
Operation of the Kazakhstan Republic Constitution: Legal, Value and Functional Content

Ermek B. Abdrasulov¹, Galia M. Onlanbekova^{2,*}, Aizhan E. Abdrasulova³

¹Dr. Sci. in Law, Professor, L.N. Gumilyov Eurasian National University, 2 Satpayev street, Nur-Sultan, 010000, Republic of Kazakhstan.

²Dr. Sci. in Law, Judge, Specialized Interdistrict Economic Court of Almaty, 273b Baizakova street, Almaty, 050000, Republic of Kazakhstan.

³PhD student, Kazakh-American Free University, 76 Gorkiy street, Ust-Kamenogorsk, East Kazakhstan Region, 070018, Republic of Kazakhstan.

*Corresponding author. E-mail address: galia-gorsud@mail.ru

Abstract

The subject of the research is the category “operating of the Constitution” and its constituent elements: use, observance, implementation and Constitution’s norms application. In this article, the analysis of the functions and meaning of operating of the Constitution is determined from the standpoint of the methodology of the theory of law, which provides for the need to study state-legal phenomena, focusing on legal practice. In this regard, the conclusions of the study are based on the legal positions and legal provisions of the constitutional control body and the judiciary. The article emphasizes that the value content of the Constitution, the purposefulness, stability, constancy and duration of its operation are determined by the functions of the Constitution, which reveal such an important quality of it as a direct and indirect impact on social relations. Based on the analysis of legal literature and practice, it is concluded that the establishment of legal links between the Constitution and the sectoral law is the task of the legislator and the body of constitutional control, rather than the subject of the application of law, for which an ordinary law may be a priority in relation to constitutional norms. At the same time, we also show the grounds for the direct application of the norms of the Constitution, except for the objective limits and restrictions reflected in the work.

Keywords Constitution · Operation of the Constitution · Functions of the Constitution · Implementation of the Constitution · Direct application of the Constitution · Limits of direct application of the Constitution

1 Introduction

The debate about the content of such concepts as the operation of the Constitution, the direct applicability of the Constitution’ norms is traditional in the legal literature. The problem of defining the essence of these legal categories is of great practical importance in establishing the regime of constitutional legality, the effectiveness of lawmaking and law enforcement activities. Some researchers’ attempt to identify such concepts as the operation of the Constitution, the

direct applicability of the Constitution and the direct application of the Constitution leads, in our opinion, to the approach that all of these categories are understood only as an opportunity and necessity in certain circumstances of the direct application of constitutional norms without resorting to specific provisions of the Constitution legislation. However, under such an approach, beyond the multidimensional concept of the Constitution's operation, various issues that have a direct impact on the constitutional regulatory mechanism and are not reflected in other constitutional norms and regulations are remained. In addition, there is a certain scientific and practical interest in the relationship between the operation of the Constitution and the implementation of constitutional norms, as well as in the limits and restrictions on the direct application of the Constitutional norms as one of the forms of the Constitution's implementation. In this paper we would like to show our position on the raised issues with the necessary arguments and substantiated conclusions.

2 Theoretical Aspects of the Category “Direct Operation of the Constitution”

2.1 Concept of the Constitution's operation

The category “operation of the Constitution” has an important theoretical and at the same time practical meaning in the system of constitutional and legal regulation, deriving from the universal concept of “operation of law”, which characterises its ability to influence the will and consciousness of people. Therefore, being the foundation, the framework of national law, the Constitution of the Republic of Kazakhstan (RK) has a special impact on social relations in informational, value-motivating and directly regulating aspects. Such an important quality of the Constitution of the RK we can call the operation of the Constitution, which is indirectly reflected in Paragraph 1 of Article 4 of the Constitution of the Republic of Kazakhstan (1995), where the current law primarily establishes the Constitution, which should comply with all forms (sources) of law recognized by the Republic of Kazakhstan.

The normative resolution of the Constitutional Council of the RK dated October 28, 1996 “On the official interpretation of Paragraph 1 of Article 4 and Paragraph 2 of Article 12 of the Constitution of the Republic of Kazakhstan” clarifies the concept of “the existing law”, which is defined as “the system of norms contained in the normative legal acts adopted by the eligible subjects in the established order”, the leading position among which is given to the Constitution of the RK. The regulatory decree also sets out the aspects in details, which are related to the procedure for amending and supplementing the Constitution.

