IMPACT OF CONSTITUTIONALIZATION ON THE LEGAL CULTURE, NATIONAL NORMS, AND INTERNATIONAL RELATIONS IN KAZAKHSTAN

a Abay Rakhmetulin, b Yermek Abdrassulov, c Aizhan Abdrassulova

ABSTRACT

Objective: The relevance of the studied issue lies in that the concept of constitutionalization is increasingly utilized in legal terminology and the spheres of state and international law. However, researchers have not yet developed a unified approach to the concept, as each scholar proposes examining constitutionalization in the context of its impact on specific aspects of legal reality. The study thus aims to explore the effect of constitutionalization not only on the system of national law but also on the national legal system in the broad sense.

Methods: The research goal is achieved through an analysis of scientific literature, legal sources, and legislative documents. Comparative legal and system structural methods are used to understand the relationship between academic theories and the practical application of constitutionalization.

Results: The analysis shows that constitutionalization is a multifaceted process that assumes the integration of constitutional norms and principles into various aspects of legal systems. The study emphasizes the influence of constitutionalization on national legal systems, including such aspects as legal culture, judicial interpretation, and the conformity of legislation with constitutional values.

Conclusion: The concept of constitutionalization is concluded to play a decisive part in the development of modern legal science. The study stresses the importance of regulating legal norms in line with constitutional principles, both nationally and internationally, to ensure effective legal regulation.

Keywords: constitutionalization, legal system, international law, national law, judicial interpretation.

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RESUMO

Objetivo: A relevância do tema estudado reside no fato de o conceito de constitucionalização ser cada vez mais utilizado na terminologia jurídica e nas esferas do direito estatal e internacional. No entanto, os investigadores ainda não desenvolveram uma abordagem unificada do conceito, pois cada estudioso propõe examinar a constitucionalização no contexto do seu impacto em aspectos específicos da realidade jurídica. O estudo visa, assim, explorar o efeito da constitucionalização não apenas no sistema de direito nacional, mas também no sistema jurídico nacional em sentido lato.

Métodos: O objetivo da pesquisa é alcançado por meio da análise da literatura científica, fontes legais e documentos legislativos. Métodos comparativos jurídicos e estruturais de sistemas são utilizados para compreender a relação entre as teorias acadêmicas e a aplicação prática da constitucionalização.

Resultados: A análise mostra que a constitucionalização é um processo multifacetado que pressupõe a integração das normas e princípios constitucionais em vários aspectos dos sistemas jurídicos. O estudo enfatiza a influência da constitucionalização nos sistemas jurídicos nacionais, incluindo aspectos como a cultura jurídica, a interpretação judicial e a conformidade da legislação com os valores constitucionais.

Conclusão: Conclui-se que o conceito de constitucionalização desempenha um papel decisivo no desenvolvimento da ciência jurídica moderna. O estudo sublinha a importância de regulamentar as normas jurídicas de acordo com os princípios constitucionais, tanto a nível nacional como internacional, para garantir uma regulamentação jurídica eficaz.

Palavras-chave: constitucionalização, sistema legal, lei internacional, lei nacional, interpretação judicial.

1 INTRODUCTION

The issues of constitutionalization of the legal system relate to the general problem of constitutional law enforcement. The latter implies observance and fulfillment of fundamental legal rules and values in the political, economic, social, and cultural spheres of public life (Dörr, 2015).

In turn, the concept of constitutional order relates to the idea of the rule of law, which includes such elements as the presence of an effective constitution that outlines the limits of state power, secures the principle of separation of powers and the system of checks and balances, establishes mechanisms for effective human rights protection, creates and realizes a harmonized electoral system, and promotes the emergence and development of civil society.

The rule of law implies ensuring the equality of all citizens and the development of society and the state through laws that bring about social well-being, peace, and
security for the people and ensure the inadmissibility of public and private abuse of power, etc.

It can be concluded that the rule of law contributes to social welfare and justice, puts a stop to corruption, and ensures that "all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes" (Bhatia, 2020).

We view the relationship between the rule of law and constitutional order as the unity of content and form whereby the principles of the rule of law are given a constitutional status. However, the constitution reflecting the principles of the rule of law does not guarantee that these principles will automatically be realized in daily life. A process of constitutionalization of the entire legal system is needed to make the rule of law work effectively and without fail.

