

ROLE AND PLACE OF THE PARLIAMENT OF KAZAKHSTAN IN THE SYSTEM OF CHECKS AND BALANCES

Timur Yerbolatovich Kanapyanov*, Naubat Kaliyevich Kaliyev* and Maral Bakytzhanovna Zhanarstanova**

This article examines the system of checks and balances in post-Soviet Kazakhstan in general and the role of the Parliament of Kazakhstan in that system in particular. As opposed to the scientific mainstream in Kazakhstan which explains established system of checks and balances as a result of formal constitutional reforms, this article implements broader analytical framework and examines the system of checks and balances in Kazakhstan taking into account a correlation of formal and informal practices. The goal of the article is to show that in post-Soviet Kazakhstan the separation of powers is established without proper checks and balances. The inference drawn from the article is that the separation of powers in Kazakhstan is blocked by the strong constitutional and informal powers of the President, which allows him to control and interfere in affairs of all branches of power.

Keywords: Parliament; Kazakhstan; separation of powers; checks and balances; constitutionalism; parliamentarism

INTRODUCTION

With the collapse of the Soviet Union almost all post-Soviet and post-communist countries decided to become democratic states with market economy and with modern political institutions adhered to the principle of separation of powers. Conventional wisdom of political science suggests that the separation of powers usually goes hand in hand with the system of checks and balances. However, we have myriad of scholars who illustrate that in some former totalitarian or authoritarian countries the separation of powers can be established without proper checks and balances (Kaliyev, 2003).

The Republic of Kazakhstan is one of the fifteen states, which emerged after the dissolution of the Soviet Union. These states were faced with a huge task of building democratic state institutions, which was a challenge (Whitmore, 2004). Since that time Kazakhstan has enacted two Constitutions (in 1993 and 1995) and there were several essential amendments to the current Constitution (in 1998, 2007 and 2011). Today according to the Constitution Kazakhstan proclaims itself a democratic state, where the state power is executed “in accordance with the principle of its division into the legislative, executive and judicial branches and a system of checks and balances that governs their interaction” (Article 3). In theory all three

* Department of Political Science, L.N. Gumilyov Eurasian National University, Astana, Kazakhstan 010000 Kazakhstan, Astana, 2, Satpayev str.

** S. Seifullin Kazakh Agro Technical University 010000 Kazakhstan, Astana, 62, Prospect Pobedy

branches of powers should function and interact through the system of checks and balances. This system implies that the branches should have an ability to act on their own, at the same time, to regulate and be regulated by each other. Nevertheless, in most post-communist countries the real situation indicates that in practice the separation of powers with the system of checks and balances is not always properly realised. All legislative power in Kazakhstan is vested in the bicameral Parliament of Kazakhstan, which was created with the new Constitution of 1995. Therefore, this article aims to study the role of the Parliament of Kazakhstan in the system of checks and balances and tries to give an answer for the question whether there is real separation of powers in Kazakhstan and what is needed to improve in the functioning of the system of checks and balances in terms of parliamentary development. Before going to the main body of the study, we would like to identify a concept and the very meaning of the system of checks and balances in democratic states.

THEORETICAL FRAMEWORK

The system of separation of powers and checks and balances were designed by philosophers of liberal thought and historically meant to prevent usurpation of absolute power by one person or any institution. Political scientists identify two types of relationship between the legislative and executive branches of government in terms of power separation. The first one is based on “the idea of a balance between the two powers, the most famous formulation of which is found in the works of Montesquieu; on the other hand, there is a more democratic idea of a subordination of the executive to the legislative power, first proposed by Rousseau in the Social Contract” (Lauritsen, 2010, p. 7). Today we can see that the model by Montesquieu has transformed into presidential government inspired by the Constitution of the United States of America, whereas the model proposed by Rousseau has become the basis of parliamentary government in most European states. The American understanding of the principle of separation of powers (perceived as classical) is based on James Madison’s vision on the system of checks and balances (Madisonian system) (Carey, 1978). He defined it as follows:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions (cited in Calabresi *et al.*, 2012).

