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*Редакторлары*

Ж.Т. Нурмуханова, С.С. Балкеева, М. Оразбаева

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100012, Қазақстан, Қарағанды қ., Гоголь к-сі, 38. Тел. 51-38-20. E-mail: izd_kargu@mail.ru

*Адрес редакции:* 100024, г. Караганда, ул. Университетская, 28.
Тел.: (7212) 77-04-38 (внутр. 1026); факс: (7212) 35-63-98.
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*Postal address*: 28, University Str., 100024, Karaganda, Kazakhstan.
Tel.: (7212) 77-04-38 (add. 1026); fax: (7212) 35-63-98.
E-mail: vestnikku@gmail.com. Web-site: law-vestnik.ksu.kz



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B.A. Taitorina[1], G.T. Baisalova[1], A.A. Assanova[1], L.B. Bogatyreva[2]

*[1]M.Kh. Dulaty Taraz State University, Kazakhstan;*
*[2]Baltic International Academy, Riga, Latvia*
*(E-mail: lida110@inbox.ru, binur.a@mail.ru)*

## State control: issues of constitutional and legal regulation

The problem of state control does not lose relevance due to a need for compliancy with the foundations of its constitutional system enshrined in the Constitution of the Republic of Kazakhstan. At present, problems arise with identifying potential opportunities and limits of control functions and finding the most effective methods and forms of their implementation. The purpose of this study is to update problems with the constitutional and legal regulations of our Institute of State Control in this modern time. As a result of analysis within the content of the Constitution and a wide range of sources, certain things have been revealed: in the constitution, state control is regulated in a general abstract-systematic form, manifested through the interrelated action of a large number of constitutional norms. The issues of constitutional zing state control are closely related to constitutional and legal policies. The authors associate problems of constitutional and legal regulations within state control with the functioning of the basic law of state and society. As a rule, control functions are a tool, a means of implementing different functions towards the state. The article concludes that control is a state-power activity expressed from control bodies who then must give controlled objects mandatory instructions to eliminate detected deficiencies; initiating the question of bringing to justice those responsible for the revealed violations.

*Keywords:* law, control, state, constitution, constitutional and legal regulation.

### *Introduction*

State control is an extensive and important area of activity by public authorities. Transformations taking place within society in recent years are the result of reforms within the system of state control and all spheres of production, social and political life. The importance of state control increases due to its need to comply with the foundations of a constitutional system enshrined in the Constitution of the Republic of Kazakhstan: the principles of freedom, democracy, the separations of power, and human and civil rights. Increasing the role of state control requires, first of all, a unified policy in the field of state control, based on constitutional principles. Of great importance is the problem of developing mechanisms to control socio-economic development within our country in a variety of forms of ownership and market economy. Questions of efficiency in administrative and control types of activity, indicators and criteria of efficiency were and remain one of actual theory and practice in state construction [1; 58]. Of particular relevance are the constitutional and legal foundations and principles of development in state control, the identification of potential opportunities and limits of control functions and finding the most effective methods and forms of their implementation.

*Materials and methods*

In order to study the problem, doctrinal sources were analyzed. During research the following methods were applied: system-structural method, analysis and synthesis methods, induction and deduction, formal legal method, historical method, sociological method, scientific generalization, logical methods.

*Discussion*

In the Constitution, state control is regulated in a General abstract-systematic form, manifested through the interrelated action of a large number of constitutional norms-norms-principles, norms-goals, status and competence norms, etc. «the Direct action of the Constitution means that state bodies can (must) apply directly its norms in the following cases: 1) if there is no special normative act regulating the issues to be considered by the state body; 2) even if there is a special normative act, but it contradicts the Constitution; 3) if the provision of the Constitution does not contain an indication of the possibility (necessity) of its application, subject to the adoption of a normative legal act defining the rights, freedoms and duties of a citizen; 4) if the provision of the Constitution in that sense does not require additional regulation» [2; 35–42]. Indeed, «issues of state control are not directly regulated in Basic law. However, the analysis of constitutional norms fixing the legal status of the Supreme bodies of state power allows a conclusion about existence to corresponding control powers and about their constitutional and legal regulation [3; 35]. It is quite understandable that the Constitution «cannot solve the problem of regulating the whole life of society and the state with exhaustive completeness. Its own tools, its capabilities for this are clearly not enough and therefore it begins to attract related political and legal institutions, making them «work» for themselves, to achieve their goals and objectives. First of all, this applies to the current legislation» [4; 99]. According to Yu. n. Starilov, «positively acting law and laws, based on constitutional and legal principles, concentrate the provisions of Basic law and ensure its application. Therefore, it is hardly possible, from this point of view, to talk about the subordinate nature of ordinary (unconstitutional) legislation. It itself establishes limitations of distribution and breaks the influence of the Constitution in the regulation of public relations. The Constitution does not need to be built into the system of existing legal ties. On the other hand, it is already, by definition, at the center of this system; while, it needs to explain fundamental legal terms, concepts and principles. Only in its clear definition in the ordinary current law can become a pledge of effective application (implementation) of the constitutional norms regulating them in the most General form in the text of the Constitution» [5; 17].

The Constitution inside its legal literature is unanimously recognized as the basic law of the state and society, endowed with a special status in the system of legislation. «The most consistent implementation of the principle of the rule of law is the theory and practice of constitutionalism, in which the Constitution plays the role of Basic Law within the state, — believes S.K. Amandykova. All other law-making activity should have constitutional limits. This explains the fact that constitutionalism as the highest expression of the rule of law should serve to protect the social institutions of power from the deformation shifts associated with its capture and usurpation» [6; 91].

Characteristics of the essence of a modern Constitution should have five components: 1) to determine the place of the Constitution and constitutional law in the system of legal regulation, their leading role; 2) not give a list of chapters of the Constitution and point out the main participants of relations of cooperation and competition in society (people, collective, the state, which, being a part of society, however, acquired an independent existence, and the society itself), certain relationships which determine the essence of the Constitution and the constitutional order;3) to characterize the main content of their relations, and, consequently, the constitutional regulation: the basis for the creation, exchange and distribution of social and spiritual benefits, which are realized in the consolidation of economic, social, political systems and the foundations of spiritual life within society; 4) to indicate the nature of the relationship; 5) to point to the regulator of these public relations, first of all, state power, as the power exercised on behalf of society as a whole, establishing the most General rules for such relations [7; 10, 11].

This doctrine for Kazakhstan offers, among the essential characteristics of the Constitution of the Republic of Kazakhstan: 1) establishment by the Constitution of the priority of the right over state and its organs to limit state power and define legal boundaries; 2) the stipulation of Basic law and principles of popular sovereignty, which proclaim the power of the people, and the only source and bearer of Supreme state power; 3) the Declaration by the Constitution of natural, absolute and inalienable human rights and freedoms in order to ensure personal freedom as the highest value of State; 4) the establishment by Basic law of the mechanism of power based on the principle of dividing unified state power into legislative, executive and judicial branches, their interaction with each other and the use of checks and balances [8; 58].

As for the issues of constitutional zing the Institute of State Control, Zh. d. Busurmanov's conclusion is relevant: «Constitutional and legal policy is designed to develop and implement strategic legal ideas to improve and implement the Constitution of the entire body of constitutional legislation. It should focus on state and society as a whole, on priorities in the constitutional and legal sphere and guide the country in the direction of its progressive legal development through the formation of a full and effective legal system — the core of which is the Constitution» [9; 193].

K.K. Aitkhozhin briefly and logically defines a list of principles: «the guiding principles that are of paramount importance for the formation of an effective mechanism of constitutional and legal regulation in the country: 1) democracy; 2) humanism; 3) the priority of human rights; 4) social justice; 5) transparency; 6) the optimal combination of interests for individual, society and state; 7) scientific validity; 8) constitutional legality [10; 72].

The determination of state control as a constitutional category is equivalent in content to the regulatory, protective, organizational, ideological and law-making functions of the Constitution. Thus, the Constitution of the Republic of Kazakhstan is inherent in the understanding of state control as a function of public administration, and public administration as a comprehensive form of implementation of state power. Function (from lat. functio-execution, implementation) is initially understood as a directly selective impact on the system (structure, whole) in certain aspects of the external environment. The authors of the sociological encyclopedic dictionary offer the following definition of the concept of «function»: «a) the role performed by a certain element of the social system in its organization as a whole, in the implementation of the goals and interests of social groups and classes; b) the dependence between different social processes, expressed in the functional dependency of variables; C) standardized, social action, regulated by certain norms and controlled by social institutions» [10; 397]. The big encyclopedic dictionary gives the following definition of function: 1) activity, duty, work; external manifestation of properties of any object in the given system of relations; 2) function in sociology — a role which is carried out by a certain social institution or process in relation to the whole (for example, functions of the state, a family, etc. in society) [11; 1300].

In legal literature, opinion is expressed that the concept of function should cover both the purpose of law and the resulting direction of its impact on public relations. Actually, the function of law is the realization of its social purpose, which formed from the needs of social development. In this regard, «the study law's function towards movement and development allows us to clarify the actual picture of the functioning of the legal system, to detect changes in it caused by transformations of a deeper order occurring in public relations, which are designed to influence law» [12; 38, 39]. In addition, «functions not only reveal the essence and social purpose of the Constitution, but also characterize the main directions of its impact on public relations, reflecting the features of constitutional norms, institutions... Developed by philosophy, the understanding of functions as a certain relationship that makes the functioning expedient, directed, establishing the dependence of one component (or a set of one-order properties) from another, as well as from the whole, allows us to distinguish different levels of functions within the Constitution.... Constitutional norms in this process are most characterized by integration, i.e. generalized regulation of the single, coinciding, which is characteristic of enlarged groups of social relations. Many constitutional norms have a primary, constituent, fixing or program character» [13; 33, 34]. S.A. Avakyan under the functions of the Constitution understands «various manifestations of its purpose, reflecting the role of basic law in politics, society and the citizens within, as well as the implementation of tasks for the state» [14; 11]. A.N. Sagyndykova believes that «the functions of the Constitution are understood as the main directions of its impact on the development of public relations» [15; 49]. The social functions of the Constitution determine the directions of its impact on public life [16; 68–72].

Modern constitutionalists under the functions of the Constitution understand, first of all, the implementation of its social purpose, which is formed, and consisting of the needs for development of society and State. The social purpose of the Constitution is to regulate fundamental social relations, give them proper stability, create the necessary conditions for the realization of human rights and freedoms as the highest value of the state and the normal functioning of civil society as a whole. The functions of the Constitution derive from its essence and content and are determined by the purpose of Basic Law in society and State. Therefore, the functions express the most essential and fundamental features of the Constitution and in general are aimed at the implementation of the most important tasks facing basic legal law in the conditions of forming a democratic, social, secular and legal state. All this suggests that the functions of the Constitution are the main directions of its impact on fundamental social relations, and their need for the implementation of which generates the need for the existence of Basic Law as a special legal and socio-political act [8; 61, 62].

*Conclusion*

Summing up the controversy on the functioning of the Constitution, let us turn to the text of article 3, which defines the unity of the state-power mechanism of State Affairs management, including the functioning of legislative, executive and judicial authorities using the system of checks and balances [17]. The unity of state power is justified by the right of a citizen to participate in government, in the implementation of state and public control, through their representatives in state bodies, representing all branches of government and checks and balances. Regardless of whether the control function is structured within a public authority for which this function is not the main one, or a specialized control body is created, all control functions have common features defined by the essence of state control. First, all control bodies exercise in legal form a special function of state power. Secondly, the functions of state control are inherent only to public authorities and management, so all kinds of commercial, non-governmental, public organizations and associations do not carry out the functions of state control (except when these functions are delegated to them by state bodies). Thirdly, the control functions are a tool, a means of implementing the functions of State. Fourthly, state control is exercised on behalf of the State as a whole, so regardless of which bodies exercise the functions of state control, they are of a national, not departmental nature. Fifth, the system of control bodies reflects the hierarchical principle of building the state apparatus, so it is built, as a rule, on hierarchical levels. At the same time, such a construction should not entail the formation of an unnecessarily independent and autonomous system of state control. Legal scholars, considering the control as an organizational and legal form of the implementation of state power, its main purpose is to ensure that it checks the implementation of laws and other regulatory legal acts by state bodies and the elimination and prevention of deviations, violations of norms and rules provided for by legislation. At the same time, two fundamental functions should be distinguished from the range of powers of the bodies vested with the right of verification, outside of which the essence and nature of state control can be reduced to zero:

1) control is a state-power activity, which is expressed in the fact that the control bodies give controlled objects mandatory instructions and instructions to eliminate the detected deficiencies;

2) the right of control bodies to initiate the issue of bringing to justice persons guilty of revealed violations, as well as to apply in some cases measures of state coercion and, in particular, judicial responsibility.

The effectiveness of state control is achieved if the legal status and activities of control and supervisory bodies are fixed and specified in normative legal acts and if these bodies are represented by professional, highly qualified specialists capable of ensuring an appropriate level of monitoring and audit. In countries where the level of state control is high, where its positive transforming power is highly effective, the effectiveness of the public administration system is guaranteed.

References

1 Тарасов А.М. К вопросу об эффективности президентского контроля / А.М. Тарасов // Вестн. Москов. ун-та МВД России. — 2018. — (6). — С. 56–62.

2 Сапаргалиев Г. Конституционное право Республики Казахстан / Г. Сапаргалиев. — Алматы: Жеті жарғы, 1998. — 336 с.

3 Липунцова А.В. Правовые основы осуществления государственного контроля в Российской Федерации / А.В. Липунцова // Вестн. Тамбов. гос. ун-та. Сер. Право. — Вып. 1. — 2015. — С. 30–35.

4 Сочетание международно-правовых и внутригосударственных форм обеспечения и защиты прав и свобод человека и гражданина / рук. автор. колл. и отв. ред. М.Т. Баймаханов. — Астана, 2007. — 368 с.

5 Старилов Ю.Н. Будущее Конституции Российской Федерации: «реализация без изменений», «преобразование» или «неизбежность пересмотра»? — Ч. 1. / Ю.Н. Старилов // Право и политика. — 2005. — № 1. — С. 4–24.

6 Амандыкова С.К. Конституционализм как основа построения правового государства // Проблемы становления правового государства и конституционный процесс в Республике Казахстан: материалы респ. науч.-теор. конф., посвящ. 70-летию акад. НАН РК М.Т. Баймаханова. — Алматы: Норма-К, 2004. — С. 89–93.

7 Чиркин В.Е. Россия, Конституция, достойная жизнь: анализ взаимосвязей / В.Е. Чиркин // Государство и право. — 2006. — № 5. — С. 5–13.

8 Айтхожин К.К. Теоретические вопросы Конституции Республики Казахстан: дис. … д-ра юрид. наук: 12.00.02 – «Конституционное; муниципальное право; административное право» / К.К. Айтхожин. — Алматы, 2008. — 351 с.

9 Бусурманов Ж.Д. Евразийская концепция прав человека: моногр. / Ж.Д. Бусурманов. — Алматы: КазГЮУ, 2006. — 481 с.

10 Социологический энциклопедический словарь на русском, английском, немецком, французском и чешском языках / ред.-коорд.акад. РАН Г.В. Осипов. — М.: Норма; НОРМА-ИНФРА-М, 2000. — 488 с.

11 Большой энциклопедический словарь / под общ. ред. А.М. Прохорова. — 2-е изд., перераб. и доп. — М.–СПб.: Большая Рос. энцикл.; Норинт, 1997. — 1456 с.

12 Радько Т.Н. Методологические вопросы познания функций права / Т.Н. Радько. — Волгоград: НИ и РИО ВСШ МВД СССР, 1974. — 151 с.

13 Лучин В.О. Конституция Российской Федерации. Проблемы реализации / В.О. Лучин. — М.: ЮНИТИ-ДАНА, 2002. — 687 с.

14 Авакьян С.А. Конституция России: природа, эволюция, современность / С.А. Авакьян. — М.: РЮИД «Сашко», 2000. — 528 с.

15 Сагындыкова А.Н. Конституционное право Республики Казахстан: курс лекций / А.Н. Сагындыкова. — Алматы: Білім, 1999. — 336 с.

16 Конституции зарубежных государств: учеб. пос. / сост. В.В. Маклаков. — М.: БЕК, 2001. — 592 с.

17 Конституция Республики Казахстан. — Алматы: Юрист, 2019. — 44 с.

Б.А. Тайторина, Г.Т. Байсалова, А.А. Асанова, Л.Б. Богатырева

## Мемлекеттік бақылау: конституциялық-құқықтық реттеу мәселелері

Мемлекеттік бақылау мәселелері Қазақстан Республикасының Конституциясында бекітілген конституциялық құрылыстың негіздерін сақтау қажеттілігіне байланысты өзектілігін жоғалтпайды. Қазіргі кезеңде ықтимал мүмкіндіктер мен бақылау функцияларының шектерін анықтау, оларды жүзеге асырудың тиімді әдістері мен формаларын анықтау мәселелері өзектендірілуде. Бұл зерттеудің мақсаты қазіргі кезеңдегі мемлекеттік бақылау институтының конституциялық-құқықтық реттеу мәселесін өзекті ету. Конституцияның мазмұнын және көптеген қайнар көздерін талдау нәтижесінде мемлекеттік бақылау Конституцияда көптеген конституциялық нормалардың өзара әрекеттесуінен көрінетін жалпы абстрактілі-жүйелі түрде реттелетіні анықталды. Мемлекеттік бақылау институтын конституциялау мәселелері конституциялық-құқықтық саясатпен тығыз байланысты. Мемлекеттік бақылауды конституциялық-құқықтық реттеу мәселесін авторлар мемлекет пен қоғамның негізгі заңының жұмыс істеу мәселелерімен байланыстырады. Әдетте, бақылау функциялары мемлекет функцияларын іске асырудың құралы болып табылады. Мақалада бақылау органдары бақылаудағы объектілерге анықталған кемшіліктерді жою бойынша орындауға міндетті нұсқаулар мен нұсқаулықтар беруінен көрінетін мемлекеттік-билік қызметі бар екендігі туралы қорытынды жасалды; ашылған құқық бұзушылықтарға кінәлі адамдарды жауапкершілікке тарту туралы мәселе көтерілген.

*Кілт сөздер:* құқық, бақылау, мемлекет, Конституция, конституциялық-құқықтық реттеу.

Б.А. Тайторина, Г.Т. Байсалова, А.А. Асанова, Л.Б. Богатырева

## Государственный контроль: вопросы конституционно-правовой регламентации

Проблематика государственного контроля не теряет актуальности в связи с необходимостью соблюдения основ конституционного строя, закрепленных Конституцией Республики Казахстан. В современный период актуализируются проблемы выявления потенциальных возможностей и пределов контрольных функций, нахождение наиболее эффективных методов и форм их реализации. Целью данного исследования является первостепенность проблемы конституционно-правового регулирования института государственного контроля в современный период. В результате анализа содержания Конституции и обширного круга источников выявлено, что в Конституции государственный контроль регламентирован в общей абстрактно-систематической форме, проявляется через взаимосвязанное действие большого количества конституционных норм. Вопросы конституционализации института государственного контроля тесно связаны с конституционно-правовой политикой. Проблему конституционно-правовой регламентации государственного контроля авторы связывают с вопросами функционирования основного закона государства и общества. Как правило, контрольные функции выступают инструментом, средством реализации функций государства. В статье сделан вывод о том, что контроль есть государственно-властная деятельность, выражающаяся в том, что контрольные органы дают подконтрольным объектам обязательные для исполнения указания и инструкции по устранению обнаруженных недостатков; инициируют вопрос о привлечении к ответственности лиц, виновных во вскрытых нарушениях.

*Ключевые слова:* право, контроль, государство, Конституция, конституционно-правовое регулирование.

## References


1 Tarasov, A.M. (2018). K voprosu ob effektivnosti prezidentskoho kontrolia [On the issue of the effectiveness of presidential control]. *Vestnik Moskovskoho universiteta MVD Rossii — Bulletin of the Moscow University of the Ministry of Internal Affairs of Russia, 6,* 56–62 [in Russian].

2 Sapargaliev, G.S.(1998). *Konstitutsionnoe pravo Respubliki Kazakhstan [Constitutional law of the Republic of Kazakhstan]*. Almaty: Zheti zharhy [in Russian].

3 Lipuntsova, A.V. (2015). Pravovye osnovy osushchestvleniia hosudarstvennoho kontrolia v Rossiiskoi Federatsii [Legal framework for the implementation of state control in the Russian Federation]. *Vestnik Tambovskoho hosudarstvennoho universiteta. Seriia Pravo — Bulletin of the Tambov State University. Series Law, 1,* 30–35 [in Russian].

4 Baymakhanov, M.T. (Eds.). (2007). *Sochetanie mezhdunarodno-pravovykh i vnutrihosudarstvennykh form obespecheniia i zashchity prav i svobod cheloveka i hrazhdanina [The combination of international legal and domestic forms of ensuring and protecting the rights and freedoms of man and citizen]*. Astana [in Russian].

5 Starilov, Yu.N. (2005). Budushchee Konstitutsii Rossiiskoi Federatsii: «realizatsiia bez izmenenii», «preobrazovaniie» ili «neizbezhnost peresmotra»? [The future of the Constitution of the Russian Federation: «implementation without change», «transformation» or «inevitability of revision»?]. *Pravo i politika — Law and politics, 1,* 4–24 [in Russian].

6 Amandykova, S.K. (2004). Konstitutsionalizm kak osnova postroeniia pravovoho hosudarstva [Constitutionalism as the basis for building the rule of law]. Proceedings from Problems of the establishmt of the rule of law and the constitutional process in the Republic of Kazakhstan: *Respublikanskaia nauchno-teoreticheskaia konferentsiia, posviashchennaia 70-letiiu akademika NAN RK M.T. Baimakhanova — Republican scientific-theoretical conference dedicated to the 70th anniversary of the academician of NAS RK M.T. Baymakhanova.* (pp.89–93). Almaty: Norma-K [in Russian].

7 Chirkin, V.E. (2006). Rossia, Konstitutsiia, dostoinaia zhizn: analiz vzaimosviazei [Russia, the Constitution, a decent life: an analysis of the relationships]. *Hosudarstvo i pravo — State and Law, 5,* 5–13 [in Russian].

8 Aitkhozhin, K.K. (2008). Teoreticheskie voprosy Konstitutsii Respubliki Kazakhstan [Theoretical questions of the Constitution of the Republic of Kazakhstan]. *Doctors thesis'.* Almaty [in Russian].

9 Busurmanov, Zh.D. (2006). *Yevraziiskaia kontseptsiia prav cheloveka [Eurasian concept of human rights]*. Almaty: KazHUU [in Russian].

10 Osipov, G.V. (2000). *Sotsiolohicheskii entsiklopedicheskii slovar na russkom, anhliiskom, nemetskom, frantsuzskom i cheshskom yazykakh [Sociological Encyclopedic Dictionary in Russian, English, German, French and Czech]*. Moscow: Norma; NORMA-INFRA-M [in Russian].

