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**GENERAL CHARACTERISTICS OF THE CONSTITUTIONAL REGULATION OF THE INDIVIDUAL FREEDOMS AND RIGHTS IN KAZAKHSTAN**

Attempting to talk about the political system or fragments of the political system of Central Asian states we must be aware that we are entering relatively poorly studied areas of research being a sort of *terra nova*. Hence the researcher is obliged to take due scientific care, as the home, European research instruments may not always be applied automatically in a given case, without taking into consideration local, historical and cultural conditions.

Post-Soviet states of Central Asia are the subject matter of political studies research conducted in Europe. In my view, Poland plays an important or perhaps even leading role in this research in the European scale. However, for a number of reasons these states have not posed yet the object of our in-depth political and constitutional research. These states are basically young in terms of its statehood. Thus, it is a scientific challenge that may be taken, and should be taken particularly by us Poles, as we have in this respect a remarkable, not quite well known traditions, which I will mention towards the end of this article.

The subject matter of the article is the regulation of individual freedoms and rights in the Constitution of the Republic of Kazakhstan, and thus the normative-constitutional aspect of human rights, taking into consideration the determinants, or factors, the resultant of the influence of which is the shape of the currently binding Constitution, including the constitutional regulation of individual freedoms and rights. This regulation is part of the state's constitution, and thus it is not possible to make an attempt at analysing its present effect without considering the determinants regarding the shape, that is the systematics and content of the whole constitution. The European commentary on this regulation must take into account the fact that the origin and evolution of the Kazakh, or rather, should we put it contemporarily, Kazakhstani constitutionalism, are definitely different from the origin and evolution of the European constitutionalism. The starting point is the assertion that the European, that is Christian and liberal in its foundation, conception of individual freedoms and rights in global terms is not the only conception of individual freedoms and rights and is significantly different from the other conceptions of human rights.

The evolving shape of the Kazakh constitutionalism was influenced by various factors, including, apart from the domestic ones – with the leading role played by the Kazakh common law, remarkable external factors in the form of legal traditions: Asian, Russian as well as Soviet assumed that with varied intensity in different periods of historical development the Kazakh social relations were affected by various factors. Being aware of the existence of multiplicity of the determinants of constitutional status of the individual in Kazakhstan, I will point to some, in my view, leading determinants, giving their short characteristics. These are the following:

- Firstly, the Asian concept of human rights,
- Secondly, the Islamic concept of human rights,
- Thirdly, the Russian constitutional tradition,
- Fourthly, the Marx-Soviet concept of the individual,

Fifthly, the permanent and consistent determinant of such relations were also the domestic traditions and common law<sup>2</sup>, and in the recent period some interest, and thus, sixthly, the European concept of individual freedoms and rights.

Along with the above mentioned factors which have exerted more or less direct influence on the position of the individual in Kazakhstan, one must indicate the influences of the Mongolian, Persian and Arabic cultures. The multiplicity and multidirectionality of the effect of the above mentioned factors result in the fact that it is at all possible to divide the identity of Kazakhs into two groups: European and Asian<sup>3</sup>.

The characteristic feature of the Asian concept of human rights is its static quality – and, as Professor B. Banaszak aptly indicated – on the grounds of this concept the role of the individual in the state has not changed for ages. The Asian concept of human rights does not leave too much room for individual freedom, setting it in the petrified social structure and assuming its subordination to the patterns promoted by the state<sup>4</sup>. The individual is on this ground a being which is strongly connected with the broadly conceived community on its subsequent organisational levels – from family to society. The static quality of the Asian concept of human rights is well rendered by the Confucius thesis according to which “ruler ought to act like a ruler, minister ought to act like a minister, father ought to act like a father, and son ought to act like a son”<sup>5</sup>. This concept formulates the order for the individual to fit the imposed social role and stresses the importance of social hierarchy.

