

Role of The Constitutional Court of the Russian Federation, The Constitutional Court of the Republic of Belarus and The Constitutional Council of the Republic of Kazakhstan in Ensuring the Sovereignty of the People: Comparative Legal Study

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ABSTRACT

The study of the implementation of the forms of the sovereignty of the people in the post-Soviet space is particularly interesting due to the formation of independent models of the above institute. Moreover, the models of forms of sovereignty and legal mechanisms for their implementation in the studied three countries have both common and distinctive characteristics. This is characterized by the general post-Soviet social environment of the three states under study. The study uses comparative legal analysis, which reveals effective methods and ways of regulating legal relations in the sphere of the sovereignty of the people in the states under study. A number of constitutional reforms are being considered, the authors conclude that much work still needs to be done to create democratic conditions when implementing existing forms of the sovereignty of the people in the three countries under study. The paper uses the dialectical method of scientific knowledge, as well as logical, historical, systemic and comparative legal methods. The methods of analysis and synthesis were particularly important. A functional method was used to study the main directions of the development of the institution of the sovereignty of the people. The paper considers the role of specialized bodies of constitutional control of the three states under study in the development of legislation in the field of the sovereignty of the people. The authors identified gaps and shortcomings of the current legislation in the field of forms of the sovereignty of the people. The analysis can be successfully implemented by improving the Russian legislation in the subject matter. The analysis suggests that there are still gaps, including in the relationship between the creation of the rule of law and democracy, illusory expectations of benefits from helping democracy and the often exaggerated value declared by the states. These gaps seem to need to be addressed, as they can not only undermine the success and credibility of the rule of law, but also destroy the hopes of local residents who believe that their participation will help them building the rule of law.

Keywords: *Constitutional Court of the Russian Federation, Constitutional Court of the Republic of Belarus, Constitutional Council of the Republic of Kazakhstan, referendum, elections, all-Russian voting*

1. INTRODUCTION

The right to participate in a referendum belongs to citizens of the state and cannot be restricted because of gender, race, religion, nationality, language, origin, property or official status or on other non-democratic grounds [1]. The people are recognized as a special subject of constitutional and legal relations [2] and are endowed with a special type of rulemaking as a referendum [3].

It is known that the only source of state power in Russia, Belarus and Kazakhstan is the people (Part 1, Article 3 of the Constitution of the Russian Federation, Article 3 of the Constitution of the Republic of Belarus, Paragraph 1, Article 3 of the Constitution of the Republic of Kazakhstan).

Although the referendum as a procedure expresses social support for the initiative of its holding, the people do not participate in the preparation of a draft normative act (Part 2, Article 6 of the Federal Law "On referendum of the Russian Federation", Article 117 of the Electoral Code of the Republic of Belarus, Article 18 of the Law of the Republic of Kazakhstan "On republican referendum"). It

follows from this that the forms of participation of the people in rulemaking are procedurally limited by the provisions on the referendum procedure.

The constitutional control bodies of Russia and Kazakhstan are vested with powers in the field of regulation of public relations arising during the referendum. Thus, by virtue of Paragraph 5.1, Part 1, Article 3 of the Federal Law “On the Constitutional Court of the Russian Federation” the compliance with the Constitution of the Russian Federation of the issue submitted for referendum is checked by the Constitutional Court of the Russian Federation.

In turn, the Constitutional Court of the Republic of Belarus is currently deprived of such powers. By virtue of Article 35 of the Law of the Republic of Kazakhstan “On republican referendum”, the decision adopted by the referendum does not need to be confirmed by an act of any state body. In turn, Article 91 of the Constitution of Kazakhstan established that amendments and additions to the Constitution of the Republic by referendum are only possible if there is an opinion of the Constitutional Council.

Thus, in Russia, the powers of the constitutional control body are legislatively enshrined in terms of checking the conformity of the issue submitted for referendum to the Constitution of the Russian Federation, in Kazakhstan – in terms of amendments to the Constitution, and in Belarus this has not received legislative consolidation. Besides, the Constitutional Council of Kazakhstan has the power to verify the correctness of the referendum.

2. MATERIALS AND METHODS

The main material of the study in this work was the legislation of the three states in the field of the sovereignty of the people, the practice of specialized constitutional control bodies, as well as the content of the latest (2020) constitutional reform in Russia. These materials were analyzed from two perspectives. First, as a stage in the constitutional evolution of the three states covering the last two decades. Second, as one of the national options for constitutional regulators in the states – former USSR republics.