Nevertheless, both conceptions of the separation of powers contains an effective and accurate system of checks and balances which in turn allows realizing main principles of liberal democracy. As Professor Jeremy Waldron has put it, “the principle of checks and balances means that the exercise of power by any one power-holder needs to be balanced and checked by the exercise of power by other

power-holders” (Waldron, 2013, p. 433). In other words, the system should be built so that the legislative power maintains the checks and balances on powers of the executive and judicial branches, and vice versa. The definition of the separation of powers used in the present paper is based on the definition proposed by M. J. C. Vile (1998) in his classic book *Constitutionalism and the Separation of Powers*. He formulates a “pure doctrine” of the separation of powers in the following manner:

It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State (Vile, 1998, p. 14).

So why do we need the system of checks and balances and the principle of separation of powers? First of all it secures citizens of given country against potential tyranny (Campbell, 2004, p. 1). In transitional countries there has always been a threat that strong presidential power will lead to the personal rule and authoritarian government. It is even more applicable to the post-Soviet countries since almost all of them have implemented presidential or presidential-parliamentary form of government with presidential dominance (Chirkin, 2014, p. 17). Despite the fact that most of these countries declare adherence to the separation of powers, Presidents often seek more freedom on their actions and strive to have less accountability and checks on their influence. According to some scholars, “in testing the limits of their power, Presidents may subvert constitutional and legal structures designed to check and balance them” (Rose-Ackerman *et al.*, 2011, p. 247).

While the essence of democracy is the principle of separation of powers with the system of checks and balances, politicians in most transitional countries were able to argue for strong presidential power trying to diminish the checks and balances on President. This mostly resulted in a weak legislature with checks and balances for executive branch not applicable in practice (Kanapyanov & Kaliyev, 2015). Many scholars explain that the dominance of one branch over other branches of power happens because checks and balances imposed on them do not operate properly. More often it is the case when the judicial and legislative checks on President are being abolished by the Constitution and constitutional laws with or without the consent of the nation.

It is clear that in order to investigate the system of checks and balances we must address a constitutional framework of a given country and to see how the system is regulated by constitution. In many established democracies the separation

of powers and the system of checks and balances is not explicitly written. Nevertheless, these features are indispensable parts of their political systems. Whereas, in Constitutions of post-authoritarian and post-totalitarian states the principle of separation of power usually receives verbal forms (Alebastrova, 2014, p. 45). It does not necessarily mean that in practice the system of checks and balances has been eagerly upheld by political actors of that states. Above-mentioned discussion in post-Soviet countries regarding the improper system of checks and balances may be applied to Kazakhstan as well. Therefore, the following section is going to investigate when and how the principle of separation of powers and the system of checks and balances were established in post-Soviet Kazakhstan in terms of constitutional development. This constitutional analysis will allow us to see how the system established in Kazakhstan corresponds to the classical Medisonian system of checks and balances.

DISCUSSION

Establishment of the separation of powers in independent Kazakhstan

In 1991, Kazakhstan became an independent state with the old communist legal framework. The country inherited from the Soviet Union weak and inefficient political institutions staffed with ex-communist cadres (Zhanarstanova & Kanapyanov, 2011). It took about three years until the old Soviet Constitution of 1978 was replaced by the first new Constitution of 1993. It was adopted by the quasi-legislative body still called the Supreme Soviet of Kazakhstan on 28 January 1993. According to the Constitution of 1993, Kazakhstan was established as a democratic state and incorporated the principle of separation of powers. Although the system of checks and balances was enshrined in the Constitution, there were no real mechanisms for its implementation. Moreover, this Constitution did not state clearly the form of government and was not able to regulate various relations between branches of powers, specifically during political stalemates. Most Kazakh scholars agree that this Constitution established some form of parliamentary government with great impact of the Soviet legal framework (Amrebaev *et al.*, 2013, p. 38). However, we have to admit that this was the first Constitution of Kazakhstan which entailed the separation of powers and tried to implement the system of checks and balances for the first time.