Some authors consider constitutionalization a process that determines the hierarchy of normative legal texts, laws, and other sources of law. The established hierarchy ensures effective legal regulation by connecting all subjects and groups in society under common legal regulation, enshrining the fundamental norms characteristic for all legal communities (Da Silva, 2020). In our view, this definition discloses only a small aspect of the functional usefulness and necessity of constitutionalization.

A similar opinion is held by O.S. Guzeeva (2020, p. 221), who believes that legal culture and legal consciousness are not directly related to, for example, criminal law, meaning that this sphere cannot be constitutionalized in view of such factors of legal reality as legal consciousness and legal culture. Other researchers have a very broad perception of constitutionalization, arguing that it should cover all socially important processes (Khasenov, 2020).

In the past, G. Brown rightly noted the difficulty of grasping the term "constitutionalization" due to the multitude of available definitions with different meanings and semantic content. Brown (2012) believes that it was also unclear how the process of constitutionalization is carried out since there is no unity in the developed normative dimensions of the constitutionalization procedure itself.

The current constitutionalization doctrine is also largely inconsistent, lacking a clear systematic approach, especially considering the theoretical concept of constitutionalization and its implementation in the Republic of Kazakhstan.
In this connection, the present study aims to analyze the meaning and role of the constitutionalization process in enforcing the rule of law and constitutional order considering the achievements of scientific doctrine and legal practice in Kazakhstan.

The study poses several research questions:
- What are the object and subject of constitutionalization and what is its primary subject?
- What phenomena, life circumstances, and social institutions need to be subjected to constitutionalization processes?
- What measures need to be taken to enshrine the ideas of constitutionalization in legal practice?

2 THEORETICAL FRAMEWORK

To conduct a comprehensive analysis of the institution of constitutionalization in national and international law, we examined research devoted to this matter.

Overall, the literature on the legal nature of constitutionalization and the processes in its implementation is vast and diverse. The research topic is largely addressed within the framework of the theory of constitutionalism (Suma, 2021), which shows a rise in the constitutional phenomena of constitutionalization and quasi-constitutional attitudes and practices (Bongiovanni, 2014), as well as the theory of the rule of law, which "is significant for a Europe-wide constitutionalization at a multinational level and strengthens the current tendency of constitutional law convergence" (Rainer, 2020, p. 22). The constitutionalism theory also speaks of a direct impact of constitutional norms, given that these norms are the most vital source and means of ensuring the unity and equality of the constitutional normative model, which is comprised of the system of positive law and supra-positive values (Bondar & Dzhagarian, 2018; Konshakov, 2014; Mayer et al., 2012).

Constitutionalization is also researched with respect to the fact that the content of constitutional norms on human and civil rights and freedoms is not only reflected by current legislation but produces a direct decisive influence of micro-processes in law, as well as court rulings (Pokol, 2002).

In some studies, constitutionalization is examined in the context of interpretation and the use of the analogy of law by constitutional courts, which "extract the deep legal meaning embedded in a constitutional norm and adapt its text to specific social and legal
phenomena” (Sapargaliev, 2021, p. 257) or translate their legal positions onto life circumstances regulated by current legislation by means of constitutional law analogy (Kruss, 2018a).

Numerous studies address the constitutionalization of the status of the highest state authorities and officials in the system of separation of powers (Drobot, 2021; Kravets, 2002).

Although many theoretical issues of constitutionalization are analyzed by researchers, these issues are often touched upon in the framework of other related matters of legal science. It can be summarized that the issues of constitutionalization are still not studied in full and the provisions put forward with respect to the studied object tend to be fragmented and often ambiguous.

3 METHODOLOGY

For a quality investigation of the legal system of constitutionalization, we conducted an extended review of literature about the issues of establishing constitutional legal order, the rule of law, constitutionalism, and constitutionalization. In addition, the study included an analysis of Kazakh and foreign legislation. The primary sources of information were scientific articles, monographs, periodicals, and online resources, as well as the legal base of the official websites of the Republic of Kazakhstan.