The constitutional acts of the neighboring states were the subject of the paper to the extent that they illustrate the general trends in the constitutional process in the region and the establishment of legal relations in the field of the forms of the sovereignty of the people. The study takes into account the concept of constitutional cycles in the post-Soviet space, the essence of which is to change the nominal constitutionalism of democratically accepted quasi-liberal constitutions, but since 2008 a new phase of this cycle has been unfolding. In the comparative legal aspect, the paper reflects both the general trends of the constitutional process and the divergent features of the constitutional development of the three states under study. At the same time, the essence of the legal development of each of the states is the constitutionalization of national identity in conditions of global turbulence.

Besides, the study used the following general scientific methods: analysis, synthesis and systemic-structural method.

The special legal methods of cognition (comparative-legal, formal-legal, formal-logical, system, technical-legal methods) made it possible to study the legislative regulation of the powers of specialized constitutional control bodies of the three states under study in the outlined area.

3. RESULTS

In Belarus, the modern Constitutional Court does not have the power to consider the issues in the field of holding a referendum, while, until 1996 inclusive, it had such a right and there was similar experience in its practice.

The first referendum in Belarus was held in 1995 and 7 issues were submitted to it [4], in respect of one of them the Commission of the Supreme Council for Education, Culture and Historical Heritage appealed to the Constitutional Court. The Constitutional Court refused the request to declare unconstitutional to submit the issue of granting the Russian language equal status with the Belarusian language to the referendum [5].

The next experience of the Constitutional Court of Belarus in studying referendum issues “dragged” it into the constitutional crisis in 1996. On November 4, 1996, the Constitutional Court adopted an opinion according to which additions and amendments to the Basic Law can only be submitted to a consultative referendum. The court found that paragraph 3 of the decision of the Supreme Council regarding the submission of amendments and additions to the Constitution to a mandatory referendum does not comply with the Constitution and the laws of the Republic of Belarus [6]. Despite the above conclusion of the Constitutional Court, the Decree of the Head of State made binding the consultative issues of the referendum. The referendum was held on November 22, 1996. According to its results, in particular, amendments and additions were made to the Constitution of the Republic of Belarus, while many of the powers of the Constitutional Court, including the consideration of issues in the field of the referendum, were not reflected in the updated text. After the 1996 referendum, some judges and the President of the Constitutional Court of Belarus, resigned. In 1997, by reviewing its own decision, the Constitutional Court of Belarus, in an updated composition, canceled its own opinion of November 1996 as being “contradictory” [7].

Despite the absence of statutory powers to consider the issues in the field of direct expression of the sovereignty of the people, in the practice of the Constitutional Court of Belarus there were cases of stating a position in this area. The Constitutional Court considered the issues related to electoral legislation during the regular presidential elections. In a decision of June 19, 2001, the Constitutional Court, revealing the meaning of the constitutional concepts of the “citizen of the Republic of Belarus by birth” and “citizen of the Republic of Belarus permanently residing in the Republic of Belarus” used in Article 80 of the

Constitution, indicated that one of the candidates is not a citizen by birth [8]. Thus, the legal positions expressed by him at the request of the Central Commission of the Republic of Belarus for the elections and the holding of republican referendums of June 15 and 19, 2001, contributed to correct understanding and clarification. The decision of the Constitutional Court was aimed at strengthening the legal basis of the electoral process and contributed to its democratization, free and fair presidential elections, and the rule of law and the will of the people [9].

The practice of the constitutional control bodies of Russia and Kazakhstan on the organization and conduct of the referendum is quite limited, and the Constitutional Court of the Russian Federation did not use the relevant powers directly, although the Federal Law “On the Referendum” established the issues of participation of the Constitutional Court of the Russian Federation in popular rulemaking in 2008 [10].

In the Federal Law “On the Constitutional Court of the Russian Federation”, the issues of participation of the Constitutional Court were reflected only in 2014. Thus, the first part of Article 3 was supplemented by paragraph 5.1 as follows: “5.1 checks the issue submitted to the referendum of the Russian Federation for compliance with the Constitution of the Russian Federation in accordance with the federal constitutional law governing the referendum of the Russian Federation” [11]. To date, there is no practice of implementing the mentioned powers, while there are cases of consideration of the Federal Law on Referendum itself by the Constitutional Court of the Russian Federation.

Thus, by Decree of the Constitutional Court of the Russian Federation No. 3-P of March 21, 2007, the provision on appealing the decision of the Central Election Commission of the Russian Federation was found to be inconsistent with the Constitution of Russia. According to the current legislation, it was the basis for the regional election commission to refuse to register regional subgroups of initiative groups for the referendum. The appeal was made to the Supreme Court of the Russian Federation or the courts of the constituent entities of the Russian Federation, and the Constitutional Court of Russia concluded that constitutional proceedings were thus excluded from the appeal procedure [12], and this limited the right to judicial protection, which, due to the Constitutional Court of Russia, became absolute.

