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Interpretation of the Constitution and of Law-Transforming Principles within Activity of Courts and the Agency of Constitutional Control in the Republic of Kazakhstan

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Abstract:

The article reveals some aspects of the system of Kazakhstan legislation and its approaches to definition of the notion, taking into account the law-making explanation of norms of the Constitution by the Constitutional Council.

Key Words: *legal norm, law-making, law enforcement, regulatory decisions, Constitutional Council*

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Introduction

The issues of law-making and law-transformation within the process of interpretation is "regarded as one of the most problematic issues of juridical science and practice. According to classical theory of separation of powers, the court and other law enforcement authorities shall not make law, their role is reduced to usage of established or state ordered rules. Proponents of this theory substantiate impossibility and maleficence of judicial law-making by the fact that it houses possibilities for abuse of power and stray from principle of legality during delivering certain judgments. Secondly, according to opponents of judicial law-making, the law should appear definitive and clear, as without this the law is non-negotiable"[4]. Recognizing existence of positive aspects in this theory, it is worth to be noted that it is possible to speak about definitive and clear character of norms of law – including constitutional ones – only from the point of view of relativity and conditionality taking into account abstractness of legal regulations. In this regard, P.I. Kozubra correctly mentioned that "if legal regulations were ideally accurate reflection of reality in all its complexity and specificity, they would not give any regulating effect. It is only approximate relevance of legal norms to objective reality (hence, partial non-conformity with it and certain independence of it) that makes it possible for them to be applied to a very broad jural relations and fulfil their social functions"[5]. Therefore, the more "abstract the legal norm is, the more relations and real-life situations it comprises. At the same time, such situation generates a need for interpretation of legal norms aimed at decreasing of their abstractness, at reducing them to a form necessary for direct usage and realisation"[6].

A. A Need for Creation of Abstract Legal Norms

In his days Hegel said following to the matter of judicial law-making within the process of legal norms interpretation, stressing that "nothing changes the fact that the law itself does not settle these *ultimate decisions* required by actual life; it leaves them instead to the judge's discretion, merely limiting him by a maximum and minimum. But these maximum and minimum are themselves only round numbers once more. Therefore it does not exempt the judge from making a finite, purely positive decision since on the contrary such a decision is still left to him by the necessities of the case"[7]. This conclusion is true as "experience of law-making and law enforcement practice reveals that the legislator aims to more completely regulate any given social relations within the law. However, wherein certain parties of social relations objectively deny their strict and detailed regulation, the legislator regulates such relations by establishment of general abstract norms of law. At this the legislator in advance

[4]Alimbekov M.T. (2009), "Legal Judgement and its Role in Perfection of Civil Legislation", Pravovedenie Journal, No4, p. 6.
[5] Kozubra P.I. (1964), "Socialist Law and Public Conscience", Moscow, p. 137-138.
[6] Abdrasulov E.B. (2002), "Interpretation of the Law and Constitutional Norms: Theory, Practice, Procedure', Almaty, p.52
[7] Hegel G. (1934), "Elements of the Philosophy of Right. Writings", Moscow-St. Petersburg, v.7. p.235.

counts on specification of the latter in the process of enforcement knowing that this specification shall be done within the limits of initial norms"[8]. This statement is also supported by Hegel: "a requirement to a law is that it should be absolutely finished, and incapable of any definitions on the form of speculations on the content of regulation is absolutely wrong and rests upon a misunderstanding of the nature of such finite objects as positive law, whose so-called perfection consists simply in a perennial approximation"[9].

During contemporary history this Hegel's idea was evolved by foreign scholars who also supported the need for legislative interpretation in view of abstractness of law presentation: "For the rule is made up of a series of words, a nexus of linguistic symbols, every norm of law has an ability of expansion. Misunderstanding of nature of a language and perceiving words and something having fixed content, the law enforcers often do not notice hidden work they perform to norms which lies in their reformulation"[10].

As to the difficulty of issuing of "gap-less" perfect (from the point of view of determinancy) legal norms, during the Soviet period scholars pointed out that "even though a thought and a word, a judgement and proposition, a norm of law and proposition are inseparably united by their form and content, but their content is not equal to their [essence]. A person who can speak his language knows the usage of certain words, but he cannot know all the possible circumstances in which a word may be used. Also, a person cannot know even the limits of possibilities of a word use, as it is the peculiarity of a language that it presents unlimited possibilities"[11].