The study utilized the comparative legal method to compare constitutionalization processes in Kazakhstan and other countries, as well as the system structural method to establish the relationship between the achievements of the scientific doctrine and the degree of its reflection in legislation and state legal practice.

4 RESULTS AND DISCUSSION

In our belief, the primary subject of constitutionalization is the legal system, both national and international. Herein we do not view the legal system in the narrow sense, unlike other researchers, who emphasize that the legal system encompasses the constitution and primary legislation (statutes), which is enacted by the law-making body established by the constitution; subordinate legislation, which is enacted by persons or bodies authorized to do so by primary legislation; customs applied by the courts based on traditional practices, and the principles or practices of civil, customary, Roman, religious, or other code of law (Blajer, 2013). In contrast to the above, we believe that sources of
law alone cannot cover all the content of the sphere of law, i.e., the legal system that includes both the state, legal culture, the system of operation of government bodies and public organizations, the system of legal relations, and the mechanism for the implementation of legal provisions and regulations. The national legal system is formed by all these categories in combination with the sources of law.

The second subject of constitutionalization is the international legal system. It may seem that constitutionalization can apply only to the national legal system, which is tied to the adopted constitution. However, it must be recognized that first, it is virtually impossible to draw a hard line between national and international law, because they cannot function in closed systems, given that national and international legal norms are interrelated and closely intertwined.

Second, the demand for constitutional norms and the experience of the constitutional regulation system appears when there is a process of active comprehension of many international legal phenomena from the point of constitutional legal traditions. This owes to the fact that the interpretation of international law and its norms starts to rely on constitutional doctrine.

Furthermore, in this relationship, it is not only international law that affects national legal systems. National constitutions have a reciprocal effect on international law, giving rise to inter-state interactions and a regulatory system for such interactions, as well as becoming a factor in the state's recognition of international legal norms and provisions. National constitutional norms must become the source norms for international law to be built on.

Therefore, the constitutionalization of international law can be considered only based on an analogy with national law. International law, like national law, has a constitutive document, i.e., a source that lays the foundation for it.

Whereas in national law, the document providing a normative basis for constitutionalization is the written or unwritten constitution, as well as constitutional laws that develop and detail its provisions, in international law it is the UN Charter. It may well be regarded as the basic document through which international law is constitutionalized. This conclusion is based on the fact that the UN Charter represents the basis of legal order and principles of the world order (Gabrielian & Karamalyan, 2020).
In both cases, constitutionalization refers to the work of public authorities and international organizations, and the system of legal provisions that are together subordinate to constitutional norms and provisions in the broad sense (Loughlin, 2010).

If we consider two types of legal systems, national and international, the subjects of constitutionalization, the objects will be the elements of legal systems. The list here will be vast, and each time it will be supplemented with object elements and sub-elements in the system. Thus, if the object of constitutionalization is the status of the highest state bodies and officials, its scope can expand and simultaneously narrow down: constitutionalization of the status of judges, of the status of members of the parliament, etc. Next, we can consider the constitutionalization of the system of selection and appointment of judges, the selection of deputies of the Kazakhstan Parliament, representatives of local authorities, etc.

The active subjects, or actors, of constitutionalization are the public bodies, officials, public unions, and scientific and educational institutions that, to the extent of their competence and powers, harmonize the norms of current legislation, law enforcement practice, and the legal conduct of all actors in legal relations with constitutional values, norms, and principles.

The main actors in constitutionalization include, first, the people as the source of power. According to the Constitution of the Republic of Kazakhstan, the people are the only source of power, insofar as they are the main active subjects of legislation. The people can exercise their power directly, through the expression of their will in a referendum, as well as by delegating their powers to state bodies (Zharbolova, 2015).

Through a referendum, the people of Kazakhstan as active subjects in constitutionalization can adopt the Constitution of Kazakhstan and constitutional and ordinary laws, make amendments and additions to the Constitution, and make other decisions important for the country.