11 Prokhorov, A.M. (Eds.). (1997). *Bolshoi entsiklopedicheskii slovar [The Great Encyclopedic Dictionary]*. (2d ed.). Moscow–Saint Petersburg: Bolshaia Rossiiskaia entsiklopedia; Norint [in Russian].

12 Radko, T.N. (1974). *Metodolohicheskie voprosy poznaniia funktsii prava [Methodological issues of knowledge of the functions of law]*. Volgograd: NI i RIO VSSh MVD SSSR [in Russian].

13 Luchin, V.O. (2002). *Konstitutsiia Rossiiskoi Federatsii. Problemy realizatsii [Constitution of the Russian Federation. Implementation Issues]*. Moscow: YuNITYI-DANA [in Russian].

14 Avakyan, S.A. (2000). *Konstitutsiia Rossii: priroda, evoliutsiia, sovremennost [Constitution of Russia: nature, evolution, modernity]*. Moscow: RYuID «Sashko» [in Russian].

15 Sagyndykova, A.N. (1999). *Konstitutsionnoe pravo Respubliki Kazakhstan [Constitutional law of the Republic of Kazakhstan]*. Almaty: Bilim [in Russian].

16 Maklakov, V.V. (2001). *Konstitutsii zarubezhnykh hosudarstv [The constitution of foreign states]*. Moscow: BEK [in Russian].

17 Konstitutsiia Respubliki Kazakhstan (2019). [The Constitution of the Republic of Kazakhstan]. Almaty: Yurist [in Russian].

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F.A. Yerzhanova, M.Yu. Abdakimova

*Ye.A. Buketov Karaganda State University, Kazakhstan*
*(E-mail: erzhanova_farida@mail.ru)*

# Constitutional and legal aspects of the ratio of international and domestic law

The article discusses the content and role of constitutional legal regulation of the ratio of domestic and international law in Kazakhstan and foreign countries. The authors show the domestic and foreign specifics of the constitutional regulation of the correlation of national and international law, different approaches of legislators to fixing the correlation of domestic and international law in the Basic Laws are indicated. The article also addresses the problems of interaction between international and constitutional law. The authors highlight theoretical and practical issues related to the incorporation of international law into the legal systems of states by the Constitutions of foreign countries and the Republic of Kazakhstan. Based on the comparative legal analysis, the features of fixing the correlation of domestic and international law in the constitutions of foreign countries are revealed. The issues of fixing the norms of general international law and international treaties in the Constitutions of various countries are also considered. Conclusions have been made, in particular, that the Constitution of the Republic of Kazakhstan as a whole is in line with global trends in the development of constitutional law, due to universal globalization and internationalization of law; about the need for further scientific development of theoretical and practical issues relating, for example, to the concept and content of universally recognized principles and norms of international law, their place in the hierarchy of legal systems of states. As one of the directions for further improvement of constitutional legislation, a proposal has been formulated to include in the constitutional and legal law provisions on universally recognized principles and norms of international law on human rights.

*Keywords:* Constitution, constitutional legislation, the ratio of domestic and international law, legal system, priority of the Constitution.

## *Introduction*

A huge impact on the global constitutional processes is exerted by modern international political and economic realities caused by globalization, leading to the convergence of various legal systems, their active interaction and interpenetration.

The international community has formed a universal concept of human rights, the respect of which is elevated to the level of generally recognized principles of international law. This makes it obligatory for all states to observe and guarantee historically achieved human rights standards, which is a priority area for the common interests of the international community. Human rights are the main criterion for a democratic state. They are the basis of politics in relations with other states and with the entire world community. The internationalization of the human rights problem led to its development from the internal affairs of the state into a factor in international politics and law, into recognition of international jurisdiction on human rights issues.

The Constitution of the Republic of Kazakhstan establishes that international treaties ratified by the Republic have primacy over its laws (Article 4, Part 3), states that the people adopt the Constitution, wishing to take a worthy place in the world community (preamble) [1], thereby emphasizes the commitment of Kazakhstan to universal values.

Human rights are recognized by the entire international community as a universal human value. This implies the adoption by the states of a coordinated policy regarding the observance of the standards of individual rights and freedoms, the creation of special international bodies to monitor the observance by states of human and civil rights and freedoms.

One of the important regularity of the development of modern law is to deepen the interaction of international and domestic law. The deepening interaction of international and internal law determines the internationalization of domestic law, making up one of the main trends in the development of law in the twenty-first century [2; 115].

Internationalization of law can be understood as the convergence of the principles of law and national legislations, the deepening of the mutual influence of various legal systems. New world economic and social conditions dictate the need for compatibility of the legal systems of various states and their interaction with

each other. This is achieved, first of all, by recognizing the priority of international law over domestic, as well as the intensive change in domestic law under the influence of international.

*Methods and materials*

In the study of the topic of a scientific article were used: comparative legal, logical and legal, historical, systemic and structural, as well as special legal methods of interpretation of legal norms.

*Results*

The meaning and place of international norms in the legal system of Kazakhstan is determined by the provisions of the Constitution. The Constitution of the Republic of Kazakhstan is a document that incorporates all the most valuable, democratic, humane, which is contained in universally recognized international legal acts [3; 84].

In accordance with paragraph 2 of Art. 4 of the Basic Law of Kazakhstan, the Constitution has the highest legal force and direct effect throughout the territory of the Republic of Kazakhstan. Laws and other legal acts adopted in Kazakhstan cannot contradict it.

According to Art. 12 of the Constitution of the Republic of Kazakhstan, human rights and freedoms belong to everyone from birth, are absolute and inalienable (paragraph 2), human rights and freedoms in the Republic of Kazakhstan are recognized and guaranteed in accordance with the Constitution (paragraph 1).

The 1995 Constitution of the Republic of Kazakhstan has included international treaty obligations of the Republic in the system of law in force on its territory (Article 4, paragraph 1 of the Constitution); recognized the priority of international treaties ratified by the Republic over its laws; proclaimed that the procedure and conditions for the operation of international treaties to which Kazakhstan is a party are determined by the laws of the country; provided for the publication of all laws, international treaties to which the Republic is a party (Article 4, Clause 3 of the Constitution of the Republic of Kazakhstan).

The 1995 Constitution of the Republic of Kazakhstan established that Kazakhstan respects the principles and norms of international law, pursues a policy of cooperation and good neighborly relations between states, recognizes their equality and non-interference in each other's internal affairs, and the peaceful resolution of disputes (Article 8).

Article 54, part 1, paragraph 7 of the Kazakhstan Basic Law stipulates that the Parliament, in a separate meeting of the Chambers, by sequential consideration of issues, first in the Majilis and then in the Senate, adopts constitutional laws and laws, including ratifies and denounces international treaties of the Republic.

The Russian Constitution in Art. 15 part 4 has stated that universally recognized principles and norms of international law and international treaties are an integral part of its legal system. If other rules are established by an international agreement than are provided by law, then the rules of the international agreement shall apply [4].

Thus, the Constitution of the Russian Federation includes universally recognized norms and principles of international law and international treaties of the Russian Federation in the national legal system. However, it does not establish a hierarchy of these acts within the legal system itself. In part 4 of Article 15 of the Constitution of the Russian Federation refers only to the priority of the rules established by the international treaty of the Russian Federation over the rules stipulated by law.

The modern constitutional process is characterized by active integration processes in the field of interaction between international and domestic law. The interpenetration of the institutions of international and national law, including constitutional law as a special kind of domestic law, have two aspects: 1) the ratio of international and domestic law; 2) the assignment of part of sovereign state powers to supranational organizations [5; 38].

In connection with the internationalization of many areas of public life, the strengthening of integration processes, the establishment of international human rights standards and the international protection of these rights, there is an increase in the use of such sources of constitutional law as international legal acts — treaties, conventions, declarations, and acts of supranational organizations (EU) relating primarily to human rights.

As known, the norms of international law operate in a space that is regulated to varying degrees by the norms of domestic law. In this case, competition of norms and conflicts of application of law may arise. For objective and subjective reasons, the norms of national legislation can more adequately approach the regulation of specific legal relations than the norms of international law. This may be due to various kinds of factors: features of national development, historical traditions, a more perfect mechanism for regulating the

norms of national law due to its later adoption, etc. Therefore, the question of the incorporation of a particular norm of international law into domestic law should be decided individually, with reference to each specific legal act. At the same time, the national legal system should establish such general mechanisms in order to avoid possible conflicts and various approaches to regulating homogeneous legal relations.

Two main positions on this issue can be distinguished. The founder of the first approach is H. Kelsen. Its essence lies in the rule of international law, after which follow the norms of the Constitution, then the norms of constitutional law, after them — laws, etc. Another approach involves the primacy of the Constitution in relation to universally recognized norms and principles of international law.

The constitutions of many foreign states enshrine the principle of supremacy of international law over domestic law. For example, Article 5 of the 1991 Constitution of the Republic of Bulgaria establishes: «International treaties ratified in the constitutional order, promulgated and entered into force for the Republic of Bulgaria, are part of the domestic law of the country. They have priority over those norms of domestic law that contradict them» [6].

The Constitution of the French Republic in Section VI «On International Treaties and Agreements» states that treaties or agreements duly ratified or approved have force exceeding the force of domestic laws from the moment of publication, subject to the application of each agreement or contract by the other party (Article 55) [7].

The Constitution of Spain proclaimed that international treaties lawfully concluded and officially published in Spain form part of its domestic law. Their provisions may be repealed, amended or suspended only in the manner specified in the treaties themselves, or in accordance with the general rules of international law (Article 96/1) [8].

In accordance with the Dutch Constitution, international treaties are considered directly applicable law and take precedence over national law. So, according to article 93 of the Dutch Constitution, the provisions of international treaties and acts of international organizations, which are general regulatory and binding on all persons, are subject to application only after their publication [9].

Recognition of the priority of international law over domestic law has found expression in the Constitution of the Russian Federation. Part 4 of Art. 15 of the Constitution states that «universally recognized principles and norms of international law and international treaties of the Russian Federation are an integral part of its legal system. If other rules are established by international treaties of the Russian Federation than those provided by law, then the rules of the international treaty shall apply» [4].

At the same time, provisions are increasingly being included in the constitution of foreign countries aimed at creating a mechanism to ensure compliance of international treaties with the national constitution at the stages of their conclusion, ratification and enforcement. Thus, the Spanish Constitution also determines that in order to conclude a number of international treaties or agreements, state bodies must first obtain the permission of the General Cortes, including treaties or agreements affecting the amendment or repeal of any law or the adoption of legislative measures for their execution (Art. 94/1) [8].

Constitution of the Republic of Poland in Art. 89 part 1 contains a provision stating that «ratification by the Republic of Poland of an international treaty and its denunciation require the prior consent of the Sejm expressed in law, if the treaty concerns: 1) peace, union, political agreements or military arrangements; 2) civil freedoms, rights or obligations enshrined in this Constitution; 3) membership of the Republic of Poland in an international organization; 4) significant burden of the state financially; 5) issues regulated by law, or those on which the Constitution requires the publication of a law. «In Art. 90 part 1 provides that the Republic of Poland may, on the basis of an international agreement, transfer to the international organization or international body the competence of public authorities in certain cases [10].

Many new foreign constitutions contain a provision that the conclusion of a treaty that includes rules that are contrary to the constitution can take place only after a corresponding review of the constitution. For example, the Spanish Constitution of 1978 contains the norm that «the conclusion of an international treaty containing provisions contrary to the Constitution must be preceded by a review of the latter» (Article 95 of the Spanish Constitution) [8]. This provision is followed by states in which it is not constitutionally fixed.

The French Constitution finds expression the idea of harmonizing national sovereignty with the provisions of an international legal act or treaty. The constitution expressing the sovereignty of the state contains a list of treaties and agreements that can be ratified or approved only on the basis of law. If the Constitutional Council declares that any international obligation contains provisions that are contrary to the Constitution, then permission to ratify or approve it can be given only after the revision of the Constitution (Article 54) [7].

The provisions on the interaction of the two legal systems of domestic and international law were enshrined in the Constitutions of the Federal Republic of Germany, Austria, Portugal, Italy. So, the Federation can legislatively transfer the supreme power to interstate institutions (Article 24/1 of the Basic Law of Germany); general rules of international law are an integral part of Federation law, they have precedence over laws and directly generate rights and obligations for residents of the federal territory. Article 25 of the German Basic Law states that «universally recognized norms of international law are an integral part of federal law. They take precedence over laws and give rise to rights and obligations directly for persons residing in the territory of the Federation [11].

According to article 9–1 part 1 of the Austrian Constitution, «universally recognized norms of international law act as an integral part of federal law», and part 2 of this article says: «Based on a law or a state agreement, certain sovereign rights can be transferred to interstate institutions and their bodies» [12]. In accordance with article 10, part 1 of the Italian Constitution, «the rule of law of Italy is consistent with generally recognized norms of international law» [13].

The Constitution of the Netherlands allows the approval of an agreement that is in conflict with the Constitution, but this decision can be made not by ordinary, but by a qualified majority of 2/3 of the composition of the chambers of the General States (Article 91 of the Basic Law (Constitution) of the Kingdom of the Netherlands) [9].

Foreign legislation also establishes the possibility of parallel application of international law and national law. For example, the Portuguese Constitution of 1976 establishes that the unconstitutional in terms of substance or form nature of international treaties, does not impede their observance by Portugal. Thus, Article 277 part 2 of the Constitution of Portugal establishes: «Organic or formal unconstitutionality of international treaties does not prevent their application in the domestic legal system of Portugal...» [14].

In contrast to the above, new constitutions, the basic laws adopted at an earlier stage of development differently regulate the issue of the correlation of international and national law. So, article 6 of the US Constitution, adopted in 1787 and still in force, establishes the priority of the US Constitution and laws throughout the country, however, along with treaties concluded by the federal government [15]. Thus, the US Constitution sets its standards above the treaties. Moreover, this norm has been repeatedly confirmed in decisions of the US Supreme Court [16; 14].

With regard to international treaties, the Constitutions of many foreign countries establish the priority value of an international treaty in influencing domestic relations, an international treaty is included as an integral part of the country's legal system. For example, the US Constitution proclaimed an international treaty part of the country's law. Section 6 also provides that «this Constitution and the laws of the United States issued to enforce it, as well as all treaties concluded or to be concluded by the United States, are the highest laws of the country, and judges of each state are required to comply with them, at least in the Constitution and laws of individual states there were conflicting resolutions» [15].

The domestic law of foreign states makes a distinction between existing generally accepted principles and norms of international law in the form of custom, on the one hand, and treaties on the other. The generally recognized principles and norms of international law in the manner of general transformation are included in the internal law of the country. Because of their universality and the objective need for their conflict with national law, they rarely arise. Therefore, states pay particular attention to the status of treaty norms in national law [17; 226].

US litigation puts customary international law below law. So, the decision of the US Supreme Court in the case of «Packbot Havana» (1900) established that customary international law is part of the country's law for the application by the courts, «unless there is an international treaty or other normative act of the executive or legislative branch or court ¬ solution». U.S. courts still adhere to this rule. As you can see, ordinary rules are even inferior to judicial decisions, case law [16; 12–13].

The question of ordinary rules in the new legal systems of Europe is being resolved in a different way. In Germany, the norms of general international law are not only included in the law of a country, but also prevail over laws. In Holland, all customary international law is applicable. Article 8 of the Portuguese Constitution establishes: «the norms and principles of general or customary international law are an integral part of Portuguese law» [14].

The Russian Constitution established the special status of universally recognized principles and norms of international human rights law. So in article 17 part 1 of the Basic Law of the Russian Federation it is stipulated: in the Russian Federation the rights and freedoms of man and citizen are recognized and guaranteed in accordance with generally recognized principles and norms of international law and in accordance

with this Constitution. Thus, universally recognized principles and norms of international law in the field of human rights are put in a priority position before the Constitution of Russia [4].

In constitutional law, references to international legal documents are also practiced, as a result of which such acts acquire legal force. Similar references can be found in the Portuguese Constitution: «The provisions contained in the Constitution and laws concerning the fundamental rights of citizens must be interpreted and in accordance with the Universal Declaration of Human Rights» (article 16) [14].

In some foreign countries, an international legal act cannot be a source of national law, including constitutional law. Its application requires implementation, that is, the publication of the corresponding law (for example, the Constitution of India, Malaysia). Thus, according to Article 76 par.1 a) of the Constitution of Malaysia, the Parliament may adopt laws with the aim of fulfilling an agreement, agreement or convention between the Federation and another state, a decision adopted by an international organization of which the Federation is a member [18]. In accordance with Article 253 of the Constitution of India «Legislation for the Implementation of International Agreements», Parliament has the right to issue any law in respect of all or any part of the territory of India in connection with the implementation of any contract, agreement or convention with any other country or countries or any decision adopted by an international conference, international association or other body [19].

*Discussion*

Globalization makes certain changes in the content of a political function from the point of view of the state's obligation to provide optimal conditions for the comprehensive and most complete development of the institutions of democracy and democratic management of society. It should be agreed with prof. I.I. Lukashuk is that in our time there is a globalization of democratic values. Democracy is recognized as a principle of universal significance. The right to it becomes a global law, which will be increasingly supported by the international community as a whole [20; 23]. International law encourages the democratic organization of state power. These norms are consistently implemented in the Constitution of the Republic of Kazakhstan [3; 81].

Speaking about the impact of international law on national legislation, it should be taken into account, as G.S. Sapargaliev emphasizes, that the norms of international law did not take shape on their own, but incorporated the most progressive legislation of various countries on state and legal construction. Now these norms in a new quality, expressing not the will of the peoples of individual countries, but the combined will of peoples represented by the advanced international public, are again returning to individual states [3; 77].

In this regard, we will consider the issue of the concept of «generally recognized principles and norms of international law». According to the Russian scientist I.I. Lukashuk, the basic principles of international law are understood as socially determined generalized norms, ideas that reflect the characteristic features of the regulatory system and its main content [16; 82]. In accordance with the position of this author, at a certain stage of social development, these ideas, which previously existed in the form of moral and political doctrines, were enshrined in the UN Charter and international legal acts developing it [16; 83].

A.N. Talalayev singles out universally recognized norms in international law, that is, such norms that are officially recognized by all or almost all states, regardless of their social structure, as universally binding. He defines the universally recognized principles of international law as the most important general, universally recognized, peremptory norms of international law [21; 5]. V.G. Boyarshinov claims that «the significance of universally recognized principles and norms of international law lies precisely in the fact that they are created by the international community as a whole and become binding on all states» [22; 60].

According to international practice, the state can not invoke the constitution to justify failure to fulfill international obligations. This principle was enshrined in 1932 in the decision of the Permanent Court of International Justice in the case «Treatment of Polish citizens in Danzig» [16; 14]. This provision has also been enshrined in the norm of the Constitution of the Republic of Kazakhstan, which refers to the mandatory nature of international treaties concluded by Kazakhstan for Kazakhstan.

An analysis of the content of the constitutions of foreign countries shows that, despite the existing differences of a national, historical nature, the processes of rapprochement of the constitutions of different countries are obvious in a substantial sense. It is important to note, as prof. K.K. Aytkhozhin, that foreign constitutions, mainly reinforcing the primacy of international law in relation to domestic law, do not say, like paragraph 1 of Article 4 of the Constitution of the Republic of Kazakhstan, the primacy of international law in relation to the constitutions themselves [5; 38]

The literature often expresses the opinion that the constitutions of some states recognized the primacy and direct effect of international law. In this regard, prof. I.I. Lukashuk rightly notes that this is not entirely true: the Constitution did not recognize the alleged primacy of international law, but established it themselves [17; 224].

Issues of defining the concept and establishing the normative content of «universally recognized principles and norms of international law» cause numerous disputes among specialists in international law. The interpretation of the concept of «universally recognized principles and norms of international law» in the domestic legal system should take into account the particularities of the international legal system. At the international level, in international legal literature, the concept of «generally recognized principles of international law» means general customary international law.

The priority of the norms of ratified international treaties in the Republic of Kazakhstan in relation to the conflicting rules of the law is quite clearly defined by the Constitution, while the hierarchical position of «generally recognized principles and norms of international law» in the legal system of many states, including Kazakhstan, is controversial. What meaning should be given to the expression «universally recognized principles and norms of international law»? Understanding the generally recognized principles and norms of only international legal customs, in our opinion, is incorrect, since international legal customs is only one form of expression of international law. The generally recognized principles and norms of international law have another form of expression — international treaties.

The generally recognized principles and norms of international law are the most significant rules of conduct. Many of them are imperative, which determines their special place in the hierarchy of international legal norms.

Given the importance of the problem of ensuring human rights and freedoms prof. V. Kartashkin expressed a proposal on the development and adoption of a Resolution by the UN General Assembly «On the Rule of International Law», in which it should call on all states of the world to recognize the priority of international law over domestic law. In this case, the author believes, basic human rights and freedoms will be universally recognized and will be protected everywhere [23; 85].

The Constitution of the Republic of Kazakhstan in the field of human rights is fully based on universally recognized norms of international law. At the same time, it would be advisable to consider strengthening the legal status of this category of norms and including in the content of the Basic Kazakhstan Law the provision that the rights and freedoms of man and citizen in the Republic of Kazakhstan are recognized and guaranteed in accordance with generally recognized principles and norms of international law and in accordance with the Constitution, similar to the provision of the Russian Constitution.

*Conclusions*

Analysis of legal regulation and theoretical approaches to the content of the principles of electoral law allows us to distinguish their essential characteristics and types. Free elections are based on a conscious expression of will, transparency and openness of elections. Under the condition that all principles of electoral law are observed, the results of the expression of will in the elections are reliable, and the elected authorities are legitimate. International treaties are a source of guarantees of electoral rights of citizens, establishing general principles, conditions for their implementation, as well as obliging states to provide the necessary legal remedies.

Globalization dictates the need for all states to provide optimal conditions for the comprehensive and full development of democratic institutions. The interaction of international and domestic law systems is due to the objective nature of the mutual influence and dependence between the foreign and domestic policies of each state, the development trends of the world community as a whole, and the fact that states are the creators of both national and international legal norms [24; 79–80].

An analysis of the content of the constitutions of foreign countries and the Basic Law of Kazakhstan shows that the Constitutions reflect progressive trends in the development of constitutional law, including the provision of international law with priority over domestic laws. The solution of the issue of primacy and direct effect of international law is in the competence of national law. Constitutional law is the basis of the legal system of the state. The norms of the Constitution have the highest legal force in the system, the primacy in relation to all other norms.

In some foreign countries, an international legal act cannot be a source of national, including constitutional, law. its application requires the publication of the relevant law. In another group of states, ratified international treaties form part of domestic law and, therefore, their provisions have a direct effect. In the latest

constitutions of a number of countries, there is a direct indication that the relevant international human rights instruments are part of domestic law.

In the development of the interaction of constitutional and international law, two important trends can be distinguished: firstly, the recognition of universally recognized principles, norms and standards of international law, primarily in the field of human rights, and secondly, the recognition of the priority of international law in the country's legal system.