Embarking on a practical translation of the assumptions of the Asian concept of human rights into the Kazakhstani ground it must be noted that important determinants of the social and political life there are so called

zhuzes. The Kazakh zhuzes are supra-tribal political and constitutional groups<sup>6</sup>, otherwise described as specific ethnoterritorial structures the existence of which is so much recorded in the social conscience of Kazakhs that their constitutionalization was taken into consideration in the 1990s, assuming that they would constitute units of a federal state<sup>7</sup>. The unit's sense of belonging to a family, clan and zhuz is embedded in the Kazakh tradition of social life. Even today the supra-ethnic structures being the zhuzes enjoy authority and are not entities deprived of significance in the processes of shaping and the functioning of the system of public authority<sup>8</sup>. The strength of this type of social bonds should not be ignored in the considerations on the position of the individual in the Kazakh society.

In turn, the Islamic concept of human rights is a religious concept of a heavily conservative character and not subject to any fundamental change. The source of human rights on the ground of this concept is God and the Qur'an being his revelation. Additionally, on the ground of Islam the whole Muslim law derives from God and God is its sole creator. This concept does not actually concern individual freedoms and rights as much as it emphasises the individual's subservience to God. On its ground the Qur'an and law is one and the same value. The very term "Islam" denotes peace and subservience to God<sup>9</sup>. The influence of the Islamic concept of human rights on the social position of the individual in Kazakhstan is remarkable as Islam differentiates the scopes of human rights on the basis of two criteria: religious and sexual. However this influence should not be overestimated. This note concerns particularly the limited intensity of the impact of the Islamic concept on the constitutional regulation of human rights. This state of affairs results not only from the relatively far gone secularization of the state and a certain level of secularization of society resulting from the long standing Soviet domination as well as due to the fact that Islam appeared on Kazakh land relatively late – not until the 16th century slowly and gradually ousting shamanism. The Quran was not, however, translated into the Kazakh language until the early 20th century. Interestingly, the growing importance of Islam in Kazakh society – on an action reaction basis – was the very reaction to the processes of russification.

On the other hand, the Russian constitutional tradition, the influence of which the Kazakh lands were subjected to for a long time, features the category of a „subject” rather than „citizen” or „human”. This period of time is commonly defined as Russian colonization in the works by contemporary Kazakh historians. Kazakh lands were captured by Russia relatively late, in the 19th century, it was the time when the nomad Kazakhs started to be removed from their pastures taken by Russians for crops.

Regarding the influence of the Marxist and Soviet concept of state and human rights, Kazakhstan was subjected to this concept for decades and a considerable part of the history of Kazakhstani constitutionalism spans the Soviet time<sup>10</sup>. The Marxist and Soviet concept of human rights is termed collectivist, as opposed to the European, Christian and liberal one stemming from the Thomist right to resistance against the ruler and state, individualistic concept of human rights. The collectivist concept of human rights put the collective interest before the individual one, it assumed solely declarative (and not constitutive) character of the constitutional rights of the individual and refused the individual the right to the formal, thus constitutional, protection of their rights.

In Kazakhstan, as well as in other post-Soviet states of Central Asia, both the theoretical Soviet patterns and the institutional and professional structures being the post-Soviet heritage, constituted important points of reference in the process of constitutional transformation of this state<sup>11</sup>. By of supplement rendering the real view and state of social relations in Kazakhstan under Soviet rule it must be added that the collectivisation and the resulting famine during 1932–33 claimed approximately 2 million Kazakhs, which accounted for a considerable part of their then population.

A significant role is also played by the domestic Kazakh traditions drawing from Kazakhs' rich common law. Contemporarily the Kazakh study of law attaches great importance to research over Kazakh common law, which favours the restoration of national identity and to „rediscover” the Kazakh monuments of common law<sup>12</sup>. The spirit of attachment to the Kazakh tradition and customs is also noticeable in the text of the binding Constitution of the Republic of Kazakhstan<sup>13</sup>. It is typically expressed in the text of Article 37 of the Constitution, which states that the citizens of the Republic of Kazakhstan, are obliged to take care of the preservation of the historical and cultural heritage and protect the monuments of history and culture. This constitutional imperative is pursued in practice in various ways, for instance through television broadcasts popularizing the native history and culture as well as promoting the Kazakh language or through conducting broad archeological research.

