A Comparison Between the Kazakhstan and Polish Judiciary after Change of Political Regime in 1989

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Abstract: The authors carried out a comparative analysis of the constitutional provisions on the judiciary of the Republics of Kazakhstan and Poland. In particular, the study examines the structure of the judicial systems of countries, judicial appointment, authority of judges, safe-conduct, the legal status of councils of the judiciary. The research points out the major similarities of the courts’ functioning in both countries. According to the authors, inclusion of Poland into European Union provides the citizens with more opportunities for legal remedy.

Keywords: Court · The judicial system · The judiciary · Constitution · Independence · Jurisdiction · Supreme Court

INTRODUCTION

In both countries, the judiciary is conceived traditionally as a third power and is regulated in the final parts of the constitutions [1]. In Poland, the issues addressed by it are located in a one chapter. In the Kazakhs fundamental law, there are two chapters to this point. The Constitutional Council is regulated in the separate 6th chapter, before the chapter, titled Courts and Justice. That chapter is next to the last, when we exclude the final chapter encompassing the final and transitional provisions, whilst in the Polish national charter, this is the 8th chapter, out of thirteen, including the temporary norms [2].

The judicial organs in Poland are clearly put aside from the other elements of the State structure. The art. 173 of the Polish national charter is categorical: “The courts and tribunals shall constitute a separate power and shall be independent of other powers”. There is not such a provision in the Constitution of Kazakhstan. Instead of that, the art. 3 al. 4 determines that the State power in the Republic “is unique, carried out … in conformity with the principle of its division on the legislative, executive and judicial branches and in the interaction between them”.

In the Polish Constitution, the judicial organs are thoroughly enumerated. The art. 175 defines that the administration of justice in the Republic of Poland is implemented by the Supreme Court, the common, administrative and military courts and adds that the extraordinary courts (or summary procedures) may be established during a time of war. The Constitution of Kazakhstan lies down that the courts of the Republic are the Supreme Court, as well as the “local and other courts of the Republic, established by the law”. As for the so-called expedite or summary justice the Kazakhstan national charter is rigorous. The setting up of the special and extraordinary courts-under whatever name-is inadmissible.

Another major difference between the Polish and Kazakhstan judiciary concerns is the public prosecutor’s office. The Polish national charter mentions only two times the functionaries of this office. The art. 103 para. 2 says that “no …, public prosecutor, … shall exercise the mandate of a Deputy”, while the 191 para. 1 authorizes the General Attorney, to make the application to the Constitutional Tribunal regarding matters specified in the art. 188 of the national charter. The Constitution of Kazakhstan, on the contrary, has a large article of four paragraphs, detailing the activities of the Office of a Public Prosecutor.

Main Part: Structure of the judiciary in Poland and in Kazakhstan. In Poland the judiciary power belongs to the courts and tribunals. This is the main division within the judiciary. There are only two tribunals: constitutional and impeachment [3]. As for the courts, the constitution enumerates their following five categories: the Supreme Court, common, administrative, military and extraordinary courts (the latter’s, only during a time of war). While
regulating its third category, the Constitution names the Chief Administrative Court and its lower instance courts. Under the Constitution of Kazakhstan you cannot say exactly which courts and how many genres of them may exist in the Republic. The fundamental law of the country mentions by name only the Supreme Court of the Republic. The other judicial institutions are stipulated generally, the national charter saying that the “local and other courts of the Republic”, may be “established by a statute” [4]. In contrast with Poland, there is no possibility of introducing “any special or extraordinary courts”.

There are in Poland, three highest judicatures: the Supreme Court, Chief administrative Court and Constitutional Tribunal. They are independent from each other. Their sentences are final and peremptory. Although they are equal, the Constitutional Tribunal is a prevailing judicature. After ending the proceedings in the Supreme Court or in the Chief Administrative Court, the losing party has a possibility to continue its cause in the Constitutional Tribunal. Besides, there is an opportunity of pleading before the international institution, like the European Court of Human Rights in Strasbourg or the Court of Justice of the European Union, settled in Luxembourg. All this makes the Polish judiciary an extremely complex system.

In the Republic of Kazakhstan, the hierarchy of courts is not clearly constitutionally fixed. You must read the Constitutional Law on Judiciary System and the Status of Judges of the Republic of Kazakhstan of 25th December 2000 (with the following changes). According to it, there are military, financial, economical, administrative, juvenile “and other courts”. The local courts are of two types: lower courts in the area (oblastnyje) and the upper courts in the district (rajonnyje) [5].

