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KAZAKHSTAN

COMMENT

**OF THE WORKING GROUP
ON THE REDISTRIBUTION OF POWERS
ON THE DRAFT AMENDMENTS
TO THE CONSTITUTION
OF THE REPUBLIC OF KAZAKHSTAN**

Comment on the Draft of Amendments to the Constitution of the Republic of Kazakhstan

In order to implement the Order №140 of the President of the Republic of Kazakhstan of 11th January of current year a working group consisting of representatives of state bodies, deputies, judicial system, the Kazakhstan Union of Lawyers and academics, reviewed the proposals for the distribution of powers between branches of government.

A few dozen proposals were sent to working group for the noted issues, of great interest, by governmental and public institutions, research institutions and scientists.

As a result of their generalizations, the working group has formulated and submitted proposals to the President of the Republic on amendments to the Constitution. During preparation, the installation of the Head of State that the measures should be implemented within the framework of the presidential form of government, which has proven its effectiveness over the years, was taken into account. Democratic transformations in social and political life of Kazakhstan, economic reforms carried out in accordance with the requirements of the market economy, social harmony and political stability. The development of civil society institutions were especially linked with the introduction of the presidential system. Presidential form of government is quite common in the political system of foreign countries, many of which are democratic, developed, legal states.

Considering the special importance of the proposed innovations, on 25th January of current year, the President of the Republic of Kazakhstan addressed to the nation and issued submitted proposals for public discussion by providing each citizen of Kazakhstan, who is not indifferent to the fate of the country, with the right to speak about the proposals and to offer their solutions to modern problems.

The essence of the proposed draft law of constitutional amendments, which was published in the media, is as follows.

Strengthening of mechanisms of the protection of private property rights

Now Article 26 of the Constitution guarantees the right to private property of citizens of the Republic of Kazakhstan.

According to the paragraph 4 of Article 12 of the Basic Law, foreigners and stateless persons in the Republic shall enjoy rights and freedoms as well as bear responsibilities established for the citizens unless otherwise stipulated by the Constitution, laws and international treaties.

Chapter II of the Civil Code (General Part) guarantees the right of ownership to citizens of the Republic of Kazakhstan, citizens of foreign countries, as well as stateless persons.

In order to guarantee the property rights of foreigners and persons without citizenship, their equality, justice and the improvement of investment climate, it is proposed to replace the words "citizens of the Republic of Kazakhstan" by the word "everyone" in this constitutional norm.

A normative judgment №12 of 1st December 2003 of the Constitutional Council explained that the legal status of the individual in the Constitution differentiates between citizen of the Republic of Kazakhstan, "everyone", "all", "foreigners" and "stateless person". It should be understood that when the text of the Constitution states "everyone" and "all", it is meant as the citizens of the Republic, and the person, who does not have citizenship of the Republic.

The Working Group recommended consolidating the constitutional principle that the right to property is inviolable. The working group offered a norm which does not permit the adoption of laws and other legal acts, restricting or depriving the right of ownership of legally acquired property, unless otherwise stipulated by the Constitution. This keeps the provisions of paragraph 3 of this article that in exceptional cases the expropriation of property may be carried out for state needs, provided that there is a fair compensation, as well as the rules of paragraph 2 of Article 6 of the Constitution, which establishes «Property shall impose obligations, and its use must simultaneously benefit the society. Subjects and objects of ownership, the scope and limits of the rights of proprietors, and guarantees of their protection shall be determined by law».

The Constitutional Council has spoken out repeatedly on this issue. They were given a detailed interpretation of data of the constitutional norms.

We can say that the inclusion of this provision on the inviolability of property rights in the Constitution significantly strengthened guarantees of private property rights, which is the basis of the market economy, entrepreneurial activity, and to a certain extent will determine the content of other human rights.

Enhancing the role of the Parliament in general and the Majilis of the Parliament in particular

It is proposed to do this by expanding the role of the Majilis of the Parliament in the formation of the Government, as well as the strengthening of supervisory powers of the Parliament and its Chambers in the activities of the Government and members of the Government.