The resultant of the influence of these shortly outlined factors is the shape of the contemporary Kazakh constitutionalism and the shape of the binding constitutional regulation of human rights. Evidently, the historical and, consequently, political and constitutional heritage of the Republic of Kazakhstan is a different heritage from ours, the European and Polish one. Even more so what must be considered interesting and noteworthy is the appearing evidence of the interest shown by the Kazakh society, as well as the local representatives of the realm of science and diplomacy in the European, individualistic concept of human rights and freedoms, including the assumptions and solutions of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The binding Constitution of the Republic of Kazakhstan was adopted by way of referendum on 30 August 1995, and seriously amended on 22 May 2007<sup>14</sup>. Chapter II of the Constitution is entitled “Man and Citizen” consisting of articles from 10 to 39. These articles regulate particular individual freedoms and rights beginning with the regulation of the issue of citizenship, including prohibitions: deprivation of citizenship, right to change citizenship, as well as prohibition of dual citizenship, and then regulated are: prohibition of expulsion and extradition of a citizen of Kazakhstan, we also notice the constitutional principle of equality and prohibition of discrimination because of national origin, social, professional, economic status, sex, race, nationality, language, religion, beliefs, place of

residence and any other criteria. The Constitution of Kazakhstan protects the right to life, the right to personal freedom, determines dignity as inviolable, establishes the prohibition of arrest or detention without the court's consent while providing the arrestee or detainee the right to lodge a complaint, prohibits torture, violence and cruel or humiliating treatment or punishment, protects the inviolability of private life, personal and family secrets, provides freedom of speech and freedom of creative activities, the right to receive and disseminate information, free movement within Kazakhstan, freedom of conscience, freedom of economic activity, the right to determine and indicate or not to indicate his national, party and religious affiliation, to use one's native language and culture, the right to freedom of forming associations, the right to peacefully assemble, the right to participate in the government of the state's affairs directly and through representatives, the right to direct appeals, the right to elect and be elected, the right to the free choice of occupation and profession, the right to freedom of labour, the right to rest, the right to housing, the right to a minimum wage and pension, the right to social security, the right to protection of health and certain forms of medical treatment, the right to education, and also under the constitutional protection are marriage, family, motherhood, fatherhood and childhood.

The above mentioned catalogue of human rights is not identical with the European constitutional catalogues of freedoms and human rights, yet its contents correspond with them. It is from the European perspective that the reading of this catalogue provokes certain observations. Worth raising, I believe, are several merit-related points formulated from the position of an European researcher.

Firstly, the Constitution of Kazakhstan does not determine the source of individual freedoms and rights. Contemporary states – EU Member States make human dignity the foundation of their social and political systems. Human dignity was introduced to the constitutions of a number of EU states. In Europe there is a doctrinal *consensus* on inherent, inalienable and inalienable human dignity is the source of individual freedom and rights, and public authorities are obliged to respect it. Recognition of human dignity as the source of individual freedoms and rights allows for departing from the typical of the collectivist concept of human rights looking at the state's intention in the form of a statute as the source of such freedoms and rights.

It must be stressed that the state does not grant us freedoms and rights. It does not happen on a *do ut des* basis, i.e. according to the give and take formula „I give and I demand” meaning that in exchange for some duties we fulfill for the state we are given certain rights. In democracy such oneness of the rights and duties of man and the citizen is out of the question. The institution of state must not be included in the debate on the sources of our freedoms and rights. Even if the constitution and legislature did not mention our freedoms and rights at all that would have no impact on our freedoms and rights as we do derive them from dignity itself and not from the statute meant as evidence of the state's intention. The constitution and legislation do not create individual freedoms and rights and neither does any public authority. The constitution and legislation merely formally confirm human rights and establish their formal safeguards.

