
Place and Function of the Prosecutor's Office of the Republic of Kazakhstan within a System of Division of Powers

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Abstract:

The authors of the article conduct a deep analysis of all the functions of the Prosecutor's Office in the Republic of Kazakhstan, study its competence and functions. It is well illustrated that the Prosecutor's Office to different extent has powers of administrative and executive branch, functions of a control body.

Key Words: *Constitution, Procurator's Office, Court and Justice, Constitutional Council, state mechanism, system of power division*

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Introduction

The Constitution of the Republic of Kazakhstan of 1995 stipulated the system of state bodies, established legal framework of activity of the Prosecutor's Office of RK, which according to the para. 1 of the Article 83 of the Constitution of the Republic of Kazakhstan "on behalf of the state shall exercise the highest supervision over exact and uniform application of law, the decrees of the President of the Republic of Kazakhstan and other regulatory legal acts on the territory of the Republic, legality of preliminary investigation, inquest and inspection, administrative and executive legal procedure; and take measures for exposure and elimination of any violations of the law, as well as the appeal of laws and other regulatory legal acts contradicting the Constitution and laws of the Republic. The Procurator's office of the Republic shall represent interests of the state in court as well as conduct criminal prosecution in cases, using procedures and within the limits, stipulated by law." Para. 2 Article 83 of the Constitution established the structure of the Prosecutor's Office the Republic of Kazakhstan, stipulating that the Prosecutor's Office of RK "shall be a unified centralized system with subordination of junior procurators to their seniors and the Procurator General of the Republic. It shall exercise its authorities independently of other state bodies and officials and be accountable only to the President of the Republic"⁴.

A. The Problems of Definition of the Place of the Prosecutor's Office within a State Mechanism and the System of Power Division

1. Norms on the Prosecutor's Office in the Section VII of the Constitution of RK "Court and Justice"

In this regard a question arises as to the place of the Prosecutor's Office of the Republic of Kazakhstan within a state mechanism and the system of power division. In the first years after the Constitution of RK was adopted some scholars noted the "placement of the norms on the Prosecutor's Office into the Section VII "Court and Justice" of the Constitution of the Republic of Kazakhstan does not correspond to the state purpose and the place of the Prosecutor's Office within system of state bodies. Taking into account constitutional powers, it appears necessary to separate within the Constitution the norms on the Prosecutor's Office into an individual section. A less effective alternative is changing the title of the Section VII of the Constitution to "Court and Justice, The Prosecutor's Office"⁵.

The same idea was described in the works of I.Zh. Bakhtybaev, who, pointing out argumentativeness of placement of Constitutional norms on the status and activity of the Prosecutor's Office of RK into the Section "Court and Justice", states following: "The place and role of the Prosecutor's Office within the system of state agencies on

⁴The Constitution of the Republic of Kazakhstan. // Astana, 2012. P.15.

⁵Tuyakbay J.A. Development of the Prosecutor's Office of Kazakhstan during State-Legal Reform: author's abstract of Cand. Leg. Sc. dissertation // Moscow, 1997.

provision of constitutional legitimacy reasonably call for the need of creation of a separate Section, regulating the status of the Prosecutor's Office, within the Constitution of the Republic or of changing of VII Section title to "Court and Justice, The Prosecutor's Office"⁶. Similar approaches can be found in works of modern scholars pointing to disputable nature of place of the Prosecutor's Office within the system of power division, as well as of belonging of the Article 83 of the Constitution (containing the provisions of the Prosecutor's Office) to the Section VII of the Constitution of RK "Court and Justice". Observation of strict and uniform application of laws, Presidential decrees of the Republic of Kazakhstan and other regulatory legal acts in the territory of the Republic of Kazakhstan cannot be "regarded as rationale for including of constitutional provisions on the Prosecutor's Office of the Republic of Kazakhstan into the Section VII of the Constitution of RK "Court and Justice". The Prosecutor's Office can only observe, but not administer justice, as the latter is done by the Court only"⁷.