2.2 Operation of the Constitution in Time, Space and in the Circle of People

The aforesaid regulatory decree indirectly addresses such an important issue as the operation of regulatory legal acts, including the Constitution of the RK, in time: the Constitution, its norms operate under the general rule directly and permanently from the moment they come into force, since “the principle of stability of the Constitution presupposes the operation of its basic provisions during a long historical period of state and society development” (Luchin 1997, p. 46).

The highest legal force as one of the expressions of the Constitution's operation is determined by its top position in the hierarchy of sources of national law (Kokotov 2018, p. 15). In addition,

the highest legal force of the Constitution in the context of its operation means the preservation of the legal force of constitutional provisions until they are amended and repealed. In this aspect, directly and continuously, since the official publication of the referendum's results on September 5, 1995, where the Constitution of RK was adopted, its norms and regulations proclaiming the goals and objectives of constitutional and legal regulation, basic human rights and freedoms, establishing the form of government and the form of state structure of the Republic of Kazakhstan, the system of public authorities and management, regulatory legal acts and other forms of legal regulation are in force.

At the same time, the norms regulating the procedure for making amendments and additions to the Constitution, as set out in Paragraph 1 of Article 91 of the Constitution, are of a restrictive nature, since Paragraph 2 of Article 91 of the Constitution prescribes that the independence of the state established by the Constitution, the unitarity and territorial integrity of the Republic, the form of its governance, as well as the fundamental principles of the Republic's activity laid down by the Founder of Independent Kazakhstan, the First President of the Republic of Kazakhstan—Yelbasy, and its status are unchanged (Constitution of the Republic of Kazakhstan 1995).

Here we can talk about the limits of possible changes and additions to the Constitution, since the operation of certain norms and provisions of the Constitution of RK should remain unchanged.

The scope of the Constitution is also defined by the circle of persons to whom its rules and regulations apply. The Constitution of the RK covers all subjects of law who are permanently or temporarily located on the territory of the Republic of Kazakhstan, as well as citizens of the Republic, officials and legal entities staying abroad. Thus, in accordance with Paragraph 1 of Article 34 of the RK Constitution (1995): “Everyone is obliged to comply with the Constitution and legislation of the Republic of Kazakhstan, to respect the rights, freedoms, honour and dignity of others”. It means that all citizens of the Republic of Kazakhstan, foreigners and stateless persons residing in the territory of the Republic of Kazakhstan, as well as citizens of the Republic of Kazakhstan staying abroad, are subject to the norms of the RK Constitution, which prescribes observance and execution of the mandatory commands of the constitutional regulations. At the same time, the Constitution provides and guarantees the protection and patronage of the RK citizens located outside its borders by the norm set out in Article 11 of the Constitution.

The scope of the RK Constitution's operation is also defined by the territorial component of the Republic of Kazakhstan, i.e. it covers the entire territorial space of the Republic, within which the sovereignty of Kazakhstan and the jurisdiction of its bodies are exercised: “The Constitution has supreme legal force and direct operation throughout the Republic” (Paragraph 2. Article 4 of the Constitution).

2.3 Operation of the Constitution and Functions of the Constitution

The Constitution's operation is closely linked to many other constitutional concepts and categories. When analysing the operation of the Constitution, it is impossible to ignore issues relating to the functions of the Constitution, since the operation of the Constitution is reflected in its “regulatory functions of constituent, assigning, protective and socio-regulatory

orientation.” Thus, the operation of the Constitution, which has constituent functions, is expressed in the fact that according to its provisions, a state with its own name, state symbols, territory, with its own structure, etc. is officially established and fundamental rights, freedoms and duties of the individual and all other bases of the constitutional order are proclaimed (Vitruk 2016, p. 147).

Consequently, the value content, purposefulness, sustainability, permanence and duration of the Constitution are determined by its functions, which reveal the important quality of the Constitution, such as its direct and indirect impact on social relations.

2.4 Operation of the Constitution and Implementation of the Constitution

The term “the operation of the Constitution” is similar, but not identical, to the category of “implementation of the Constitution”. These concepts can be considered as a relationship between general and special, where the operation of Constitution acts as general, reflecting the similarity of properties, sides of the object, the relationship between elements of the system, and the implementation of Constitution is special, i.e. the connecting link between the general (the operation of Constitution) and the single (application, observance of Constitution).