The source of constitutionalization when amending and supplementing the Constitution are those norms of Kazakhstan’s Constitution that cannot be altered. These include a range of principles and provisions fundamental for the Republic: social harmony and political stability, economic development for the benefit of all people, Kazakh patriotism, and resolution of the most important issues of state life by democratic methods, including voting at the Republican referendum or in Parliament (Parliament of the Republic of Kazakhstan, 1995).
The President of Kazakhstan also acts as a primary active subject of constitutionalization. Addressing the people of Kazakhstan on the situation in the country and outlining the domestic and foreign policy of the country, the President sets the vector of constitutional and legislative development for the country. Furthermore, the President of Kazakhstan is an active subject of legislative initiative, along with members of the Parliament and the Government. Importantly, the President’s power to influence the law-making process is much greater than that of other subjects, as he can define the priority of draft laws review in the Parliament. Thus, the Parliament must first consider the draft projects specified by the President of Kazakhstan as a priority in two months.

Based on the recent constitutional reforms, the Parliament of Kazakhstan as another chief actor in constitutionalization adopted six big laws in 2022 concerning the establishment of the Constitutional Court of Kazakhstan and the constitutional status of the General Prosecutor's Office and the Ombudsman for Human Rights, as well as many issues as part of implementing the President’s messages of March 16, 2022. The latter includes amendments to the constitutional legislation regulating the electoral process and activities of the President of Kazakhstan, the Government of Kazakhstan, and the judicial system, as well as to the current legislation on property, land, budgetary, environmental, and other relations.

There are some shortcomings in this process. If we take for example the constitutionalization of the system of selection and appointment of judges, the Parliament should not merely ensure formal compliance of laws and by-laws with the Constitution of Kazakhstan. The concern here must be with the goal of legal regulation for this process, while the essence of this regulation is to secure the spirit of constitutional norms. Constitutional norms prescribe that the selection must result in the appointment of judges who would be independent of the executive and legislative branches of government in their decision-making and have the highest level of professional qualifications. For example, the constitutionalization of this sphere in Kazakhstan needs to provide such a tool of legal regulation as Appeals against the appointment and promotion of judges. In this respect, it is possible to draw on the experience of foreign countries. For instance, in the Federal Republic of Germany, applicants who believe that they, and not their competitor, should have been appointed to a relevant judicial position can apply for formal judicial review (Riedel, 2020).
The Government of Kazakhstan should also be considered an active subject in constitutionalization, because it is endowed with a wide range of constitutional powers in law-making, and the overwhelming majority of bills are developed by the Government of the Republic of Kazakhstan.

The practice of constitutionalization of Kazakhstan’s legal system is accumulated by the Constitutional Court of the Republic of Kazakhstan, which has adopted several important decisions on appeals of the objects established in the Constitution.

However, there are some rulings of the Constitutional Court that did not contribute to bridging the gap in legal regulation – the lack of opportunity for judges to appeal against the decisions of the Supreme Judicial Council to judicial bodies concerning their disciplinary liability or dismissal of judges based on the decisions of the Judicial Jury and the Commission on Quality of Justice under the Supreme Court of Kazakhstan. In our view, the constitutionalization of this process requires bringing these provisions in alignment with international experience, as well as Paragraph 2 of Article 13 of the Constitution, which stipulates the right of every person to judicial protection of their rights and freedoms (Parliament of the Republic of Kazakhstan, 1995). Regrettably, the Normative Resolution of the Constitutional Court of the Republic of Kazakhstan dated April 21, 2023 No. 10 establishes that due to the special procedure for the dismissal of judges, the procedure prescribed by the Constitutional Law on the Judiciary and the Law on the Supreme Judicial Council of the Republic of Kazakhstan for appealing the decisions of the Commission or the Judicial Jury to the Supreme Judicial Council does not infringe the right of judges to judicial protection enshrined in Article 13, paragraph 2 of the Constitution (Constitutional Court of the Republic of Kazakhstan, 2023).

The Supreme Court of Kazakhstan also participates in constitutionalization, ensuring the conformity of constitutional laws and ordinary laws of the provisions of normative resolutions and cassation decisions of the Supreme Court of Kazakhstan with the norms of the Constitution. For example, on December 22, 2022, the Supreme Court adopted the Normative Resolution "On introducing amendments and additions to some regulatory resolutions of the Supreme Court of the Republic of Kazakhstan on criminal and criminal procedure legislation" (Supreme Court of the Republic of Kazakhstan, 2022).