2. Dispute on the Issue about the Prosecutor's Office of RK not Belonging to Any of the Branches of Governmental Power

As to a given problem there is an interesting idea of the academician G.S. Sapargaliev. He thought that the Prosecutor's Office of the Republic of Kazakhstan does not belong to any of the branches of governmental power, but did not suggest how can the Prosecutor's Office of the Republic of Kazakhstan exist outside of the integral system of the governmental power divided into three branches. In this regard we are fully agree with the position of E.B. Abdrasulov, who during a scientific dispute upon this issue with an academician G.A. Sapargaliev noted that "several famous Kazakh scientists oppose attribution of the Prosecutor's Office to the control power. They note that "the Prosecutor's Office of the Republic of Kazakhstan does not belong to any of the branches of governmental power according to the current Constitution and legislation based on it". It is a "separate system of state agencies independent on other state bodies"⁸.

Opposing such position, E.B. Abdrasulov notes that even if we regard the governmental power as a system, i.e. an aggregate of numerous elements which are related to each other and make up a certain entirety, then the system elements of integral governmental power stand out by different criteria. In such case, the division of governmental power is done according to the principles of allocation of different competences and functions of governing of a state to state bodies. In the result we get a system of division and interaction of integral governmental power. Each state

⁶Bakhtybaev I.Zh. Constitutional Supervision of the Prosecutor's Office of the Republic of Kazakhstan. Cand. Leg. Sc. dissertation. Moscow, 1998. P. 170.

⁷Maisakanov M.A. Peculiarities of Realisation of Principles of Division of Power in the Republic of Kazakhstan. <http://repository.enu.kz/bitstream/handle/123456789/3727/osob.pdf>

⁸Sapargaliev G.S. Constitutional Law of the Republic of Kazakhstan. Academic Course, Almaty, 2006. P. 169.

body having a specific function belongs to this or that branch of power. Therefore, all the government authorities should find a place within the system. If the system is divided into three branches of power, then a state body should fit into the sphere of three branches of power of integral governmental power. However, if the functions of a state body do not fit into traditional system of power division, then we may talk about transformation of integral governmental power into four, five or more branches of power. This is why the wording “does not belong to any branch of power” puts a certain state body or an official out of the system of state bodies, which is absolutely illogical. It is a different matter that one should correctly identify main activity profile of a state body and correctly place it into this or that branch of power. And if main activity profile falls beyond traditional legislative, executive and judicial powers, then we may look for the answer among those special functions which are placed independently within the activity of state bodies⁹ and are “consistent with placement into legislative, executive or judicial branches of power”¹⁰.

Similar idea was earlier presented by Russian scientists, who stated that “all branches of power together constitute an integral system of realisation of power by state bodies. It is impossible to be out of branches of power and be included into the system of governmental bodies at the same time”¹¹.

B. Functions of the Prosecutor’s Office

1. Prosecutor Functions of Supervisory and Administrative Nature

Based on this approach, we should first define the functions of the Prosecutor’s Office and its competence, and on the basis of this we may try to show the place of Prosecution authorities within the system of power division.

Supervisory and other functions of the Prosecutor’s Office of the Republic of Kazakhstan are performed through authoritative powers granted by the legislation, many of which directly influence legal situation for the subjects of legal relations. Thus, paragraphs 1, 3 and 7 of the Article 6 of the Law on Prosecutor’s Office stipulate that any influence on the Prosecutor with the purpose to impede him from carrying out his powers or to force him into making of illegal decisions, as well as non-compliance with decisions, regulations, orders and demands of the Prosecutor creates responsibility established by the law. Orders (requests, instructions, directions) of the Prosecutor, given by him within the limits of his competence, are

⁹Abdrasulov E.B. The Role and Meaning of the Bodies of Constitutional Control within the System of Power Division. // A collection of works of the Republic Scientific Conference organised by L.N. Gumilyov Eurasian National University: “Legal and Juridical Reform in the Republic of Kazakhstan: History and Modern Period”. – Astana, 2005. p. 46-47.

