovoi perestroiki — Actual problems of legal restructuring,* 15–19. Moscow [in Russian].

8 Shul'zhenko, Yu.L. (1995). *Konstitutsionnyi kontrol v Rossii [Constitutional control in Russia]*. Moscow: Institut hosudarstva i prava [in Russian].

9 De Tocqueville, A. (1945). Democracy in America. New York: Vintage Books (Vol. 1, Ch. XVI): Causes which mitigate the tyranny o f the majority in the United States. P.290.

10 Sokhe, V. (1893). *An Essay on Judicial Power and Uncon stitutional Legislation.* Philadelphia, PA: Kay and Brother.

11 Strashun, B.A. (Eds.). (2000). *Konstitutsionnoe (hosudarstvennoe) pravo zarubezhnykh stran [Constitutional (state) law of foreign countries]*. (Vols. 1-4; Vol. 1, 2). Moscow: Izdatelstvo «BEK» [in Russian].

12 Favoreu, L. (1992). *Les cours constitutionnelles.* Paris.

13 Chernilovskiy, Z.M. (1982). *Ot Marshalla do Uorenna. Ocherki istorii Verkhovnoho Suda SSHA [From Marshall to Warren. History Essays US Supreme Court]*. Moscow: Yuridicheskaia literatura [in Russian].

14 Gandaloyev, R.B., & Borisov, D.I. (2019). Institut konstitutsionnoho kontrolia Verkhovnoho Suda SSHA v istoricheskom razvitii [US Supreme Court Constitutional Review Institute for Historical Development]. *Vestnik Moskovskoho universiteta MVD Rossii — Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia, 2(62),* 62–64 [in Russian].

15 Cappelleti, M. (1988). The Expanoling Role of Judicial Reviene in Modern Societies. *The Role of Cours in Society. Martimes Nijinoff Publishers. A. member of the Kluneer Academic Publishers Groop.* Dorolrecht-Boston-Lancaster, Chapter 7, 79.

16 Ovsepyan, Zh.I. (1968). Sudebnyi konstitutsionnyi kontrol v zarubezhnykh stranakh [Judicial constitutional review in foreign countries countries]. *Extended abstract of Doktor's thesis.* Moscow [in Russian].

17 Chirkin, V.E. (Eds.) (1996). *Sravnitelnoe konstitutsionnoe pravo [Comparative constitutional law]*. Moscow: Manuskript [in Russian].

18 Khesse, K. (1981). *Osnovy konstitutsionnoho prava FRH [Fundamentals of constitutional law of Germany]*. Moscow: Yuridicheskaia literatura [in Russian].

19 Ovsepyan, Zh.I. (1992). *Sudebnyi konstitutsionnyi kontrol v zarubezhnykh stranakh. Pravovaia zashchita konstitutsii [Judicial constitutional review in foreign countries. Legal protection of the constitution]*. Rostov-na-Donu: Litera-D [in Russian].

20 Haratyunyan, G., & Mavcic, A. (1999). *The Constitu tional Review and Its Development in the Modern World.* Yerevan; Ljubljana: Hayagitak.

21 Cornel ia, V.F. (2009). *Constitutional Courts and Democratic Values: A European Perspective.* New Haven, CT; London: Yale University Press.

22 Mishin, A.A., & Vlasikhin, V.A. (1985). *Konstitutsiia SShA. Politiko-pravovoi kommentarii [US Constitution. Political and legal]*. Moscow: Mezhdunarodnye otnosheniia [in Russian].

23 Tanchev, Ye. (2012). Rozhdenie i razvitie konstitutsionnoho kontrolia. Problemy konstitutsionnoho kontrolia v sravnitelno-pravovoi perspektive i s pozitsii bolharskoi pravovoi sistemy [Birth and development of constitutional control. The issue of stability and control in the comparative legal perspective and from the perspective of the Bulgarian legal system]. *Sravnitelnoe konstitutsionnoe obozrenie — Comparative constitutional review*, *1,* 85–103 [in Russian].

24 Schwartz, I. (2000). *The Struggle for the Constitutional Justice in Post-Communist Europe.* Chicago, IL: University of Chicago Press.

25 Salomatin, A.Yu. (2014). Idealnaia model orhana konstitutsionnoho pravosudiia (komparativistskii analiz verkhovnykh i konstitutsionnykh sudov vedushchikh stran mira) [The ideal model of the body of constitutional justice (comparative analysis of the supreme and constitutional courts of the leading countries of the world)]. *Izvestiia vysshikh uchebnykh zavedenii. Povolzhskii rehion. Obshchestvennye nauki — News of higher educational institutions. Volga region. Social Sciences, 2 (30),* 101–111 [in Russian].

26 Kuznetsov, D.A. (2016). K voprosu o konstitutsionnoi zhalobe kak effektivnom sredstve natsionalnoi pravovoi zashchity na primere Konstitutsionnoho suda Turetskoi Respubliki [On the issue of the constitutional complaint as an effective means of national legal protection on the example of the Constitutional Court of the Republic of Turkey]. Actual issues of the development of Russian statehood and public law: *II Vserossiiskaia nauchno-prakticheskaia konferentsiia — proceedings of the II All-Russian Scientific and Practical Conference* (p. 104–133). Saint-Petersburg: Sankt-Peterburhskii institut (filial) VGUYU (RPA Miniusta Rossii) [in Russian].

27 Taytorina, B.A. (2011). *Hosudarstvennyi kontrol v konstitutsionnoi sisteme razdeleniia vlasti v Respublike Kazakhstan [State control in the constitutional system of separation of powers in the Republic of Kazakhstan]*. Almaty [in Russian].

28 Taranov, A.A. (2007). Konstitutsionnyi sud ili sovet: vybor modeli konstitutsionnoho kontrolia [Constitutional Court or Council: selection of a model of constitutional control]. *Yurist — Lawyer, 2,* 32–36 [in Russian].