Thus, it should be noted that issuing of statutory wording with high level of abstractness is an objectively conditioned phenomenon, as by doing so it is possible to provide legal regulation for relatively wide range of social relations and subjects of legal relations. However, such state of things requires specification of the law at the level of law enforcement: "Enforcing the law, a subject usually logically develops previously formulated norms along with application of new terms, definitions, methods of comparison and opposition etc. I.e., such intellectual operation which introduce something new to understanding of the issue under interest. Without this novelty aspect any analysis, commentation and reasoning are meaningless. Thus, the enforcement (interpretation) of law bears an element of new understanding of

[8] Abdrasulov E.B. (2002), "Interpretation of the Law and Constitutional Norms: Theory, Practice, Procedure", Almaty, p.53.

[9] Hegel G. (1934), "Elements of the Philosophy of Right. Writings", Moscow-St. Petersburg, v.7. p.237.

[10]See. Karl N. Llevelin (1988), "The Case law system in Amerika", Columbia law review, Vol.88 No.5. P.1007. Quotation from work of S.V. Lozovskaya "About Judicial Lawmaking". Siberian Law Herald Journal. 2004. No.1.

[11] See: Cherdantsev A.F. (1979), "Interpretation of Soviet Law", Moscow, p.8.; Zvyagintsev V.A. (1971), "Language and Social Practice", Moscow, p. 17.

effective law or its understanding in connection to a certain fact of group of facts, which constitutes the legal practice"[12].

B. Origin of Legal Provisions

Studying the institute of legal provisions, V.V. Lazarev pointed out that "legal provisions are general orders from law enforcement authorities, which most clearly represent legislative will and serve as a relatively independent means of subnormal legal impact at subjects of social relations"[13].

The term "legal provision" is inseparably related to the notion of "legal opinion". However, this relation does not bespeak equality of compared terms. They may be regarded as a union of form and content, where legal provision is a form and legal opinion is content. Taking into account that legal opinion of courts and constitutional control agencies is a process of "identification of those numerous potential opportunities, those juridically reach 'layers' which can be contained in constitutional provisions in concentrated form" or "a fragment of statement of reasons of final decision of court or constitutional control agency, associated with its final conclusion and representing apprehension of constitutional provision", we may say that the formalisation of legal opinion, its objectifying is done through establishment of *legal provisions* having characteristics of legal norms. *Legal opinion*, presented in statement of reasons, is objectified and realised through legal determinations in its operative part as a *legal provision.* Here it is positioned as statutory standard of adequate understanding of the content of constitutional norms, having regulating function and sufficient characteristics of standardization and generally binding nature.

C. Law-making within the Activity of Court and Regulating Agencies

To summarise all above said, it should be noted that "taking into account existence of law-making functions not only in legislative branch, at present it would be *more appropriate and efficient to talk not about legitimacy or non-legitimacy* of law-making by court or other law enforcement authorities (as this right-conferring fact shall inevitably be transformed into the act of law), *but about the nature of these functions, forms of realisation of such type of law-making and its limits, about correlation of extraparliamentary law-making to parliamentary and negotiated"*[14]. Taking into account that legislator often has to formulate norms quite unequivocally, to introduce contextual and evaluating notions, Kazakhstan practice of constitutional control goes deeper generating more definite, specific formulations, as while there is no problem of understanding and administering of constitutional norm and the question of their determinacy does not arise and only when a question about the content of a constitutional norm comes before the *Constitutional Council of the Republic of Kazakhstan*, the final content of the constitutional norm is found out. If

[12]Voplenko N.N. (1976), "Official Interpretation of Norms of Law", Moscow, p.33.
[13] See: Lazarev V.V. (1976), "Legal provisions: definition, origin and role in the mechanism of legal impact", Pravovedenie Journal, No. 6. p. 5.
[14] See Marchenko M.N. (2008), "Judicial Legislation and Magisterial Law", Moscow, p. 418.

out of different possible interpretations of a constitutional norm one is taken as correct and fixed in a regulatory decision of the *Constitutional Council of the Republic of Kazakhstan*, it becomes a legal provision included to the law. However, in all independence of members of the *Constitutional Council of the Republic of Kazakhstan*, they should not rely on their subjective feeling. The spirit of current public order in general, as well as its principles represented in the Fundamental Law, should be the basis for their decisions.