¹⁰Mailybaev B.A. Establishment of the Evolution of the Institute of President: International Practice and Kazakhstan Model during a Transition Period. // author’s abstract of LLD dissertation. Almaty. 2002. P. 37.

¹¹Avtonomov A.C. Elected Officials. Moscow, 2002. P.50

mandatory for state bodies, officials, individuals and legal entities. The Prosecutor has a right in case of non-compliance with regulations and decisions within his competence to bring them to compulsory execution.

Orders of the Prosecutor to the bodies of pre-trial investigation related to criminal investigation, to bodies performing preliminary investigation and non-public investigation, are, effectively, a mediate form of participation of the Prosecutor in activity on execution of legal settlements aimed at efficient realisation of the law, the main subject of which are the bodies of executive branch. This conclusion is based on the norm of sub-para. 2-2) para. 1 Article 29, indicating that in order to reveal concealed crime, the Prosecutor has a right to require from competent authorities to carry out preliminary investigation with notification of results.

Also, the nature of supervisory and administrative functions of the Prosecutor is supported by written regulations stipulated by the Article 24 of the Law on Prosecutor's Office about elimination of violations of the law, which are presented by the Prosecutor and directed to an authority or an official that made the violation, or to an authority or an official competent of elimination of this violation. The Article also stipulates that a regulation must be executed within the period of time established by the Prosecutor. The Prosecutor is promptly notified of the execution of the regulation. Non-fulfilment of a regulation of the Prosecutor involves responsibility stipulated by the laws of the Republic of Kazakhstan.

Articles 45 and 46 of the Law on Prosecutor's Office prove that the Prosecutor's Office may carry out certain functions of the executive power. They stipulate that the Prosecutor's Office according to the Constitution in the form and within the limits forth by the Law and criminal procedure legislation, carries out criminal prosecution. Within this the Prosecutor:

- 1) has the right to start prejudicial inquiry, to pass it for investigation to the agency of inquest or inspection, or to take it into own proceedings;
- 2) controls investigation team, investigation and operational group, initiates criminal proceedings and conducts prejudicial inquiry.

Taking into account abovementioned facts it is difficult to agree with the opinion of G.S. Sapargaliev, who suggests that "the executive branch of power fulfils executive and administrative functions. The Prosecutor's Office does not fulfil these functions. The Prosecutor's Office does not have administrative authority"¹².

2. Protestation of Regulatory and Other Legal Acts, Decisions and Actions of State Bodies and Officials

¹²Sapargaliev G.S. Constitutional Right of the Republic of Kazakhstan. Academic Course. // Almaty, 2006. P. 170.

Another direction of activity of the Prosecutor's Office is protestation of regulatory and other legal acts, decisions and actions of state bodies and officials, contradicting the Constitution, the laws and decrees of the President of the Republic. According to the para. 4 and 5 Article 19 of the Law on Prosecutor's Office "in the protest, a Prosecutor shall request the cancelling of illegal act or its bringing to conformity with the Constitution and the Laws, as well as termination of illegal actions of an official and restoration of a violated right. The Prosecutor shall have the right to suspend the execution of appealed act or action before adoption of decision on the protest. The protestation of the Laws shall not suspend their actions".

This competence of the Prosecutor's Office by its content is similar to the constitutional control fulfilled by the Constitutional Council, as the purpose of protestation of legal acts of regulatory and non-regulatory nature is to bring them into conformity with the Constitution and the laws based on it. The difference, though, lies in the fact that, firstly, the supervisory range of the Prosecutor's Office includes not only the laws, but also other types of regulatory legal acts and the acts of law-enforcement content. Secondly, the protest of the Prosecutor does not change the legal situation (as upon adoption of a Regulatory Decision of the Constitutional Council of the Republic of Kazakhstan) in case if the protest is rejected, i.e. the protestation by the Prosecutor of legal acts does not suspend their action. According to the para. 2 Article 286 Civil Procedure Code of RK, "in case of dismissal of the Prosecutor's protest against the legal act, non-appropriate to the law and (or) the legal act of individual application, as well as against the actions of a state body or an official issued the unlawful act or committed illegal acts, or a higher-level body or the official, the Prosecutor appeals to court to acknowledge the contested act or action to be illegal¹³".