According to the same Resolution, the provisions of Part 7 of Article 6 of the Federal Law “On the Referendum”, which establish the criteria according to which the issues submitted to the referendum are formulated (impossibility of multiple interpretation, unambiguity of the candidate answer, lack of uncertainty of legal consequences) are recognized by the Russian Constitution as guaranteeing the adequacy of decisions taken at the referendum to the real will of the people.

In the said Decision, the Constitutional Court of the Russian Federation also referred to two previously formulated legal positions, as expressed in Regulations No. 3-P of March 13, 1992 and No. 8-P of April 21, 1993,

which indicated that the wording of the question submitted to the referendum should allow it to be taken as a whole, belonging to the same level of legislation, due to its hierarchy and the federal structure of Russia. Furthermore, there should be no combination of a general sentence and a question of principle. The question should be formulated in such a way that the legal consequences of the decision taken at the referendum are determined by their content and by the powers entrusted to the relevant state authorities. Otherwise, the adequacy of the will of the citizens of Russia participating in the referendum is questioned, and the implementation by federal state authorities of the will of the people expressed in the referendum becomes problematic.

This decision is also notable for the fact that in it the Constitutional Court of Russia set out a broad understanding of the term “federal law”, including federal constitutional laws, thereby confirming the right to verify this and other federal constitutional laws.

The referendum does not apply to the election procedure in the usual meaning of this term. It implies a voting procedure – the same categories of Russian citizens have the right to participate in elections and referendums, a similar procedure for the implementation of these rights is provided. But the legislation establishes various procedures for the adoption and form of a normative act regulating the procedure: for a referendum this is a federal constitutional law, for elections – a federal law [13]

The resolution of the Constitutional Court of the Russian Federation No. 8-P of April 22, 2013 recognized the provision of Article 259 of the CCP of the Russian Federation in interrelation with Articles 75 and 77 of the Federal Law “On the main guarantees of electoral rights and rights for participation in a referendum of citizens of the Russian Federation” and Article 92 of the Federal Law “On elections of deputies of the State Duma of the Federal Assembly of Russia” not corresponding to the Constitution of the Russian Federation. Due to the uncertainty of the normative content in relation to subjects, procedure and conditions for applying to the court, these provisions exclude the possibility for voters to appeal decisions and actions (inaction) of election commissions related to the establishment of voting results at the polling station at which these citizens took part in the election [14]. In this case, the Constitutional Court of the Russian Federation has expanded its understanding of the constitutional nature of active suffrage [15], including in its implementation in the conduct of a referendum.

In the years since the adoption of the Federal Law “On the Referendum” the legislative work in terms of improving the mechanisms of electoral rights by citizens of Russia has been supplemented by rather active activities of the Constitutional Court of Russia. This activity consisted in formulating legal positions on the content of the mechanisms under study (it should be noted that in general, more than 130 acts on the issues of electoral legislation have been adopted by the Constitutional Court as of 2020).

The analysis of the above legal positions allows concluding that the Constitutional Court of Russia has the

right to consider the organizational issues of the referendum both in terms of the form (determines the participants in this process; considers the request of the President of the Russian Federation on compliance with the provisions of the Constitution of the referendum initiative, etc.) [16], and the content (checks questions submitted to the referendum). At the same time, as N.V. Vitruk rightly noted, a detailed description of the procedure for considering the request would be correct, in particular, to grant the Constitutional Court of Russia the right to exclude unconstitutional issues from the number proposed for a referendum without terminating the referendum procedures in the event of a decision on inconsistency with the Constitution of the referendum initiative [17]. Thus, the Russian legislation contains viable issues of expanding the powers of the Constitutional Court of Russia in this area. Besides, the Constitutional Court of Russia does not have the power of constitutional control over the correctness of the referendum. The marked reserves of authority can act as a guarantor of ensuring public stability.