Finally, we should point out the different constitutional approaches to the personal freedom of the person arrested or detained or in other words to the famous Habeas Corpus writ [6]. According to the art. 16 al. 2 of the Kazakhstan national charter, the “detention and the custody is allowed only in cases stipulated by statute and with the sanction of a court with a right of lodging a complain by an arrested person. Without the sanction of a court, a person may be detained for a period of no more then seventy-two hours”. In addition to it, the detainee, arrested or accused of committing a crime has the right to the assistance of a defense lawyer (defender) from the moment of its detention, custody or arraignment. If we compare these provisions with the appropriate article of the Polish Constitution the difference is striking.

The Polish constitutional norms proclaim that “anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation” and that this person “shall be informed, immediately and in a manner comprehensible to him of the reasons for detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. The detained person shall be set free unless a warrant of temporary arrest issued by a court, along with the specification of the charges laid, has been served on him within forty hours of the time of being given over to the court’s disposal”. The legal defense is available at all stages of such proceedings and when the individual has been unlawfully derived of liberty, he has a right to compensation.

The appointment and the independence of the judges. The Polish National Charter says that the “judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of Judiciary”. The President of the Supreme Court and the President of the Chief Administrative Court are appointed by the Head of State “for a 6-year term of office from amongst candidates proposed by the general assemblies of the judges of the respective institutions. The equivalent provisions of the Constitution of Kazakhstan proclaim “the presidents and the judges of the local and other courts are designated to the posts by the President of the Republic upon the recommendation of the Highest Judicial Council”. As to nomination of the president and of the judges of the Supreme Court of the Republic of Kazakhstan, the procedure is something different. They are elected by the Senate on the proposal of the Head of State, based on the recommendation of the Highest Judicial Council.

The ban of the multiple office holding, in the Constitution of Kazakhstan is more explicit than in the Polish. Its art. 79 al. 4 declares that the judgeship is incompatible with a deputy’s mandate, an employment in other paid functions, the realization of entrepreneurial action, or being a member of a managing or supervisory body of a commercial enterprise. The only exception is the teaching, research or other artistic activity. The Polish Constitution, with the same exception as in its Kazakhstan counterpart, provides for the incompatibility of the judgeship with the parliamentary mandate, the political party trade union membership and especially...
with the performing of public activities incompatible with the principles of independence of the courts and judges.

Both the Kazakhstani and Polish judges has the large constitutional guaranties of tenure. So, the judges, within the exercise of their office, are independent and subject only to the Constitution and statutes. The Constitution of Kazakhstan adds that whatever interference in the activity of a court during a dispensation of justice is inadmissible and entail liability under law. The judges are not accountable for the concrete judicial affaires. The powers of the judges may be terminated or suspended exclusively on the grounds laid down by statutes. A judge may not be arrested, subject to detention, measures of administrative punishment, imposed by a court of law, made criminally responsible without the consent of the Head of State, based on an advisory opinion of the Highest Judicial Council. In turn, the General Attorney, the President and the Justices of the Supreme Court arrested or subject to the same restrictions require the consent of the Senate, except for the cases of being apprehended on the scene of a crime or committing grave crimes.

The Polish national charter, while caring for the same aspects of the judge’s autonomy, does not contain the identical provisions. There are no special safeguards of immunity of the justices of the Supreme or of the Chief Administrative courts. The Polish basic law puts more accent-as it does its Kazaks’ counterpart-on the wage guarantees of the magistrates. The art. 80 of the Kazakhstani fundamental law states shortly that the financing of the courts, the providing of the judges with the dwelling shall be made at the expenses of the republican budget funds and shall secure the possibility of the whole and independent delivery of justice. The Polish national charter proclaims that “judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties”. As for the irremovability, the Polish constitutional norms are very detailed and touch upon many of its facets and principles: recall of a judge from office, suspension from it; removal to another bench or position against his will may only occur by virtue of a court judgment and the instances prescribed in statute; retirement only as a result of illness or infirmity with the vast opportunities of appealing; retirement with the whole indexed salary [7]; allocation to another court with full remuneration.