Thirdly, "from the point of view of ensuring of supremacy of the Constitution and constitutional legitimacy, the Prosecutor's Office has a more active role compared to the Constitutional Council, as it can ascertain application of laws and other acts upon a request from any subject and on own initiative"¹⁴.

Fourthly, the norm of the Article 83 of the Constitution of RK states that the Prosecutor's Office protests the laws and other legal acts contradicting the Constitution and the laws of the Republic. However, at present this norm does not have the mechanism for the implementation, i.e. there is no appointed state agency to which the Prosecutor's Office can appeal with the protest of non-compliance of the law with the Constitution of the Republic of Kazakhstan.

¹³Civil Procedure Code of the Republic of Kazakhstan (with amendments and supplementations as of 22.04.2015) // http://online.zakon.kz/Document/?doc_id=1013921

¹⁴Temirbulatov S.G. The Prosecutor's Office and Assuring of Constitutional Legitimacy in the Republic of Kazakhstan // Sayasat Journal. 1998. No. 8. P. 55.

In this regard it “seems logical to give the Prosecutor’s Office a right to appeal (not to protest) to the Constitutional Council upon the issue of unconstitutionality of the laws and other regulatory acts”¹⁵.

3. *Sanctioning of Proceedings of Certain Preliminary Investigative Work and Investigative Activities Which are Directly Related to the Interests and Freedoms of Citizens.*

The third function of the Prosecutor’s Office is related to the main form of Prosecutor’s supervision – the sanctioning of proceedings of certain preliminary investigative work and investigative activities which are directly related to the interests and freedoms of citizens. Subpara. 10 Article 29 of the Law on Prosecutor’s Office stipulates that to the extent regulated by the law, the Prosecutor gives sanction for preliminary investigation and non-public investigative activities. Subpara. 3) Para. 1 Article 38 of the Law on Prosecutor’s Office states that the Prosecutor shall “support or deny a motion of the prosecuting agency on sanctioning the arrest and detention in custody or house imprisonment of accused, suspected person; sanction the use of bail”.

The institute of sanctioning also includes signing of an indictment by the Persecutor, of criminal infraction protocol, direction of the criminal case to the court for review on the merits.

Also, sub-para. 8) Article 44 “Powers of Prosecutor on Administration of Legality of Executive Proceedings” of the Law on Prosecutor’s Office states that the Prosecutor shall sanction the acts of the administration of authorities, fulfilling the punishment in the cases, established by the Law.

4. *Representation of the Interests of the State in Court*

Another direction of activity of the Prosecutor’s Office is representation of the interests of the state in court. It is connected, on the one hand, with “supervision of strict and uniform application of criminal and criminal procedure legislation under delivering justice by criminal cases and for protection of the constitutional rights of citizens involved into litigation, for protection of interests of the society and the state by provision of enforcement of function of public prosecution, appeal against inconsistent with the Law or unjustified resistances in court”¹⁶. On the other hand, “the task of supervision for legitimacy of judicial act on civil cases and for representation of state interests in court is to provide protection of constitutional and other rights, freedoms and interests of citizens, the state or legal entities protected by

¹⁵Sapargaliev G.S. Constitutional Right of the Republic of Kazakhstan. Academic Course. // Almaty, 2006. P. 173.

¹⁶Regulation on the Department of Supervision for Legitimacy of Judicial Acts and Representation of State Interests within Criminal Cases, as approved by the Prosecutor General of the Republic of Kazakhstan of March 13, 2012 No. 28. // http://online.zakon.kz/Document/?doc_id=31204164&agreement=31204164

the law, strict compliance with principles of delivering of justice, strengthening of legality and order, prevention of wrong¹⁷.