At the beginning of the Constitution of 1993, eight basic principles were enshrined and among them the principle of separation of powers found itself in the following way: "Sixth. State authority in the Republic of Kazakhstan shall be based on the principle of its division into legislative, executive, and judicial powers. In accordance with that principle, state bodies shall act independently within their powers, cooperating with each other, using the system of restraints and counterbalances" (Ludwikowski, 1996, p. 443). According to Article 62, the

Supreme Soviet was the only legislative and the highest representative body of Kazakhstan. The Article 72 stated that the President of the Republic of Kazakhstan is the head of state and the head of the united system of executive power. Whereas Article 75 clearly implied that the judicial power in the Republic of Kazakhstan is vested in Constitutional Court, the Supreme Court, the High Arbitration Court and lower-ranking courts established by law (Ludwikowski, 1996, p. 456). In this vein, constitutional norms separated branches for legislative, executive and judicial powers, and did not allow blurring of powers. Every branch meant to implement its own functions. However, this Constitution proved to be not viable and in two years was replaced by the new and current Constitution of 1995.

Many scientists have explored the reasons for rewriting the Constitution and tried to examine which democratic principles lacked in that Constitution. First of all, we think that it was a result of struggle between various political leaders and elites. This is not to say that Constitution of 1993 was good enough and fully responded for growing demands of a transitional society. This Constitution, as highlighted above, lacked coherence between the branches and the system of checks and balances was not properly applied. The equilibrium between branches of power was not achieved and it was apparent since the first days of political interactions. As a matter of fact the Supreme Soviet had too much power and could not be equally regulated by other branches of powers. Mostly it is explained as a repercussion of the Soviet legacy, where the Kazakh SSR Supreme Soviet formally was granted wide and unlimited executive and legislative powers within the republic, but practically remained a decorative legislative body, which functioned under the strict supervision of the Communist Party. It seems logical that the founding fathers of 1993 Constitution strived to empower the Supreme Soviet of Kazakhstan with real powers (Amandykova, 2014, p. 63). Thus, for instance, the Supreme Soviet was designed to handle a wide range of government affairs, including the sole prerogative to adopt Constitution and laws; to appoint the Prosecutor-General, the Chairman of the National Bank; to elect the Constitutional Court, the Supreme Court and the High Court of Arbitration, to determine the procedure for establishing lower-ranking courts; to exercise control over implementation of laws and over the execution of budget (Ludwikowski, 1996, p. 451). Moreover, the President appoints the Prime Minister, Deputy Prime Minister, Ministers of Foreign Affairs, Defence, Finance, Internal Affairs, Chairman of the Committee of National Security, and Heads of diplomatic representations only with the consent of the Supreme Soviet. The President's and Prime Minister's authority was severely limited with various checks imposed on them by the Supreme Soviet. The President could not appoint members of the Cabinet, could not even declare a state of emergency without the consent of the Supreme Soviet. Besides, other branches of powers did not have rights to dissolve the Supreme Soviet. The only check on the legislative branch was the President's power of the suspensive veto (Amandykova, 2014, p.

65). Therefore, it is clear that the legislative branch had great advantages over other branches of powers.

Taken together, the Constitution of 1993 contained the following basic elements of the system of checks and balances: a suspensive veto of the President, an election of the Vice President, resignation of the President, responsibility of the members of the Cabinet to Supreme Soviet, resignation of the Cabinet of Ministers. We agree with professor Amandykova (2014) that these elements of the system of checks and balances were not enough for the effective functioning of the political system (Amandykova, 2014, p. 65). In general, many issues in the Constitution were left blur and unclear, including the relations between legislative and executive branches in terms of checks and balances, the form of government, votes of no confidence and others. These constitutional inconsistencies were partly responsible for parliamentary crises of 1993 and 1995, which led to self-dissolution of the Supreme Soviet in 1993 and its dismissal by the Constitutional Court in 1995. During the absence of the legislative branch in 1995, President Nazarbayev adopted a new constitution by the referendum, and consequently, enacted the new set of laws, including a new electoral law. This constitution was elaborated on the basis of the French model, and people nicknamed it as a “Nazarbayev’s Constitution” (Kaliyev, 2005).

With the new Constitution of 1995, a new stage of constitutional and institutional development of independent Kazakhstan begins. It established bicameral Parliament with a new set of interactions between branches of power with totally different system of checks and balances compared to the previous Constitution (Sapargaliyev, 2006, p. 27).