In the legal literature on the subject, it has been noted that implementation is one aspect of the concept of “operation” of the Constitution, which creates the legal possibility of implementing constitutional norms: “The operation of the Constitution means its readiness to have a regulatory impact on social relations” (Luchin2002, p. 62).

Paragraph 2 of Article 4 of the Constitution refers to the direct operation of the Constitution throughout the Republic. What is the meaning of this norm and what is the relationship of “direct operation” with the Constitution’s implementation? This question was not asked by chance, because “the Constitution of the RK itself, having established its direct operation in Paragraph 2 of Article 4, does not explain what is meant by direct operation and does not stipulate its conditions” (Barpibaev2010, p. 99).

3 Direct Operation of the Constitution

3.1 Concept of Direct Operation of the Constitution

When disclosing the concept of “direct operation of the Constitution”, many scholars and practitioners put into it the meaning that it is understood as the possibility and necessity under certain circumstances of direct application of constitutional norms without recourse to legislation that specifies the provisions of the Constitution. Thus, academician Sapargaliev, defining the concept of direct operation of the Constitution, noted that “direct operation of the Constitution’s norms means that state bodies may (must) apply the law and directly the Constitution’s norms to relations in certain cases” (Sapargaliev2006, p. 35). Toleubekova, speaking about the limits of direct operation of the Constitution’s norms in the implementation of sectoral legal relations, ultimately reduces the direct operation of the Constitution’s norms to direct application of constitutional norms: “...Even in the case of obvious contradictions, direct application of the Constitution norms in the procedural sense is impossible for the following reasons...” (Toleubekova2020).

Similar positions can often be observed in Russian legal science. For example, Vengerov, studying the nature of the direct operation of the Russian Federation Constitution, directly

connects it with the application of the Constitution norms, emphasizing that “for the first time the court, the executive authorities had an opportunity to legally apply the norms of the Constitution to resolve specific disputes, to use these norms to issue substantiated management acts, to consider citizens’ complaints and applications” (Vengerov1995, p. 48). The same opinion is expressed by Chirkin, who identifies the direct operation of the Constitution with the two forms of law implementation such as application and usage: “Direct operation means that the Constitution must be directly applied by the supreme bodies of the state, officials and courts. It must be applied and followed by citizens, stateless persons, public associations, legal entities, etc.” (Chirkin2003, p. 61).

The above approach to the notion of “direct operation of the Constitution” does not fully disclose the meaning laid down by the legislator in Paragraph 2 of Article 4 of the Constitution. Firstly, when identifying the notions of “the direct operation of the Constitution” and “direct application of the Constitution”, beyond the multidimensional notion of “the direct action of the Constitution”, there are various issues left that have a direct impact on the mechanism of constitutional and legal regulation and are not reflected in other constitutional norms and regulations: the operation of the Constitution in time, space and in the circle of people, the relationship between the operation of the Constitution and its functions, etc. Secondly, such an important question as the ability of the Constitution to permanently influence the will and consciousness of law’s subjects may be outside the scope of constitutional regulation. Thirdly, understanding only the imperative meaning of the direct operation of the Constitution as a direct application of the Constitution would not leave an opportunity for the indirect application of constitutional norms through the normative legal acts corresponding to the Constitution. And such a way of implementing constitutional norms is very common, if not the main one. Fourthly, such an approach does not take into account other forms of the law’s realisation: observance, usage and execution.

In the specified norm of Article 4 of the Constitution, the notion of “direct operation of the Constitution” is not different from the general notion of “operation of the Constitution” but covers it and additionally emphasises the direct nature of such operation, i.e. the notion of “direct operation of the Constitution” is multidimensional and multifaceted. Chairman of the Constitutional Council Igor Rogov correctly emphasises in connection with this provision, noting that any constitutional norm, irrespective of the place occupied in the system of the Basic Law, functions performed and goals pursued, is a valid legal norm. The Constitution is the part of the legislation that has a direct regulatory effect on social relations, “binds” the state and its bodies and establishes rights and freedoms of a person and a citizen as subjective rights that impose certain obligations on the state and are subject to judicial protection. That is the meaning of the direct operation of constitutional norms (Ahmetovan.d.).

Therefore, the direct operation of the Constitution primarily manifests itself in the constituent nature of its prescriptions, according to which the state—the Republic of Kazakhstan—with its territory, internal structure and external attributes is officially proclaimed.