D. Law-making in the Practice of the Constitutional Council of the Republic of Kazakhstan in Interpretation of the Constitution

One of examples of the *Constitutional Council of the Republic of Kazakhstan creating a legal provision* (thereby participating in the process of law-making and law-transformation) is the Regulatory Decision of the *Constitutional Council of the Republic of Kazakhstan* of March 6, 2013 No. 1 "On Official Interpretation of the Norms of Para. 8 of Article 62 and Para. 1 of Article 83 of the Constitution of the Republic of Kazakhstan". The Constitutional Council of RK through specification and detalization of a norm of the Constitution clarified its content, as according to the statement of reasons of the Regulatory Decision "the Constitution of the Republic of Kazakhstan does not disclose the content of notions "other normative legal acts" and "other legal acts". Meaning and content of the para. 8 of the Article 62 and para. 1 of the Article 83 of the Constitution, which used these notions, cannot be explained in isolation from several others constitutional provisions related to the subject of the statement under consideration". This means that in order to provide efficient legal regulation of corresponding spheres of public relations it was necessary to specify constitutional norms, and the Constitutional Council established it, therewith extending the subject of legal regulation of a special law and stipulating that it may include other issues of law-making and law-enforcement activity of state agencies and officials, including the issues of regulation of the procedure of drafting and adoption of non-regulatory legal acts[15].

It is necessary to fully accept para. 1 of the operative part of the Regulatory Decision, which through right-conferring concretization clears the meaning of notions "other normative legal acts" and "other legal acts".

However, it is interesting that simple issues known from the common law concerning the fact that legal acts are an aggregate of all juridical acts of regulatory and individual legal nature issued by the state or nonstate authorities as direct delegated powers or in relation to the competence mediately implied by functions of given nonstate authorities and institutions, caused certain complications for the subject of statement as to their meaning.

[15] See Regulatory Decision of the Constitutional Council of the Republic of Kazakhstan of March 6, 2013 No. 1 "On Official Interpretation of the Norms of Para. 8 of Article 62 and Para. 1 of Article 83 of the Constitution of the Republic of Kazakhstan." //http://constcouncil.kz/rus/resheniya/?cid=11&rid=872

1. *Preliminary Points of Law as to the Activity of the Constitutional Council of the Republic of Kazakhstan*

Next aspect we would like to pay attention to is problems of clarification, specification and detalization of the law which the Constitutional Council of the Republic of Kazakhstan faces upon making its decisions, even though it is not a direct subject of official normative interpretation of the law. In earlier works we presented good examples of law-making specification of the law by the Constitutional Council of RK, which increased efficiency of legal regulation in general[16].

In this work we are going to bring up only the event when, according to our opinion, the Constitutional Council should have not only cited the articles of the law in order to substantiate its position, but also expressed its opinion on those gaps and defects which may be present in the law, as well as give appropriate recommendation for their elimination. Thus, the abovementioned Decision of the Constitutional Council of the Republic of Kazakhstan cites para. 4 of the Article 2 of the Law of the Republic of Kazakhstan dated 24 March 1998, No. 213-I "On Regulatory Legal Acts": "This law shall not regulate the procedure of development, presentation, adoption, enforcement, action, publication, amendment, supplementation and termination of regulatory acts, adopted in accordance with the legislation, but not being regulatory legal acts and having the effect of realising rights and enforcing laws (paragraph 4 Article 2 of the Law)."

Literal interpretation of this norm of the Law of the Republic of Kazakhstan dated 24 March 1998 No. 213-I "On Regulatory Legal Acts"[17] destroys, in our opinion, all the juridical doctrine in this sphere and produces negative influence on legal practice, causing confusion to understanding of necessary terms and notions. Literal interpretation results into, firstly, the fact that regulatory acts can be legal and nonlegal. This is not possible, as absence of legal aspect within a regulatory act takes it out of state-legal framework and deprives its realisation of state influence when necessary.