According to the current Constitution of 1995, Kazakhstan is a unitary state with a presidential form of government. In the constitution of Kazakhstan the principle of state powers’ division is explicitly enshrined in the Article 3: “The state power in the Republic of Kazakhstan is unified and executed on the basis of the Constitution and laws in accordance with the principle of its division into the legislative, executive and judicial branches and a system of checks and balances that governs their interaction”. The legislative branch is represented by a bicameral Parliament consisting of the Senate (upper house) and the Majilis (lower house), the executive power is vested on the Government and local executive bodies, whereas the judicial power is realised by the Supreme Court and local courts. Interestingly enough, this constitution prescribed the special role for the President. The President is not a member of any branches of power, but stands somehow above all power branches in Kazakhstan. It expressed in the Article 40 of current Constitution: “The President of the Republic shall ensure by his arbitration concerted functioning of all branches of state power and responsibility of the institutions of power before the people”. Nevertheless, the President has great influence over the executive branch, since the Government is formed and dismissed by the President

and accountable to him. For the sake of readers' convenience the President will be referred to as the executive branch during explaining the system of checks and balances.

As a result of analysis of the Constitution of 1995, the main elements of the system of checks and balances regarding to each branch of power were identified.

The legislative branch has following checks:

(1) on executive branch:

- vote of no confidence in the Government (Article 53-2, Article 56-2)
- issues of war and peace (Article 53-4)
- power to enact taxes (Article 54-2)
- may override the suspensive veto of the President (Article 54-2-2)
- Senate approves some appointments by the President (Chairperson of the National Bank, the Prosecutor General and the Chairperson of the Committee of National Security) (Article 54-2)
- Majilis gives consent to the President to appointment of the Prime Minister of the Republic (Article 56-1-2)
- power to appoint sixth members of the Accounts Committee for control over execution of the republican budget (Article 57-1)
- power to hold Parliamentary hearings (Article 57-1)
- power of releasing a member of the Government from office (Article 57-6)
- power to approve international treaties (Article 54-1-7)
- impeachment of the President (Article 47)

(2) on judicial branch:

- power to amend the Constitution (Article 53-1, Article 63-3)
- power to decide issues of amnesty to citizens (Article 54-6)
- Senate approves the Chairperson of the Supreme Court and judges of the Supreme Court (Article 55-1)
- deprivation of inviolability of the Chairperson and judges of the Supreme Court (Article 55-3)

The executive branch has following checks

(1) on legislative branch:

- the President has power to convene the first session of the Parliament and accept the oath of its deputies to the people of Kazakhstan (Article 44-1-2)
- the President has power to call extraordinary session of the Parliament (Article 44-1-2)

- the President signs laws submitted by the Senate (Article 44-1-2)
- the President acts as the Commander-in-Chief of the Armed Forces of the Republic (Article 44-1-12)
- the President has power to declare a state of emergency and to impose martial law on the entire territory of the Republic (Article 44-1-16-17)
- legislative initiative of the President and Government (Article 61-1)
- the President appoints fifteen deputies of the Senate (Article 50-2)
- nine deputies of Majilis are elected by Assembly of the people of Kazakhstan (where the Chair is the President) (Article 51-1)
- the President has power to initiate changes to the Constitution (Article 53-1)
- suspensive veto of the President (Article 54-2-2)
- the President has power to nominate the candidacy for the Chairperson of the Senate (Article 58-1)
- drafts of law envisioning reduction of state revenues or increase in state expenditures may be submitted only when supplied with the positive resolution of the Government (Article 61-6)
- when a draft of law submitted by the Government is not adopted, the Prime-Minister has the right to raise an issue of confidence in the Government (Article 61-7)
- the President has to sign laws (Article 62-2)
- the President has power to dissolve the Parliament (Article 63-1)

(2) on judicial branch:

- President has power to appoint judges (Article 82-1-2)
 - President has power to pardon a citizen (Article 44-1-15)
- Whereas the judicial branch has checks on legislative branch in the forms of
- validation of accusation during impeachment of the President by Parliament (Article 47-2)
 - deprivation of deputies' mandate by a conviction of the court (Article 52-5-2)
 - and the judicial review of laws on constitutionality (Article 78).

The members of the executive branch are permanently checked by the judicial branch as ordinary citizens.

We tried to highlight most important and obvious checks imposed on each branch and which are most relevant to our study. At the same time we do not claim

that this list is exhaustive, since the system of checks and balances is pervaded throughout the political system and it is impossible to cover it all in this article. These elements of the system of checks and balances in Kazakhstan seem logical and in theory ought to contribute to the democratization of the government. However, in practice the situation is different.