Secondly, the direct operation of the Constitution means that its norms, having a binding nature, directly affect the development of social relations through the legal values and guidelines established in it, to the achievement of which society and the state, all its subjects are aimed. The

Republic of Kazakhstan asserts itself as a democratic, secular, legal and social state, the supreme values of which are the individual, his life, rights and freedoms (Paragraph 1 of Article 1).

The next meaning of the direct operation of the Constitution lies in the supremacy of its norms in the legal system of the state. The Constitution has supreme legal force (Paragraph 2 of Article 4), laws of the Republic, decrees of the Parliamentary Assembly and its Chambers should not contradict the Constitution (Paragraph 7 of Article 62), Government Decrees and orders of the Prime Minister should not contradict the Constitution (Paragraph 3 of Article 69). International treaties ratified by the Republic have priority over its laws (Paragraph 3 of Article 4 of the Constitution). The Constitutional Council of the RK, explaining the provisions of the Paragraph 3 of the Article 4 of the Constitution and defining the supremacy of the Constitution of the RK, points out that in case of recognition in the established order of an international agreement of the Republic of Kazakhstan or its separate provisions contradicting the Constitution of the Republic, possessing according to the Paragraph 2 of the Article 4 of the Main Law the supreme legal force on the territory of the Republic, such an agreement completely or in the part recognized not corresponding to the Constitution, is not subject to execution (Constitutional Council of the Republic of Kazakhstan 2009).

The multifaceted nature of direct operation of the Constitution is also reflected in the fact that it determines the locality of implementation of constitutional norms in a certain space, time and circle of persons.

3.2 Direct Operation of the Constitution and Forms of the Constitution's Implementation

An equally important aspect in the direct operation of the Constitution, but deeply meaningful, is the implementation of the Constitution through its various forms, such as implementation, observance, usage and application. The main property of the direct operation of the Constitution with regard to the forms of its implementation should also be mentioned here. The norms of the Constitution can or should be directly applied, used, observed and executed if the normative legal acts in whole or in part contradict the constitutional norms and provisions, there is no normative legal act that develops and specifies the norms of the Constitution that establishes guarantees for its implementation.

3.2.1. Direct operation of the Constitution and its Correlation with Implementation and Observance of the Constitution's Norms

There are three directions in the activities of subjects of law in the implementation and observance of the norms of the Constitution. The first is that the regulatory impact of the Constitution on all national legislation is carried out through the activities of special subjects (Parliamentary Assembly, the Constitutional Council, the Government), which are obliged to adopt laws and other regulations that develop, concretize the norms of the Constitution and form the system of national law, complying and observing the requirements of prescriptive and prohibitive constitutional norms. For example, the Constitutional Law of the RK "On the Constitutional Council of the Republic of Kazakhstan" was adopted in compliance with Paragraph 6 of Article 71 of the RK Constitution, which stipulates that the organization and activities of the Constitutional Council are regulated by constitutional law.

The second direction is characterised by the fact that all subjects of law, regardless of their areas of activity, are obliged to follow the established constitutional prescriptions and refrain from actions that are directly prohibited by the Constitution. The realisation of the rights and freedoms of a person and citizen should not violate the rights and freedoms of other persons, infringe on the constitutional order and public morality (Paragraph 5 of Article 12). No one may be subjected to any discrimination on grounds of origin, social, official or property status, sex, race, nationality, language, attitude towards religion, beliefs, place of residence or any other circumstances (Paragraph 2 of Article 14). Everyone is obliged to comply with the Constitution and legislation of the Republic of Kazakhstan, to respect the rights, freedoms, honour and dignity of other persons (Paragraph 1 of Article 34). The care and upbringing of children is a natural right and the parents' obligation (Paragraph 2 of Article 27). Adult able-bodied children are obliged to take care of incapacitated parents (Paragraph 3 of Article 27).

As for the direct operation of the Constitution in the implementation of its provisions, where no additional legislative regulation is required, an example can be found in Paragraph 4 of Article 62 of the Constitution, which obliges the Parliamentary Assembly to adopt Constitutional laws on matters provided for in the Constitution by a majority of at least two-thirds of votes from the total number of deputies of each Chamber.

