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Granting of electoral rights to convicted: international experience and national legislation

During preparation of scientific article the authors conducted a study on the restriction of the electoral rights of citizens convicted for crimes and being in places of deprivation of freedom as an actual and ambiguous constitutional and legal phenomenon. Accordingly, the purpose of the study is a comparative legal analysis of this phenomenon based on its socio-philosophical, theoretical and legal background, practical aspects from the point of view of international legal practice of restricting electoral rights of citizens convicted for crimes, as well as from the point of view of the implementation of this restriction in the national electoral system in modern Kazakhstan. The International Acts and Materials of the Conventions protecting human rights were examined. Constitutions of the near and far abroad countries are considered. On the example of European countries, the USA, China, Korea and others, various restrictions on the electoral rights of convicted and the progressive changes that have occurred recently in connection with the democratization of society and liberalization of the rights of convicted are shown. The special place in the article is devoted to the European Court of Human Rights, its ideology is revealed, and purpose of creation, competence and authority, as well as the possible consequences of non-compliance with European Court rulings are considered. Within the legal reform conducted by the humanization of society in the country authors proposed to add part 3. of article 104 of Penal Code of the Republic of Kazakhstan p. 5-1 by words that active suffrage is given to persons serving their sentences in lightened conditions in the minimum security institutions, which will be another step towards democratization of Kazakhstan legislation on persons convicted for crimes for a short time.

Keywords: international community, European Court of Human Rights, legislation, Constitution, Criminal Code, democracy, constitutional state, participation in elections, electoral law, convicted.

Introduction

The relevance of the research topic is that the international community was still in the process of building its foundations, namely the birth of the principles of separation of powers, a system of checks and balances, protection of natural human rights from the arbitrariness of absolutism towards the creation of a civil society, touched upon issues of universal equal suffrage. The founders of constitutional state, Jean-Jacques Rousseau, Charles-Louis Montesquieu, John Locke, Thomas Hobbes and others, gave the theoretical basis for the formation of legislative organs of power through their general elections. As human society developed, the electoral law was democratized. Of course, this depended on the political situation in a particular state and the alignment of class forces in society.

From the history of the formation of the US state and law, we know that the victory in the war between the South and the North in the 19th century was the last to be due to the fact that the authorities abolished slavery and gave them hope that they would rule the state through participation in general elections.

Every state of Europe, America and the East achieved this as a result of a brutal struggle against the totalitarian regimes of the ruling monarchies. It was a long and difficult path in which the foundation of today's democracy strengthened and developed.

To take, for example, the Russian Empire at the beginning of the twentieth century, this included Kazakhstan, as the Steppe Territory. Officially electoral rights in the first parliament of the country - the State Duma persons younger than 25 years old were deprived, studying in educational institutions, military ranks of the army and navy, wandering aliens (peoples of the North who lived in hunting), foreign citizens [1; 146, 147]. To this official list you need to add more women, as well as those convicted by the court for the crime committed for any period of time.

The study of the electoral law is relevant due to its evolution and strengthening as democracy wins in Europe, Asia and the CIS countries after the collapse of the USSR in the post-Soviet space. The level of democracy in the electoral law depended on how much society had advanced in protecting human rights and freedoms in the way of its main goal - the construction of a state of law. In this regard, the international community, through established organizations, is doing a lot for the further democratization of electoral law.

A special place in them is given to the rights of convicted in the countries of young democracy, to which Kazakhstan can be attributed.

The purpose of the study was on the example of international law norms, enshrined in Article 21 of the Universal Declaration of Human Rights (1948), Article 25 of the International Covenant on Civil and Political Rights (1966) to show that every citizen, without any discrimination and without unreasonable restrictions, should have the right to take part in the conduct of public affairs through freely chosen representatives.

Also, the purpose of the research of a scientific article is to identify patterns of constitutional restriction of electoral rights of convicted, as well as, proceeding from the patterns found, to develop their own position on improving national legislation in the context of restricting electoral rights of citizens convicted and staying in minimum security institutions.