The Constitution of 1995 clearly states that Kazakhstan has a presidential form of government with the system of checks and balances. Moreover, from the analysis of checks imposed to each branch one can say that the country is not a classical presidential, but has a mixed form of government with strong presidential powers. The set of checks designed to separate and to provide mutual restrictions on power through occasional blending frequently ends up with domination of one power upon other powers. In case of Kazakhstan the executive branch, which includes the President as well, seems to be dominant over the two others. Checks upon executive power meant to be weak and very difficult to exercise in practice. In Kazakhstan the legislative branch is the institution designed to check and balance the power of the President. Here comes the question how does the Parliament of Kazakhstan cope with this task? To answer this question we study the role of Kazakh Parliament in the system of checks and balances.

The Parliament of Kazakhstan in the system of checks and balances

According to the Constitution of Kazakhstan, bicameral Parliament has its distinctive place and role in the political system of the country. It is defined as the highest representative body of the Republic performing legislative functions (Constitution of Kazakhstan, 1995). In this section we are going to examine how the Parliament exactly checks the executive branch and prevents from encroachment upon its powers. Our argument here is that the Parliament delegates too much legislative power to the President and to the executive branch and does not properly check the executive branch.

According to the professor Kaliyev (2005) even in the Constitution we have inconsistent and contradictory articles regarding the principle of separation of powers and mutual checks. He argues that Article 40 stating that “the President determines the main directions of the domestic and foreign policy of the state and ensures concerted functioning of all branches of state power” somehow contradicts to Article 3, which implies the principle of power division into the legislative, executive and judicial branches (Kaliyev, 2005). It is true that in the situation where the President has a wide range of powers prescribed by Article 40 of the current Constitution the executive, legislative and judicial branches can never be totally free in performing their assigned powers with consistent mutual checks on each other.

To say that there is no clear separation of powers in Kazakhstan is not to say that the Constitution contains no parliamentary checks on executive branch at all.

The Parliament has its distinctive place in the system of checks and balances at least in theory. Basic constitutional elements of the system of checks assigned to the Parliament in order to balance and check the executive power are analyzed in detail hereinbefore. We would like to discuss some of them in more detail here.

First of all, the Parliament has right to express vote of no confidence in the Government by means of non-approval of the report of the Government about execution of the republican budget and by a majority of votes of the total number of deputies of the Majilis by the initiative of not less than one-five of the total number of deputies of the Majilis (Constitution of Kazakhstan, 1995). Moreover, the legislative branch has power to impeach the President, but only in the case of high treason. The veto power of the Parliament is perhaps the most powerful means of checking and balancing the executive branch. Nevertheless, in the period of 20 years under the current Constitution none of these powers has been exercised. Contrary to that, the Parliament was several times dissolved by the President prior to the official end of its term. The Constitution gives power to the Senate to approve some high officials of executive branch and power to the Majilis to give consent to appointment of the Prime Minister. However, the history of independent Kazakhstan does not know the cases of rejection of the candidacy of the Prime Minister and other appointments of the President. Many times members of Government have been criticised in the sittings of the Parliament, but the power of releasing a member of the Government from office was never used.

Taken together, these cases suggest that the Parliament has not had the reason to use the prescribed checks on the executive branch or other factors impeded from doing so. In order to understand this we should discover a little bit deeper some features of the political system of Kazakhstan.

Kazakhstan has its own peculiarities in the form of government and relations between power branches. In order to study these peculiarities, one must look upon not only constitutional norms and legal acts, but also established practice. The form of government in Kazakhstan is mixed (presidential-parliamentary) with the domination of the President over all branches of power. According to the Constitution the President determines the main directions of the domestic and foreign policy of the state and ensures concerted functioning of all branches of state power. Moreover, he forms the Government with the consent of the Parliament, however, he does it without taking into account whether a candidate is a member of the ruling party or other parties. Thus the member of Government may be appointed not being a member of any party. This is another peculiarity of Kazakh political system and probably the best example of the underdevelopment of party system in the country. There are a lot of secondary studies indicating that the legislative and judicial branches in Kazakhstan are contaminated by the practice of “telephone justice” (cited in Waldron, 2013) frequently used by the President’s Administration and other members of the executive branch. This is one more

example of informal relations and unconstitutional practices, which infringes the system of checks and balances. It entails some amount of undocumented oral orders and instructions from the members of the executive branch, as well as between other branches of powers.