There is a need for further scientific development of theoretical and practical issues regarding the concept and content of universally recognized principles and norms of international law, standards of democracy, determining their place in the hierarchy of national legal systems.

The Constitution of the Republic of Kazakhstan is the legal basis for the formation of national legislation focused on universally recognized norms of international law. Domestic Basic Law as a whole corresponds to the world trends in the development of constitutional law, due to the general globalization and internationalization of law. The Constitution of Kazakhstan laid a good foundation for the improvement of the legal system of the country, including taking into account international law. In order to give special status to the universally recognized principles and norms of international law on human rights and freedoms, it would be possible to include in the Constitution of the Republic of Kazakhstan the provision that the rights and freedoms of a person and a citizen in the Republic of Kazakhstan are recognized and guaranteed in accordance with generally recognized principles and norms of international law and in accordance with Constitution.

The globalizing world in its legal development is characterized by two interconnected processes: the internationalization of domestic regulation, especially in the humanitarian sphere, and the tendency to constitutionalize international relations. The trend of constitutionalization of international relations reflects the natural processes of formation along with the national also transnational (regional, continental and even global) constitutionalism, the legal basis of which are peremptory norms of international law, which have been universally recognized [25; 6].

## References

1 Конституция Республики Казахстан 1995 г. [Электронный ресурс]. — Режим доступа: http://www.akorda.kz/ru /official_documents/constitution

2 Лукашук И.И. Взаимодействие международного и внутригосударственного права в условиях глобализации / И.И. Лукашук // Журнал российского права. — 2002. — № 3. — С. 113–119.

3 Сапаргалиев Г. Конституционное право Республики Казахстан / Г. Сапаргалиев. — Алматы: Жеті жарғы, 2002. — 528 с.

4 Конституция Российской Федерации [Электронный ресурс]. — Режим доступа: http://www.constitution.ru/

5 Айтхожин К.К. О конституционных реформах: Казахстан и мировой опыт / К.К. Айтхожин // Юрист. — 2007. — № 2. — С. 37–41.

6 Конституция Болгарии [Электронный ресурс]. — Режим доступа: https://www.parliament.bg/en/const/

7 Конституция Французской Республики [Электронный ресурс]. — Режим доступа: https://worldconstitutions.ru/? p=138

8 Конституция Испании [Электронный ресурс]. — Режим доступа: https://worldconstitutions.ru/? p=149

9 Конституция Королевства Нидерландов [Электронный ресурс]. — Режим доступа: http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/nethrlnd/holand-r.htm

10 Конституция Республики Польша [Электронный ресурс]. — Режим доступа: http://www. worldconstitutions.ru/? p=112

11 Основной Закон Федеративной Республики Германии [Электронный ресурс]. — Режим доступа: http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/germany/german-r.htm

12 Конституция Австрийской Республики [Электронный ресурс]. — Режим доступа: http://worldconstitutions.ru/? p=160

13 Конституция Итальянской Республики [Электронный ресурс]. — Режим доступа: https://worldconstitutions.ru/? p=148

14 Конституция Португальской Республики [Электронный ресурс]. — Режим доступа: http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/portugal/portug-r.htm

15 Конституция США [Электронный ресурс]. — Режим доступа: https://worldconstitutions.ru/? p=168

16 См.: Лукашук И.И. Нормы международного права в правовой системе России / И.И. Лукашук. — М.: Спарк, 1997. — 90 с.

17 Лукашук И.И. Международное право. Общая часть: учеб. / И.И. Лукашук.— М.: БЕК, 1996. — 371 с.

18 Конституции Малайзии [Электронный ресурс]. — Режим доступа: https://worldconstitutions.ru/? p=655

19 Конституции Индии [Электронный ресурс]. — Режим доступа: http://www.concourt.am/armenian/legal_resources /world_constitutions/constit/india/india—r.htm#sub_para_N_11000

20 Лукашук И.И. Глобализация, государство, право, XXI век / И.И. Лукашук. — М.: Спарк, 2000. — 262 с.

21 Талалаев А.Н. Соотношение международного и внутригосударственного права в Конституции Российской Федерации / А.Н. Талалаев // Журн. междунар. права. — 1994. — № 4. — С. 3–9.

22 Бояршинов Б.Г. Международные договоры в правовой системе Российской Федерации / Б.Г. Бояршинов // Законодательство. — 1997. — № 4. — С. 58–61.

23 Карташкин В.А. Права человека: международно-правовая защита в условиях глобализации / В.А. Карташкин. — М.: Норма, 2009. — 289 с.

24 Международное публичное право: учеб. / под ред. К.А. Бекяшева. — М.: Проспект, 1999. — 640 с.

25 Эбзеев Б.С. Глобализация и становление транснационального конституционного права / Б.С. Эбзеев // Государство и право. — 2017. — № 1. — С. 5–15.

Ф.А. Ержанова, М.Ю. Абдакимова

## Мемлекетішілік және халықаралық құқықтардың арақатынастарының конституциялық-құқықтық аспектілері

Мақалада Қазақстандағы және шет елдердегі мемлекетішілік және халықаралық құқықтың арақатынасын конституциялық құқықтық реттеудің мазмұны мен рөлі қарастырылған. Авторлар ұлттық және халықаралық құқықтың арақатынасын конституциялық реттеудің отандық және шетелдік ерекшеліктерін көрсетеді, Негізгі Заңдардағы ішкі және халықаралық құқықтың арақатынасын бекітудегі заң шығарушылардың әртүрлі тәсілдерін айқындайды. Мақалада, сонымен қатар, халықаралық және конституциялық құқықтың өзара әрекеттесу мәселелері көрсетілген. Авторлар шет елдердің және Қазақстан Республикасының Конституцияларымен халықаралық құқық нормаларын мемлекеттердің құқықтық жүйелеріне енгізумен байланысты теориялық және тәжірибелік мәселелерге назар аударады. Салыстырмалы-құқықтық талдау негізінде шет елдердің конституцияларында мемлекетішілік және халықаралық құқықтың арақатынасын бекіту ерекшеліктері қарастырылды. Және де жалпы халықаралық құқық пен халықаралық шарттардың нормаларын әртүрлі елдердің конституцияларында бекіту мәселелері зерттелген. Қазақстан Республикасының Конституциясы жалпыға бірдей жаһандану мен құқықтың интернационализациясына байланысты конституциялық құқықты дамытудың әлемдік тенденцияларына сәйкес келетіндігі; халықаралық құқықтың жалпыға бірдей танылған қағидалары мен нормаларының түсінігі мен мазмұнына, олардың мемлекеттердің құқықтық жүйелерінің иерархиясындағы орнына қатысты теориялық және тәжірибелік сұрақтарының әрі қарай ғылыми дамыту қажеттілігі жөнінде қорытынды жасалған. Конституциялық құқықты одан әрі жетілдірудің бағыттарының бірі ретінде конституциялық-құқықтық заңнамаға адам құқықтары туралы жалпыға бірдей танылған қағидалар мен нормалар туралы ережелерді енгізу туралы ұсыныс жасалған.

*Кілт сөздер:* Конституция, конституциялық-құқықтық заңнама, мемлекетішілік және халықаралық құқықтың арақатынасы, құқықтық жүйе, Конституцияның басымдығы.

Ф.А. Ержанова, М.Ю. Абдакимова

## Конституционно-правовые аспекты соотношения внутригосударственного и международного права

В статье рассмотрены содержание и роль конституционно-правового регулирования соотношения внутригосударственного и международного права в Казахстане и зарубежных странах. Авторами показана отечественная и зарубежная специфика конституционной регламентации соотношения национального и международного права, обозначены различные подходы законодателей к закреплению соотношения внутреннего и международного права в Основных Законах. В статье затронуты также проблемы взаимодействия международного и конституционного права. Авторами освещены теоретические и практические вопросы, связанные с включением Конституциями зарубежных стран и Республики Казахстан норм международного права в правовые системы государств. На основе сравнительно-правового анализа раскрыты особенности закрепления соотношения внутреннего и международного права в конституциях зарубежных стран. Изучены вопросы закрепления норм общего международного права и международных договоров в Конституциях различных стран. Сделаны выводы, в частности, о том, что Конституция Республики Казахстан в целом соответствует мировым тенденциям развития конституционного права, обусловленным всеобщей глобализацией и интернационализацией права; о необходимости дальнейшей научной разработки теоретических и практических вопросов, касающихся, например, понятия и содержания общепризнанных принципов и норм международного права, их места в иерархии правовых систем государств. В качестве одного из направлений дальнейшего совершенствования конституционно-правового законодательства сформулировано предложение о включении в конституционно-правовое законодательство положения об общепризнанных принципах и нормах международного права о правах человека.

*Ключевые слова:* Конституция, конституционно-правовое законодательство, соотношение внутригосударственного и международного права, правовая система, приоритет Конституции.

## References

1 Konstitutsiia Respubliki Kazakhstan ot 30 avhusta 1995 hoda (1995) [The Constitution of the Republic of Kazakhstan]. (n.d.) *akorda.kz*. Retrieved from http://www.akorda.kz/ru/official_documents/constitution [in Russian].

2 Lukashuk, I.I. (2002). Vzaimodeistvie mezhdunarodnoho i vnutrihosudarstvennoho prava v usloviiakh hlobalizatsii [The interaction of international and domestic law in the context of globalization]. *Zhurnal rossiiskoho prava — Journal of russian law, 3,* 113–119 [in Russian].

3 Sapargaliev, G. (2002). *Konstitutsionnoe pravo Respubliki Kazakhstan [Constitutional law of the Republic of Kazakhstan*]. Almaty: Zhety zharhy [in Russian].

4 Konstitutsiia Rossiiskoi Federatsii [Constitution of the Russian Federation]. (n.d.) *constitution.ru.* Retrieved from http://www.constitution.ru [in Russian].

5 Aithozhin, K.K. O konstitutsionnykh reformakh: Kazakhstan i mirovoi opyt [About constitutional reforms: Kazakhstan and world experience]. *Yurist — Lawyer, 2,* 37–41 [in Russian].

6 Konstitutsiia Bolharii [Bulgarian Constitution]. (n.d.) *parliament.bg.* Retrieved from http://www.parliament.bg/en/const/

7 Konstitutsiia Frantsii [French Constitution]. (n.d.) *worldconstitutions.ru.* Retrieved from http://www.worldconstitutions.ru/?p=138 [in Russian].

8 Konstitutsiia Ispanii [Constitution of Spain]. (n.d.) *worldconstitutions.ru.* Retrieved from http://www. worldconstitutions.ru/?p=149 [in Russian].

9 Konstitutsiia Korolevstva Niderlandov [Constitution of the Kingdom of the Netherlands]. (n.d.) *worldconstitutions.ru.* Retrieved from http://www. world_constitutions/constit/nethrlnd/holand-r.htm [in Russian].

10 Konstitutsiia Respubliki Polsha [Constitution of the Republic of Poland].(n.d.) *worldconstitutions.ru.* Retrieved from http://www. worldconstitutions.ru/? p=112 [in Russian].

11 Osnovnoi Zakon Federativnoi Respubliki Hermanii [Basic Law of the Federal Republic of Germany]. (n.d.) *concourt.am.* Retrieved from http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/germany/german-r.htm [in Russian].

12 Konstitutsiia Avstriiskoi Respubliki [Constitution of the Republic of Austria]. (n.d.) *worldconstitutions.ru.* Retrieved from http://worldconstitutions.ru/? p=160 [in Russian].

13 Konstitutsiia Italianskoi Respubliki [Constitution of the Italian Republic]. (n.d.) *worldconstitutions.ru.* Retrieved from https://worldconstitutions.ru/? p=148 [in Russian].

14 Konstitutsiia Portuhalskoi Respubliki [Constitution of the Portuguese Republic]. (n.d.) *concourt.am.* Retrieved from http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/portugal/portug-r.htm [in Russian].

15 Konstitutsiia Soedinennikh Shtatov Ameriki [United States Constitution]. (n.d.) *worldconstitutions.ru.* Retrieved from https://worldconstitutions.ru/? p=168 [in Russian].

16 Lukashuk, I.I. (1997). *Normy mezhdunarodnoho prava v pravovoi sisteme Rossii [Norms of international law in the legal system of Russia]*. Moscow: Spark [in Russian].

17 Lukashuk, I.I. (1996). *Mezhdunarodnoe pravo*. *Obcshaia chast [International law. Common part]*. Moscow: BEK [in Russian].

18 Konstitutsiia Malaizii [Constitution of Malaysia]. (n.d.) *worldconstitutions.ru.* Retrieved from https://www. worldconstitutions.ru/? p=655 [in Russian].

19 Konstitutsiia Indii [Constitution of india]. (n.d.) *concourt.am.* Retrieved from http://www.concourt.am/armenian /legal_resources/world_constitutions/constit/india/india—r.htm#sub_para_N_11000 [in Russian].

20 Lukashuk, I.I. (2000*). Hlobalizatsia, hosudarstvo, pravo, XXI vek [Globalization, State, Law, XXI Century]* Moscow: Spark [in Russian].

21 Talalaev, A.N. (1994). Sootnoshenie mezhdunarodnoho i vnutrihosudarstvennoho prava v Konstitutsii Rossiiskoi Federatsii [Correlation of international and domestic law in the Constitution of the Russian Federation]. *Zhurnal mezhdunarodnoho prava — Journal of international law, 4,* 3–9 [in Russian].

22 Boiarshinov, B.G.(1997). Mezhdunarodnye dohovory v pravovoi sisteme Rossiiskoi Federatsii [International treaties in the legal system of the Russian Federation]. *Zakonodatelstvo — Legislation, 4, 58–61* [in Russian].

23 Kartashkin, V.A. (2009). *Prava cheloveka: mezhdunarodno-pravovaia zaschita v usloviakh hlobalizatsii [Human rights: international legal protection in the context of globalization]*. Moscow: Norma [in Russian].

24 Bekiashev, K.A. (Eds.). (1999). *Mezhdunarodnoe publichnoe pravo [International public law]*. Moscow: Prospekt [in Russian].

25 Ebzeev, B.S. (2017). Hlobalizatsia i stanovlenie transnatsionalnoho konstitutsionnoho prava [Globalization and the emergence of transnational constitutional law]. *Hosudarstvo i pravo — State and law,* 5–15 [in Russian].

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B.A. Taitorina[1], Z.T. Abdukarimova[1], M.T. Beisenbayeva[2], L.B. Bogatyreva[3]

*[1]M.Kh. Dulaty Taraz State University, Taraz, Kazakhstan;*
*[2]Kazakh National Agrarian University, Almaty, Kazakhstan;*
*[3]Baltic International Academy, Riga, Latvia*
*(E-mail: binur.a@mail.ru, manshuk.beisenbaeva@mail.ru, lida110@inbox.ru)*

# Problems of increasing the efficiency of the parliamentary control mechanism in the Republic of Kazakhstan

The article analyzes the problems of organizing parliamentary control in the Republic of Kazakhstan. Based on the analysis of modern research in the Republic of Kazakhstan and foreign countries, relevant issues of the formation and development of this legal institution have been raised. The authors of the article substantiated conceptual provisions. Parliament has a complex multifunctional mechanism for effective control. The analysis is based on two fundamental conceptual principles in the interpretation of parliamentary control. Firstly, parliamentary control as a system of norms aimed at checking and evaluating the activities of executive bodies, with the possible application of sanctions. Secondly, parliamentary control is a set of measures that allows initiating the resignation of the government. The principle of democracy is the initial category of parliamentarism. The central category of parliamentary law theory is the principle of separation of powers. The main functions of the Parliament are updated: legislative, representative, control. The article formulates the main conclusions and presents options for improving the effectiveness of the mechanism of parliamentary control in the Republic of Kazakhstan. One of the main conclusions of the study is the conclusion that a law is needed in the republic that would regulate and intensify the activities of the Parliament in such aspects as appeal to procedural forms of control such as interpellation with its ability to apply political sanctions, a resolution of censure, a parliamentary investigation of official crimes persons entailing their resignation, etc.

*Keywords:* law, parliament, deputy, control, parliamentary control, state.

## *Introduction*

The transformations taking place in the life of society in recent years have been accompanied by the reform of the system of state control of the sphere of production, social and political life of society. The importance of state control is growing in connection with the need to comply with the foundations of the constitutional system, enshrined in the Constitution of the Republic of Kazakhstan: the principles of democracy, separation of powers, human and civil rights and freedoms. The increasing role of state control requires, first of all, the pursuit of a unified policy in the field of state control based on constitutional principles. Of great importance is the problem of developing mechanisms for monitoring the socio-economic development of the country in a variety of forms of ownership and a market economy. Of particular relevance are the constitutional and legal foundations and principles of development of the state control system, the identification of potential opportunities and limits of control functions, finding the most effective methods and forms of their implementation.

The obligatory attributes of the modern state of law are, as life practice shows, two types of control in the management of the state — democratic, or democratic, and state. Democratic control is based on the activities of public structures and organizations aimed at protecting the rights and interests of citizens from arbitrariness, various kinds of abuses committed by authorities. It is an inherent way to realize the independence and sovereignty of the people — the only one in the country, as the Constitution of the Republic of Kazakhstan states, the source of state power. By delegating power to state bodies, he at the same time exercises control over the executive structures of the state through public associations and formations. And as it is rightly noted, in many developed countries it is perceived as the most important problem and direction of legitimizing state power. In the context of the theory of parliamentary law as a sub-branch of constitutional law, considerable attention is paid to the concept of parliamentary control, the essence, forms and order of its organization, its role in the system of state control and, more broadly, in the process of exercising state power.

## *Materials and methods*

The methodological basis of the study is the dialectical method, as well as the ideas presented in the works of philosophers, legal theorists, the concepts of modern domestic and foreign scientists, devoted to the

problems of improving the functioning of the parliamentary control institution in the Republic of Kazakhstan. The following research methods were used in the work: system-structural method, analysis and synthesis methods, formal legal method, comparative legal method, historical method, sociological method, legal modeling method.

*Discussion*

The analysis of the theory and practice of parliamentary control manifests the presence of a whole of two fundamental conceptual attitudes in the interpretation of this type of control. The first, the most common, postulates parliamentary control as a system of norms aimed at regulating the procedure for conducting and verifying the activities of executive bodies, as well as evaluating these activities with the possible application of sanctions — a vote of no confidence, a resolution of censure, impeachment, etc. The second installation, more categorical, imperative, perceives parliamentary control as a set of measures, «allowing the chambers of Parliament to form an opinion on the activities of the government and overthrow it in case of non-compliance with current policies». This view is characteristic of the French, their researchers. This is natural, since it is precisely this state that has gained in history the fame of an adherent to the idea of democracy. It is no accident that the French Constitution enshrines the maxim of Lincoln as a priority principle: «The rule of the people, by the will of the people and for the people» (Article 2, Section 1).

Parliamentary control is the prerogative of the activities of the legislative branch of government — the Parliament and its chambers. Legislative power is actualized by such thinkers as John Locke, S.-L. Montesquieu, J. -J. Russo, T. Hobbes, I. Kant et al. The legislative branch has gained effective force in our time and is actively influencing modern state building and the constitutional process. The legislative branch, through its body — the Parliament — exercises constant and active supervision over all branches of the administration, and strictly and uncompromisingly criticizes the actions and methods of the government and its individual members.

Parliament is able to deploy its sophisticated multi-functional mechanism through effective monitoring. The control function is subordinated, according to V.Orlando, to the goal of constant and active supervision by the parliament over all branches of the administration and ensuring the right of the parliamentarian to express to the government members «any desire, doubt or dissatisfaction» [1; 134]. It is also noted that parliamentary control is carried out using parliamentary criticism of government actions [2; 530]. S.A. Kotlyarevsky also considered the control function to be extremely important: «In a modern state, the parliament's controlling activity is all the more important the more inevitable it is the strengthening of government, which holds in its hands the threads of legislative and budgetary work» [3; 264]. The conceptual concepts of the theory of parliamentary control are based on the principle of democracy: «the representative component of state power is seen as an institutional form of exercising the people's will. It is public power, with the help of which public interest is realized as a combination of state, national and public interests» [4; 137]. It is noted that «back in the Middle Ages, the idea of popular sovereignty was one of the popular accessories of natural-legal constructions. This idea was a further formulation of the legal dependence of the government on society. It postulated for the people a permanent right of control and supremacy over power» [5; 23]. Developing the theory of democracy as a principle of parliamentarism, K.V. Aranovsky notes: «The forms in which democracy is consolidated are different. It can be proclaimed directly.... The political image of the people — the founder, the holder of power — can be used — the text of the constitution is preceded by a preamble, from which it follows that it was the people who established the foundations of the political system, determined their goals and further reserves the right to control the conditions for exercising power in the country [6; 130]. The principle of democracyisthus the initial category of parliamentarism.

The central category of the theory of parliamentary law is the principle of separation of powers, designed to ensure the effectiveness of democracy, «this principle is democratic, it provides for such an organization of state power that can effectively identify and reflect the interests of both the majority and minorities of the population, its various groups» [7; 5]. In the history of political and legal thought, various opinions on this subject are embodied: the legislature should remove «people from government if they abuse their powers or fulfill their opposition to the clearly expressed opinion of the nation» [8; 53]. The government (ministers) must bear the consequences of not only their own violations, but also political mistakes that deprive them of the trust of people's representatives [9; 128]. The literature also notes that parliamentary control in the mechanism of separation of powers is one of the types of state control: «the oldest form of control (dating back to antiquity) is the conviction of the need for separation of state power into three branches — executive, legisla-

tive and judicial — and assignment of these functions to state bodies independent of each other. This type of control is designed to prevent abuse of power or the excess of power by individual state bodies and, thereby, ultimately guarantee civil liberties.... The basic law defines the tasks and boundaries of the executive and legislative authorities and allows them to be controlled for possible abuse» [10; 47]. A. Lafitov believes that «along with lawmaking, law enforcement and the implementation of the rule of law in the legal management mechanism, there exists and really operates a block of such legal means as acts of control bodies; measures against the adoption of unlawful management decisions; measures to correct such decisions to eliminate the consequences caused by them; preventive measures; crime prevention; compulsory performance of duty, legal liability. The legislation establishes state legal means that give parliamentarians the opportunity to actively participate: in making managerial decisions (legislative initiative, the right to make a question, request); in the organization of the execution of decisions» [11; 32].