In his special speech, the President said that we took that step in order to ensure that all branches of government worked effectively and responsibly, to create the appropriate balances and counterweights between them.

The current procedure for the appointment of the Prime Minister was proposed to retain. According to paragraph 3) of Article 44 of the Constitution the President of the Republic after consultations of the political parties fractions represented in the Majilis of the Parliament, submit for consideration to the Majilis for consent a candidacy of the Prime Minister of the Republic; appoint a Prime Minister of the Republic with the consent of the Majilis of the Parliament.

Of course, proposals for radical change of the order, in particular, the appointment of the Prime Minister by Head of State on the proposal of the Majilis of the Parliament were also subject to review. However, the analysis showed that, in most countries, even in parliamentary republics, the initiative for the nomination and appointment of the Prime Minister is within the competence of the President. The president, of course, takes into account the party composition of Parliament. Otherwise their candidacy can be rejected by MPs.

In the formation of the composition of the Government and its structure it is proposed to strengthen the role of the Majilis of the Parliament, establishing the following order: Prime Minister makes presentation to Head of State on the structure of the candidate members of the Government, after consultation with the Majilis of the Parliament. The same procedure is proposed for the dismissal of members of the Government from office, upon the presentation of Prime Minister, after consultation with the Majilis. An exception is made for the ministers of foreign affairs and defenses, appointed and dismissed by the President independently. The procedure for such consultation is required, apparently, to be determined in the

constitutional laws (about the Parliament and the status of its deputies, the Government, and others.).

Novelty establishes the Government resigns its powers to the newly elected President of the Republic. This is logical, when the Government is formed, together with the political forces represented in the Majilis. It does not follow that it is now the Head of State stays away. He retains the right on his own initiative to adopt a decision to terminate the powers of the Government (Article 70, paragraph 7, of the Constitution).

Strengthening mechanisms of subordination and accountability of the Government to the Parliament and its Chambers serves to increase the efficiency of state power branches.

To this end, it suggested to establish that the Government is accountable in its activity to the President, the Majilis of the Parliament and the Parliament as a whole.

The Prime Minister shall be obliged to report on the main directions of the Government activity and its important decisions not only to the President but also, to the Majilis of the Parliament.

The Houses of Parliament are granted the right to take an appeal to the President of the Republic on the dismissal of the minister in the case of non-fulfillment of laws, on the basis of the report hearing the member of the Government by a majority of not less than two thirds of the total number of deputies. In this case, the Head of State dismisses the member of the Government.

Distribution of some of the powers of the President between the Government and the Parliament

The Government is proposed to transfer the following powers of the Head of State: approval of the state program, a unified system of financing and labor payment for all employees of state bodies, financed by the state budget, which will be implemented by the Government in consultation with the Head of State; education, the elimination of and reorganization of central executive bodies, which are not encompassed by the Government, and the appointment and dismissal of their heads.

It is recommended to abolish the right of the Head of State to cancel or suspend the acts of the Government and the Prime Minister. At the same time, the President of the Republic is proposed to give authority for the protection of the rights and freedoms of man and citizen, national security, sovereignty and integrity of the state, direct appeals to the Constitutional Council on the review a law or other legal act, which entered into force, including a governmental, for compliance with the Constitution.

The project provides the exclusion of the following legislative powers of the President:

- To charge the Government on the introduction of the draft law in the Majilis of the Parliament (the President retains the right of legislative initiative);

- To issue laws or decrees having the force of law;

- For the implementation of legislative powers in the case of delegating them to him by Parliament. At the same time, the right to determine priority consideration of draft laws, which means that they must be taken on a priority basis during the current session of Parliament shall retain with the President of the Republic.

The right of the Head of State to preside over meetings of the Government on especially important issues remains, but with a reservation that "where appropriate".

For the President, under the new conditions, the priorities will be the strategic functions, the role of supreme arbiter in the relations between the branches of government, foreign policy, national security, defense capability of our country.

Clarification of the constitutional framework of the judicial system and the prosecutor's office

In paragraph 3 of Article 79 of the Constitution it is proposed to establish that the requirements of judges of the courts are determined by the requirements of constitutional law.