Main function of the Parliament ought to be the law-making. Here the legislative branch also does not have sole prerogatives and feels constant pressure from the executive branch of power. As we saw above, the legislative initiative belongs not only to the Parliament, but also to the President and the Government, although it shall be realised exclusively in the Majilis (Article 61). According to Article 61 “drafts of law envisioning reduction of state revenues or increase in state expenditures may be submitted only when supplied with the positive resolution of the Government”, besides, “in the case when of a draft of law submitted by the Government is not adopted the Prime-Minister has the right to raise an issue of confidence in the Government”. In our opinion, these constitutional norms constantly subordinate the Parliament to the Government in the law-making process. It means that in adopting laws deputies always depend on the executive branch. Moreover, the President has power to issue decrees having the force of laws in the Republic and has the right to initiate the delegation of legislative powers to him (Article 45-2), which was aptly used many times, including during the parliamentary crises of 1993 and 1995.

All this clearly shows that the very system of checks and balances in Kazakhstan is in trouble and the Government has huge potential of domination over other branches of power. If this situation continues the political system of Kazakhstan will face great challenge of balancing and keeping equilibrium between power branches. There is a danger that one of the power branches will lose its checking and balancing mechanisms, thus becoming a subordinate branch of power. This may contribute negatively to the democratization of society in transitional period and may throw back the country to the “gray zone” (Carothers, 2002).

Today the functioning of the system of checks and balances and the separation of powers deeply depends on the existence of real opposition and free party competition within any political system. Contemporary political situation in Kazakhstan is characterised by the weak political opposition, the absence of institutionalised multiparty system and a lack of democratic competitions in elections of different levels. This can be simply proved by the composition of current parliamentary convocation where absolute majority of seats is taken by the ruling “Nur Otan” party (in the Majilis 84 seats are occupied by “Nur Otan”, seven seats – by Democratic Party of Kazakhstan “White Road” and seven seats – by Communist People’s Party of Kazakhstan). On the other hand, such situation is the result of weak political opposition, which is unable to find mass support of the population and consequently to get the power. All past elections in Kazakhstan have demonstrated this situation (OSCE/ODIHR Report, 2011). Therefore, it is

difficult to speak about the realization of the principle of power separation in any country without strong political parties available to obtain the power via democratic elections, at least from time to time. Indeed, without viable opposition the Parliament cannot be strong and efficient player in political life of the country, particularly it would be detrimental for the quality of laws, for the assurance of control over the President and the executive power, for the forming and checking of the judicial branch. Moreover, the whole system of checks and balances might be harmed since there are no such subjects strongly and directly interested for keeping such balance between the power branches. Sources of this political situation in Kazakhstan vary and in most cases explanations found beyond legal frameworks. This opens a great perspective for future studies on this issue.

CONCLUSION

It is clear now that in order to study the system of checks and balances in Kazakhstan we must take into account a correlation of formal and informal practices. We have witnessed that there is a range of relationships undergoing far beyond formal constitutional norms and procedures preventing an establishment of truly Madisonian system of checks and balances. Our research shows that there is constitutional principle of separation of powers in Kazakhstan, however the system of checks and balances is not properly realised, especially when it comes to the checks imposed on the executive branch by the legislative branch. In our opinion it is caused, first of all, by inefficient constitutional separation of powers, where the President stands as the arbiter over all powers of government and by the informal practices established in all public authorities. As separation of powers is blocked by the strong constitutional and informal powers of the President, it allows him to control and interfere in affairs of all three branches of power. In order to establish a workable system of powers separation it is necessary to strengthen the role of the Parliament of Kazakhstan in the system of checks and balances. This is impossible to do without a strong multiparty system, a real opposition and political competition in the country.

Our conclusion is that the Parliament of Kazakhstan delegates too much legislative power to the President and to executive branch and does not properly check the latter, which is almost impossible to perform with the constitutional dominance of the President over all branches of power and without established multiparty system, including real opposition available to get the power.

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