Secondly, according to the norm under consideration, the difference of 'nonlegal' regulatory acts of legal ones is that the latter are passed at a referendum or by a competent authority or a state official and stipulate legal norms, change, abolish or suspend their operation. And 'nonlegal' regulatory acts have, as it was found out, law-exercising and law-enforcing meaning.

At this several question arise: how does a fact that a regulatory act (however, nonlegal by its meaning) is not of regulatory (!) nature but law-enforcing is consistent with the

[16]See Abdrasulov E.B. Legal Opinions and Legal Provisions of the Constitutional Council of the Republic of Kazakhstan and their Role for Development of National Legislation. // http://www.zakon.kz/4558872-pravovye-pozicii-i-pravopolozhenija.html

[17]The Law of the Republic of Kazakhstan dated 24 March 1998, No. 213-I "On Regulatory Legal Acts" (with amendments and supplementations as of 04.07.2013) //http://online.zakon.kz/Document/?doc_id=1009108

juridical doctrine and other norms of the laws? Why then is it regulatory? And if regulatory acts have law-enforcing meaning, then what is the meaning of individual legal acts? Regulatory? Yes, according to the logic of the legislator. And do not the regulatory legal acts have law-exercising meaning? According to the content of the article, yes: only regulatory acts have this meaning. In our opinion, regulatory legal acts aimed at their realisation, i.e. enforcement, exercising, observation and usage. Without this there is no point in adoption of regulatory legal acts.

The definition of the legal act of government agencies and officials cited in analysed regulatory decision of the Constitutional Council of the Republic of Kazakhstan is stipulated in the Law of the Republic of Kazakhstan "On Regulatory Legal Acts"[18]. Here it is labelled the "act of individual application; a written official document of registered form designed for single use or limited in time by other means; applies to specified individuals, exercises and (or) realises rights and responsibilities of specified individuals established by the legislation. Individual legal acts are not included into the legislation of the Republic and do not belong to the regulatory legal acts (paragraphs 2, 3 of the Article 4 of the Law)"[19].

As we can see, within the system of Kazakhstan legislation there are two different approaches to definition of one and the same notion, even taking into account the law-making explanation of norms from the para. 8 Article 62 and para. 1 Article 83 of the Constitution by the Constitutional Council. On the one hand, "…the term 'legal act' by its content is broader than the notion of 'regulatory legal act', and the term 'other legal acts' used in the para. 1 of the Article 83 of the Constitution includes all the other acts of regulatory or other nature". On the other hand, the notion of a legal acts stipulated in the Law "On Regulatory Legal Acts" carries only its individual legal nature, which is entirely wrong both from the position of the doctrinal approach, consistency of the Kazakhstan legislation and from legal opinion of the Constitutional Council expressed in the operative part of the abovementioned Decision.

In our opinion, the Constitutional Council of the Republic of Kazakhstan, together with correct law-making specification of the norms of para. 8 of the Article 62 and para. 1 of the Article 83 of the Constitution, should have also pointed out inconsistencies, obvious flaws and divergence both in the Law "On Regulatory Legal Acts" and in the Law "On Administrative Procedures". From our point of view, the Constitutional Council has a right and must upon necessity explain the laws in relation

[18]The Law of the Republic of Kazakhstan dated 27 November 2000, No. 107- II "On Administrative Procedures" (with amendments and supplementations as of 03.07.2013) //http://online.zakon.kz/Document/?doc_id=1020750

[19]See Regulatory Decision of the Constitutional Council of the Republic of Kazakhstan of March 6, 2013 No. 1 "On Official Interpretation of the Norms of Para. 8 of Article 62 and Para. 1 of Article 83 of the Constitution of the Republic of Kazakhstan." //http://constcouncil.kz/rus/resheniya/?cid=11&rid=872

to the official interpretation of the Constitutional norms in the legal meaning corresponding to its content. At this, they should point out the ways to eliminate obvious flaws and gaps in the law, thus broadening the range of constitutional order and strengthening the Constitution.