In the modern science of constitutional law, sufficient attention is paid to the problems of parliamentary control; the sources define this institution. The notion of parliamentary control formulated by M.M. Utyashev and A.A. Kornilayeva deserves attention and appreciation: this is a set of various measures carried out by the highest legislative (representative) government body to constantly monitor and verify the activities of the system, as well as to eliminate those identified as a result such verification of violations and prevention of possible inconsistencies [12; 30]. The authors of the textbook «Modern Parliament: Theory, World Experience, Russian Practice» also offer a definition of parliamentary control: parliamentary control is «a system of norms that regulates the established procedure for monitoring and verifying mainly the activities of executive bodies and aimed at evaluating these activities with the possible application of sanctions (vote of no confidence, resolution of censure, impeachment, etc.)» [13; 81]. Leading after the legislative powers of the parliament, modern scientists call the control function, which consists in exercising control over the activities of the government and other supreme bodies of state power with the exception of interference in their directly executive and administrative work [14; 386]. Considering parliamentary budget law as part of parliamentary financial control, A. Somenkov defines its specificity: parliamentary control «by its tasks is state control, as a form of unified state power, the source of which is the multinational people, exercising their sovereignty through representation in the control system relations» [15; 31]. The wording of the French scientists sounds more categorical and laconic: parliamentary control is a set of measures that allows the chambers of parliament to form an opinion on the activities of the government and to overthrow it in case of deep discrepancy with the current policy [16; 96]. E.V. Kovryakova defines parliamentary control as an institution of law as a set of rules of law governing the established procedure for conducting, monitoring and verifying mainly the activities of executive bodies in order to evaluate these activities and the possible application of sanctions (vote of no confidence, resolution of censure, impeachment, etc.) [17; 137].

E.A. Solomatina summarizes: «The stability and continuity of any power system is ensured by a certain constitutional and legal mechanism providing for a balanced balance of powers, their interdependence, and mutual control. For this, each of them determines its own source of formation, various terms of office are fixed, and political and legal levers are envisaged to neutralize the actions of the other. In modern conditions, the principle of separation of powers is considered as an organizational and legal mechanism for the implementation of a unified state power as a complex phenomenon. State authorities carry out activities adhering to a certain framework, which does not allow «checks» to go beyond, and «balances» represent powers whose implementation neutralizes possible abuses, deviations from state bodies, representing a different type of state power» [18; 20, 21].

In developed democracies, the principle expressed by the formula «when a people gather as a sovereign body, all government jurisdictions ceases» has good enough reason. And this is clearly demonstrated and demonstrated by their institutions of legislative power, representing the will of the people in a highly adequate and irrefutable form. Thus, the representative function of the Parliament is leading after the legislative one, that the control function is largely determined by the representative, that is, the nature, nature and purpose of this body.

However, in countries around the world, not all of these three functions are equally involved. There are countries where the legislative and control functions of the parliament are equally performed, and this does not create an imbalance of the branches of government, but, on the contrary, contributes to the sustainable and effective development of the state. There are no such precedents when the control function is overshadowed by the legislative, which creates a significant bias, which allows us to state the fact that the Parliament does not have control powers and the demand for these powers. This kind of imbalance in the functionalism of the Parliament is often a consequence of the fact that control functions are not prescribed in the Constitu-

tion, are not fixed in special legislative acts, as, naturally, the mechanism for their implementation is not fixed [19; 10].

So, the control function of the Parliament of the Republic of Kazakhstan has not been singled out in separate articles of the Constitution and relevant laws, which allows some experts to talk about the lack of parliamentary control in the country. However, a complete denial of the control activities of the Parliament is not entirely correct and lawful. A number of his powers, both exclusive and independent, contain elements of a control property.

These elements are included in the right of Parliament: 1) to approve the republican budget and the reports of members of the Government and the Accounts Committee on monitoring the implementation of the republican budget on its implementation; 2) take part in the implementation of the country's personnel policy (giving consent to the appointment of senior executive officials (the Prime Minister of the Republic of Kazakhstan, the Prosecutor General, the Republic of Kazakhstan, the Chairman of the National Security Committee of the Republic of Kazakhstan, etc.); 3) raise the issue of dismissal President of the Republic and submit its results to joint meetings of the chambers; 4) use the legal procedural forms of control — deputy questions and requests, parliamentary hearings, government hour, meetings with voters, etc.

*Conclusion*

The powers of deputies of the parliament of the Republic of Kazakhstan contain great potential for monitoring the activities of executive authorities, the Government, its individual members, the spending of budget funds, other material and financial income. However, deputies and committees and commissions operating within the framework of the Parliament do not fully use this potential, and if they do, they do not maintain the control sequence and do not bring it to the end. The Parliament of the Republic of Kazakhstan does not appeal to such procedural forms of control as interpellation with its ability to apply political sanctions, a censure resolution, a parliamentary investigation of the crimes of officials, entailing their resignation, etc. Meanwhile, the practice of foreign countries indicates the high dynamics of the application of such control measures in activities of the investigation committees, which may require any documents and materials, call any official for interrogation, up to the head of state and in accordance with the constitution and laws on the responsibility of state officials (on impeachment).

The factology of the activities of foreign parliaments leads to the conclusion that a law is needed in the republic that regulates and activates the activities of the Parliament in this aspect. The law should contain the norms of the parliamentary investigation, its procedures, create a basis for organizing investigative committees, whose competence would include, first of all, the investigation of violations of laws and other forms of deviant behavior of senior state officials. The parliamentary investigation is one of the specific methods of parliamentary and, more broadly, state control. A parliamentary investigation should be of a state legal nature. The parliamentary investigation should be organizationally and structurally isolated from other forms and means of parliamentary control, from other types of investigation. Only legislatively enshrined control activities of the representative body will give the Parliament a truly representative image, which it is currently deprived of.

References

1 Орландо В. Принципы конституционного права. — М.: Изд-во В.М. Саблина: Потровка, домъ Обидиной, 1907. — 309 с.

2 Еллинек Г. Право современного государства. Общее учение о государстве / Г. Еллинек. — СПб., 1903. — 620 с.

3 Котляревский С.А. Власть и право. Проблема правового государства / С.А. Котляревский. — СПб.: Лань, 2001. — 368 с. — Мир культуры, истории и философии.

4 Государственное управление: основы теории и организации: учеб. / под ред. В.А. Козбаненко. — М.: Статус, 2002. — 366 с.

5 Новгородцев П.И. Историческая школа для юристов / П.И. Новгородцев. — СПб.: Лань, 1999. — 192 с.

6 Арановский К.В. Государственное право зарубежных стран / К.В. Арановский. — М.: Инфра-М, 1998. — 462 с.

7 Шеховцев В.А. Развитие российского парламентаризма / В.А. Шеховцев. — Владивосток: Дальнаука, 2002. — 320 с.

8 Милль Джон Стюарт. Представительное правление / Джон Стюарт Милль . — СПб.: Слово, 1907. — 322 с.

9 История политических и правовых учений XIX века. — М.: Наука, 1993. — 392 с.

10 Швебах В. Контроль за административной деятельностью. В сб.: Государственная служба / В. Швебах. — Вып. 6. Зарубежный опыт. Контроль. — М., 1995. — 289 с.

11 Латифов А. Парламентский контроль в Узбекистане / А. Латифов // Политика и право. — 2002. — № 5. — С. 31–36.

12 Утяшев М.М. Контрольные функции региональных парламентов: сравнительный анализ / М.М. Утяшев, А.А. Корнилаева // Право и политика. — М. — 2001. — № 1. — С. 26–30.

13 Современный парламент: теория, мировой опыт, российская практика / под общ.ред. О.Н. Булакова. — М.: Эксмо, 2005. — 320 с.

14 Парламентское право России: учеб. пос. / под ред. И.М. Степанова, Т.Я. Хабриевой. — М., 1999. — 386 с.

15 Соменков А.Д. Проблемы парламентского контроля за исполнением федерального бюджета в России: автореф. … д-ра юрид. наук / А.Д. Соменков. — М., 2006. — 31 с.

16 Исполнительная власть, законодательная власть, судебная власть во Франции: информационные и учеб. материалы. — Новая сер. – № 6 // Посольство Франции в России. МИД Франции. — М., 1996. — 118 с. (Рос.-фр. сер.).

17 Парламентское право России: учеб. — М.: Эксмо, 2006. — 656 с.

18 Соломатина Е.А. Теоретико-правовые основы контроля законодательной власти за деятельностью правоохранительных органов: дис. … канд. юрид. наук / Е.А. Соломатина. — М.: МУ МВД Росии, 2005. — 172 с.

19 Франклин де Вризе. Принципы парламентской оценки эффективности применения законодательства. Руководство по парламентской оценке эффективности применения законодательства. — Лондон, 2018. — 16 с.

Б.А. Тайторина, З.Т. Абдукаримова, М.Т. Бейсенбаева, Л.Б. Богатырева

## Қазақстан Республикасындағы парламенттік бақылау механизмінің тиімділігін арттыру мәселелері

Мақалада Қазақстан Республикасындағы парламенттік бақылауды ұйымдастырудың мәселелері талданған. Қазақстан Республикасындағы және шет мемлекеттердегі қазіргі заманғы зерттеулерді талдау негізінде осы құқықтық институтты қалыптастыру мен дамытудың өзекті мәселелері қарастырылған. Мақала авторларының тұжырымдамалық ережелері негізделген. Парламенттің тиімді бақылауды жүзеге асырудың күрделі көпфункционалды тетігі бар. Талдау парламенттік бақылауды түсіндірудегі екі негізгі тұжырымдамалық ұстаным негізінде берілген. Біріншіден, парламенттік бақылау санкцияларды қолдану мүмкін болатын атқарушы органдардың қызметін тексеруге және бағалауға бағытталған нормалар жүйесі ретінде. Екіншіден, парламенттік бақылау - Үкіметтің отставкасын бастауға мүмкіндік беретін шаралар кешені ретінде. Халық билігі қағидасы парламентаризмнің бастапқы санаты болып табылады. Парламенттік құқық теориясының орталық санаты билікті бөлу принципі болып табылады. Парламенттің негізгі заң шығарушылық, өкілді, бақылау қызметі (функциялары) өзектілендірілген. Мақалада Қазақстан Республикасындағы парламенттік бақылау тетігінің тиімділігін арттыру жөніндегі ұсынымдардың негізгі қорытындылары тұжырымдалған және өзіндік нұсқалары берілген. Зерттеудің негізгі қорытындыларының бірі республикада саяси санкцияларды қолдану мүмкіндігі бар интерпелляция, айып тағу қарары, лауазымды адамдардың отставкасына әкеп соғатын қылмыстарын парламенттік тергеу сияқты аспектілерде Парламенттің қызметін реттейтін және белсендіретін заң қажеттігі туралы қорытынды болып табылады.

*Кілт сөздер:* құқық, парламент, депутат, бақылау, парламенттік бақылау, мемлекет.

Б.А. Тайторина, З.Т. Абдукаримова, М.Т. Бейсенбаева, Л.Б. Богатырева

## Проблемы повышения эффективности механизма парламентского контроля в Республике Казахстан

В статье проанализированы проблемы организации парламентского контроля в Республике Казахстан. На основе анализа современных исследований в Республике Казахстан и зарубежных государствах подняты актуальные вопросы формирования и развития данного правового института. Авторами статьи обоснованы концептуальные положения. Парламент имеет сложный многофункциональный механизм осуществления эффективного контроля. Анализ дан на основе двух основополагающих концептуальных установок в толковании парламентского контроля. Во-первых, парламентский контроль как система норм, направленная на проверку и оценку деятельности исполнительных органов, с возможным применением санкций. Во-вторых, парламентский контроль — комплекс мер, позволяющий инициировать отставку правительства. Принцип народовластия является исходной категорией парламентаризма. Центральной категорией теории парламентского права является принцип разделения власти. Актуализированы основные функции Парламента: законодательная, представительная, контрольная. В статье сформулированы основные выводы и представлены варианты рекомендаций по повышению эффективности механизма парламентского контроля в Республике Казахстан. Одним из основных выводов исследования является заключение о том, что в республике необходим закон, который бы регламентировал и активизировал деятельность Парламента в таких аспектах, как апелляция к таким процессуальным формам контроля, как интерпелляция с его возможностью применять поли-

тические санкции, резолюцию порицания, парламентское расследование преступлений должностных лиц, влекущее их отставку, и др.

*Ключевые слова:* право, парламент, депутат, контроль, парламентский контроль, государство.

## References

1 Orlando, V. (1907). *Printsipy konstitutsionnoho prava [Principles of constitutional law]*. Moscow: Izdatelstvo V.M. Sablina: Potrovka, dom Obidinoi [in Russian].

2 Jellinek, G. (1903). *Pravo sovremennoho hosudarstva. Obshchee uchenie o hosudarstve [Law of the modern state. General doctrine of the state]*. Saint Petersburg [in Russian].

3 Kotlyarevsky, S.A. (2001). *Vlast i pravo. Problema pravovoho hosudarstva [Power and law. The problem of the rule of law]*. Saint Petersburg: Lan [in Russian].

4 Hosudarstvennoe upravlenie: osnovy teorii i orhanizatsii (2002). [Public administration: the basics of theory and organization]. Moscow: Status [in Russian].

5 Novgorodtsev, P.I. (1999). *Istoricheskaia shkola dlia yuristov [Historical school for lawyers]*. Saint Petersburg: Lan [in Russian].

6 Aranovsky, K.V. (1998). *Hosudarstvennoe pravo zarubezhnykh stran [State law of foreign countries]*. Moscow: Infra-M [in Russian].

7 Shekhovtsev, V.A. (2002). *Razvitie rossiiskoho parlamentarizma [The development of Russian parliamentarism]*. Vladivostok: Dalnauka [in Russian].

8 Mill John, Stewart. (1907). *Predstavitelnoe pravlenie [Representative Board]*. Saint-Petersburg: Slovo [in Russian].

9 Istoriia politicheskikh i pravovykh uchenii XIX veka (1907) [The history of political and legal teachings of the nineteenth century]. Moscow: Nauka [in Russian].

10 Schwebach, V. (1995). *Kontrol za administrativnoi deiatelnostiu [Control over administrative activities]*. Moscow [in Russian].

11 Latifov, A. (2002). Parlamentskii kontrol v Uzbekistane [Parliamentary control in Uzbekistan]. *Politika i pravo — Politics and Law, 5,* 31–36 [in Russian].

12 Utyashev, M.M., & Kornilayeva A.A. (2001). Kontrolnye funktsii rehionalnykh parlamentov: sravnitelnyi analiz [Control functions of regional parliaments: a comparative analysis]. *Politika i pravo — Law and Politics, 1,* 26–30 [in Russian].

13 Bulakova, O.N. (Eds.). (2005). *Sovremennyi parlament: teoriia, mirovoi opyt, rossiiskaia praktika [The modern parliament: theory, world experience, Russian practice]*. Moscow: Eksmo [in Russian].

14 Stepanova, I.M., & Khabriyevoy, T.Ya. (1999). *Parlamentskoe pravo Rossii [Parliamentary law of Russia]*. Moscow [in Russian].

15 Somenkov, A.D. (2006). Problemy parlamentskoho kontrolia za ispolneniem federalnoho biudzheta v Rossii [Problems of parliamentary control over the execution of the federal budget in Russia]. *Extended abstract of doctor's thesis.* Moscow [in Russian].

16 Ispolnitelnaia vlast, zakonodatelnaia vlast, sudebnaia vlast vo Frantsii (1996) [The executive branch, legislative branch, judicial branch in France]. Moscow [in Russian].

17 Parlamentskoe pravo Rossii (2006) [Parliamentary law of Russia]. Moscow: Eksmo [in Russian].

18 Solomatina, E.A. (2005). Teoretiko-pravovye osnovy kontrolia zakonodatelnoi vlasti za deiatelnostiu pravookhranitelnykh orhanov [Theoretical and legal foundations of the control of the legislative power over the activities of law enforcement bodies]. *Candidate s thesis'.* Moscow [in Russian].

19 Franklin de Vries. (2018). *Printsipy parlamentskoi otsenki effektivnosti primeneniia zakonodatelstva. Rukovodstvo po parlamentskoi otsenke effektivnosti primeneniia zakonodatelstva [Principles of parliamentary evaluation of the effectiveness of the application of legislation. Guidance on parliamentary assessment of the effectiveness of legislation]*. London [in Russian].

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Ф.А. Ержанова, Р.М. Жамиева, Г.А. Ильясова

*Карагандинский государственный университет им. Е.А. Букетова, Казахстан*
*(E-mail: erzhanova_farida@mail.ru)*

# Некоторые вопросы совершенствования избирательного законодательства Республики Казахстан: анализ судебной практики

В статье рассмотрены проблемы применения норм материального и процессуального права в сфере деятельности по выборам, правовые основы защиты избирательных прав граждан, требования к субъектам избирательного процесса. Определена сущность некоторых избирательных процедур, в частности, связанных с принятием решения об отказе в регистрации кандидатов в депутаты, исключения из списка кандидатов или об отказе в восстановлении в списке кандидатов. Проанализированы положения Конституционного закона Республики Казахстан «О выборах в Республике Казахстан», гражданско-правовых норм, посвященных избирательному праву, исследованы позиции ученых-юристов относительно проблем конституционно-правовой ответственности. Актуальность статьи заключается в том, что путем исследования действующего законодательства проведен комплексный анализ порядка рассмотрения жалоб граждан и определены меры по совершенствованию процедуры их принятия и рассмотрения в избирательных органах. Авторами предложено принятие специального Постановления Верховного Суда по вопросам применения законодательства о выборах, устранение некоторых пробелов в избирательном законодательстве. Сформулированы выводы о необходимости дальнейшего совершенствования институтов избирательного права и процесса, посредством которых реализуются гарантии в сфере избирательных прав граждан.

*Ключевые слова:* Конституционный закон Республики Казахстан «О выборах в Республике Казахстан», избирательные комиссии, гарантии избирательных прав граждан.

## *Введение*

Конституция Республики Казахстан [1] закрепила важнейшие гарантии развития Казахстана как демократического правового государства, в котором признаются, соблюдаются и защищаются права и свободы человека и гражданина. Подтверждением общей направленности на демократизацию политических процессов явилось внесение изменений и дополнений в Конституционный закон Республики Казахстан от 28 сентября 1995 г. № 2464 «О выборах в Республике Казахстан» [2] Конституционным законом Республики Казахстан от 29 июня 2018 г. № 162-VI «О внесении изменений и дополнений в некоторые Конституционные законы Республики Казахстан» [3]. Конституционное законодательство о выборах пошло по пути либерализации и дальнейшей демократизации выборного процесса в Казахстане.

Важными новеллами 2018 г. являются упразднение окружных избирательных комиссий, введение осуществления полномочий на профессиональной основе двумя членами территориальных избирательных комиссий; усовершенствование статуса избирательных органов; закрепление порядка выдвижения кандидатов в депутаты маслихатов по партийным спискам. Данные изменения и дополнения направлены на повышение профессионализации членов избирательных комиссий, создание равных условий для представительства различных политических партий, внедрение современных информационных технологий в избирательный процесс в целях обеспечения его прозрачности и подотчетности. Полномочия Центральной избирательной комиссии Республики Казахстан, территориальных, участковых избирательных комиссий дополнены функцией по организации и проведению обучения участников избирательного процесса, а также проведению семинаров с представителями политических партий и другими участниками избирательного процесса по организации и проведению выборов [3].

Нами были проанализированы судебные решения республиканских судов в период подготовки и проведения внеочередных выборов депутатов Мажилиса Парламента Республики Казахстан и маслихатов — местных представительных органов Республики Казахстан в 2016 г. Целью анализа было изучение практики применения судами правовых норм законодательства о выборах; исследование причин и условий, влекущих нарушение законности при рассмотрении гражданских дел по заяв-

лениям о защите избирательных прав граждан и общественных объединений, участвующих в выборах; выявление проблемных вопросов при применении норм материального и процессуального права, регулирующих вопросы защиты избирательных прав граждан.

Основными нормативными правовыми актами, регулирующими отношения по выборам депутатов Мажилиса Парламента Республики Казахстан и маслихатов – местных представительных органов Республики Казахстан, являются Конституция Республики Казахстан, Конституционный закон Республики Казахстан (далее — КЗ РК) «О выборах в Республике Казахстан», Гражданский процессуальный кодекс Республики Казахстан от 31 октября 2015 г. (далее ГПК РК), Закон Республики Казахстан «О политических партиях» от 15 июля 2002 г. № 344.

Заявления о защите избирательных прав граждан и общественных объединений, участвующих в выборах, республиканском референдуме, согласно подр. 3 р. 2 ГПК РК рассматриваются в порядке особого производства, поэтому, в соответствии с ч. 3 ст. 23 ГПК, отнесены к подведомственности судов.

Всего изучено 57 решений, 3 определения суда, которые представлены в банке судебных актов на сайте Верховного Суда Республики Казахстан [4]. Все судебные решения, в целом, явились обоснованными и законными. Изучение актов суда показало, что чаще всего в суд подаются заявления о нарушениях законодательства о выборах избирательными комиссиями. Они связаны, преимущественно, с несоблюдением процедуры принятия решения об отказе в регистрации кандидатов в депутаты или исключения из списка кандидатов; в ошибочном использовании недостоверных фактических данных при принятии решений; неправильном применении материального права избирательными комиссиями; в недостаточном обосновании принятых решений, бездействии, выразившемся в непредоставлении ответа-решения, на заявление гражданина. Суды, принимая решения, руководствовались перечисленными выше нормативно-правовыми актами и ГПК РК.

*Методы и материалы*

В исследовании использовались логико-юридический, системно-структурный, сравнительно-правовой, исторический, а также специальные юридические методы толкования правовых норм.

*Результаты*

В результате изучения судебных решений выявлены типичные нарушения в деятельности окружных избирательных комиссий. Они связаны, преимущественно, с несоблюдением процедуры принятия решения об отказе в регистрации кандидатов в депутаты или исключения из списка кандидатов, в ошибочном использовании недостоверных фактических данных при принятии решений, неправильном применении материального права избирательными комиссиями, в недостаточном обосновании принятых решений.

Первая категория нарушений в работе избирательных комиссий выражается в несоблюдении установленных процессуальных правил. Так, выявлены нарушения окружными избирательными комиссиями процедуры принятия решения, что привело к удовлетворению требований заявителей. Председатель комиссии ответил электронным письмом об отказе в регистрации в кандидаты депутата районного маслихата. Тем самым нарушил ч. 5 ст. 20 КЗ РК «О выборах в Республике Казахстан».

Электронное письмо не может считаться законным и обоснованным документом об отказе в восстановлении, так как любые решения избирательной комиссии, в соответствии с КЗ РК «О выборах в Республике Казахстан», принимаются открытым голосованием большинством голосов от общего числа их членов, при участии не менее двух третей от общего числа членов комиссии. Цифровое письмо не является надлежащим документом об отказе в восстановлении кандидатом в депутаты.

Аналогично в другом решении требования истца были удовлетворены полностью, так как заявитель требовал обязать рассмотреть его заявление о восстановлении в кандидаты в депутаты. Председатель избирательной комиссии на заявление истца, ранее снятого с регистрации кандидатом в депутаты, о его восстановлении в качестве кандидата, в связи с устранением ошибок в декларации о доходах, ответил письмом.

В этом деле также не соблюдены положения требования КЗ РК «О выборах в Республике Казахстан» о порядке принятия решения избирательной комиссией. Требования заявителя именно в этой части (о необходимости рассмотрения и принятия решения в окружной избирательной комиссии, а не в электронном письме) были удовлетворены. В обоих случаях избирательные комиссии обязали принять решение с соблюдением законной процедуры принятия решения.