3.2.2 Direct Operation and Usage of the Constitution's Norms

The direct operation of the Constitution covers such an important issue as the possibility for subjects to use the norms of the Constitution, which is ensured by means of enabling norms that establish the rights of subjects to perform certain actions and exercise certain powers granted to them: "Everyone has the right to be recognised as a person before the law and has the right to defend his or her rights and freedoms by all means that do not contradict the law, including the necessary defence" (Paragraph 1 of Article 13). "The President of the Republic has the right to determine the priority of consideration of draft laws, which means that the relevant draft laws must be adopted as a matter of priority within two months" (Paragraph 2 of Article 61).

Many legislative norms of the Constitution are at the same time binding, i.e. endowing state bodies and their officials with certain powers, the Constitution also provides for their implementation. The Prime Minister of the Republic of Kazakhstan organises and manages the activities of the Government and is personally responsible for its work (Article 67).

In the legal literature, some Russian researchers cite examples of direct operation of the Constitution in the context of the possibility of using the rights and freedoms granted, while pointing out that "in accordance with Part 1 of Article 29 of the Constitution of the RF everyone is guaranteed freedom of thought and speech. This right is exercised directly, regardless of the will or actions of other subjects of legal relations" (Umnova and Aleshkova 2016, pp. 12-13).

Such an unambiguous conclusion that the usage of the constitutional right to freedom of speech does not depend on any factors, and that there is no need to adopt a law specifying the scope of these legal relations, contradicts Paragraph 3 of Article 19 of the International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200 (XXI) of December 16, 1966 and ratified by almost all countries of the world, including the Russian Federation. This paragraph of the International Covenant prescribes that the enjoyment of the above rights (freedom of speech and expression of thought) imposes special duties and responsibilities, which

may be subject to certain restrictions, which must be established by law and which are necessary to respect the rights and reputations of others, to protect national security, public order, health or morality of the population (Abdrasulov 2020).

3.2.3 Direct Operation and Application of the Constitution

The direct operation of the Constitution is related to such an important form of its implementation as the application of the Constitution. If one considers the direct operation of the Constitution as a multidimensional phenomenon covering various aspects of the implementation of constitutional norms, which is a legal property of the Constitution, then the application of the Constitution's norms as one of the forms of its implementation serves as the main mechanism for the implementation of the constitutional provisions and the normative legal acts corresponding to it, since through the application of national legislation's norms, firstly, the legal situation for the subjects of legal relations is changing, and secondly, law enforcement bodies and officials in the process of applying the Constitution are obliged to simultaneously observe and execute constitutional requirements.

3.3. Limits and Restrictions on the Direct Application of the Constitution's Norms

The direct application of norms and provisions of the Constitution has its limits and restrictions. What are the reasons for such an approach?

Firstly, constitutional norms are more abstract and extensive than the norms of sector-specific legislation, therefore the establishment of a legal relationship between the Constitution and sector-specific legislation is more a task for the legislator and constitutional control body than for the subject of application of the law, for whom an ordinary law may have a priority over constitutional norms. It follows from the fact that in the process of the law's adoption there is a set of legal measures aimed at revealing the fact that the draft law or individual provisions of the law contradict the requirements of the Constitution. Therefore, the adoption of a law compliant with the norms and provisions of the Constitution is a strong reason on which the enforcer can rely in arguing the direct application of the current legislation norms rather than the norms of the Constitution.

Secondly, the disorderly, often inappropriate application of the Constitution in the activities of the judiciary and other law enforcement agencies can lead to "inflation" of constitutional norms and values.

Thirdly, the experience of some leading countries in the assessment by the constitutional review body of the practice of direct application of the Constitution's norms by courts of general jurisdiction also suggests that there should be clear limits on the direct application of the Constitution by law enforcement bodies. Thus, a noteworthy example of argumentation about the inadmissibility in many cases of direct application by the courts of the Constitution's norms is set out in one of the decisions of the Constitutional Court of the Federal Republic of Germany, which notes that the principle of the welfare state of the Basic Law, as a rule, does not contain direct instructions on the direct action of the principle due to its breadth and lack of certainty, which could be applied by the courts without specifying it in sectoral legislation. Therefore, it is less available to judges to determine content than fundamental rights. Thus, the implementation

of the constitutional principle is a task that must be solved, first of all, by the legislator (Federal Constitutional Court 1983).