Competence and functioning. According to the art 76 of the Constitution of Kazakhstan, the judicial power shall be intended to protect the rights, freedom and legal interest of the citizens and organizations, to ensure the fulfillment of the Constitution, statutes, other normative juridical acts, as well as the international agreements of the Republic. The Polish national charter stipulates generally that the common courts shall implement the justice concerning all matters, save for those statutorily reserved to others courts and that the administrative courts shall control over the performance of public administration and also over the legality of resolutions of organs of local self-government and normative acts of territorial organs of government administration. The contrast is evident and in favor of the Polish concrete determination. The same can be said on the Kazakhstani constitutional provision stating that the judicial power shall be exercised on behalf of the Republic. The Polish analogue regulation states simply that the courts and tribunals shall pronounce judgments in the name of the Republic.

The Kazakhstan national charter contains a set of ten guidelines to be observed by the judges and the declaration that the judgments of courts shall have an obligatory force on the entire territory of the Republic. While stating, like the Polish Constitution, that the Supreme Court exercises the supervision over the activities of other common courts, the Kazakhstan national charter adds imprudently that this organ “provides with the interpretations on the issues of judicial practice”. The Polish Constitution’s regulation of the courts functioning is more modest. It orders that the court proceedings should have at least two stages and that a statute shall specify the scope of citizen’s participation in the administration of justice. The first provision is lacking in the Kazakhstan national charter, while the second one is less unambiguous than the Polish, for it provides that “in cases, stipulated by statute, criminal procedure shall be carried out with the participation of jurymen”.

Council of judiciary. Both constitutional texts have rules on the council of judiciary which in Kazakhstan is called “Highest” and in Poland “National”. The constitutional provisions of the first country are very scant. The fundamental law refers to it in two articles. There is even impossible to know how many members has this body, because the art. 82 al. 4 says only that Highest Judicial Council is made up of the Chairman and “of the other persons, nominated by the Head of State” [8]. The Council gives its recommendation during the process of election of the Chairperson and the Justices of the Supreme Court and of nomination of the chairpersons and judges of all inferior (lower) courts of law of the country. The al. 5 of the cited article of the Kazakhstani
Constitution proclaims that the status and the organization of work of the Highest Judicial Council shall be determined by law.

The Polish constitutional provisions on the Council of Judiciary are a little bit more detailed and precise. There are four constitutional articles concerning this organ. The starting point is the art. 186 which states that the National Council of Judiciary shall safeguard the independence of courts and judges. The next article presents his composition. It comprises the President of the Supreme Court, the minister of Justice, the President of the Chief Administrative Court and an individual appointed by the Head of State, 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts and 4 members chosen by the Chamber of Deputies from amongst its deputies, 2 members chosen by the Senate from amongst its senators. In total 25 members. In contrast to the Kazakhstan counterpart, the Polish Council chooses by itself a chairperson and the two vice-chairmen.

The Poland’s constitutional regulation provides that the Council’s members term of office shall be four years. Like in Kazakhstan, the judges are appointed by the Head of State on the motion of the Council. However, contrary to the regulation of Kazakhstan, the Polish Senate is not involved in the nomination process. The art. 186 al. 2 of the Constitution provides for a very important competence of the Poland’s Council of the Judiciary. This organ might make application to the Constitutional Tribunal regarding the conformity to the Fundamental Law of normative acts to the extent to which they relate to the independence of courts and judges [9]. Only after this regulation, the art. 187 al. 4 defines the referral to the parliamentary legislation. It is a little better worded as his Kazakhstani equivalent. It provides that “the organizational structure, the scope of activity and procedures for work of the National Council of the judiciary, as well as the manner of choosing its members, shall be specified by statute” [8].

CONCLUSIONS

The contrast between the two judicial systems shows that the Polish Judiciary has more traits of independent power than of the Kazakhstan “system of justice”. This is apparent even in the Kazakhstani constitution’s chapter name, titled “Courts and Justice”, not the judiciary power. The general characterization of the Kazakhstani institution is also saying a lot. The third article of the national charter of that country speaks of the unified (uniform) state power and of the judicial branch in the interaction with the two other branches. In this respect the Polish text is talking only on the judicial power and of its rigid separation from the legislative and executive powers.

The Polish judiciary is clearly defined with its different elements, whilst the Constitution of Kazakhstan speaks only about the Supreme Court and the “local and other courts of the Republic established by law”. The Constitution of Kazakhstan imposes on the judges, when applying the law, ten principles. Although these principles are praiseworthy, its specification is inappropriate and even suspect. The Polish national charter says only (and also his Kazakhstani counterpart) that the judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

From the organizational point of view there are also some differences. The judiciary system of Kazakhstan encompasses the procurator’s office, while the Constitutional jurisdiction remains outside of it. The Polish constitutional regulation is low profile on this score. While it mentions the Attorney General, it is not attributing him a precise role or a domain (competence). The Constitutional Tribunal is included in Poland into separate judicial separate. It pronounces judgments, like the common courts, in the name of the Republic of Poland.