However, the Constitution of Kazakhstan states on dignity but in a relatively reductionist way. Article 17 section 1 thereof stipulates that human dignity is inviolable. And this is the entire constitutional entry on this. From the European perspective one can sense a deficiency in the form of lack of a constitutional determination of the Constitution as the source of human rights and freedoms so that any suspicion of the state being the source of such rights and freedoms can be clearly excluded. Moreover, section 2 thereof provides that no one may be subject to torture, violence and other cruel or inhuman treatment. This provision is a carbon copy of Article 3 European Convention on Human Rights, which is positive. However, the fact that the same article contains this prohibition laid out with the human dignity provision suggests that this dignity is perceived as personal dignity which must not be violated. Yet a clear distinction must be made between human dignity (individual dignity) which is absolutely inviolable under Article 17 section 1 Constitution of Kazakhstan and personal dignity, which is indeed violable. We enjoy the existence of personal dignity fullest at the very moment it is violated, for instance while being treated or punished in a humiliating and degrading way. On the other hand, attempting at presenting an act violating human dignity it is not sufficient to violate one person's or many people's dignity. This type of act would have to touch man as a representative of the human kind, humanity (humanitas). For example, as a violation of human dignity could be regarded some of the actions in the scope of medicine, including genetics. Potential recognition of human dignity as the source of individual freedoms and rights on the grounds of the Constitution of the Republic of Kazakhstan would constitute a considerable step towards the Kazakh constitutionalism binding with the European constitutional law studies.

Secondly, both the wording and the location of dignity within Chapter II of the Constitution of the Republic of Kazakhstan proves the combination of the axiological layer of the constitution and the subjective rights of the individual, which must result in problems in case of their practical application. There are more such points in the constitution, which Professor J. Szymanek classifies as a sheer state of chaos<sup>15</sup>. Performing a more clear cut division between the axiological layer of the constitution and the constitutional subjective rights of the individual would reach out to the principles of decent legislation.

Thirdly, the above presented catalogue of individual freedoms and rights is included in Chapter II of the Constitution of Kazakhstan, deprived of internal systematics. Admittedly, in the content layout of this chapter one can see the legislator's intention – slightly vague though it may seem – of regulating individual freedoms and rights in order: personal freedoms and rights, political and socio-economic. However, this division is not coherent, clear and unambiguous in its interpretation. For instance, the fundamental right to life (Article 15) – *nota bene* expressed *expressis verbis* in the Constitution of the Republic of Kazakhstan – was regulated after the constitutional regula-

tions of among others the right to self-defence (Article 13 section 1), the right to qualified judicial assistance (Article 13 section 3) the prohibition of any discrimination (Article 14) and directly before the constitutional regulation of the conditions of arrest and detention (Article 16 section 2. This location of the right to life within the Kazakhstani constitutional catalogue of freedoms and rights is not to be classified as optimal.

As an example of, I believe, an apt, and acute in its systematic expression, solution, I quote the solution contained in the Constitution of the Republic of Poland. Chapter II of our Constitution is dedicated to freedoms, rights and duties of man and the citizen, owns its internal systematics, determined by the philosophy of successive generations of human rights. Beside others, this chapter contains three systematic units dedicated to personal, political and economic, social and cultural freedoms and rights. This measure allows us to clearly classify specific freedoms and rights of the individual and favours the order and coherence of the constitutional regulation of freedoms and rights of the individual. Furthermore, what is particularly important, its implementation results in the constitutional acceptance and reception of the study of generations of human rights, which constitutes a permanent element of the European doctrine of constitutional law. Thus we affirm the evolution of human rights from the defensive, negative rights of the first generation expressed in the first ever constitutional documents to the positive rights of the second generation, of a basically social-economic character, the realisation of which requires the state's active attitude in the social and economic processes. In this sense the implementation of such coherent, tripartite systematics in the Constitution of Kazakhstan would not just be a legislative work measure. On the contrary, it would mean creating a bridge between the Kazakhstani constitutionalism and the European tradition and constitutional law doctrine.

Fourthly, it happens that a right (freedom) of the individual, which due to its character is clearly classified as a human right in the content of Chapter 2 is attributed solely to citizens. It refers to the freedom of forming associations, expressed in Article 23 of the Constitution of the Republic of Kazakhstan, which reads "citizens of the Republic of Kazakhstan shall have the right to freedom of forming associations". Thus the residents of Kazakhstan not being its citizens have been removed outside the subjective scope of this constitutional right<sup>16</sup>. Undoubtedly, the subjective scope of constitutional political freedoms and rights is distinguished between human rights and civil rights, but on the European grounds the right to freedom of association is classified as a human right (Article 11 European Convention on Human Rights). From this viewpoint and in the European perspective, the said Article 23 in its current wording must be considered to be suffering from a technical defect which needs urgent correction.