A similar position that actually restricts the direct application of the Constitution's norms by courts can be observed in the Russian Federation. The resolution of the Constitutional Court of the Russian Federation dated by June 16, 1998 "On the case of interpretation of certain provisions of Articles 125, 126 and 127 of the Constitution of the Russian Federation" (Constitutional Court of the Russian Federation 1998) was a reaction to the resolution of the Supreme Court of the Russian Federation dated by October 31, 1995 "On certain issues of application by the courts of the Constitution of the Russian Federation in the administration of justice", in which, it was stated that the court can directly apply the Constitution, if it comes to the conviction that a law adopted after the Constitution of the RF came into force contradicts it. In objecting to such a conclusion of the Supreme Court of the Russian Federation, the Constitutional Court of the Russian Federation, in its ruling emphasised that a court of general jurisdiction or an arbitration court, having come to the conclusion that a law does not comply with the Constitution of the Russian Federation, is not entitled to apply the Constitution, but is obliged to apply to the Constitutional Court with a request for verification of the constitutionality of a law, since the powers to resolve cases on compliance of the Constitution of the Russian Federation with laws and other legal acts specified in Article 125 of the Constitution apply only to the Constitutional Court of the Russian Federation. Subsequently, amendments were made to the Ruling of the Supreme Court of the RF which took into account the legal position of the Constitutional Court of the Russian Federation on this issue and excluded the fifth clause of 2nd Paragraph, which allowed the courts to determine the constitutionality of the law themselves and, if the court is convinced of the inconsistency of the law with the Constitution, allowed it to directly apply the norms of the Constitution (Plenum of the Supreme Court of the Russian Federation 2013).

Summarising the above-mentioned, it should be noted that due to the non-specialised nature of the constitutional norms, the sectoral application should be mainly based on special norms of law. The legal force and authority of the sectoral norms corresponding to the Constitution of the RK are sufficient for the regulatory function, since the publication of a law provided for in the Constitution is also a form of its direct operation. The Constitution's norms are specified by constitutional and ordinary laws, but the concretizing nature of these acts does not call into question the direct extension of the Constitution's operations to the relevant relations. Therefore, under normal circumstances, the enforcer does not apply the norms of the Constitution to make decisions, but refers to the norms of current legislation.

3.4. Grounds for the Direct Application of the Constitution's Norms

In which cases is it possible to apply the Constitution's norms directly, except for the objective limits and restrictions mentioned above?

Firstly, the Constitution provides for direct regulatory and organisational impact on social relations, if its application does not require additional reference to sector-specific legislation specifying the Constitution and this fact is clearly derived from the meaning of the constitutional provisions. Thus, in accordance with Paragraph 3 of Article 49 of the Constitution, "the powers of Parliamentary Assembly can be terminated prematurely in the cases and manner prescribed by

the Constitution”. Consequently, the Head of State may dissolve Parliamentary Assembly by directly applying the provision of Paragraph 1 of Article 63 of the Constitution, which provides for the procedure of early termination of the powers of Parliamentary Assembly: “The President of the Republic may dissolve the Parliamentary Assembly or the Majilis of Parliamentary Assembly after consultation with the Chairman of the Houses of Parliament and the Prime Minister”.

Secondly, the norms of the Constitution must be applied directly if regulations in general or in part contradict constitutional norms and provisions. Such a conclusion may be objected that the establishment of the fact of contradiction or conformity of a normative legal act with the Constitution is established by the Constitutional Council but not by the law enforcement body, in particular by the court. Yes, one could agree that the courts do not make an independent final decision on a dispute about the rights of various subjects on the basis of constitutional norms, concluding that a normative legal act or part of it contradicts the Constitution. However, the court’s decision to apply to the Constitutional Council for a request on the constitutionality of a normative act is one of the forms of direct application of the Constitution, because the court applies to the provisions of the Constitution, analyses them, compares the compliance of a normative act with these provisions, motivates the need to apply to the Constitutional Council and makes a decision.

The submission of a court to the Constitutional Council on the unconstitutionality of an act as a specific form of its decision becomes legally valid and ensures the regime of constitutional legality in the State, if the Constitutional Review body agrees with the arguments of the court. Thus, in January 2005, the Constitutional Council of the Republic of Kazakhstan received a submission from the court of Astana city on the verification of compliance with the Constitution of the Republic of Kazakhstan Paragraph 3 of Article 15 of the Law of the Republic of Kazakhstan dated July 14, 1997 № 155 “On Notaries”.