Хотя в законе нет четкого указания на то, что отказ в восстановлении в регистрации должен быть оформлен протоколом,считаем, что следует устранить этот пробел. О протоколах в КЗ РК «О выборах в Республике Казахстан» говорится только применительно к решениям о регистрации, о регистрации партийных списков, представленных политическими партиями, выдвигающими кандидатов в депутаты маслихатов.

Поэтому суды вынуждены принимать решения, исходя из толкования статей закона. Суды считают, что протоколированию подлежат не только решения избирательных комиссий о регистрации, но и решения об отказе в регистрации, отказе в восстановлении ранее снятого с регистрации кандидата в депутаты. Судебная практика, исходя из анализа дел, свидетельствует о единообразном толковании положений КЗ РК «О выборах в Республике Казахстан». Это также свидетельствует о небрежном отношении избирательных комиссий, указанных в судебных решениях, к процедуре принятия решения при отказе в регистрации в кандидаты в депутаты и восстановлении ранее снятого с регистрации кандидата, что и привело к предсказуемому результату судебного процесса.

В другом деле также не была соблюдена процедура реагирования на заявления участников избирательного процесса, то есть кандидатов в депутаты. Заявитель не дождался официального ответа от городской избирательной комиссии, которая ответила также обычным письмом, приложив к нему копии протоколов заседания избирательной комиссии по результатам выборов. Суд квалифицировал действия данной городской избирательной комиссии (непринятие официального решения) как незаконное бездействие и обязал ее дать официальный ответ заявителю в виде решения. Суд считает, что письмо комиссии не является решением по поставленным заявителем вопросам.

Отсутствие официального ответа лишает заявителя возможности обжаловать его в вышестоящие избирательную комиссию или суд в течение 10 дней со дня принятия решения или совершения действия (бездействия) в соответствии с положениями КЗ РК «О выборах в Республике Казахстан».

Приведенные судебные решения демонстрируют, что окружные избирательные комиссии не соблюдали положения ст. 20 КЗ РК «О выборах в Республике Казахстан» в части процедуры и формы принятия решений по жалобам и заявлениям. Они ограничивались электронными письмами либо простыми почтовыми письмами. Хотя КЗ РК «О выборах в Республике Казахстан» требует, что любые решения должны быть оформлены протоколом заседания окружной избирательной комиссии. Решения о регистрации, об отказе в регистрации, об отказе в восстановлении в списке кандидатов являются категориями одного ряда. Поэтому представляется, что они требуют официального оформления, несмотря на отсутствие на это прямого указания в законе.

Вторая категория нарушений в работе избирательных комиссий выражается в том, что принимается решение об отказе в регистрации в качестве кандидата или в отмене решения о регистрации на основании ошибок в установлении факта декларирования доходов кандидата.

Так, заявителю было отказано в регистрации на основании отсутствия декларации о доходах его жены. Он предоставил декларацию и обратился с повторным заявлением в окружную избирательную комиссию о регистрации. В ответ не получил должного ответа. Суд частично удовлетворил его требование о принятии решения, но отказал в требовании о регистрации, так как нет официального решения избирательной комиссии.

В другом деле — по заявлению о признании недействительным протокола окружной избирательной комиссии с решением об отказе в регистрации — в результате проверки выяснилось, что недостоверность сведений о доходах и имуществе вызвана объективными причинами: ошибкой менеджера банка, выдавшего справку об остатке на счете на первое число месяца начала срока выдвижения, а фактически указавшего сумму остатка на момент обращения, что и вызвало расхождения между данными декларации и результатами проверки органом государственных доходов. Информация о принадлежности акций была опровергнута в суде фактом наличия договора купли-продажи и отчуждения акций.

Но из судебного решения неясно, соблюдены ли требования законодательства об отчуждении ценных бумаг, представлены ли подтверждающие факт отчуждения акций иные документы, помимо договора купли-продажи. Потому что по ст. 38 Закона РК от 2 июля 2003 года № 461 «О рынке ценных бумаг» [5] необходимо соблюдение процедур регистрации сделок по ценным бумагам.

В соответствии с ч. 3 ст. 117 ГК РК «Имущество, не относящееся к недвижимости, включая деньги и ценные бумаги, признается движимым имуществом. Регистрации прав на движимые вещи не требуется, кроме случаев, указанных в законодательных актах» [6].

В следующем деле по заявлению истца на основании ошибочного определения факта недостоверности информации о доходах было отменено решение нижестоящей избирательной комиссии. Выяснилось, что, несмотря на наличие кадастровой регистрации, земельный участок был продан за год до указанных событий и не был перерегистрирован на покупателя дома с участком по его вине. Суд справедливо признал, что факт принадлежности по кадастровой регистрации еще не означает фактической и юридической принадлежности недвижимого имущества. Поэтому заявитель не обязан был указывать в декларации недвижимость, которая фактически ему не принадлежала. Вины заявителя в том, что имущество не снято с регистрации в кадастре на его имя, нет, так как договор купли-продажи дома с земельным участком был зарегистрирован в департаменте юстиции. В соответствии со ст. 118 Гражданского кодекса РК, «права (обременения прав) на недвижимое имущество возникают, изменяются и прекращаются с момента государственной регистрации». Следовательно, государственная регистрация сделок с недвижимостью является основанием прекращения права собственности прежнего собственника недвижимого имущества, т.е. зявителя. В данной ситуации окружная избирательная комиссия сделала поспешные выводы, отменяя решение нижестоящей комиссии, не осуществив тщательную проверку заявления гражданина.

В ряде решений следует отметить наличие ошибок, допущенных избирательными комиссиями в применении материального права. Это можно отнести к третьей категории нарушений в работе избирательных комиссий

Так, наблюдается расширительное толкование полномочий окружной избирательной комиссией, которая факт перехода из одной партии в другую расценила как нарушение требований к кандидатам в депутаты Мажилиса Парламента РК (пп. 3–4 ч. 6 ст. 104 КЗ РК «О выборах в Республике Казахстан»).

Но, исходя из анализа содержания пп. 3–4 ч. 6 ст. 104 указанного закона и фактических данных, неочевидно, что кандидатом нарушены правила выдвижения, непредставления необходимых документов для регистрации; или он не соответствует требованиям, предъявляемым к нему; или использует должностное или служебное положение в своей предвыборной кампании; или проводит предвыборную агитацию до его регистрации, в день выборов либо предшествующий ему день; или установлен судом факт распространения кандидатом и (или) его доверенными лицами ложных сведений, порочащих честь и достоинство другого кандидата, подрывающих его деловую репутацию; или установлен судом факт подкупа кандидатом и его доверенными лицами избирателей и другие обстоятельства.

В данном случае окружная избирательная комиссия не обосновала свое решение об отмене решения нижестоящей комиссии о регистрации. Она ограничилась ссылкой на положения п. 3 ч. 6 ст. 104 КЗ РК «О выборах в Республике Казахстан» и не изучила фактические обстоятельства и законодательство. Факт перехода из одной партии в другую состоялся не во время регистрации или предвыборной кампании, в Законе РК «О политических партиях» об этом тоже ничего не говорится.

Так, в п. 4 ст. 8 Закона Республики Казахстан от 15 июля 2002 года № 344 «О политических партиях» записано: «Членство в политической партии является добровольным, индивидуальным и фиксированным», а п. 8 ст. 4 этого же Закона устанавливает, что «основанием прекращения членства в политической партии являются смерть, выход из партии, исключение из партии, вступление в другую партию, прием на воинскую службу» [7]. Факт перехода из одной партии в другую прошел в соответствии с Уставами этих партий, поэтому факта нарушения законодательства зафиксировано не было.

В другом случае вышестоящая избирательная комиссия (городская избирательная комиссия), по существу, правильно отменила решение нижестоящей комиссии, которая неправильно квалифицировала действия кандидата по п. 6 ст. 28 КЗ РК «О выборах в Республике Казахстан» как нарушение условий, обеспечивающих равные права для всех кандидатов при размещении агитационных печатных материалов.

По факту имело место умышленное уничтожение или повреждение агитационных материалов (п. 13 ч. 2 ст. 50 КЗ РК «О выборах в Республике Казахстан»). Ответственность за нарушения, указанные в этой части ст. 50, предполагает административную и иную ответственность.

Верная, в целом, квалификация привела к решению, вызывающему сомнения в законности. Окружная избирательная комиссия могла направить в суд материалы дела для принятия мер административной ответственности, а не выносить собственное решение по данным фактам. В этой части решение избирательной комиссии было отменено.

Хотя, по нашему мнению, положения ч. 3 ст. 50 КЗ РК «О выборах в Республике Казахстан» не предписывают обязательно направлять материалы в суд или прокуратуру. Формулировка: «При выявлении нарушений настоящего Конституционного закона избирательная комиссия вправе обратиться в суд либо в прокуратуру» означает, что у избирательной комиссии есть право, но не обязанность. Поэтому решение суда является спорным, так как избирательная комиссия могла и ограничиться предупреждением в соответствии с ч. 4 этой же статьи, что она и сделала. По смыслу закона у нее нет прямой обязанности обращения в суд или прокуратуру, а только право. Как гласит ч. 4 ст. 50 КЗ РК «О выборах в Республике Казахстан»: «При нарушении кандидатом, политической партией требований настоящего Конституционного закона, за исключением тех, которые являются основанием для отказа или отмены регистрации кандидата, они предупреждаются, а при повторном нарушении решение о регистрации кандидата, партийного списка отменяется соответствующей избирательной комиссией» [2].

Также при исследовании данного судебного решения возник вопрос о необходимости разграничения административной и иной ответственности, которая упоминается в начале ч. 2 ст. 50 КЗ РК «О выборах в Республике Казахстан». Отметим, что в российском Федеральном законе «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации» от 12 июня 2002 г. в ст. 79 «Ответственность за нарушение законодательства РФ о выборах и референдумах» указывается, что «ответственность за нарушение законодательства Российской Федерации о выборах и референдумах устанавливается федеральными законами» [8].

Вместе с тем считаем, что если бы было установлено и доказано, что кандидат уничтожал агитационные материалы конкурентов, то вряд ли такой кандидат достоин представлять народ и быть депутатом. Поэтому можно внести предложение о совершенствовании избирательного законодательства, в частности, дополнить п. 4 ст. 50 КЗ «О выборах в Республике Казахстан» положением о том, что в случае, если доказано, что кандидат в депутаты уничтожал агитационные материалы политических конкурентов, то решение о регистрации такой кандидатуры должна быть отменено немедленно.

По другому делу окружная избирательная комиссия также неправильно применила нормы КЗ РК «О выборах в Республике Казахстан», квалифицировав нарушения в деятельности кандидата в депутаты как основания для вынесения предупреждения кандидату исходя из ч. 4 ст. 50 КЗ РК «О выборах в Республике Казахстан». Ошибка вызвана отсутствием обоснованности данного решения. При рассмотрении заявления со стороны другого кандидата, избирательная комиссия не исследовала достаточным образом материалы видеозаписи, где наглядно представлены нарушения правил ведения предвыборной агитации. Установлено, что развешиваются агитационные материалы на кандидата раньше разрешенного срока — срока окончания регистрации кандидатов.

При этом данное нарушение суд расценил как исключительное, подпадающее под действие п. 3 ч. 6 ст. 104: «Проведение кандидатом предвыборной агитации до окончания срока регистрации, в день выборов либо предшествующий ему день», что влечет за собой отказ в регистрации или отмену решения о регистрации кандидата в депутаты.

Часть 2 ст. 27 КЗ«О выборах в Республике Казахстан» гласит, что предвыборная агитация начинается с момента окончания срока регистрации кандидатов...». Закон не уточняет момент окончания регистрации кандидатов и, тем самым, не дает четкого ответа.

В данном случае судья, ссылаясь на указанную норму, истолковал ее таким образом: «Согласно вышеуказанной норме закона, предвыборная агитация начинается с 00.00 часов 24.02.2016 года».

Мы считаем, что в данном случае суд расширительно толкует положения КЗ РК «О выборах в Республике Казахстан». В связи с этим предлагаем изменить ч. 2 ст. 27 КЗ «О выборах в Республике Казахстан» в следующей редакции: «Предвыборная агитация начинается со следующего дня, после окончания срока регистрации кандидатов и заканчивается в 00 часов 00 минут по местному времени дня, предшествующего дню выборов».

Если правильно толковать положения ч. 2 ст. 27 данного закона и сравнивать с положениями ч. 2 ст. 28 этого же Закона, то начало предвыборной агитации — с момента окончания регистрации кандидатов в депутаты.

В соответствии с ч. 8 ст. 104 КЗ РК «О выборах в Республике Казахстан», «регистрация кандидата в депутаты маслихата начинается за два месяца и заканчивается в 18.00 часов по местному времени за двадцать пять дней до дня выборов, если иное не установлено при назначении выборов».

Часть 4 ст. 50 КЗ РК «О выборах в Республике Казахстан» подчеркивает, что «при нарушении кандидатом, политической партией требований настоящего Конституционного закона, за исключени-

ем тех, которые являются основанием для отказа или отмены регистрации кандидата, они предупреждаются, а при повторном нарушении решение о регистрации кандидата, партийного списка отменяется соответствующей избирательной комиссией».

В п. 3 ч. 6 ст. 104 КЗ РК «О выборах в Республике Казахстан» отказ в регистрации или отмена решения о регистрации кандидата, как крайняя мера, предусмотрена только в случае «проведения кандидатом предвыборной агитации до окончания срока регистрации, в день выборов либо предшествующий ему день».

Анализ приведенных выше норм КЗ РК «О выборах в Республике Казахстан» приводит к следующим выводам.

Есть диспозиция о том, что участники избирательного процесса имеют право осуществлять агитацию только после окончания срока регистрации. Если исходить из смысла ч. 8 ст. 104 КЗ РК «О выборах в Республике Казахстан», то поскольку срок регистрации кандидатов измеряется в днях, это означает, что окончание срока приходится на 00 часов 00 минут последнего дня.

Но по смыслу ст.ст. 27, 28 и ч. 8 ст. 104 КЗ РК «О выборах в Республике Казахстан» эти предписания носят диспозитивный характер. То есть имеется право на агитацию, есть общие правила агитации, среди которых предусмотрено начало ее только по окончании срока для регистрации кандидатов.

Исключительный характер нарушению правил агитации придает проведение агитации кандидатом до окончания срока его личной регистрации, а не регистрации кандидатов вообще. Только в этом случае предусмотрены крайние санкционные меры — отказ в регистрации или отмена решения о регистрации. Поэтому данное решение суда является оспоримым. Считаем, что суд расширительно истолковал положения п. 3 ч. 6 ст. 104 КЗ РК «О выборах в Республике Казахстан».

*Обсуждение*

Представляется целесообразным осветить проблематику конституционно-правовой ответственности за нарушения при проведении выборов. Юридическая ответственность за нарушения норм избирательного права является важной гарантией реализации избирательных прав граждан, закрепленной как в международно-правовых документах, так и в актах национального права.

За нарушения установленных КЗ РК «О выборах в Республике Казахстан» [2] положений в сфере организации и проведения выборов предусмотрена различная ответственность, чему посвящено немало исследований. Так, российский ученый Д.А. Шевчук считает юридическую ответственность за нарушения законодательства о выборах публично-правовым средством обеспечения общественного интереса при реализации гражданами избирательных прав [9; 309].

Правовая ответственность в сфере избирательного права может быть гражданской, административной, уголовной и конституционной. Что касается конституционной ответственности за нарушения избирательного законодательства, то она представляется мерой публичной ответственности, применяемой только в рамках избирательного процесса. К особенностям конституционно-правовой ответственности можно отнести то, что виновное лицо ограничивается в осуществлении своего избирательного права, в отличие от других видов ответственности.

В научной литературе нет однозначного подхода к определению понятия конституционно-правовой ответственности в избирательном праве. Ряд российских авторов исходят из того, что «конституционно-правовая ответственность за нарушение законодательства о выборах состоит в применении к виновным участникам избирательного процесса определенных конституционно-правовых санкций», [10; 8], в числе которых отмена регистрации кандидатов и признание выборов недействительными. Д.А. Шевчук полагает, что, в зависимости от отраслевой принадлежности нормативно-правовой основы, различаются три вида ответственности за нарушения законодательства о выборах: 1) конституционно-правовая ответственность (ответственность по избирательному праву); 2) административная ответственность; 3) уголовная ответственность. Каждый из указанных видов ответственности отличается друг от друга основаниями (правовыми и фактическими), санкциями, субъектным составом, процессуальной формой реализации [9; 310].

В отечественной правовой литературе тематика конституционно-правовой ответственности также затрагивается в работах Э.Б. Мухамеджанова, Г.С. Сапаргалиева, Ж. Салимбаевой, К.К. Айтхожина, О. Копабаева.

Так, согласно позиции профессора Э.Б. Мухамеджанова, в п. 3 ст. 50 КЗ «О выборах в Республике Казахстан» речь идет не об ответственности, а о нарушении (правонарушении) кандидатом в депу-

таты, политической партией Конституционного закона и применении за это нарушение санкции в виде предупреждения, а за повторное нарушение — отмены регистрации кандидата, партийного списка [11; 92].

Г.С. Сапаргалиев и Ж. Салимбаева высказывают утверждение, что: 1) в конституционном праве может быть санкция без привлечения к юридической ответственности; 2) в конституционном праве санкция может означать привлечение к ответственности: а) персональной; б) коллективной [12; 21]. По их мнению, характерной чертой конституционно-правовых санкций является также их организующее, воспитательное, предупредительное значение [12; 22].

К.К. Айтхожин и О. Копабаев полагают, что за нарушения законодательства о выборах законами предусмотрены как меры административной и уголовной, так и конституционно-правовой ответственности. Авторы выделяют такую отличительную особенность конституционно-правовой ответственности (то есть ответственности по избирательному праву) в Республике Казахстан, как: а) ответственность физических лиц (граждан) и б) ответственность коллективных субъектов (избирательных комиссий, юридических лиц) [13; 175].

В каких случаях может наступить ответственность кандидатов в депутаты? Согласно положениям КЗ РК «О выборах» в Республике Казахстан, конституционно-правовая ответственность гражданина наступает в случаях отказа избирательной комиссии в его регистрации в качестве кандидата; в случае отмены решения избирательной комиссии о регистрации кандидата. Какие же нарушения Конституционного закона РК могут повлечь отмену регистрации кандидата в депутата, партийного списка?

Это несоответствие программы кандидата требованиям Закона (п. 2 ст. 29); нарушение кандидатом от политической партии правил, предусмотренных п. 10 ст. 34; выявление более 1 % собранных подписей недействительными (п. 7 ст. 72) [11; 91, 92].

Ст. 82, 89, 104 КЗ РК «О выборах» в Республике Казахстан также предусматривают наступление конституционно-правовой ответственности (отказ в регистрации либо отмену решения о регистрации кандидатов в депутаты или партийного списка) в установленных законом случаях.

Конституционно-правовая ответственность избирательных комиссий установлена, к примеру, ст. 10 п. 7: деятельность избирательной комиссии может быть прекращена по решению органа, образующего избирательную комиссию, или решением суда на основании заявления Центральной избирательной комиссии [3].

Конституционным законом о выборах устанавливаются основания, при которых применяются меры конституционно-правовой ответственности, например, в ст. 34 (признание выборов по соответствующей территории или округу недействительными), в ст. 84 (признании недействительными выборов депутатов Сената в тех административно-территориальных единицах, где были установлены нарушения Конституции и выборы признаны Конституционным Советом РК не соответствующими Конституции).

Таким образом, институт конституционно-правовой ответственности за нарушение избирательного законодательства Республики Казахстан в сфере организации и проведения выборов имеет четкое нормативное закрепление и теоретическое обоснование. Поскольку конституционно-правовая ответственность предусмотрена за ряд нарушений избирательного законодательства, ее следует рассматривать как гарантию реализации избирательных прав граждан.

*Выводы*

Избирательная система Республики Казахстан строится с учетом демократических традиций нашего народа, а также мировой выборной практики, на принципах международных избирательных стандартов и требований к гарантиям прав и свобод человека и гражданина.

Судами республики, в основном, правильно применяются нормы законодательства при рассмотрении дел указанной категории. Вместе с тем, по некоторым вопросам имеет место различное толкование и применение закона.

1. Изучение дел этой категории показало, что в некоторых случаях суды допускают расширительное толкование закона.

Необходимо, при разрешении данных дел, строго следовать нормам закона, регулирующим спорные правоотношения, разрешать дела указанной категории с учетом обстоятельств по каждому конкретному делу, применяя принципы справедливости и разумности, законности.

2. Анализ судебной практики показал, что при рассмотрении заявлений о защите избирательных прав граждан и общественных объединений, участвующих в выборах, отсутствует единообразная судебная и правоприменительная практика.

В целях обеспечения правильного применения судами законодательства о выборах, для выработки единой судебной практики по делам данной категории, необходимо принять нормативное Постановление Верховного Суда РК «О практике рассмотрения судами гражданских дел по заявлениям о защите избирательных прав граждан и общественных объединений, участвующих в выборах, республиканском референдуме».

В данном Постановлении необходимо рассмотреть следущие вопросы: разграничения основания административной и иной ответственности; разъяснения положений по срокам начала предвыборной агитации. Требуют толкования положения КЗ РК «О выборах в Республике Казахстан» в части возможностей обращения избирательной комиссии в условиях альтернативы: в вышестоящую избирательную комиссию, в суд либо в прокуратуру. Возникают неясности при применении норм, регламентирующих процедуру принятия решения избирательными комиссиями, в особенности, о регистрации, отмене регистрации, восстановлении регистрации кандидатов.

Необходимо устранить пробелы в толковании положений закона относительно составления протокола, в котором закрепляются все решения избирательной комиссии: о регистрации, отказе в регистрации или восстановлении в кандидатах в депутаты и другие. Решения о регистрации, об отказе в регистрации, об отказе в восстановлении в списке кандидатов являются категориями одного ряда. Поэтому представляется, что они требуют официального оформления, несмотря на отсутствие прямого указания на это в законе. На сегодня, суды вынуждены принимать решения, исходя из собственного толкования статей закона.

3. Конституционный закон РК «О выборах в Республике Казахстан» нуждается в совершенствовании.

Мы считаем, что суды расширительно толкуют положения КЗ РК «О выборах в Республике Казахстан». В связи с этим предлагаем изменить ч. 2 ст. 27 КЗ «О выборах в Республике Казахстан» в следующей редакции: «Предвыборная агитация начинается со следующего дня, после окончания срока регистрации кандидатов и заканчивается в 00 часов 00 минут по местному времени дня, предшествующего дню выборов».

Дополнить п. 4 ст. 50 КЗ РК «О выборах в Республике Казахстан» положением о том, что в случае, если доказано, что кандидат в депутаты уничтожал агитационные материалы политических конкурентов, то решение о регистрации такой кандидатуры должно быть отменено немедленно.