The objectives of the study were:

– summarize and analyze the international experience of restricting the electoral rights of citizens convicted for crimes, according to the Basic Laws of the states under study, the Criminal Procedure Codes, regulations, etc.;

– to analyze the international legal practice of resolving issues related to the liberalization of electoral rights of convicted, in particular, documents of the European Court of Human Rights (ECHR), article 3 of Protocol No. 1 of the European Convention on Human Rights of 1950;

– to study the Constitutional Laws «About Elections in the Republic of Kazakhstan», «About the Republican Referendum», normative acts: Criminal Code, Civil Procedural Code, Code of the Republic of Kazakhstan on Administrative Offenses and other normative acts;

– to study various points of view about the legal nature of the phenomenon of restriction of the electoral rights of convicted, about the necessity and expediency of applying criminal penalties in the form of restricting electoral rights;

– to offer practical recommendations for improvement of Kazakhstan's constitutional, criminal, criminal-executive legislation, as well as electoral law and process.

Methods and materials

In the scientific article, the authors applied both general scientific methods of knowledge and special methods and techniques characteristic of the legal sciences: dialectical, historical and legal, methods of logical deduction and induction, a system-structural approach, a comparative (comparative-legal), formal-legal and others.

The dialectic method of cognition allowed studying fully and thoroughly the theoretical problems of restricting the electoral rights of prisoners, to identify patterns of deprivation of electoral rights as a type of criminal punishment and constitutional restrictions on electoral rights of citizens convicted by a court sentence used today, their legal nature and background.

The comparative legal method of research was used by the authors in the aspect of comparing international standards for restricting the electoral rights of citizens in places of isolation with the norms of Russian law in the sphere of legal regulation of the institution for restricting electoral rights of prisoners. This allowed us to disclose more fully the content of the studied legal problem.

Results

According to Article 3 of Protocol No. 1 of the European Convention on Human Rights, signed in Rome on November 4, 1950: «The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot under conditions that would ensure the free will of the people when choosing the legislative power» [2]. The Convention provides for electoral law as a fundamental principle of effective political democracy.

As known, the OSCE Office for Democratic Institutions and Human Rights (ODIHR), founded in 1991 and interested in ensuring respect for human rights and freedoms [3], established an Election Observation Mission. The OSCE mission highly appreciated the extraordinary parliamentary elections in the Republic of Kazakhstan held on March 20, 2016 with the proviso that Kazakhstan still has a significant way to go to ensure compliance with OSCE commitments on democratic elections. In particular, one of the issues was the deprivation of the electoral rights of our citizens serving their sentences in places of detention.

The election process in the Republic of Kazakhstan is ensured by the Constitution of the Republic of Kazakhstan, the Constitutional Laws «About Elections in the Republic of Kazakhstan», «About the Republi-

can Referendum», regulations: the Criminal Code, the Civil Procedural Code, the Code of Administrative Offenses of the Republic of Kazakhstan, and other regulations, such as «About the procedure consideration of citizens' appeals in the Republic of Kazakhstan», «About the order of the organization and holding of peace meetings, rallies, processions, pickets and demonstrations in the Republic of Kazakhstan».

Point 3 of Article 33 of the Republic of Kazakhstan Constitution contains a ban on participation in elections and in the republican referendum of citizens held in places of detention by a court sentence [4; 153]. Point 3 of Article 4 of the Constitutional Law of the Republic of Kazakhstan «About Elections» provides that citizens who are recognized to be incapacitated by the court and who are detained in prisons by a court sentence do not participate in the elections.

Thus, according to the norms of the Constitution and the Constitutional Law about Elections of the Republic of Kazakhstan, citizens who are serving a sentence of imprisonment by a court decision are deprived of their electoral rights, regardless of the severity of the crime they committed.

It should be noted that participation in voting by persons in places of deprivation of freedom is legally prohibited in other CIS countries. For example, in the Constitutions of the Russian Federation, Part 3. Article 32, Part 2 of the Republic of Belarus. Article 64, Part 2 of the Republic of Armenia. Article 27, Azerbaijan Republic p.3. Article 56, Turkmenistan, Part 2. Article 194, Republic of Tajikistan, Part 4 Article 27.