If Kazakhs and the Kazakh study of law themselves set their goal in the form of the Europeanization of the standard of individual freedoms and rights, then the importance is growing of the activities leading to approximate to Kazakhstan, its legal system, its elites, the European legal culture and even leading to bind Kazakhstan with the European legal culture.

Seemingly, the road to thus outlined goal leads first through education, that is through popularizing in Kazakh society knowledge about the axiology of European constitutionalism and constitutional status of the individual in European states. That may be pursued by way of the intensification of scientific and student exchange, which may be effected on the basis of certain programs of that kind.

From our European and Polish point of view, the support, also the experts' support deserve any initiatives aiming to promote the European, individualistic concept of individual freedoms and rights in Kazakhstan.

Finally, I would like to share another observation of a more general nature. An additional incentive for us to monitor Kazakhstani rights and for undertaking studies on this country is the fact that Polish people seem to have a special title to this type of activity. This title results from the Polish tradition of research on Kazakh law and administration, pointing to two exemplary persons, namely Seweryn Gross – one of the most prominent Polish 19th century deportation victims in the Steppe Land and Karol Gutkowski – appointed in 1865 member of the government Steppe Committee, established for the exploration and modernization of the country's administrative system<sup>17</sup>.

This is a Pole – Seweryn Gross who blazed the research trail in the field of Kazakh common law study, and the effect of such studies he included in the fundamental work published in 1888 entitled "Materiały dla izuczieni-ja juridycznych obyczajów Kirgizów" („Materials for the study of Kyrgyz common law"). As I have mentioned within the framework of the reconstruction of their national identity, Kazakhs have been conducting research on their own common law, and despite that this fundamental work is not widely known there.

In turn, Karol Gutkowski – graduate of the General Staff Academy in Petersburg, acting as a member of the said administrative committee, did object to imposing in the Kazakh Steppe the administrative system which was in force in central Russia and defended Kazakhs from the oppressing Cossacks, who accounted for the tsardom's military support<sup>18</sup>.

The above mentioned attitudes and achievements of our compatriots acting in the Steppe Land in the 19th century constitute a kind of inspiration, encouragement and challenge for the contemporary Polish researchers studying the legal system of Kazakhstan.

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<sup>2</sup> G. B. Achmedżanowa: Sud bijew i institut prisjagi w obycznom prawie Kazachow, Ministerstwo obrazowania i nauki Rzespubliki Kazachstan, Pawłodarskij gosudarstwiennyj uniwersitet im. S.Torajgyrowa, Pawłodar 2010, p. 4–5, 7 and 118–151. Also see: T. M. Kultejejew: Ugołownoje obycznoje prawo Kazachow (S momenta prisojedinenija Kazachstana k Rossii do ustanowlenija sowietskoj własci), Izdatielstwo AN KazSSR, Alma-Ata 1995, p. 72.

<sup>3</sup> I. Stonimska–Szkutowicz: Przemiany społeczne w Kazachstanie, [in:] W. Baluk: Kazachstan. Polityka wewnętrzna i zagraniczna, Wrocław 2009, p. 75 and T. Bodio, K. A. Wojtaszczyk (eds.): Kazachstan. Historia – społeczeństwo – polityka, Warszawa 2000, p. 33.

<sup>4</sup> B. Banaszak: Prawa jednostki i systemy ich ochrony, Kolonia Limited, Wrocław 1995, p. 39.

<sup>5</sup> Ibid

<sup>6</sup> In Kazakhstan there are distinguished three zhuzes: Old, Middle, Young. An expression relating to zhuz and deriving from the Mongolian tradition is the term “orda”.

<sup>7</sup> Cf. J. Szymanek: Ustrój konstytucyjny Kazachstanu, Dom Wydawniczy ELIPSA, Warszawa 2013, p. 101 and after him: N. Amrekulow: Żuzy w socialno-politiczeskoj żizni Kazachstana, Centralnaja Azja i Kawkaz No. 3/2000.

<sup>8</sup> A. Abdakimow: Istorija Kazachstanu, Almaty 1994, p. 21; I. Stonimska – Szkutowicz: op.cit., p. 76; Also see: A. Wierzbicki: Etnokratyzm w strukturach władzy politycznej państw Azji Centralnej, [in:] J. Zaleśny (ed.): Zagadnienia ustrojowe państw poradzieckich, Dom Wydawniczy ELIPSA, Warszawa 2010, p. 9 and following.