Необходимо разграничить основания административной и иной ответственностии, которая упоминается в начале ч. 2 ст. 50 КЗ РК «О выборах в Республике Казахстан». Убрать слова «и иную ответственность» в ч. 2 ст. 50 Закона «О выборах».

Конституционно-правовую ответственность, предусмотренную за ряд нарушений избирательного законодательства, следует рассматривать как гарантию реализации избирательных прав граждан. Сформулированные в работе предложения по совершенствованию действующего законодательства позволят повысить уровень гарантий избирательных прав граждан в Республике Казахстан.

## Список литературы

1 Конституция Республики Казахстан 1995 г. [Электронный ресурс]. — Режим доступа: http://www.akorda.kz/ru/official_documents/constitution

2 Конституционный закон Республики Казахстан от 28 сентября 1995 г. № 2464 «О выборах в Республике Казахстан» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/? doc_id=1004029#pos=3;-137

3 Конституционный закон Республики Казахстан от 29 июня 2018 г. № 162-VI «О внесении изменений и дополнений в некоторые конституционные законы Республики Казахстан» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/? doc_id=35041664

4 Банк судебных актов. Верховный Суд Республики Казахстан. Электронный ресурс]. — Режим доступа: https://sud.gov.kz/rus/content/bank-sudebnyh-aktov

5 Закон Республики Казахстан от 2 июля 2003 г. № 461-II «О рынке ценных бумаг» [Электронный ресурс]. — Режим доступа: // https://online.zakon.kz/document/? doc_id=1041258

6 Гражданский кодекс Республики Казахстан. (Общая часть) [Электронный ресурс]. — Режим доступа: /https://online.zakon.kz/document/? doc_id=1006061#pos=5;-155

7 Закон Республики Казахстан от 15 июля 2002 года № 344-II «О политических партиях» [Электронный ресурс]. — Режим доступа: // https://online.zakon.kz/document/? doc_id=1032141

8 Федеральный закон «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации» от 12 июня 2002 г. N 67-ФЗ [Электронный ресурс]. — Режим доступа: /http://www.consultant.ru/document/cons_doc_LAW_37119/

9 Шевчук Д.А. Избирательное право и процесс в Российской Федерации: конспект лекц./ Д.А. Шевчук. — Ростов н/Д.: Феникс, 2007. — 384 с.

10 Игнатенко В.В. Юридическая ответственность субъектов избирательного процесса: учеб. пос. / В.В. Игнатенко, С.Д. Князев, В.А. Номоконов. — Владивосток: Изд-во Дальневос. ун-та, 2003. — 136 с.

11 Мухамеджанов Э.Б. Избирательное право Республики Казахстан: теоретико-правовые вопросы / Э.Б. Мухамеджанов. — Алматы: Жеті жарғы, 2001. — 176 с.

12 Сапаргалиев Г. Проблемы конституционной ответственности / Г. Сапаргалиев, Ж.Салимбаева. — Алматы: Жеті жарғы, 2001. — 152 с.

13 Копабаев О.К. Избирательное право Республики Казахстан: науч.-практ. пос. / О.К. Копабаев, К.К. Айтхожин, М.Б. Кудайбергенов. — Астана, 2009. — 194 с.

Ф.А. Ержанова, Р.М. Жәмиева, Г.А. Ілиясова

## Қазақстан Республикасының сайлау заңнамасын жетілдірудің кейбір мәселелері: сот тәжірибесін талдау

Мақалада сайлау бойынша қызмет саласында материалдық және процессуалдық құқық нормаларын қолданудың мәселелері, азаматтардың сайлау құқықтарын қорғаудың құқықтық негіздері, сайлау үрдісінің субъектілеріне қойылатын талаптар қарастырылған. Кейбір сайлау тәртіптерінің мәнісі анықталды, атап айтқанда, депутаттыққа үміткерлерді тіркеуден бас тартумен, үміткерлер тізімінен шығару туралы немесе үміткерлер тізімінде қалпына келтіруден бас тартумен байланысты. «Қазақстан Республикасындағы сайлау туралы» конституциялық заңның ережелеріне, сайлау құқығын реттейтін азаматтық-құқықтық нормаларға талдау жүргізілді, конституциялық-құқықтық жауапкершілік мәселесіне арналған ғалым-заңгерлердің көзқарастары зерттелген. Мақаланың жаңашылдығы сол, қолданыстағы заңнамаға зерттеу жүргізу арқылы азаматтардың шағымдарын қарастыру тәртібіне кешенді зерттеу жүргізілген және сайлау органдарында шағымдарды қабылдау мен қарастырудың тәртібін жетілдіру бойынша шаралар анықталған. Сайлау туралы заңнаманы қолдану мәселелері бойынша арнайы Жоғарғы Соттың нормативтік қаулысын қабылдау, сайлау заңнамасындағы кейбір ақаулықтарды жою ұсынылды. Азаматтардың сайлау құқықтары саласындағы кепілдіктерді жүзеге асыру арқылы сайлау құқығы мен іс жүргізу институттарын одан әрі жетілдіру қажеттігі туралы қорытындылар жасалған.

*Кілт сөздер:* Қазақстан Республикасының «Қазақстан Республикасындағы сайлау туралы» Конституциялық заңы, сайлау комиссиялары, азаматтардың сайлау құқықтарының кепілдіктері.

F.A. Yerzhanova, R.M. Zhamiyeva, G.A. Ilyassova

## Some issues of improving the electoral law of the Republic of Kazakhstan: analysis of judicial practice

The article discusses the problems of applying substantive and procedural law in the field of electoral activities, the legal framework for protecting the electoral rights of citizens, and requirements for the subjects of the electoral process. Determined the essence of certain election procedures, in particular, related to the decision about refuse to register candidates for deputies, exclusions from the list of candidates, or to refuse to reinstate in the list of candidates. Given the analysis to provisions in the Constitutional Law of the Republic of Kazakhstan «About Elections in the Republic of Kazakhstan», to civil law norms about election law, investigated the legal scholars' positions of regarding to the problems of constitutional legal responsibility. The novelty of the article is that by studying the current legislation, a comprehensive analysis of the procedure for considering citizens' complaints was carried out and measures were determined to improve the procedure for their adoption and consideration in electoral bodies. Proposed to adopt a special Decree of the Supreme Court about the application of election legislation, to eliminate some gaps in the election legislation. Formulated the conclusions about the need to further improve the institutions of the electoral law and the process, through which the guarantees are implemented in the field of electoral rights of citizens.

*Keywords:* Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan», election commissions, guarantees of the electoral rights of citizens.

## References

1 Konstitutsiia Respubliki Kazakhstan ot 30 avhusta 1995 hoda (1995). [The Constitution of the Republic of Kazakhstan]. *online.zakon.kz.* Retrieved from // http://www.akorda.kz/ru/official_documents/constitution [in Russian].

2 Konstitutsionnyi Zakon Respubliki Kazakhstan «O vyborakh v Respublike Kazakhstan» ot 28 sentiabria 1995 h. No. 2464. *online.zakon.kz.* Retrieved from [The Constitutional Law of the Republic of Kazakhstan of № 2464 «On Elections in the Republic of Kazakhstan», adopted on September 28, 1995]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/? doc_id=1004029#pos=3;-137 [in Russian].

3 Konstitutsionnyi zakon Respubliki Kazakhstan ot 29 iiunia 2018 h. No. 162-VI «O vnesenii izmenenii i dopolnenii v nekotorye konstitutsionnye zakony Respubliki Kazakhstan» [The Constitutional Law of the Republic of Kazakhstan dated June 29, 2018 No. 162-VI «On Amendments and Additions to Some Constitutional Laws of the Republic of Kazakhstan»]. *online.zakon.kz.* Retrieved from// https://online.zakon.kz/document/? doc_id=35041664

4 Bank sudebnykh aktov. Verkhovnyi Sud Respubliki Kazakhstan [Bank of judicial acts. The Supreme Court of the Republic of Kazakhstan]. *sud.gov.kz.* Retrieved from// https://sud.gov.kz/rus/content/bank-sudebnyh-aktov

5 Zakon Respubliki Kazakhstan ot 2 iiulia 2003 hoda No. 461-II O rynke tsennykh bumah [Law of the Republic of Kazakhstan dated July 2, 2003 No. 461-II On the Securities Market]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/? doc_id=1041258

6 Hrazhdanskii kodeks Respubliki Kazakhstan (Obshchaia chast) [Civil Code of the Republic of Kazakhstan (General part)]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/? doc_id=1006061#pos=5;-155

7 Zakon Respubliki Kazakhstan ot 15 iiulia 2002 hoda No. 344-II O politicheskikh partiiakh [The Law of the Republic of Kazakhstan dated July 15, 2002 No. 344-II On Political Parties]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/? doc_id=1032141

8 Federalnyi zakon «Ob osnovnykh harantiiakh izbiratelnykh prav i prava na uchastie v referendume hrazhdan Rossiiskoi Federatsii» ot 12.06.2002 h. N 67-FZ [Federal Law «On Basic Guarantees of Electoral Rights and the Right to Participate in the Referendum of Citizens of the Russian Federation» dated 12.06.2002 N 67-ФЗ]. *consultant.ru* Retrieved from http://www.consultant.ru/document/cons_doc_LAW_37119/

9 Shevchuk, D.A. (2007). *Izbiratelnoie pravo i protsess v Rossiiskoi Federatsii: konspekt lektsii [Suffrage and process in the Russian Federation: the abstract of lectures]*. Rostov on the Don [in Russian].

10 Ignatenko, V.V., Knyazev, S.D., & Nomokonov, V.A. (2003). *Yuridicheskaia otvetstvennost subiektov izbiratelnoho protsessa [Legal responsibility of the subjects of the electoral process]*. Vladivostok [in Russian].

11 Mukhamedzhanov, E.B. (2001). *Izbiratelnoe pravo Respubliki Kazakhstan: teoretiko-pravovye voprosy [The electoral law of the Republic of Kazakhstan: theoretical and legal issues]*. Almaty [in Russian].

12 Sapargaliyev G., & Salimbayeva, Z.H. (2001). *Problemy konstitutsionnoi otvetstvennosti [Problems of constitutional responsibility]*. Almaty: Zheti zharhy [in Russian].

13 Kopabayev, O.K., Aytkhozhin, K.K., & Kudaybergenov, M.B. (2009). *Izbiratelnoe pravo Respubliki Kazakhstan [Electoral law of the Republic of Kazakhstan]*. Astana [in Russian].

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A.I. Birmanova[1], G.U. Balgimbekova[1], A. Lavnichak[2]

*[1]Ye.A. Buketov Karaganda State University, Kazakhstan;*
*[2]University of Wroclaw, Poland*
*(E-mail: birmanova81@mail.ru)*

# Cultural rights and freedoms of the individual enshrined in the Constitution abroad: a comparative analysis

In the scientific article on the basis of studying the legislation of foreign countries the comparative legal analysis of legal regulation of cultural rights is given. The article analyzes the impact of universal and regional international treaties that enshrine cultural human rights on the constitutional legislation of a number of European States. The inclusion of cultural rights in the category of constitutionally enshrined is one of the features of the development of the legislative process in many countries of the world since the second half of the XX century. The purpose of the article is to show the development of «cultural law», and the task is to reveal the concept of cultural law on the example of the analysis of the legislation of the CIS countries and some Western European countries. Attention is drawn to the fact that the constitutions of European countries do not directly provide for the right of access to cultural property as a set of legal institutions, but a number of laws contain certain elements of this right. The methodological basis of this scientific work was dialectical, systemic, comparative legal, normative and other methods of cognition. The conclusion is formulated that the task of each state is not only their detailing in the national legislation, but also practical implementation for the purpose of preservation and rational use of the cultural heritage. It is concluded that the study of foreign experience of legislative regulation of cultural rights provides ample opportunities for its use in practice.

*Key words:* Constitution, cultural human rights, cultural values, European countries, legal institutions, guarantees, legal documents, legislation.

## *Introduction*

As a rule, cultural human rights are associated with the adoption of fundamental documents designed to contribute to the establishment and strengthening of the institution of human rights in the world. In 1948, The United Nations adopted the Universal Declaration of human rights, in 1966 the international Covenant on civil and political rights and the international Covenant on economic, social and cultural rights. It is well known that the international concept of human rights is still based on the universal Declaration of human rights. If you look at the set of rights enshrined in the document, it is not difficult to make sure that any community speaks about the ideal standard of human rights to which it should strive. Such an ideal standard is the values and legal institutions that meet the level of development of modern liberal democratic society. Thus, at the present stage, it is especially important to conduct constitutional and legal studies on the problems of realization of cultural rights and freedoms of man and citizen.

Interest in foreign constitutional legislation is manifested in the definition of different classifications of cultural rights and freedoms. Therefore, we decided to conduct a comparative study of the Constitution of several countries to form the correct content of this right at the international or constitutional level. Our study

was reflected on the analysis of the content of this right and determining that they are closely related to other categories of law and clarifying the existence of a category of separate constitutional law.

We are wrong to say that cultural rights are essential in the modern life of society and the nation, revealing it, forming the basis of individual and unique development of society as a whole. The study of this right recognizes the necessary human rights to cultural heritage, original culture, native language, scientific achievement, education, the phenomenon of creative life and access to cultural life.

The article helps to control the degree of security of cultural rights by analyzing the Constitution (legislation) of many foreign countries. Cultural rights have arisen, especially in the constitutions of European countries, but it is difficult to find some laws. In particular, the typology of the treatment of social and economic rights needs to be addressed in order to ensure cultural rights. In this regard, it is recommended to consider cultural rights in several constitutions, international legal instruments. Cultural rights have been discussed in many post-Soviet constitutions as a catalogue of social rights associated with over-burdening the state and the return of real socialism.

*Materials and methods*

The methodological basis of the study consists of analysis, synthesis and other general methods. Individual scientific methods of formal-legal, concrete-historical, comparative-legal were used during the research of the article. In particular, the formal-legal method was used in the analysis of the norms of law governing constitutional and legal relations in the field of cultural law. The comparative legal method was used in the study of the constitutional rights of foreign citizens in the field of cultural law. These methods of analysis allowed to determine the place, role and essence of cultural rights and freedoms of man and citizen.

*Results*

In the modern world, cultural law is a step for a person and a citizen of a decent and free life, social prerequisites for meeting spiritual needs, the basis of moral education. The significance of this category of law for the state is expressed in the fact that it characterizes it as a democratic and legal state.

In order to achieve these objectives, States aim to promote freedom of creativity, ensure the right of everyone to participate in cultural life and to use cultural institutions and access to cultural values. However, in practice, there is a decrease in the participation of the state in the support of national culture, which has a negative impact on the protection of human and civil rights and freedoms in the field of culture. In the course of the implementation of cultural rights and freedoms, there is a lack in the current legislation of the norms necessary for the study of modern social relations.

As for the world experience of constitutional regulation, the right of citizens to access to culture, the right to use cultural values are officially recognized by the basic laws of many countries of the world. In many post-Communist constitutions that emerged in the 1990s, cultural law did not have the same status. In this article, an example is the constitutional legal regulation of the Polish country. The preamble of the Constitution of the Republic of Poland assigns a great place to cultural heritage in the formation of Polish statehood and national identity and covers the organizational principles reflecting the goals and objectives of the state to achieve culture. In accordance with this, the Polish country creates conditions for access to culture and dissemination of culture, preserving the connection of the Polish people living abroad with the national cultural heritage. This regulation provides for the definition of state policy in the field of access to culture, in accordance with article 73 of the Constitution of Poland, everyone is guaranteed freedom of artistic creativity, scientific research and disclosure of their results, freedom of education, as well as freedom of use of cultural property. Polish citizens are also guaranteed the right to establish their own educational and cultural institutions for the development of their language, the preservation of morality and traditions, as well as the development and protection of their culture. Article 62 of the Polish Constitution refers to the right of access to the national cultural heritage [1].

Polish citizens have the full right to the development of national culture, the use of cultural goods for creative activities. It ensures that every citizen does not lose the roots of culture and the values of culture in the formation of a cultural way of life. Thanks to this, the culture does not become obsolete, it retains only viable elements.

Another important aspect of cultural activity is that the emphasis on Polish culture, which determines the identity of the Polish people, is a national problem. The two principles of equal access to the benefits of culture and the principle of freedom of creativity and freedom of use of cultural works occupy an important place in the Constitution. This is a rule guaranteed by the Polish state, so they are protected by generally ac-

cepted law. It should be noted that the application of constitutional principles relating to the sphere of culture cannot differ from the objective, social context.

It can be said that in European countries a standard has been formed for the financing of culture, in most of which funds set standards that determine the competitive procedures and are provided by independent expert bodies.

A. Kosinskaya noted that the average inhabitants of Europe today work with a good source of income than in 150 years, so the demand for entertainment related to cultural offerings is growing in society. Under the Polish Constitution, everyone is given the freedom to use culture. The right to participate in cultural life, the right to the development of science and the use of its achievements, as well as the protection of artistic and scientific activities are provided only by the Constitution at the level of high legal force. Culture language, customs, beliefs, way of governing, architecture, art, education system, etc. it includes such spheres of cultural life as [2; 18]. One of the tasks set by the Polish state is the involvement of society in the national culture and the formation of actions that activate the level of participation in culture.

*Discussion*

On the basis of the comparative analysis of guarantees of constitutional rights of citizens of the Republic of Kazakhstan and foreign countries in the field of cultural law in the national legislations of the studied States, the task of creating specific mechanisms for their protection is assigned. Norms on the tasks of creating the necessary conditions for the realization of cultural rights and freedoms of citizens abroad are contained in the Constitution (Poland, the Netherlands, the Republic of Belarus, Georgia, Ukraine, Portugal, etc.). The Constitution of the Republic of Kazakhstan contains norms declaring cultural rights and freedoms (from articles 19,20,30,37). The consolidation of state obligations to ensure this group of rights and freedoms at the level of the Constitution of the Republic of Kazakhstan will contribute to increasing the responsibility of public authorities for the creation of guarantees for their implementation.

In the Constitution of many States, the achievement of participation in cultural life is an important and necessary element in the creation of a person's identity and presupposes that for personal development and self-determination of a person it is necessary from the point of view of protecting the dignity of this right. In particular, the Finnish Constitution recognizes the right to participate in cultural life as a duty of the state. The state shall meet the cultural and social needs of each person by guaranteeing his right to use the Finnish or Swedish language, and not only guarantees the preservation and development, access of other ethnic groups to their language and culture, but also assigns a positive task to ensure access to these cultural goods (article 17) [3].

Also, the Constitution of Lithuania guarantees freedom of science, culture, research and education (article 42), the state supports culture and science, takes care of the historical heritage of Lithuania, works of art and cultural monuments (paragraph 2 of article 42). As stated in the Constitution of the Republic of Lithuania (25 October 1992), citizens belonging to national associations have the right to develop their language, culture and customs (article 37). In article 41 of the Civil code of the Republic of Kazakhstan: education of persons under the age of 16 years is mandatory; education in state (self-government) General vocational schools and higher education institutions is free; higher education is available to all in accordance with the abilities of each person. Citizens who successfully study in higher education institutions are guaranteed free education. Spiritual and material interests of the author related to scientific, technical, cultural and artistic creativity are protected by law [4]. Consequently, the Lithuanian country sets itself the task of improving cultural law and other important issues related to this law.

Article 44 of the Spanish Constitution States: «public authorities uphold the right of access to and care for all culture». In addition, article 46 prescribes the enrichment, preservation and maintenance of the historical and cultural heritage of the peoples of Spain in relation to public authorities. At the constitutional level of Spain, cultural human rights are widely recognized, as the concept of the interrelationship of all human rights in General is based on the ideology of promoting the progress of culture and the economy to ensure the proper quality of human life. The Preamble of the Spanish Constitution, adopted on 27 December 1978, protects the rights of all Spaniards and peoples, including their culture and traditions, language and institutions; it is proposed to develop culture and economy to ensure a decent standard of living for all people Article 20 (b) of literary, artistic, scientific and technical creativity; (c) Where freedom of teaching is considered, Article 27 has the right to education for all citizens. Education is the goal of the full development of the human person on the basis of respect for the principles of democracy and the realization of fundamental rights and freedoms. Public authorities guarantee the right of parents to educate their children in accordance with their

religious and moral beliefs. Primary education is compulsory and free. Public authorities will fully consider the obligation of all citizens to guarantee the right to education through the establishment of universal planning and education centres with the effective participation of all stakeholders. Also promotes the development of science, scientific and technical research in the common interest. Article 46 of this law the public authorities shall guarantee the observance and protection of the historical, cultural and artistic heritage of the peoples of Spain and the legal regimes of its constituent parts. The criminal law stated that it takes and authorizes appropriate measures to encroach on this inheritance [5]. A special place in the system of constitutional norms of the Kingdom aimed at regulating the development of cultural rights of citizens is occupied by provisions on the strategic vector for creating the necessary conditions for the free participation of young people in cultural development. It is gratifying that in this legislation there are many activities related to cultural law.

In paragraph 2 of article 26 of the Constitution of the Russian Federation (December 12, 1993) States that everyone has the right to use their native language, fluency in the language of communication, education, training and creativity. Under article 43 of the Russian Constitution, everyone has the right to education. In state or military educational institutions and enterprises, the availability and free of charge of preschool, basic General and secondary vocational education is guaranteed. Everyone has the right to receive higher education on a competitive basis in state or municipal educational institutions and enterprises. Compulsory basic General education. Parents or persons replacing them provide basic General education. The Russian Federation establishes Federal state standards of education, supports various forms of education and education. Also, recognizing the right to participate in cultural life, article 44, paragraph 1, guarantees everyone the freedom to read literary, artistic, scientific, technical and other creative works. Answer: in accordance with this, everyone has the right to participate in cultural life and use cultural institutions, access to cultural values[6]. Thus, in accordance with the content of the Russian Constitution, the right to participate in cultural life is the right of every person and subjects in these relations. During the analysis of the Constitution of Russia, we noticed that cultural and spiritual values do not leave indifferent and especially need to preserve these rights.

The Constitution of Japan (may 3, 1947), in accordance with their abilities, gives equal right to education in the manner prescribed by law. All must ensure compulsory education of their wards in accordance with the law. Compulsory education is free of charge (article 26). Freedom of scientific activity is guaranteed (Article 23) and it is stated that everyone has the right to maintain a minimum standard of healthy and cultural life (Article 25) [7]. This is how the role of the state in ensuring this category of law is recognized.

In the Constitution of the people's Republic of China (December 4, 1982), the state develops socialist education and raises the scientific and cultural level of the entire people. In article 19, by creating various educational institutions, the state shall carry out primary General education, develop secondary, vocational and higher education, as well as develop pre-school education. In article 20, the state shall develop natural and social Sciences, promote scientific and technical knowledge, encourage achievements in research, inventions and innovations in the field of technology. In article 21, the state develops publishing Houses, radio and television, publishing houses, expands the network of libraries, museums, houses of culture and other cultural institutions that serve the people and socialism, conducts cultural events. The policy of this state does not remain without priority on cultural rights. Continuously develop and maintain cultural rights.