The Constitution of the Kyrgyz Republic does not prohibit participation in elections of convicted, however, it is provided for by Part 3. Article 3 of the Constitutional Law of the Kyrgyz Republic «About the Election of the President of the Kyrgyz Republic and Deputies of the Zhogorku Kenesh of the Kyrgyz Republic» [5].

The exclusion from the list of CIS countries is Ukraine, according to Article 38 of the Constitution of Ukraine; the law does not restrict the right to vote of persons serving sentences in places of deprivation of freedom [6].

In countries of the far abroad, for example, in many states of the United States, persons who are serving a sentence of imprisonment are suspended from elections. Currently, in accordance with the provisions of the law, about 5.3 million offenders (of whom about 2 million have already served their sentences) are not eligible to participate in elections, including in connection with the bureaucratic procedure of restoration of electoral rights.

Only 2 states, Maine and Vermont, provide prisoners with the opportunity to vote in elections, the remaining 48 and the Federal District of Columbia prohibit voting, 8 states deny offenders electoral rights for life, 8 provide for a special procedure to restore the voter in electoral rights by the decision of the governor of the state. However, in some states, legislative measures have been taken to facilitate the participation of ex-offenders in the implementation of active suffrage, in particular in Alabama, Florida, Indiana and Maryland [7].

According to the United Kingdom Law of 1870, all prisoners are denied the right to vote. This rule was supplemented by the Law of 1983 on National Representation, which reads: «A convicted who is serving a sentence in places of deprivation of freedom does not have the right to participate in a parliamentary or local government election» [8].

In a number of European countries, such as Italy and Greece, varying degrees of prohibition apply. In both countries, a life sentence for criminals implies a final loss of voting rights. Italian and Polish courts may restrict the electoral rights of a criminal even after his release [9; 6].

According to the laws of Germany, prison authorities are obliged to encourage prisoners to participate in elections and ensure the conduct of voting. But, as in France, a court can deprive a person of electoral rights if he is convicted of high treason [9; 4].

In Poland and Malta, a similar ban is imposed on those who have committed serious crimes. By the decision of the State Tribunal of the Republic of Poland, a person who has committed a crime related to violation of the Constitution or laws may be deprived of both active and passive electoral rights in all types of elections (item 1 of Article 23 of the Law about the State Tribunal from the 26 of March 1982) [10].

For example, in Cyprus, Romania, Moldova, Monaco, prisoners can vote if the court has not issued a corresponding ban [9; 8].

In 2006, the Republic of Ireland adopted a bill allowing all prisoners to vote, and European countries - Bulgaria, Luxembourg, the Netherlands and Slovakia have the right to deprive of the electoral rights of any offender sentenced to a term of more than 10 years [9; 7].

According to the Criminal Code of the People's Republic of China, persons who committed acts with the aim of overthrowing the dictatorship of the proletariat, undermining the socialist system or harming the

PRC are deprived of voting rights. Persons sentenced to the death penalty or imprisonments for life are not eligible to vote either. As well as election commissions can deprive of electoral rights, persons who systematically violate public order [11].

In Malaysia convicted of a crime and sentenced to death or imprisonment for a term of more than 12 months, and serving a sentence are deprived of active electoral rights.

In accordance with the Japan Law about «Election of Public Officials», citizens who are serving a sentence in places of detention do not have an active electoral right; persons convicted of violation of electoral legislation do not participate in elections.

In South Korea, persons who are serving sentences in prisons under a court sentence that has entered into force until the expiration of their sentence, persons who are deprived of the right to vote under a court sentence, persons who have committed an offense in electoral rights in high-level elected positions are deprived of active suffrage.

The circle of prohibitions on voting in the Republic of Turkey is very interesting. Thus, according to Article 67 of the Constitution of Turkey, criminals held in prisons, as well as soldiers and corporals serving in the Armed Forces, students of higher military schools do not have the right to vote [12; 147].