<sup>9</sup> A. Bisztyga: Zachodnia a islamska koncepcja praw jednostki, Przegląd Prawa Konstytucyjnego 2013/No. 1 (13), Wydawnictwo Adam Marszałek, p. 85

<sup>10</sup> This question is presented by T. Bodio, T. Mołdawa: Konstytucje państw Azji Centralnej. Tradycje i współczesność, Instytut Nauk Politycznych Uniwersytetu Warszawskiego, Warszawa 2007, s. 15 oraz s. 37–63.

<sup>11</sup> Cf. T. Bodio: Badania nad teorią i metodologią transformacji oraz elit politycznych w Azji Centralnej, [in:] T. Bodio: Przywództwo, elity i transformacje w krajach WNP. Problemy metodologii badań, Vol. 1, Zakład Badań Wschodnich Instytutu Nauk Politycznych przy współpracy z Międzynarodową Pracownią Badań nad Rosją i Państwami Poradzieckimi Wydziału Dziennikarstwa i Nauk Politycznych Uniwersytetu Warszawskiego, Warszawa 2010, p. 444.

<sup>12</sup> Cf. J. Szymanek: op.cit., p. 20–22.

<sup>13</sup> In the preamble of the binding Constitution of the Republic of Kazakhstan, in spite of the fact that it is a short, concise form we encounter the phrase “the people of Kazakhstan, united by a common historic fate.”

<sup>14</sup> Konstytucja Rzespubliki Kazachstan, prinjata na riepublikanskom riefierendumie 30 awgusta 1995 goda (Wiedomosti Parlamenta Rzespubliki Kazachstan, 1996 g., No 4, statia 217), c izmienenijami i dopolnienijami, wniesiennymi Zakonom Rzespubliki Kazachstan ot 7 oktjabrja 1998 goda (Wiedomosti Parlamenta Rzespubliki Kazachstan, 1998 g., No 20, statia 245), z izmienenijami i dopolnienijami, wniesiennymi Zakonom Rzespubliki Kazachstan ot 21 maja 2007 goda (Wiedomosti Parlamenta Rzespubliki Kazachstan, 2007 g., No 10, p. 68).

<sup>15</sup> J. Szymanek: op.cit., p. 71.

<sup>16</sup> Cf. A. Czajowski: Republika Kazachstanu, [in:] W. Baluk and A. Czajowski (eds.): Ustroje polityczne krajów Wspólnoty Niepodległych Państw, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2007, p. 234.

<sup>17</sup> R. Badowski: Polscy piewcy Kazachstanu, Wydawnictwo z okazji II Polskiej Wystawy Narodowej w Kazachstanie, Poland EXPO Kazachstan 2006, Wydawnictwo Bernardinum 2006, p. 81–82.

<sup>18</sup> Ibidem, p. 84–86.

## Summary

### **Andrzej Bisztyga. General characteristics of the constitutional regulation of the individual freedoms and rights in Kazakhstan.**

The evolving shape of Kazakh constitutionalism has been affected by various determinants, i.e. both the national legal tradition and the outer factors in the form of Asian, Islamic, Russian and Soviet legal traditions. The Author describes them and outlines the catalogue of individual rights and freedoms regulated under the Constitution of the Republic of Kazakhstan, adopted by way of referendum on 30 August 1995. This catalogue is not identical with the European constitutional catalogues of individual rights and freedoms, it is, however, possible to discuss its content-related correspondence between them.

**Key words:** Constitution of Kazakhstan, constitutionalism of Kazakhstan, individual rights in the Constitution of Kazakhstan.

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## SAFETY OF THE CHILD AS THE CONSUMER ON THE MARKET OF TOYS IN THE POLISH LAW

### 1. Introduction

The consumer as the weakest participant in the business trading is exposed to many inconveniences appearing on the market. So it doesn't surprise that the consumer protection was and is still a subject of the particular interest<sup>1</sup>. Action that was taken for this entity is a multistage process which started on the plain of Community, and at present is being continued by the European Union (farther: the EU)<sup>2</sup>. The reflection of actions are not only changes,