The classification of active subjects in constitutionalization also includes auxiliary elements, to which we refer various ministries, departments, state institutions, local
bodies of state power and self-government, and scientific and educational organizations, which ensure the implementation of legal provisions based on the Constitution and constitutional laws of Kazakhstan (Nursaliyeva et al., 2023).

To summarize the obtained results, constitutionalization should be understood as a process provided by primary and auxiliary active subjects that consists of harmonizing the entire legal system of the state and the international legal system with constitutional imperatives in the broad sense and supra-positive values.

Our understanding of constitutionalization is consistent with the position of V.I. Kruss, who sees it as a process of improving the legal system of society. Under the legal system, he understands the totality of legal consciousness and the system of law and legal practice (Kruss, 2018b, p. 16). However, first, our study expands the number of elements in this subject, adding to them legal culture, behavior, and education. Second, our research focuses on the constitutionalization of the national legal system together with the constitutionalization of the system of international law.

This conclusion resonates with the opinion of A. Peters who considers the legal system as legal order and argues that the legal systems of individual countries in the EU and the legal system of the Union as a subject of international law that has many traits of an international institution are interrelated and intertwined in all respects. Furthermore, Peters’ views about constitutionalization virtually coincide with our position. The researcher warns about the identification of the subject of constitutionalization with the concept of the legal system in the German legal tradition. Herein, Peters (2013) considers legal order in a broad, overarching sense, referring to S. Romano (1975), implying not only a system of legal norms but also the force that drives these norms.

Proceeding from our findings, we suggest that the definition of constitutionalization of the national and international legal systems, as well as its attributes, principles, and methods of implementation, need to be enshrined by world countries in legal documents, for instance, in the international documents of the UN (the UN Charter). This measure is needed to unify the goals, objectives, limits, and methods of this important national and international legal process. In addition, it is important to first determine the vector of constitutionalization in the concept of legal policy or other program documents. Next, it is necessary to set the objectives of primary and auxiliary active subjects in the constitutionalization of the legal system.
Concerning the focus of our study, an example of this kind of practical work in Kazakhstan is the specification of constitutionalization stages proposed by I.N. Plotnikova. The researcher identifies the following stages, which align with our more detailed conclusions: reflection of the goals of constitutionalization in constitutional legal policy documents; embodiment of constitutional values in existing legislation; realization of the ideas of constitutionalism in the execution, observance, and application of legal prescriptions; constitutionalization of legal consciousness and legal culture (Plotnikova, 2021).

Although we fully agree with the first three described stages of constitutionalization, we believe that the constitutionalization of legal consciousness and legal culture cannot be considered a separate stage, because it is a component of the constitutionalization process overall. The constitutionalization of legal consciousness and legal culture is vital both at the stage of developing the state’s legal policy, at the stage of legislative work, in implementing the legal prescriptions, and when providing legal education and upbringing. Currently, it is extremely important to ensure a high level of legal consciousness and legal culture of not only law-makers, but representatives of the judiciary and civil servants, whose work largely defines the quality of judicial decisions.

5 CONCLUSION

The conducted analysis of state legal practice of the constitutionalization of the legal system demonstrates that constitutionalization is of high importance in national and international law and is a prominent modern trend in legal science and practice. It should be recognized that both the concept of constitutionalization and the ideas of constitutionalism are largely abstract theories rather than effective imperatives since no sphere of legal reality can receive the necessary development without legal regulation.

Therefore, further scientific developments on the theory of constitutionalization of the legal system and proposals to improve practical ways to implement constitutional values in the life of society and the state will reinforce the principles of the rule of law and constitutional order for the sake of realizing the principles of sustainable development.

The first step toward implementing the ideas of constitutionalization in legal practice is to ensure that the program documents of the state and international organizations reflect the legal requirements of all actors. This will enable active subjects
in constitutionalization to work on the compliance of the legislative system and legal behavior with constitutional values each at their own level. Furthermore, this measure will accelerate the development of scientific ideas on the theory and practice of constitutionalization of the legal system. In turn, scientific advancements will provide for an effective practical constitutionalization of all aspects of the most important social relations, which the legal sphere is aimed at regulating.
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