Discussion

According to the scientist V.V. Krasinsky — an expert of the Russian public institution of electoral law, that the objectives of depriving electoral law are to maintenance of authority of the law, to exclude the possibility of criminal influence on the formation of national representative bodies, and to prevent offenders from electoral authorities [10].

After analyzing the international experience of restricting the electoral rights of citizens convicted of crimes, according to the Basic Laws, Criminal Procedural Codes and regulations of the studied states, we note that the situation with respect for the electoral law of convicted prisoners is ambiguous throughout the world. The issue of the rights of convicted began to be put on the agenda for the world community for the following reason. As we have noted, in the United Kingdom, prisoners have been forbidden to vote for more than 140 years, but the European Court of Human Rights has challenged this provision. The first and most debated resolution of the European Court concerning the total deprivation of convicted voting rights was issued in 2005 in the case of «Hurst against United Kingdom».

According to the decree, in order to preserve the foundations of an effective and meaningful democracy, guided by the principle of the rule of law, the right to vote in elections is a right, not a privilege. In response to this, the position of the British government can be expressed in the words of the then Prime Minister David Cameron: «I feel uneasy at the mere thought that convicted can vote, rights are privileges and need to be earned» [13]. The opinion of the government supported the parliament of the country.

In 2011, this issue was considered by the House of Commons and informed the European Court of Human Rights that the court is not entitled to resolve such issues, since it falls under the jurisdiction of national legislation. However, the International Court of Justice in Strasbourg in 2018 again invited Britain to comply with the decision of the European Court, thereby fulfilling its international obligations.

In this case, the judges set a period of 6 months for the British government, for which they must make amendments and changes in legislation necessary to resolve this complex issue. The ECHR found the violation of the convention Article 3 of Protocol No. 1 the right to free elections, meaning «automatic and indiscriminate» deprivation of the right to vote.

At the same time, the international organization recognizes for each state sufficiently broad powers to select those categories of prisoners who will not still be granted the right to vote. The authorities can resolve these issues without the consent of the European Court of Human Rights. Here the principle of «independent state discretion» should be applied. This principle came into being as a result of the decision of the Strasbourg Court in the case of «Frodl agaist Austria». This was an important decision of the International Strasbourg Court, since each country has its own characteristics not only in historical, cultural, ethnicity, but also in national legislation, where in each particular case the court must decide on the basis of the Law of this state [14; 1, 2].

It should be noted that so far this issue, which has been going on for more than 30 years between the Strasbourg Court and the UK, remains open.

It is necessary to say a few words about the European Court of Human Rights, it is an unusual court in many respects, it serves as the basis for the protection of human rights in the 47 member countries of the Council of Europe, including Russia, Azerbaijan, Georgia, Armenia and Moldova, where more than 800 mil-

lion people live. The ECHR protects the interests of the applicants of all violations of the Convention for the Protection of Human Rights and Fundamental Freedoms. It is hoped that in the future, our Republic of Kazakhstan will become a member of this serious and authoritative international human rights body [15].

The official languages of the European Court of Human Rights are English and French, which means that the court hearing and court proceedings are carried out in one of these languages. The working languages of the Strasbourg Court are all languages of the States Parties to the Convention, which means, for example, a complaint can be filed in any language of the State party.

The European Court makes 3 main types of decisions:

1) The decision of inadmissibility of the complaint is made in the form of a letter and sent to the applicant;

2) The decision on the inadmissibility or admissibility of the complaint in the form of a separate motivated document, translated into Russian, means «decision»;

3) and, finally, the final decision on the case in translation into Russian, referred to as the court order. Only this document of the European Court can recognize a violation of human rights [16; 3].