In addition, it is worth considering the institution of the sovereignty of the people that appeared in 2020, such as the all-Russian vote [18]. A short analysis of the Law of the Russian Federation No. 1-DKZ “On the amendment to the Constitution of the Russian Federation” of March 14, 2020 allows concluding that certain legal elements of the Russian referendum are borrowed when organizing an all-Russian vote – a “quasi-referendum”. In particular, the participation of the Constitutional Court. Thus, a study of the Conclusion of the Constitutional Court of Russia of March 16, 2020 allows concluding that in essence there is an analogy of the Court’s participation in the referendum. The Constitutional Court gave a reasoned opinion in terms of the form, assessed the procedure for organizing and conducting an all-Russian vote on the approval of amendments to the Constitution of the Russian Federation, and in terms of the content, in particular, checked Article 1 of the Law on Amendment (checked the issues put to the vote) [19]. Thus, it can be said that the legislator secured the participation of the Constitutional Court in the all-Russian vote by analogy with the existing powers of the Court in relation to the referendum (Clause 5.1, Part 1, Article 3 of the Federal Law “On the Constitutional Court of the Russian Federation”).

In Kazakhstan, in accordance with Article 72, Paragraph 1, Subparagraph 1 of the Constitution, in the event of a dispute the Constitutional Council decides on the correctness of the republican referendum. The implementation of these powers as of December 2017 is absent in the activities of the Constitutional Council of the Republic of Kazakhstan. At the same time, its practice has another experience of partisanship in the field of the referendum. Thus, the Resolution No. 2 of 31 January 2011 says that recognizing that amendments and additions to the Constitution of Kazakhstan are not in accordance with the Constitution of the Republic of Kazakhstan the Constitutional Council of Kazakhstan stated that “being one of the fundamental constitutional values, the act of expressing the will of the people becomes legally binding

by voting in a republican referendum or in elections of the President of the Republic and deputies of Parliament held periodically in the country”. The decision further notes that on the basis of its sovereign right, the people of Kazakhstan adopted the current Constitution in a republican referendum on August 30, 1995. In this regard, the Constitutional Council believes that by voting in a republican referendum, any most important issue of state life of the Republic can be resolved, including the extension of the presidential powers of the First President of the Republic of Kazakhstan – Elbasa. However, as noted in the decision of the Constitutional Council, *the initiatives aimed at changing the unitary and territorial integrity of the state and the form of government of the Republic established by the Constitution cannot be the subject of a republican referendum* (Article 91, Paragraph 2 of the Constitution) [20].

Besides, in the event of a dispute the Constitutional Council has the power to resolve the issues on the correctness of holding the following: 1) elections of the President of the Republic; 2) elections of deputies of the Parliament. There is no practical experience in this direction, but during its existence, the Constitutional Council has adopted 12 regulatory decisions regarding the constitutional and legal aspects of the electoral system (direct expression of the will of citizens). They contain a thorough and systematic analysis of the principles, general provisions and norms of the Constitution and play a decisive role both for the legislature and the judiciary. The decisions of the Constitutional Council, which relate to the organization and conduct of elections and referendums, prevail. They are an important element in the uniform application and monitoring of the electoral law.

Thus, the Council explained that the *difference in the number of voters from single-mandate territorial constituencies within one administrative-territorial unit should be minimal* [21]. Having accepted this legal position of the Council, the legislator amended the Constitutional Law “On Elections in the Republic of Kazakhstan”, reducing the specific limits of the permissible deviation in the number of voters in different constituencies from 25 to 15%, which serves to ensure the constitutional principle of equal suffrage [22].

In other decisions, the Council resolved a number of important issues for the electoral system:

- determined the term of office of the deputies elected between the convocations of the Parliament in connection with the amendment in the Constitution of the terms of office of the deputies of the Parliament and the subsequent re-election of the Parliament, the deputies of the Senate elected in October 1997 will have a five-year term of office consisting of half of the four-year term of the Parliament of the first convocation and half of the six-year term of the Senate of the Parliament of the second convocation [23];
- confirmed the possibility of extending the session of the Parliament by an appropriate resolution [24];
- clarified that the provisions of the Constitution on the grounds for the termination of the powers of a member of the Parliament are not exhaustive, such grounds may not

be the death of a deputy provided for by them; loss of Kazakh citizenship; court decision that has entered into force declaring a person being a deputy missing; elimination of a political party or termination of membership in the party on the basis of which party list he was elected [25].

4. CONCLUSION

In Russia, Belarus and Kazakhstan, the constitutional control bodies influence the development of legal regulation in the sphere of the sovereignty of the people in various ways, in particular, the identified general rules of behavior formed in their decisions are implemented through the legislator.

At the same time, the main result is the introduction of legal positions of the constitutional control body into the national legal system in the following ways: amending the current legislation, adopting new laws with the abolition of existing ones, adjusting the normative legal act before its entry into force. Besides, the activities of the constitutional control bodies of Russia, Belarus and Kazakhstan influence the unification of the enforcement mechanism, since the constitutionalization of legislation and the stability of decisions make it possible to ensure the unity of the law enforcement practice.

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