At the constitutional level of the analyzed countries, it is quite justified that cultural rights are aimed at ensuring the cultural and spiritual needs of the individual, as well as at the formation of a humanistically oriented society. For example, in the Constitution of the Republic of Azerbaijan, «the state promotes the development of culture, education, science, art, protects the historical, natural, material and spiritual heritage of the people» [9].

Tasks requiring analysis of cultural rights, in article 37 of the Basic law oblige citizens of the Republic, regardless of national characteristics, to take care of the preservation of historical and cultural heritage, to protect historical and cultural monuments [10]. These tasks should be clearly formulated and include people in the care of the national culture. Thus, for the education of a citizen in Patriotic communication is harmoniously combined in a broad sense with the mandatory transfer of traditions and heritage of the nation and the educational process is combined with the need to preserve the cultural heritage. Access to the benefits of culture and heritage should enhance the effectiveness of this process.

Despite the consolidation of a wide range of such rights at the international level, the mechanism of their implementation and protection gives grounds to argue that the creators of the legal regulation system in this area have been neglected, forming significant regulatory gaps. Transnational treaties, in particular, make

reference to the mechanism for the realization of cultural rights, which in turn creates a very unstable and bilateral legal framework for the effective protection of such rights at the interstate level.

According to the conclusion of the Polish lawyer am kosinska «some parts of the world on the issue of the right of all people to equal access to culture face great difficulties because of the civilized lag» [11;79].

Analyzing the main features of the legal regulation of cultural rights and freedoms, it is necessary to take into account not only the content of articles 19, 20 of the Basic law, but also the presence of the entire set of rules relating to the content and implementation of these rights and freedoms. In the process of developing norms of law, the instruments characteristic of constitutional regulation in General are used to regulate the content and implementation of cultural rights and freedoms. These are permissive tools, obligations and prohibitions. Thus, it can be concluded that many definitions and observations, currently the complex status of cultural rights is not defined, still need to be studied.

The constitutions of countries of CIS generally reflect these rights, however there is no uniformity in the approach to the list and content of the rights and their guarantees. The rights are admitted and attached to the constitutions, and their performance is, as a rule, guaranteed by laws and authority of state. However in constitutions of some states the variety of rights and freedoms are not reflected or set in declarative way, while others are just absent» [12;2083].

*Conclusion*

The constitutional and legal study has shown that the cultural rights and freedoms of man and citizen in the Republic of Kazakhstan are still provided with the minimum of all socio-economic rights. Studying the international experience in this area, it is recognized that the participation of citizens in ensuring cultural rights abroad is constantly evolving this category of law.

The development of ensuring the cultural rights and freedoms of citizens requires a certain sequence: first, scientific justification is necessary; secondly, an official concept; thirdly, legislative support; and fourth, organizational measures. As a result of the study, we came to the conclusion that the legal regulation of citizens ' participation in cultural life involves the preparation of a conceptual justification. Its conceptual provision provides for the definition of this category of law, its justification, the solution of problematic issues of the ratio of levels of competence, the development of a system of special principles on the content. It also provides for clarification of certain rules of participation of citizens in law enforcement, permitted in cooperation with state bodies, cultural rights. This, in turn, obliges to clearly define the competence of cultural law.As can be seen from the analysis of EU laws in the field of culture, here the competence of unions is limited and cultural rights are primarily guaranteed at the national level by laws of a constitutional nature.

In conclusion, a comparative analysis of the legal norms of the Constitution of some CIS and European countries allowed to generalize the patterns of development and enforcement of cultural rights in the world community. In particular, the mechanism for the implementation of cultural rights of citizens on the European continent is more developed than the CIS countries, declarative norms proclaiming the recognition, respect and development of cultural rights are provided in detail and enshrined in the text of the Constitution and sectoral legislation. The above analysis leads to the conclusion that countries are only on the way to implementing European legal standards in the field of guarantees for the realization of cultural human rights. At the same time, the norms enshrined at the national level have a clear archaic character and require significant updating in the context of changes in the content of cultural human rights under the influence of global problems of our time.

References

1 Конституция Республики Польша 2 апреля 1997 г. [Электронный ресурс]. — Режим доступа: https://legalns.com/download/books/cons/poland.pdf

2 Kosinska A.M. Szczegolny charakter praw kulturalnych i ich miejsce w Konstytucji RP — proba charakterystyki i kwalifikacji / A.M. Kosinska // Przeglad Prawa Konstytucyjnego. — 2013. — № 3 (15). — S. 11–27.

3 Библиотека конституции Пашкова Романа. Конституции государств (стран) мира: Конституция Финляндии. [Электронный ресурс] / Р. Пашков. — Режим доступа: https://worldconstitutions.ru/? p=139

4 Конституция Литовской Республики. 25 октября 1992 г. [Электронный ресурс]. — Режим доступа: https://www.wipo.int/edocs/lexdocs/laws/ru/lt/lt045ru.pdf

5 Конституции 16 стран мира: сб. конституций стран-членов СНГ, Балтии и ряда других государств мира / Сост. Ж. Баишев, К. Шакиров. — Алматы: Жеті жарғы, 1995. — 576 с.

6 Конституция Российской Федерации. 12 декабря 1993 г. [Электронный ресурс]. — Режим доступа: http://www.constitution.ru/10003000/10003000–4.htm

7 Конституция Японии. 3 мая 1947 г. [Электронный ресурс]. — Режим доступа: https://www.krugosvet.ru/enc/gosudarstvo-i-politika/yaponiya-konstitutsiya

8 Конституция Китайской Народной Республики. 4 декабря 1982 г. [Электронный ресурс]. — Режим доступа: https://legalns.com/download/books/cons/china.pdf

9 Конституция Азербайджанской Республики. 12 ноября 1995 г. [Электронный ресурс]. — Режим доступа: https://static2.president.az/media/W1siZiIsIjIwMTgvMDMvMDkvY3dodDN2dzF0X0tvbnN0dXRpc3lhX1JVUy5wZGYiXV0?sha=83f38924a4086483

10 Қазақстан Республикасының Конституциясы 30 тамыз 1995 ж. [Электрондық ресурс]. — Қолжетімділік тәртібі: http://adilet.zan.kz/kaz/docs/K950001000_.

11 Kosinska A.M. Kulturalne prawa czloweka. Regulacje normatywne i ich realizacja / A.M. Kosinska. — Lublin: Wydawnictwo KUL, 2014. — 341 p.

12 Bazarova G.S. Legal Content and the Issues of Classification of Socio-economic Human Rights [Electronic resource] / G.S. Bazarova, A.I. Birmanova, I.Z. Aliyeva, G.U. Balgimbekova, N.S. Akhemetova // Journal of Advanced Research in Law and Economics. — 2017. — Vol. 8, Issue 7. — P. 2078–2085. — Access mode: DOI:10.14505/jarle.v8. 7(29).3. http://journals.aserspublishing.eu/jarle/index

А.И. Бірманова, Г.Ұ. Балғымбекова, А. Лавничак

## Шетелдердегі Конституцияда бекітілген адамның мәдени құқықтары мен бостандықтары: салыстырмалы талдау

Мақалада шетелдердің заңнамасын зерттеу негізінде мәдени құқықтарды құқықтық реттеуге салыстырмалы-құқықтық талдау берілген. Адамның мәдени құқықтарын бекітетін әмбебап және өңірлік халықаралық шарттардың Еуропаның бірқатар мемлекеттерінің Конституциялық заңнамасына әсері талданды. XX ғ. екінші жартысынан бастап әлемнің көптеген елдерінде конституциялық бекітілген құқықтар тобына мәдени құқықтарды қосу заң шығару процесінің даму ерекшеліктерінің бірі болып табылады. Мақаланың мақсаты «мәдени құқықтың» дамуын көрсету, сондай-ақ ТМД елдерінің және Батыс Еуропаның кейбір мемлекеттерінің заңнамасын талдау мысалында мәдени құқық ұғымын ашу. Еуропалық елдердің Конституцияларында құқықтық институттар кешені ретінде мәдени құндылықтарға қол жеткізу құқығы тікелей қарастырылмағанына назар аударылады, алайда бірқатар заңдарда осы құқықтың жекелеген элементтері бар. Осы ғылыми жұмыстың әдіснамалық негізін диалектикалық, жүйелік, салыстырмалы-құқықтық, нормативтік және танымның өзге де әдістері құрады. Әрбір мемлекеттің міндеті ұлттық заңнамада оларды нақтылау ғана емес, сонымен қатар өзінің мәдени құқығын сақтау және ұтымды пайдалану мақсатында практикалық іске асыру болып табылады, сонымен қатар мәдени құқықтарды заңнамалық реттеудің шетелдік тәжірибесін зерттеу оны тәжірибеде пайдалануға кең мүмкіндік береді.

*Кілт сөздер:* Конституция, адамның мәдени құқықтары, мәдени құндылықтар, Еуропа елдері, құқықтық институттар, кепілдіктер, құқықтық құжаттар, заңдылықтар.

А.И. Бирманова, Г.У. Балгимбекова, А. Лавничак, А. Лавничак

## Культурные права и свободы человека, закрепленные Конституцией за рубежом: сравнительный анализ

В статье на основе изучения законодательства зарубежных стран дан сравнительно-правовой анализ правового регулирования культурных прав. Проанализировано влияние универсальных и региональных международных договоров, закрепляющих культурные права человека, на конституционное законодательство ряда государств Европы. Включение культурных прав в разряд конституционно закрепленных является одной из особенностей развития законотворческого процесса во многих странах мира, начиная со второй половины XX в. Цель статьи — показать развитие «культурного права», а также раскрыть понятие культурного права на примере анализа законодательства стран СНГ и некоторых государств Западной Европы. Обращено внимание, что в конституциях европейских стран право на доступ к культурным ценностям как комплекс правовых институтов непосредственно не предусматривается, однако в ряде законов содержатся отдельные элементы данного права. Методологическую основу данной научной работы составили диалектический, системный, сравнительно-правовой, нормативный и иные методы познания. Сформулирован вывод, что задачей каждого государства является не только их детализация в национальном законодательстве, но и практическая реализация в целях сохранения и рационального использования своего культурного наследия, кроме того, исследо-

вание зарубежного опыта законодательного регулирования культурных прав дает широкие возможности для его использования в практике.

*Ключевые слова:* конституция, культурные права человека, культурные ценности, страны Европы, правовые институты, гарантии, правовые документы, законодательство.

## References

1 Konstitutsiia Respubliki Polsha. 2 aprelia 1997 h. [Constitution of the Republic of Poland 2 April, 1997]. *legalns.com.* Retrieved from https://legalns.com/download/books/cons/poland.pdf [in Russian].

2 Kosinska, A.M. (2013). Szczegolny charakter praw kulturalnych i ich miejsce w Konstytucji RP — proba charakterystyki i kwalifikacji [The special nature of cultural rights and their place in the Constitution of the Republic of Poland — their characteristics and qualifications]. *Przeglad Prawa Konstytucyjnego — Constitutional Law Review, 3(15),* 11–27 [in Poland].

3 Biblioteka konstitutsii Pashkova Romana. Konstitutsii hosudarstv (stran) mira: Konstitutsiia Finliandii [Library of the Constitution Pashkov Roman. Constitutions of States (countries) of the world: Constitution of Finland]. *Worldconstitutions.ru.* Retrieved from https://worldconstitutions.ru/? p=139 [in Russian].

4 Konstitutsiia Litovskoi Respubliki. 25 oktiabria 1992 h. [Constitution of the Republic of Lithuania 25 October, 1992]. *wipo.int.* Retrieved from https://www.wipo.int/edocs/lexdocs/laws/ru/lt/lt045ru.pdf [in Russian].

5 Baishev, Zh. & Shakirov, K. (Ed.) (1995). *Konstitutsii 16 stran mira: sbornik konstitutsii stran-chlenov SNH, Baltii i riada dr. gosudarstv mira [Constitutions of 16 countries: Collection of constitutions of CIS, Baltic and other countries]*. Almaty: Zheti zharhy [in Russian].

6 Konstitutsiia Rossiiskoi Federatsii. 12 dekabria 1993 h. [Constitution of the Russian Federation 12 December, 1993]. *constitution.ru.* Retrieved from http://www.constitution.ru/10003000/10003000–4.htm[in Russian].

7 Konstitutsiia Yaponii. 3 maia 1947 h. [The Constitution of Japan on 3 may, 1947]. *krugosvet.ru.* Retrieved from https://www.krugosvet.ru/enc/gosudarstvo-i-politika/yaponiya-konstitutsiya [in Russian]

8 Konstitutsiia Kitaiskoi Narodnoi Respubliki. 4 dekabria 1982 h. [Constitution of the people's Republic of China 4 December, 1982]. *legalns.com.* Retrieved from https://legalns.com/download/books/cons/china.pdf [in Russian]

9 Konstitutsiia Azerbaidzhanskoi Respubliki. 12 noiabria 1995 h. [Constitution of the Republic of Azerbaijan 12 November, 1995]. *president.az/media.* Retrieved from https://static2.president.az/media/W1siZiIsIjIwMTgvMDMvMDkvY3dodDN2dzF0X0tvbnN0dXRpc3lhX1JVUy5wZGYiXV0? sha=83f38924a4086483 [in Russian].

10 Konstitutsiia Respubliki Kazakhstan 30 tamyz 1995 zh. [Constitution of the Republic of Kazakhstan on 30August, 1995]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/kaz/docs/K950001000_ [in Kazakh].

11 Kosinska, A.M. (2014). *Kulturalne prawa chloveka. Rehulatsie normativne i ich realizatsia [Cultural human rights. Regulations and their implementation]*. Lublin: Wydawnictwo KUL [in Poland].

12 Bazarova, G.S., Birmanova, A. I., Aliyeva, I.Z., Balgimbekova, G.U., & Akhemetova, N.S. (2017). Legal Content and the Issues of Classification of Socio-economic Human Rights. *Journal of Advanced Research in Law and Economics, Vol. 8, 7,* 2078–2085. Retrieved from http://journals.aserspublishing.eu/jarle/index.

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A. Turlayev, N. Akhmetova

*Ye.A. Buketov Karaganda State University, Kazakhstan*
*(E-mail: turlaev_a@mail.ru)*

# The role and principles importance of the biys court activity as an institution of Kazakh customary law for modern legal relations

The article reveals the unique customs and traditions of the Kazakh people, which were based on the principles that lay down the legal regulation of social relations, condition social justice in resolving disputes and other conflicts arising in the process of economic activity and everyday life. The principles on which the Kazakh society was founded, which are the basis of Kazakh customary law in modern conditions can be char act erased as humanistic. On the basis of these principles, the formation of a fundamental principles number is possible that, taking into account the historical roots, will allow modernization of modern law. Despite the fact that the principles of customary law worked effectively in the historical period of the existence of the Kazakh Khanate and semi-nomadic farming, in modern conditions it is possible to modernize and use them in the modern legal culture as a historically established system of authoritative legal values. These are legal values that stipulate certain types of legal punishments and rewards, principles of mutual relations of the parties in civil, family, labor and other legal relations based on the equality of the parties and voluntary rights and obligations determination. The article substantiates the possibility of using the principles of adversariality, transparency, the predominance of property responsibility as the main punishment type, and the wider use of legal incentive measures in modern conditions.

*Keywords:* Kazakhstan, adaptation of traditional principles, court of biys, customary law, principles of law.

## *Introduction*

Currently, research on the institutions of customary Kazakh law, court of biys, legal principles that have existed for centuries, is carried out, as a rule, from a historical point of view. However, modern legal and political theory can use separate institutions of customary law, which have proved their usefulness in the regulation of public relations. Important aspects of the modern state of law and civil society are self-government, initiative, independence, focus on the legal and social capabilities implementation of the individual. The whole features range that define modern civil society can be extended to the institutions of traditional Kazakh society, since the khan's power has always relied on public institutions, which in turn have a significant impact on the khan's power by limiting it. The non-interference of political (khanate) power in the everyday life of nomads, their autonomy, due to the characteristics of the semi-nomadic life way, implied social interaction based on the equality principles, competitiveness in resolving disputes, openness of legal proceedings and management decisions. At the same time, as a legal relations guarantee, the priority form was property liability, which was due to the way of life and the production mode. Moreover, in modern conditions, personal autonomy is becoming increasingly important. It is also due to lifestyle and mode of production. For an emerging postindustrial society, an autonomous person communicates with other individuals on the basis of equality, independence, non-interference in personal life, personal secrets, family secrets, personal interest in the results of their work, which determines the way of life and life priorities, are becoming increasingly important. Based on this, it seems harmonious to consider the principles of Kazakh customary law, since to a certain extent they are consonant with the requirements of the present.

## *Methods and materials*

The research uses general and private methods of legal research. Based on analysis and generalization, legal sources, views and theories of individual scientists are examined, individual opinions and provisions are examined that reveal the problems of reflecting legal principles in the process of implementing the law. The research basis is the dialectical approach, reflecting the variability and dynamic development of legal norms and social relations. Moreover, legal principles and legal values that are the foundation of legal regulation in a specific historical period are considered as a metaphysical basis. The phenomenon under consid-

eration is studied in the inextricable link of social relations, legal principles and legal regulation of social relations. Based on the method of comparison, analogy, by researching the historical institutions that take place in the history of Kazakh customary law, the value of legal principles is revealed. The concrete historical method made it possible to consider the continuity of the principles governing social relations in a dialectical interconnection and use these principles in modern legal regulation.

*Results*

In our opinion, the court of biys should be considered as a key institution of Kazakh customary law. From the earliest times, judicial power in the Kazakh society was mainly carried out by the biys. It is impossible to determine the period of the emergence of the bii court, since it is the bii courts that are the main non-governmental institution organizing a traditional society. The bii courts, as such, existed long before the reign of Tauke Khan and, in essence, were an integral institution of not the state, but society. The biys court was not only the central institute of judicial procedural law, but also for a long time the most important active center of the socio-political and, in particular, legal life of the Kazakhs. The peculiarity of the court of biys is that it, in fact, represents only one of the biys activities aspects, which in Kazakh society constituted a «group of custodians», i.e. connoisseurs and interpreters of customary law, sporadically, periodically or continuously performing judicial mediation functions. The judicial power, which belonged to the Biy, was of exceptional importance in the Kazakh nomadic society. It was the leading form of power in the system of self-government, widespread, close and understandable to the people, deserved respect and relied on him. Compared with the khanate, the judiciary was the most developed, fully realized itself. In the nomads understanding, it acted as a statehood symbol, was a convenient, efficient, fast, one might say, universal means of exercising state power. Therefore, almost all state bodies in achieving their goals, in the implementation of their activities, tried to use or rely on the judiciary. Only this can explain the fact that in the system of state power, everything from the khan and the sultans, ending with aul axals, were vested with judicial functions. Accordingly, the authority and legitimacy of power was ensured by a fair resolution of disputes, and non-interference in the personal space of a nomad who turned to the authorities, as a rule, exclusively in case of need. Thus, the principles are: competitiveness; transparency; the predominance of property responsibility as the main punishment form, was the legal relations basis, which provided autonomy relative autonomy from the political and legal authority of the legal relations subjects.

*Discussion*

In a society of nomads, the judiciary was so revered that it sometimes stood above the khan power. Of course, the power of the khan in the Kazakh society was considered the highest state power, so it was in reality. However, in order to ensure its level, the khan’s power was forced to constantly reckon with the supreme power and rely on it. And in many cases, the Khan's power considered the judiciary as its component, a continuation and did not separate from itself. In a society of nomads, the judiciary was so revered that it sometimes stood above the power of the khan. The power of the khan in the Kazakh society was considered the highest state power, so it was in reality. However, in order to ensure its level, the khan’s power was forced to constantly reckon with the supreme power and rely on it. And in many cases, the Khan's power considered the judiciary as its component, a continuation and did not separate from itself [1; 23]. This is the main difference between Kazakh biys and Bek-biys in other Turkic-speaking countries. The Biysk judicial power in Kazakhstan enjoyed great influence on the general civil power, including the civil-dynastic power of sovereigns and rulers, and often shared the supreme power with them. The uniqueness of this judicial system is emphasized by the fact that in neighboring countries and certain Central Asian regions agricultural or urban culture prevailed, and the norms of law connected with it were secular and mental. Biy (bi) is first and foremost a judge. The power of the Biy was considered to be the indigenous power, going back into the history depths of the people themselves, in contrast to the power of the khans, who had a «non-Kazakh origin». One of the famous Russian researchers of Kazakh customary law I.A. Kozlov gave the following definition to the Biysk court: «In the minds of the people, the title of bi belongs to the few who were distinguished by impeccable honesty, a natural mind, and combine deep knowledge in the fundamental customs of the people. Biy is a living chronicle of a people, a lawyer or his lawyer» [2; 225]. Such a review was universal on the part of those who were familiar with the Kazakh legal system. According to researcher D. Zuev, «Kazakh Biy was the wisest and most dignified» that their court represented «the bright pages of the distant past, when in the quiet way of the patriarchal life he was as pure and truthful as life itself» [3; 161, 162]. Another author B.N. Delvig biev refers only to as «the sole custodians of customary law» [4; 123]. According to

A. Krahalev, «with regard to the justice of the court, the Kyrgyz (Kazakhs) are very demanding... Justice — the presence of it is most important» [5; 40].