Having analyzed the international legal practice of resolving issues related to the restriction of the electoral rights of convicted, in particular, documents of the European Court of Human Rights (ECHR), it should be noted that at the European Court of Human Rights, complaints from individuals, legal entities and groups increase every year about the protection of human rights and fundamental freedoms under the 1950 Convention [17; 2, 3]. Statistics show that since the formation of the ECHR until 2016, the most complaints were filed against 4 states: Turkey, Poland, Russia and Italy [17; 8–11]. According to official data, as of November 2016, the ECHR issued 42,529 motivated decisions and orders. 90 % of them were rendered in the last 20 years. The last of them, for example, is the case of «Anchugov and Gladkov against Russia» [18; 1–4].

If a state that is a member of the Council of Europe does not comply with the rulings of the European Court, then for it this could have the following consequences: bringing to international legal responsibility (warning, retaliatory measures and the last resort - suspension of membership or expulsion from the Council of Europe [16; 3–11].

Although Kazakhstan is not a member of the European Court, but, nevertheless, as a state committed to the ideas of building democracy and civil society, it systematically implements state-legal reforms, including with regard to those convicted by a court sentence. In particular, the penitentiary system is being reformed, as well as the recommendations of the OSCE Office for Democratic Institutions and Human Rights to amend the prohibition on voting for convicted prisoners deserve our attention and discussion.

Despite the fact that the national legislation of the Republic of Kazakhstan prohibits voting for those sentenced to deprivation of freedom, we need to take steps towards democratization - the gradual granting of the electoral rights of this part of the population. The first step in this direction may be a review of the legal status of convicted serving their sentences in lightened conditions, that is, in minimum security institutions. According to Article 46 of the Criminal Code of the Republic of Kazakhstan «Deprivation of freedom and the criminal code», the serving of deprivation of freedom is appointed in the institutions of the penitentiary system of minimal security to persons convicted for crimes committed recklessly; not related to the use of violence, provided for by chapters 7, 8, 9, 12 and 13 of this Code; persons convicted of crimes under Chapter 15 of the Code, in the case of their full compensation for the damage caused by the crime; persons convicted for the first time for committing an intentional crime for which they were sentenced to imprisonment for up to two years [19].

In a minimum security institutions, a sentence can be served in strict, ordinary, and lightweight conditions. Everything depends on the prisoner's behavior, his conscientious attitude to work, discipline and other rules of this institution.

After examining various points of view on the legal nature of the phenomenon of restricting the electoral rights of convicted, about the need and appropriateness of applying criminal penalties in the form of restricting electoral rights, it can be noted that in minimum security institutions there is no mandatory sign of imprisonment - isolation from society, and therefore, they are often referred to as open institutions where prisoners are held unguarded, but under the supervision of the administration. At one time, a number of Soviet scientists A.Ye. Natashev, A.V. Maslihin, S.A. Mikhlin, N.A. Struchkov and others noted that in the colonies-settlements, despite their belonging to a corrective labor institution, there is no main element of imprisonment - isolation of free people from society [20; 50–55]. Yu.M. Tkachevsky supporting this idea, pointed out that serving a sentence in a penal colony cannot be considered as a deprivation of freedom [21; 14].

Conclusions

Given the above, it is realistic to grant the right to vote to convicted persons serving their sentences in lightweight conditions in minimum security institutions. For this it is necessary to offer practical recommendations, in particular, to add a new paragraph of part 3. Article 104 of the Penal Code of the Republic of Kazakhstan dated July 5, 2014 with the following content: p. 5–1 «active electoral right is granted to persons serving a sentence in lightened conditions in minimum security institutions. Thus, we will take the first step towards international standards, which are supported by the world democratic community, and we are confident that over time Kazakhstan will become a member of the European Court of Human Rights and Freedoms.