5. *Formation of State Crime Statistics*

To end the classification of functions of the Prosecutor's Office, it is worth to mention the formation of State Crime Statistics by the Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan (hereinafter – the Committee). The Committee keeps special records, excluding current records, department records and records of persons confidentially collaborating with the bodies of preliminary investigation. The Committee also carries out information analytics associated with crime statistics and special records; develops strategic principles, standards and methods in the sphere of state crime statistics and special records etc. All the abovementioned bespeaks supervisory, executive and administrative functions of the Prosecutor's Office.¹⁸

C. Formation and Development of an Independent Branch of Power – Prosecutorial – in the Republic of Kazakhstan

Analysis of all the functions of the Prosecutor's Office which were studied herein leads us to a conclusion that the competence of the Prosecutor's Office is complex and its functions comprise to some extent powers of all three branches. As we illustrated above, the Prosecutor's Office to different extent has powers of administrative and executive branch, functions of a control body (when its actions and acts are directly changing legal situation) and a function of a supervisory body (when the Prosecutor's Office via protests demands change of legal situation form certain subjects of government power, which may be satisfied or dismissed).

This conclusion is more and more often found in juridical literature – expressly or implicitly. Thus, professor V.P. Ryabtsev notes that the main purpose of the Prosecutor's Office and specific character of its legal status lies in the fact that the Prosecutor's Office is a body authorised by the state, and it is in some way statutory and functionally included into all three branches of power, as well as into the system of legal status of the President as a head of the state. However, at this the Prosecutor's Office, initially being a systemically important element of the

¹⁷Instruction on Organisation of Prosecutor's Supervision Over the Legitimacy of Judicial Acts for Civil Cases and Representation of State Interests in Court, as approved by the Order of Prosecutor General of the Republic of Kazakhstan of December 13, 2012 No. 151.

// http://online.zakon.kz/Document/?doc_id=31330215&agreement=31330215

¹⁸Regulation on the Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan, as approved by the Decree of the President of the Republic of Kazakhstan of March 28, 2003 No. 1050 // http://online.zakon.kz/Document/?doc_id=1038548

mechanism of checks and balances for branches of power, of legal coverage of their alignment and cooperation, it does not – and should not – be the part on any of them to the full. This is what makes up uniqueness, the main specificity of legal status of the Prosecutor's Office and its difference from all the other government institutions. It is a good and reliable solution for establishment of modern statehood, for formation of efficient element of the system of checks and balances, for insuring of legitimacy order within a democratic legal state, for optimal interaction of the Prosecutor's Office with other structures of the state¹⁹. All complex and multifunctional competence of the Prosecutor's Office in the Constitution of the Republic of Kazakhstan is described as activity of the Prosecutor's Office of the Republic of Kazakhstan on carrying out of supreme supervision on the behalf of the state – supervision over strict and uniform application of laws, presidential decrees and other regulatory legal acts in the territory of the Republic; over legitimacy of preliminary investigation, inquest and inspection, administrative and executive proceedings; over measures for revealing and elimination of any infringement of legality; over protestations to laws and other legal acts contradicting the laws of the Republic. This activity also includes representation by the Prosecutor's Office of state interests in court, as well as carrying out of criminal prosecution according to cases, procedures and limits established by the law.

Taking into account complexity and multifunctional nature of activity of the Prosecutor's Office agencies, its deep content, its great importance for protection of rights and freedoms of an individual and a citizen, for protection of interests of the state and society, at the present stage of development of the Prosecutor's Office we should recognise the formation and evolvement of an independent branch of power in the Republic of Kazakhstan – prosecutorial one. It is reporting only to the President of the Republic of Kazakhstan. Performing the functions of supreme supervision on behalf of the state in different spheres of social and public life, taking measures for detection and elimination of any infringements of legality, the Prosecutor's Office of the Republic of Kazakhstan becomes an independent subject of the system of checks and balances of a state mechanism, interacting with all its constituents and thus helping the President of the Republic of Kazakhstan to promote coherent functioning of all the branches of governmental power and responsibility of authorities before the people.

¹⁹Ashurbekov T.A., Ryabtsev V.P. The Prosecutor's Office within the System of Government Institutions of the Russian Federation: Modern Rendering // Herald of the Academy of General Procuracy of the Russian Federation. -2009. – No. 6. P. 30.

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