A detailed presentation of requirements for judges in the text of the Constitution is not consistent with modern realities and practical needs. Therefore it is necessary to set a flexible rule.

The new edition of Article 81 of the Basic Law requires clarification of the functions of the Supreme Court - instead of the provisions on supervision over the activities of local and other courts it is proposed to identify that the Supreme Court in the cases stipulated by law considers court cases related to its jurisdiction.

The proposed edition of Article 83 of the Constitution sets out that the prosecutor's office shall exercise the highest supervision over the observance of law stipulated by law limits and forms, as well as clearly stating that it carries out on behalf of the State criminal prosecution.

Thus, more clearly delineated the contours of public prosecutor's supervision, which limits will be determined by law. This makes it possible to adjust the amount of authority the prosecutor's office without making every time the amendments to the Constitution.

The proposed approach can be appeared in other countries, even in those in which there is still a so-called general prosecutor's supervision. The Constitution of Russia, for example, stipulates that the powers, organization and functioning of the Prosecutor's Office of the Russian Federation shall be determined by federal law (Article 129).

Kazakhstan is not yet on the way to the establishment of a European Public Prosecutor's model, such as the precept of criminal prosecutions, as a rule. Moreover there is consensus in Europe on this issue.

Committee of Ministers of Council of Europe has recently adopted a recommendation CM / Rec (2012) 11 on the role of public prosecutor outside the criminal justice system, which points out that where the national legal system, prosecutors have responsibilities and powers outside the criminal justice system, their tasks should be to represent the general or public interest, to protect the rights and fundamental freedoms and to support the rule of law.

However, a new version of Article 83 of the Constitution of our country can be considered as another step to optimize prosecutor's office, which increasingly borrows from European practice, as evidenced by the key role of the prosecutor in the pretrial investigation according to the current Code of Criminal Procedure.

All these measures help to remove problems periodically arising in the modernization of law enforcement, as well as to create a constitutional basis for the deepening of reforms.

Further improvement of the legal framework for the activities of the local administration and local government

Article 86 of the Constitution is proposed to make a new requirement according to which the powers of a Maslikh at shall be terminated ahead of time by the President of the Republic after consultation with the Prime Minister and Chairpersons of the Chamber of Parliament. This means that when making such decisions there are elements of collegiality, which is intended to ensure its legitimacy and relevance.

The current procedure for the appointment of akims of regions, cities and the capital are prompted to save.

However, the procedure for appointment or election to the position of akims of other administrative-territorial units is proposed to determine by the law, but not by a legal act of the Head of State, which implies in a certain extent, the transmission of this function to Parliament.

Strengthening the protection of the constitutional order mechanisms

Giving the current challenges, it is proposed to complete the list of constitutional values established by Article 91, paragraph 2 of the Constitution, which cannot be changed in any case, even through the revision of the Basic Law. Among them, along with unitarily and territorial integrity of the Republic, the form of its government recommended to carry also independence of the state.

Speaking about the success in the formation and development of the country, it should be emphasized that independence - it is our greatest achievement, which requires constant attention. On 15th December last year the President noted that independence - age-old aspirations of millions, which requires constant preservation, protection and development. At all times the conservation of political identity of the state and suppressing any threat to statehood are relevant.

In order to ensure the inviolability of these constitutional provisions, the paragraph 3 of mentioned Article stipulates that amendments to the Constitution of the Republic are submitted to a national referendum or to the Parliament of the Republic upon the conclusion on their compliance with the requirements of the Constitutional Council.

This is due to the fact that if at the legislative level, we have the authorities (the prosecutor's office, judiciary, etc.), which monitor compliance with these constitutional principles in law-making and enforcement process, at the constitutional level, this is not a special mechanism. Now it is proposed to assign to the Constitutional Council, who will give an opinion whether the amendments to the Basic Law infringe the values of unitary, territorial integrity of the Republic, its form of government and the independence of the state. This experience is available in many foreign countries.

The President instructed the working group to conduct ongoing monitoring of the suggestions made during the public discussion, to ensure their generalization, the revision of draft law, taking into account the results, and submit it to the Head of State.