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Сотталғандарға сайлау құқығын беру: халықаралық тәжірибе және ұлттық заңнама

Мақаланы дайындау барысында авторлар өзекті әрі ерекше конституциялық-құқықтық феномен ретіндегі қылмыс жасағаны үшін сотталған және бас бостандығынан айыру орындарындағы азаматтардың сайлау құқықтарын шектеу сұрағына зерттеу жүргізді. Сәйкесінше, зерттеудің мақсаты бұл қылмыс жасағаны үшін сотталған азаматтардың сайлау құқықтарын шектеудің халықаралық-құқықтық тәжірибесі тұрғысынан және осы шектеуді қазіргі Қазақстандағы ұлттық сайлау жүйесінде жүзеге асыру тұрғысынан құбылыстың әлеуметтік-философиялық, теориялық және құқықтық алғышартына, тәжірибелік аспектіде осы феноменге салыстырмалы-құқықтық талдау жүргізу болып табылады. Адам құқықтарын қорғайтын халықаралық актілер мен конвенциялардың материалдары зерттелді. Жақын және алыс шетелдердің конституциялары қарастырылған. Еуропа елдерінің, АҚШ, Қытай, Корея және басқа да елдердің мысалында сотталғандардың сайлау құқығына қатысты соңғы уақыттардағы қоғамның демократиялануымен және сотталғандардың құқықтарының ырықтандырылуына байланысты прогрессивті өзгерістер мен сотталғандардың сайлау құқықтарындағы әртүрлі шектеулер көрсетілген. Мақалада Адам құқықтары жөніндегі Еуропалық сотқа ерекше орын берілген, оның идеологиясы, құрылу мақсаты, құзыреттілігі және өкілеттіктері, сондай-ақ Еуропалық сот шешімдерін орындамаудың ықтимал салдары ашып көрсетіледі. Елдегі қоғамды ізгіліктендіру бойынша жүргізіліп жатқан құқықтық реформа шеңберінде авторлар Қазақстан Республикасының Қылмыстық атқару кодексінің 104-бабының 3-бөлімінің 5-1 пунктін келесідей сөздермен толықтыруды ұсынады: белсенді сайлау құқығы қауіпсіздігі төмен мекемелердегі жеңілдетілген жағдайда жазаларын өтеп жатқан тұлғаларға беріледі. Бұл қысқа мерзімге қылмыс жасағаны үшін сотталған тұлғаларға қатысты қазақстандық заңнаманы демократияландыруға тағы бір қадам болып табылады.

Кілт сөздер: халықаралық қоғамдастық, Адам құқықтары жөніндегі Еуропалық сот, заңнама, Конституция, Қылмыстық кодекс, демократия, құқықтық мемлекет, сайлауға қатысу, сайлау құқығы, сотталғандар.

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Предоставление избирательных прав осужденным: международный опыт и национальное законодательство

При подготовке статьи авторы провели исследование вопроса ограничения избирательных прав граждан, осужденных за преступления и находящихся в местах лишения свободы, как актуального и неоднозначного конституционно-правового феномена. Соответственно, целью исследования является сравнительно-правовой анализ этого феномена исходя из его социально-философских, теоретико-правовых предпосылок, практических аспектов, с точки зрения международно-правовой практики ограничения избирательных прав граждан, осужденных за преступления, а также с точки зрения реализации указанного ограничения в национальной избирательной системе в современном Казахстане. Были исследованы международные акты и материалы конвенций, защищающих права человека. Рассмотрены конституции стран ближнего и дальнего зарубежья. На примере европейских стран, США, Китая, Кореи и других показаны различные ограничения в избирательных правах осужденных и прогрессивные изменения, произошедшие за последнее время в связи с демократизацией общества и либерализацией в отношении прав осужденных. В статье особое место уделено Европейскому суду по правам человека, раскрыта его идеология, цель создания, компетенция и полномочия, а также рассмотрены возможные последствия невыполнения постановлений Европейского суда. В рамках правовой реформы, проводимой в стране гуманизацией общества, авторами предложено дополнить ч. 3, ст. 104 Уголовно-исполнительного кодекса Республики Казахстан п. 5-1 словами, что активное избирательное право предоставляется лицам, отбывающим наказание в облегченных условиях в учреждениях минимальной безопасности, что станет еще одним шагом к демократизации казахстанского законодательства относительно лиц, осужденных за совершенные преступления на небольшой срок.

Ключевые слова: международное сообщество, Европейский суд по правам человека, законодательство, Конституция, Уголовный кодекс, демократия, правовое государство, участие в выборах, избирательное право, осужденные.

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