The submission stated, inter alia, that certification of notaries engaged in private practice is carried out every five years by the Ministry of Justice in order to determine the level of professional skills, while governmental notaries are not subject to such certification under the Law. Therefore, Paragraph 3 of Article 15 of the Law contradicts the requirements of Paragraphs 1 and 2 of Article 14 of the Constitution, which establishes the principle of equality of all before the law and the prohibition of discrimination of the rights of citizens on the basis of their profession.

While agreeing with the arguments set out in the court's appeal and developing and supplementing them, the Constitutional Council concluded that Paragraph 3 of Article 15 of the Law, stipulating that only private notaries must be certified, is in contradiction with Paragraph 1 of Article 14 of the Constitution, stipulating equality of all before the law, and Paragraph 1 of Article 6 of the Constitution, stipulating recognition and equal protection of governmental and private property (Constitutional Council of the Republic of Kazakhstan 2005).

Thus, on the basis of the decision of two public authorities (court representation and the decision of the Constitutional Council) one can see aspects of the direct application of the Constitution’s norms which changes the legal situation for the subjects of legal relations, in the given case, private notaries.

Thirdly, the direct application of the Constitution may take place if there is a valid gap in the legal regulation established by the constitutional review body or the law enforcement body itself. Thus, the Temirtau City Court, in its appeal to the Constitutional Council dated November 15, 2016, justified the argument that it was impossible to resolve the merits of the case in the claim proceeding by the lack of specific powers of the court, that it was not within its competence to grant permission to leave, since it was within the jurisdiction bodies of internal affairs, and also does not include the competence to instruct the defendant to give such permission, since this contradicts the basic principles of civil proceedings (Constitutional Council of the Republic of Kazakhstan 2016). However, according to Paragraph 2 of Article 76 of the Constitution of the RK, the judicial power is extended to all cases and disputes arising on the basis of the Constitution, laws, other regulatory legal acts and international treaties of the Republic. Therefore, the court in this case, in our opinion, did not apply the provisions of the Constitution directly and, based on them, did not resolve the case on the merits, applying at the same time the analogy of sectoral law and the analogy of law.

The Constitutional Council, in its decisions, often establishes gaps in legal regulation and obliges the relevant subjects of application of the law to ensure that the rights and freedoms of citizens are respected at a level no lower than the guarantees established in the Constitution and other legislation before making the required amendments (Constitutional Council of the Republic of Kazakhstan 2018).

The most common form of application of the Constitution is the reference to constitutional norms in order to strengthen the reasoning of the legal position of the court, which demonstrates the indirect application of the Constitution. Thus, the decision of the Ridder District Court of EKR dated May 21, 2019 states that the Constitution of the Republic of Kazakhstan establishes the right of every person to judicial protection, which is directly related to the protection of labour rights. By virtue of Paragraph 1 of Article 159 of the Labour Code (hereinafter referred to as the LC), individual labour disputes are considered by a conciliation commission and, in the case of unresolved issues or non-execution of the conciliation commission's decision are considered by the courts. ...Unlawful actions on the dismissal of the plaintiff through the fault of the defendant violated the rights of the plaintiff to change and terminate the employment contract in accordance with the established procedure provided for in Clause 1, Paragraphs 1 and 4 of Article 22 of the LC. The above mentioned rights are personal non-property rights, which are included in Paragraph 1, 2 of Article 24 of the Constitution of the rights of everyone to social protection from unemployment. According to the Articles 917,951,952 of the Civil Code, the above circumstances are the basis for compensation for moral damages (Bank of judicial acts of the Supreme Court of the Republic of Kazakhstan).

4 Conclusion

Thus, the operation of the Constitution is its important property, characterized by a special, direct impact of the Constitution on social relations in informational, value-motivational and directly regulating aspects. The operation of the Constitution is a multifaceted and multidimensional phenomenon, including a whole layer of characteristics and features that directly affect the system of constitutional and legal regulation of social relations.