Last but not least. The Polish citizens have more possibilities of legal defense than the Kazakhstan nationals. Poland is fully integrated in the European system of safeguarding of fundamental rights. The Polish nationals have the opportunity of pleading before the European Court of Human Rights in Strasbourg and before the Court of Justice of the European Union in Luxembourg. The Kazakhstan citizens have not available such an intentional system of protection. The Customs Unions and other organizations to which the Kazakhstan is a member have not created up to now the equivalent judicial bodies. Besides, it should be remembered that Poland signed and ratified the Rome Statute of International Criminal Court, what is not fully the Kazakhstan’s case.

It would be pretentious to see in the Polish constitutional regulation of the judiciary the way by which the Kazakhstani evolution should proceed. However, it can be a pattern for its improvement, like certain norms of the Kazakhstan national charter may be the model for the Polish constitution-makers. If it would be done, the purpose of this article would be lived up to the authors’ expectations.
REFERENCES

1. We had chosen as the topic of that article the judicial power, inter alia, for its underestimated importance, always regarded as the third power. Therefore, we disagree, with the famous statement by A. Hamilton that the judiciary is the “least dangerous” branch of government. For that reason, we are sticking to the excellent book by R. I. Martin, The Most Dangerous Branch. How the Supreme Court of Canada Has Undermined Our Law and Our Democracy, McGill-Queen’s University Press 2003 and to the central thesis of the monography of K.J. Alter, The European Court’s Political Power. Selected Essays, Oxford University Press, 2009.

2. This last chapter of the Polish Constitution has now the historical value, because its provisions with stated times were fulfilled. This is not the case of Kazakhstan. A lot of provisions from the last 9th chapter has lasting validity, like the art. 91 al. 2 proclaiming that “The established by the Constitution the unitary character and the territorial integrity of the State, the form of government of the Republic cannot be changed”.

3. The Polish name of this organ is Trybunal Stanu. In the most widespread translation, it stands for the Tribunal of State. That expression in English is confusing. In Poland (and in other countries), there are not private tribunals or courts, although some kinds of peoples (popular) justice are known. This tribunal is elected by the parliament to try the high-ranking officials. That type of activity was popularized by the media all over the world as impeachment. For that reason, I consider the better name for the Polish peculiar institution as the Impeachment Tribunal. On the impeachment in the Anglo-American literature exist a huge number of publications. Amongst other, see R. Berger, Impeachment: The Constitutional Problems, Harvard University Press 1974; Ch L. Black, Impeachment: a Handbook, Yale University Press 1998 and M. J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis, University of Chicago Press 2000.


6. This privilege called also the “Great Writ” is a written judicial order to require a person holding a prisoner to demonstrate the legal basis for continuing detention or incarceration. W. Blackstone described it as “the glory of the English law”. Today, there is a lot of controversy about it, following the new security measures after the attacks of September 11, 2001. See the habeas corpus petition in connection with the Guantanamo Bay detainees, in E. Chemerinsky, The Conservative Assault on the Constitution, Simon and Schuster Paperbacks 2010, pp: 68-72.

7. The Polish judges are not going on pension. They keep not only the salary of current judges, but the status of a ‘judge on rest’. He or she may be called, in any moment, to work. His or her status is a sort of nomination for life, but without an obligation to be in office. Even the US Supreme Court justices do not have these privileges. According the Supreme Law of that country (Art. III, Section 1, Clause 1), a compensation which the judges receive for their services “shall not be diminished [only – KC and Sh S M] during their Continuance in Office”. Conf. the controversy about the forms of indirect or collateral diminishment of judicial salary. Conf. A. Vermeule, The Constitutional Rule of Official Compensation, Columbia Law Review, pp: 501.

8. The second constitutional article (44, point.20) repeats content of the art 82 al. 4 saying that the Highest Judicial Council is set up by the Head of State.

9. His attribution is reiterated-as in the Kazakhstan national charter-in the art. 188, defining the scope of activity of the Polish Constitutional Tribunal.

10. The art. 82 al. 5 of the Kazakhstan Constitution provides that the status and the organization of work of the Highest Judicial Council is determined by statute.