2. *To the Problem of Formulation of the Second Question of the Prime Minister's Application for Official Interpretation of the para. 8 Article 62 and para. 1 Article 83 of the Constitution of the Republic of Kazakhstan*

Finally, we would like to draw attention to the second question of the Application of the Prime Minister of the Republic of Kazakhstan for official interpretation of the para. 8 of the Article 62 and para. 1 of the Article 83 of the Constitution of the Republic of Kazakhstan: "*Does the rule of paragraph 8 of the Article 62 of the Constitution of the Republic of Kazakhstan mean that the subject of a special law can be expressed in this norm of the Constitution only in relation to regulatory legal acts, or the scope of the subject of a special law can be expanded to include the rules regulating the order of development and adoption of legal acts that are not normative?"*[20].

The Constitutional Council of the Republic of Kazakhstan gave a comprehensive answer to this question. It was stipulated that "in accordance with paragraph 8 of the Article 62 of the Constitution of the Republic of Kazakhstan, the order of development, submission, discussion, enactment and publication of laws and other regulatory legal acts should be determined by a special law and regulations of the Parliament of the Republic of Kazakhstan and its Chambers. The Constitution does not limit the subject of legal regulation of the special law except for the order of development, presentation, discussion, enactment and publishing of legislative and other regulatory legal acts referred to in paragraph 8 of Article 62 of the Constitution. It may also include other issues of law-making and law-enforcement state agencies and officials, *including the regulation of the procedure of elaboration and adoption of legal acts that are not regulatory.* If necessary, the legislator may do so using powers granted by the Constitution*"*[21].

However, it is worth to clarify: was there a need for this question? As the framework of the law de-facto included norm regulating the procedure of development and adoption of new legal acts which are not regulatory. Several articles of the Civil Procedure Code and the Criminal Procedure Code of the Republic of Kazakhstan are a strong example of norms regulating the procedure for development and adoption of legal acts, but which are not regulatory. Thus, the Article 202 "Rulings Given During the Preliminary Inquiry", Article 207 "Formal Notice on Indictment", Article 278 "

[20]See Regulatory Decision of the Constitutional Council of the Republic of Kazakhstan of March 6, 2013 No. 1 "On Official Interpretation of the Norms of Para. 8 of Article 62 and Para. 1 of Article 83 of the Constitution of the Republic of Kazakhstan." //http://constcouncil.kz/rus/resheniya/?cid=11&rid=872
[21]Ibid.

Bill of Indictment", almost all the articles of the Chapter 44 "Sentencing" of the Criminal Procedure Code[22] contain the norms regulating the procedure for development and adoption of legal rights which are not regulatory, i.e. individual legal rights. Similar norms relating to the procedure of adoption and the content of individual legal norms, which are not regulatory by their nature but are included into the system of legal acts, are also contained in the Civil Procedure Code of the Republic of Kazakhstan[23]. It may be seen not only in the above-mentioned regulatory legal acts, as the legislator selectively (taking into account, when necessary, the importance of legal regulation of relations associated with adoption, content and execution of legal acts which are not normative) ensured their legal regimentation.

Conclusion

Above-mentioned examples (i.e. the presence of numerous legal norms, regulating the procedure of adoption, formalisation of content and publication of legal acts of non-regulatory nature in regulatory legal acts, regulating different types of public relations) certainly presuppose that upon necessity there might be a variant of adoption of a *special law regulating the procedure of development and adoption of legal acts which are not regulatory.*

Another question is if we should adopt a special general law stipulating the procedure of development and adoption of legal acts which are not regulatory? Probably, such law could be adopted for those areas of public relations which are crucial and associated with the rights, freedoms and interests of a person and a citizen. However, every area of relations is peculiar, which is illustrated by criminal legal and civil law relations: each of them needs special regulation in the sphere of adoption of law-enabling acts. Also, these relations are well regulated by existent legislation. Certainly, in this work we are not talking about technical norms, the specificity of which is quite different from legal norms regulating public relations.

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[22]Civil Procedure Code of the Republic of Kazakhstan (with amendments and supplementations as of 04.07.2013) //http://online.zakon.kz/Document/?doc_id=1008442#sub_id=2020000

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