References

- AbdrasulovYeB (2017) Some aspects of legal regulation and correct implementation of freedom of public expression of opinion about the judicial system. <https://www.zakon.kz/4867333-nekotorye-aspekty-pravovojj.html> Accessed 16 February 2020
- Akhmetova S (n.d.) Constitution and direct effect of its norms, https://online.zakon.kz/Document/?Doc_id=30203802#pos=3;-80 Accessed 15 February 2020
- Bank of judicial acts of the Supreme Court of the Republic of Kazakhstan, <https://sud.gov.kz/rus/content/bank-sudebnyh-aktov> Accessed 18 May 2009
- Barpibaev TE (2010) Direct action of the Constitution of the Republic of Kazakhstan. Bulletin of the D.A. Kunaev University 3(36):98–102
- Chirkin VE (2003) Constitutional law of Russia. Yurist, Moscow
- Constitution of the Republic of Kazakhstan (1995), revised 03.23.2019. https://online.zakon.kz/Document/?doc_id=1005029#pos=5;-88 Accessed 15 February 2020
- Constitutional Council of the Republic of Kazakhstan (1996) Regulatory Resolution No. 6/2 “On the official interpretation of paragraph 1 of Article 4 and paragraph 2 of Article 12 of the Constitution of the Republic of Kazakhstan”, <http://ksrk.gov.kz/index.php/en/node/62> Accessed 10 February 2020
- Constitutional Council of the Republic of Kazakhstan (2005) Regulatory Resolution No. 1 “On verification of the constitutionality of paragraph 3 of Article 15 of the Law of the Republic of Kazakhstan ‘On Notaries’ upon the appeal of the Astana city court”, <http://ksrk.gov.kz/solutions/np-ks-rk-ot-31012005-g-no1-o-proverke-konstitucionnosti-punkta-3> Accessed 03 March 2020
- Constitutional Council of the Republic of Kazakhstan (2009) Normative resolution No. 6 “On the official interpretation of the norms of Article 4 of the Constitution of the Republic of Kazakhstan in relation to the procedure for the execution of decisions of international organizations and their bodies”, https://online.zakon.kz/Document/?doc_id=30519643&#pos=3;-88 Accessed 15 February 2020
- Constitutional Council of the Republic of Kazakhstan (2016) Regulatory Decree No. 1 “On checking the constitutionality of subparagraph 3) of paragraph 7 of the Rules for processing documents for leaving the Republic of Kazakhstan for permanent residence, approved by the Government of the Republic of Kazakhstan dated March 28, 2012 No. 361, on the proposal of Temirtau the city court of the Karaganda region”, <https://ksrk.gov.kz/index.php/solutions/np-ks-rk-ot-14122016-g-no1-o-proverke-konstitucionnosti-podpunkta-3-punkta-7-pravil> Accessed 11 March 2020
- Constitutional Council of the Republic of Kazakhstan (2018) Regulatory Resolution No. 5 “On the verification of the constitutionality of paragraph 5 of Article 27 of the Law of the Republic of Kazakhstan ‘On enforcement proceedings and the status of bailiffs’ on the proposal of the Karaganda Regional Court”, <http://ksrk.gov.kz/solutions/np-ks-rk-ot-03072018-g-no5-o-proverk> Accessed 12 March 2020
- Federal Constitutional Court (1983) 2 BvR 485, 486/80, BVerfGE 65, 182
- Kokotov AN (2018) Action and implementation of the Russian Constitution of 1993. Vestnik of Siberian Law Institute of the MIA of Russia 4(33):14–20

- Luchin VO (1997) Constitutional norms and legal relations. Unity, Moscow
- Luchin VO (2002) Constitution of the Russian Federation: Problems of Implementation. UNITI-DANA, Moscow
- Plenum of the Supreme Court of the Russian Federation (2013) Resolution No. 9 “On Amending the Resolution of the Plenum of the Supreme Court of the Russian Federation of 31.10.1995 No. 8 ‘On some issues of the application of the Constitution of the Russian Federation by the courts in the administration of justice’”, http://base.garant.ru/70362214/#block_1 Accessed 25 February 2020
- Sapargaliev GS (2007) Constitutional law of the Republic of Kazakhstan. Legal literature, Almaty
- ToleubekovaBK (2007) Direct action of the norms of the Constitution of the Republic of Kazakhstan: problems and trends, <https://www.zakon.kz/99062-prjamoe-dejjstvie-norm-konstitucii.html> Accessed 15 February 2020
- Umnova IA, Aleshkova IA (2016) Application of the Constitution of the Russian Federation by courts of general jurisdiction: topical issues of theory and practice. RGUP, Moscow
- Vengerov AB (1995) Direct action of the Constitution: legal, social, psychological aspects. Social sciences and modernity 5:48–55
- Vitruk NV (2016) Loyalty to the Constitution. RGUP, Moscow