In Kazakh customary law, there is a whole principles layer and norms that determine the essence and status of judge biy. They are formed in short and expressive sayings-formulas: «Do not be the son of only your father, but be the son of mankind». «There is no more punishment for a judge-judge than his addiction in favor of a relative»; «The stone has no root, and likewise the biy has no relative». Truth and justice, the desire to comprehend them were the fundamental foundations of court proceedings and adjudicated judgments of biys, based on the norms of Kazakh law: «Worship justice if it is expressed even by your father's slave»; «Expression is important in eloquence, but more valuable than isin». An important feature of the Kazakh Biysk court is its spirituality, that is, recognition of the primacy of the spiritual content of the case before its material and substantive content on the one hand, and the management of moral principles of «conscience» on the other. The words «There is no god above truth», «Material wealth should serve spirituality, and spirituality is the main honor» were preserved in the people's memory. These statements had real content: in a man his conscience, honor and dignity were declared the highest values. The strength of this high morale was predetermined by the fact that, after centuries, it was noted by Academician S.Z. Zimanov, established itself as an integral part of the Kazakh people's mentality [6; 30]. With regard to justice, this general morality was reflected in such normative and moral principles: «The ruler of the khan has the mind of forty people, and the biy has the knowledge and conscience of forty people», «The rich man is the keeper of livestock, and biy is the guardian of conscience»; «The judge (biy) is impartial, because he has no bias in favor of his own and not his own, violation of this leads to the justice itself death». A well-known national culture figure, S. Seifulin, wrote about the Kazakh biys: «Those who were extremely devoted to the wills and wise ancestors legacy, mastered the past historical ancient rules and customs selection and traditions, laws — heres and case-law decisions became beas, the statements and judgments of the sages, knew them by heart and had the eloquence gift» [7; 8]. In the Kazakh nomadic society, «biy» and «speaker» were used as single-meaning concepts. Moreover, the judicial «oratory» among the Kazakhs was not so much eloquence in general and a speech form as it was evidence-based, included in the proof means and persuasiveness. This was expressed in installation sayings: «The one who is resourceful in expressiveness excels». The power of words in a nomadic society has always been so prestigious and authoritative that often the victory was delivered to those who possessed the speech art. «Artificial biy can solve the murder case with just one short speech». Recognizing that «Of all the arts, the most important thing is the language culture», at the same time, Kazakh law has formed its judicial goal: «Language is valuable, but truth is more valuable in court». In Kazakh society, the title «biy» was not so much hereditary or granted as a well-deserved honorary title. Bii were not appointed or elected. At least, that was before the intervention of the Russian colonial administration in the 19th century. The applicant (candidate) could sometimes be determined, distinguished by beats, elders and other respected and wise people who initially provided him with some support, but you can become a beater only after popular recognition of the applicant deserving such a title. The main requirements that were presented to the Biy as a sender of justice were: thorough knowledge of the norms of customary law, mastery of the wealth of the steppe law and its basic norms, fixed in the Codes «True Establishments of Kassym Khan», and «Ancient Establishments of Yessim Khan» «Supplemented by the precedential decrees of famous biys, possession of oratory talent and honesty. Customs sanctioned by state authorities turned into legal customs, reflected in the above code. The attempt to codify customary law adopted during the reign of Khan Tauke at the end of the 17th century is better known. The Codex, developed by the famous biys under Tauke Khan, was called the Jet of Jarga (seven regulations) [8; 100–101]. Thus, customs were transformed into legal customs, provided by the official, khanate power to one degree or another throughout the entire period characterized as the Kazakh khanate from its formation to the period of the protectorate.

The historical period in literature is called as the Golden Age of Justice. This is a major milestone, a kind of spiritual frontier in the history of Kazakhstan, is strongly associated with the triumph and authority of the law and justice rule, which have been and remain in all time and among all nations a special moral criterion for human society. It is known that according to the canons of the Golden Age of Justice, the life of all three Kazakh zhuzs flowed: Elder, Middle, Younger. And it is especially important that regardless of the period and the names of the supreme rulers, under which a «fair order» was possible and established, its incorruptible judge, sage, orator, historically acts as an active creator — bearer, defender, interpreter, reformer and guide of law and justice. real biya figure. These were people whom the famous orientalist, professor A.I. Levshin calls «geniuses of his own kind» on his merits standing «along with Solons and Lycurgus», who assert high morality and holiness in public relations in their work [9; 367].

It is nessesary to note that recognition by the people gave the Biy great authority and social power over the nomads. However, it was honesty, impartiality, knowledge of customs and their correct application, and not state coercion, that execution ensured of court biys decisions. A dishonest man inevitably lost the biy title, since no one considered it possible to turn to him for a fair decision. An impeccable reputation was a necessary and sufficient guarantee of justice. However, in order to recognize the applicant as meeting these requirements, it was necessary to show his skill in practice by taking part in any judicial (legal) dispute. Success in such a case actually ensured the recognition of the applicant by bi. Other criteria (social origin, age, etc.) were not critical. For example, researchers sometimes note a rather early age, even for those times (13 years), when the applicant was recognized as a biy. Usually the biys came from commoners, were not distinguished by generosity, although the biys from the sultans were known. The title of biy was a kind of perpetual license to legal practice as a judge or lawyer. Of course, the biys differed from each other in terms of power and sphere of influence, they occupied different levels in the judicial hierarchy — from the biys of a small aul, tribal collective to biys, whose fame and influence extended to zhuzes, uluses and the entire territory of Kazakh statehood. Depending on this, the stringency of the requirements for beats changed. The trial was the main function of the bi judges. It was at this stage that the biys should have revealed their skill, experience and acted as «heralds of truth», signs of customs, «guardians of order» and justice, defenders of traditions: to show the ability in eloquence, ability to apply various methods and tricks in resolving conflict litigation.

*Conclusions*

Kazakh customary law defined the following judicial tasks:

1. Ensuring the restoration of the lost right to property, things, livestock, wintering, summering, ponds; restore the right to brides, widows, the recovery of kun, ayyp and punish the offender, the guilty.
2. Recovery of material damage and losses caused by unlawful actions of the offender to the victim.
3. The common Kazakhs law the distinguished damage as in the form of lost profits (offspring, growth in property and others).
4. The restoration and proper the tribal honor of the injured party satisfaction in litigation. Protection of the honor and personal dignity of the community member, his family, noble family, the clan honor, tribe and their branches.

It should be noted that, among the goals and the bii court objectives, there was no punitive function, which is so inherent in the modern state court. The absence of such punishments as imprisonment, awesome punishments and torture, as well as the lawsuit the proceedings nature, the representation possibility and surety in court put the biys court in an institutions number of non-state social authority, bringing it closer to the modern arbitration court. Thus, considering the court of biys institution from the point of view of the modern approach to legal institutions, we can characterize it as a human rights and law-restoring public institution. Emphasizing the main features of the biy court, it should be noted its independence, autonomy from the khan (state) government, self-financing, the security of the court decision by the power of public opinion, the conciliatory orientation of decisions, designed to realize the personality's capabilities in this historical period. The court of biys was an important institution of the Kazakh society for 15–18 centuries. This institution was indispensable and vital for a traditional society, which, with relatively weak khanate power and strong beginnings of social self-organization, allows us to consider it as an institution of a traditional society based on principles that could be acceptable in modern times. The independence of judges in making decisions, strict adherence to the principles enshrined in the Constitution of the Republic of Kazakhstan, procedural codes and other legal acts should bring the judiciary to a new level of legal impact on public relations.

The exercise of the judiciary on the justice basis, openness, publicity, human rights protection, violated rights restoration is intended to make the courts the main bodies protecting the individual interests in modern conditions. Judges are called upon to become «heralds of truth», «guardians of order» and justice, defenders of law: to show the ability not only of eloquence, but also the ability to apply various methods and skills in resolving court cases in modern conditions.

According to the authors, Biysk justice continues to be preserved in the historical memory of the people as a standard of legality and justice. Centuries separate modern generations from the Golden Age of bi justice, the socio-political environment, norms and content of law have fundamentally changed, however, even at the present stage of the development of the judicial system, bi as a judge, the court as a judicial power should embody high professionalism and honest attitude in the public representation to the administration of the judicial function. Biysk justice as a standard of legality and justice not only continues to be preserved in

the historical memory of the people, but is also gaining relevance at present as a value reference point and the democratization of justice in the Republic of Kazakhstan.

## References

1 Зиманов С.З. Мир права казахов «Жаргы» — уникальная система / С.З. Зиманов // Юрист. — 2005. — № 11. — С. 19–26.

2 Козлов М.А. Обычное право киргизов / М.А. Козлов // Материалы по казахскому обычному праву: сб. № 1. — Алма-Ата, 1948. — С. 225–239.

3 Зуев А. Киргизский народный суд / А. Зуев // Журн. Министерства юстиции. — СПб., 1867. — № 3. — С. 161–208.

4 Дельвиг Б.Н. Киргизский народный суд в связи с правовым положением инородцев Степного края / Б.Н. Дельвиг // Журн. Министерства юстиции. — СПб., 1910. — № 5. — С. 122–140.

5 Крахалев А.И. Суд и следствие у киргизов Сибири / А.И. Крахалев // Юрид. вестн. — М.: Типогр. А.И. Мамонтова и Ко, 1888. — № 5. — С. 23–48.

6 Древний мир права казахов: материалы, документы и исследования: [В 10 т.] / под ред. С.З. Зиманова. — Т. 1. — Алматы, 2001. — 440 с.

7 Сейфулин С. Казахская литература / С. Сейфулин. — Кызыл Орда, 1932. — 34 с.

8 Абиль Е.А. История государства и права Республики Казахстан с древнейших времен до начала XX века / Е.А. Абиль. — Астана: ИКФ «Фолиант», 2000. — 184 с.

9 Левшин А.И. Описание киргиз-казачьих или киргиз-кайсацких орд и степей / А.И. Левшин; под общ. ред. акад. М.К. Козыбаева. — Алматы: Санат, 1996. — 656 с.

А.В. Турлаев, Н.С. Ахметова

## Қазіргі құқықтық қатынастар үшін қазақ әдет-ғұрып құқығының институты ретіндегі билер сотының қызметінің қағидаларының рөлі мен маңызы

Мақалада күнделікті өмірде және шаруашылық қызмет процесінде туындайтын, өзге де қайшылықтарды және дауларды шешу кезінде әлеуметтік әділдікті негіздейтін, қоғамдық қатынастарды құқықтық реттеуді құрайтын, қағидаттар негізі болған, қазақ халқының бірегей салт-дәстүрлері мен әдет-ғұрыптары ашылған. Қазіргі жағдайда қазақтың әдет-ғұрып құқығының негізі болған, соның негізінде қазақ қоғамы құрылған, қағидаттарды гуманистік деп сипаттауға болады. Осы қағидаттардың негізінде тарихи түп-тамырларды ескере отырып, қазіргі құқықты жаңғыртуға мүмкіндік беретін бірқатар негіз қалаушы бастамалар қалыптастыруы мүмкін. Қазақ хандығының құрылуының және жартылай көшпелі шаруашылық жүргізудің тарихи кезеңдерінде әдет-ғұрып құқығының қағидалары тиімді жұмыс істегеніне қарамастан, қазіргі жағдайда оларды заманауи құқықтық мәдениетте тарихи қалыптасқан, беделді құқықтық құндылықтар жүйесі ретінде жаңғырту және пайдалануға мүмкін болады. Бұл тараптардың теңдігіне және құқықтар мен міндеттерді бекіту еріктілігіне негізделген, азаматтық, отбасылық, еңбектік және өзге де құқықтық қатынастардағы тараптардың өзара қарым-қатынастарының қағидаларын, көтермелеу және заңды жазалар түрлерін негіздейтін құқықтық құндылықтар. Мақалада қазіргі заманғы жағдайларда жарыспалылық, транспаренттілік қағидаттарын пайдалану, мүліктік жауапкершіліктің негізгі жаза түрі ретінде басым болуы, құқықтық көтермелеу шараларын кеңінен пайдалану мүмкіндігі негізделген.

*Кілт сөздер:* Қазақстан, дәстүрлі қағидалардың бейімделуі, билер соты, әдет-ғұрып құқығы, құқық қағидалары.

А. Турлаев, Н. Ахметова

## Роль и значение принципов деятельности суда биев как института казахского обычного права для современных правовых отношений

В статье раскрыты уникальные обычаи и традиции казахского народа, в основе которых находятся принципы, закладывающие правовое регулирование общественных отношений, обусловливающих социальную справедливость при решении споров и иных коллизий, возникающих в процессе хозяйственной деятельности и повседневной жизни. Принципы, на которых было основано казахское общество, находящееся в основе казахского обычного права, в современных условиях можно охарактеризовать как гуманистические. На их основе возможно формирование ряда основополагающих начал, которые позволят, с учетом исторических корней, модернизировать современное право. Несмотря на то, что принципы обычного права эффективно работали в исторический период существования казах-

ского ханства и полукочевого ведения хозяйства, в нынешних условиях возможны их модернизация и использование в современной правовой культуре как исторически сложившаяся система авторитетных правовых ценностей, которые обусловливают определенные виды юридических наказаний и поощрений, принципы взаимоотношений сторон в гражданских, семейных, трудовых и иных правоотношениях, основанных на равенстве сторон и добровольности установления прав и обязанностей. В статье обоснована возможность использования в современных условиях принципов состязательности, транспарентности, преобладания имущественной ответственности как основного вида наказания, более широкого использования мер правового поощрения.

*Ключевые слова:* Казахстан, адаптация традиционных принципов, суд биев, обычное право, принципы права.

## References

1 Zimanov, S.Z. (2005). Mir prava kazakhov «Zharhy» — unikalnaia sistema [The world of Kazakh law «Zhargi» is a unique system]. Y*urist — Lawyer, 11,* 19–26 [in Russian].

2 Kozlov, M.A. (1948). Obychnoe pravo kirhizov [Kyrgyz customary law]. *Materialy po kazakhskomu obychnomu pravu — Materials on Kazakh customary law, 1,* 225–239 [in Russian].

3 Zuev, A. (1867). Kirhizskii narodnyi sud [Kyrgyz People's Court]. *Zhurnal Ministerstva iustitsii — Department of Justice Journal, 3,* 161–208. Saint Petersburg [in Russian].

4 Delvig, B.N. (1910). Kirhizskii narodnyi sud v sviazi s pravovym polozheniem inorodtsev Stepnoho kraia [Kyrgyz People's Court in connection with the legal status of Steppe Territory foreigners]. *Zhurnal Ministerstva iustitsii — Zhurnal ministerstva iustitsii — Department of Justice Journal, 5,* 122–140. Saint Petersburg [in Russian].

5 Krakhalev, A.I. (1888). Sud i sledstvie u kirhizov Sibiri [The trial and investigation of the Siberia Kyrgyz]. *Iuridicheskii vestnik — Legal Bulletin, 28,* 23–48 [in Russian].

6 Zimanov, S.Z. (2001). *Drevnii mir prava kazakhov. Materialy, dokumenty i issledovaniia [The ancient world of Kazakh law. Materials, documents and studies]*. (Vols. 1–10; Vol. 1). Almaty [in Russian].

7 Seifulin, S. (1932). *Kazakhskaia literatura [Kazakh literature]*. Kyzyl-Orda [in Russian].

8 Abil, E.A. (2000). *Istoriia hosudarstva i prava Respubliki Kazakhstan s drevneishikh vremen do nachala 20 veka [The history of the state and law of the Republic of Kazakhstan from ancient times to the 20th century beginning]*. Astana: IKF «Foliant» [in Russian].

9 Levshin, A.I. (1996). *Opisanie kirhiz-kazachikh ili kirhiz-kaisatskikh ord i stepei [Description of the Kyrgyz-Cossack or Kyrgyz-Kaisak hordes and steppes]*. Almaty: Sanat [in Russian].

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Н.В. Сидорова, К.Ж. Магдатова, Д.Ш. Мейрманова

*Карагандинский экономический университет Казпотребсоюза, Казахстан*
*(E-mail: nsidorova75@mail.ru)*

# Правовые основы становления и развития транспортной прокуратуры Казахстана

В статье рассмотрены правовые основы становления и развития транспортной прокуратуры Казахстана. Целью настоящего исследования является определение историко-правовых предпосылок создания и функционирования транспортной прокуратуры как специализированного органа системы органов прокуратуры Казахстана. Основной акцент сделан на исследование архивных материалов, отражающих основные этапы специализации органов прокуратуры Казахстана по надзору на транспорте. Методологическую основу настоящей работы составили системные подходы к изучению правовых актов, отражающих историю развития транспортной прокуратуры, а также общенаучные методы познания. Проведенное исследование позволило сделать вывод о том, что транспортная прокуратура создавалась, исходя из потребностей развития экономики, общества и государства. Исследование становления и развития транспортной прокуратуры Республики Казахстан позволило авторам обосновать историческое предназначение данного органа и его место в системе органов прокуратуры через призму необходимости выполнения функций, возложенных на транспортную прокуратуру в соответствии с законодательством Республики Казахстан и потребностями общества. Исследование исторических аспектов становления и развития органов транспортной прокуратуры позволяет сформулировать выводы и предложения, направленные на совершенствование правовых и организационных основ деятельности.

*Ключевые слова:* транспортная прокуратура, история транспортной прокуратуры, правовые основы, становление транспортной прокуратуры, развитие транспортной прокуратуры, архивные материалы, специализированная прокуратура, периодизация.

## *Введение*

В современный период реализовываются различные стратегические проекты и программы, направленные на модернизацию и развитие отечественной инфраструктуры, в том числе и транспортного сектора, в этой связи актуализируется роль органов государства, в поле зрения которых должна находиться полная и качественная их реализация. К числу таких органов можно отнести транспортную прокуратуру Республики Казахстан, которая в установленных законом пределах и формах осуществляет высший надзор за соблюдением законности на транспорте.

Транспортная прокуратура Казахстана прошла длительный путь своего становления и развития, при этом в различные временные отрезки деятельность данного органа оценивалась неоднозначно, от безусловного обоснования ее целесообразности и эффективности до полярного отрицания необходимости специализации прокуратуры в данном направлении деятельности. Сегодня Главная транспортная прокуратура Республики Казахстан — ведущее звено в системе органов прокуратуры Республики Казахстан.

Исследование становления и развития транспортной прокуратуры Республики Казахстан позволило авторам обосновать историческое предназначение данного органа и его место в системе органов прокуратуры через призму необходимости выполнения функций, возложенных на транспортную прокуратуру, в соответствии с законодательством Республики Казахстан и потребностями общества.

## *Методы исследования*

Методической основой исследования при написании настоящей статьи послужили общенаучные методы познания, а также методы историко-правового и сравнительно-правового анализа. Выбранные методы позволили комплексно исследовать основные этапы становления и развития транспортной прокуратуры. Непосредственному анализу были подвергнуты материалы Центрального государственного архива Республики Казахстан, а также архивные материалы Главной транспортной прокуратуры Республики Казахстан.

*Обсуждение*

До начала XX в. на территории Казахстана преобладал гужевой, местами вьючный транспорт. Первыми железными дорогами Казахстана были узкоколейные линии Покровская Слободка–Уральск (1893 г.), Урбах–Астрахань (1897 г.), Орленок–Кара-Куча (1896 г.), Оренбург–Ташкент (1906 г.). Общая протяженность дорог в Казахстане составила 2081 км, большинство линий было тупиковыми, а участки магистралей Оренбург–Ташкент, Урбах–Астрахань — транзитными. Вместе с тем они имели большое значение для Казахстана. Так, например, большое влияние на экономическое развитие региона оказала Ташкентская железная дорога [1; 17].

Специализация органов прокуратуры в области надзора за исполнением законов на транспорте началась с момента учреждения советской прокуратуры, которая с самого начала строилась применительно к структуре железнодорожного транспорта. Уже в Положении «О прокурорском надзоре», принятом ВЦИК 28 мая 1922 г., содержалось требование о специализации военной и общей прокуратуры по надзору за исполнением законов на железнодорожном и водном транспорте [2; 215].

После Октября 1917 г. одна часть Казахстана входила в Астраханскую губернию, другая — в Туркестанскую АССР, третья — в территорию Сибревкома. Только 10 июля 1919 г. Декретом Совета народных комиссаров РСФСР был образован Революционный комитет по управлению Казахским краем (военревком), который выполнял все функции, присущие органам государственной власти и управления. В соответствии с этим Декретом Казахстан вошел в состав РСФСР, а это значило, что на него распространялись все российские законы [1; 18], в том числе касающиеся прокуратуры.

Если сделать экскурс к истокам создания прокуратуры, следует отметить, что к компетенции российской прокуратуры еще с момента ее создания относился надзор за центральными органами исполнительной власти. Образованный Петром I Сенат осуществлял функции, которые позднее были распределены между Государственным советом, Кабинетом министров и Сенатом. Первый законодательный акт о прокуратуре — Указ Петра I от 12 января 1722 г. гласил: «Быть при Сенате генерал-прокурору». В Указе от 27 апреля 1722 г. «О должности генерал-прокурора» генерал-прокурору вменялось в обязанность «накрепко смотреть, чтоб в Сенате не на столе только дела вершились, но самим действом по указам исполнялись». При нарушении законов Сенатом генерал-прокурор был обязан предложить последнему устранить их, а если не послушает, «протестовать и оное дело остановить» [3; 6].

Еще до создания централизованной системы советской прокуратуры действовали военно-транспортные трибуналы, при народных комиссариатах путей сообщения, а также при управлениях каждой из железных дорог РСФСР. На них возлагалось «ничем не ограниченное право в определении меры репрессии», производство предварительного следствия осуществляли следственные комиссии, поддержание обвинения возлагалось на коллегию обвинителей в составе трех человек [4; 69].

В 1921 г. подсудность военно-транспортных трибуналов была ограничена исключительно делами о преступлениях рабочих и служащих железнодорожного и водного транспорта, если в результате деятельности последних транспорту был причинен ущерб [5; 81]. После создания прокуратуры, при военно-транспортных трибуналах были учреждены должности военных прокуроров, на которых возлагалось право осуществлять функции надзора в отношении учреждений и должностных лиц железнодорожного транспорта.

Военные прокуроры военно-транспортных трибуналов имели полномочия: входить с представлением в органы и учреждения железнодорожного и водного транспорта об отмене или изменении изданных ими незаконных распоряжений; опротестовывать указанные выше распоряжения через прокурора республики в Совет народных комиссаров или Президиум ВЦИК; возбуждать уголовное преследование против должностных и частных лиц по собственной инициативе, а также по жалобам и заявлениям; осуществлять надзор за производством дознания и предварительного следствия, давать указания; разрешать вопросы о придании суду и прекращении уголовного дела; участвовать в распорядительном заседании суда; поддерживать обвинение в суде; опротестовывать приговоры и решения суда; проверять правильность содержания под стражей [6; 102].

В 30-е годы, в связи с ростом темпов развития экономики, увеличился объем грузовых и пассажирских перевозок, возросла роль транспорта в экономике государства. В 1921–1924 гг. в Казахстане построено 457 км новых железных дорог. В 1925–1932 гг. введены в эксплуатацию новые железнодорожные линии: Петропавловск–Кокчетав–Боровое (264 км), Туркестано-Сибирская магистраль (Турксиб), железнодорожная линия Боровое–Акмолинск–Караганда. Эксплуатационная длина железных дорог Казахстана к 1940 г. составила 658 км [1; 21].

Однако уже в те времена было очевидно, что система организации транспорта не совпадает с административно-территориальным устройством. На объединенном Пленуме ЦК и ЦКК ВКП (б), состоявшемся 17–21 декабря 1930 г., было отмечено, что отставание железнодорожного транспорта сдерживает развитие экономики [7; 511–520]. В то же время росла роль транспорта в народном хозяйстве страны, что требовало усиления борьбы с преступлениями, совершаемыми на транспорте. Поэтому в целях приближения рассмотрения дел об этих преступлениях к месту совершения и ускорения производства по ним, Постановлением ЦИК и СНК СССР «О железнодорожных линейных судах» от 27 ноября 1930 г. на железнодорожном транспорте созданы железнодорожные линейные суды, которые образуются по месту нахождения железных дорог и подчинены Верховным Судам союзных республик [8; 200]. В данном Постановлении указывалось на специализацию в этой области органов прокурорского надзора, то есть расследование дел о преступлениях, подсудных железнодорожным линейным судам, производится специальными следователями, а прокурорский надзор по указанным делам осуществляется специальными прокурорами, выделяемыми для этого соответствующей краевой, областной прокуратурой [8; 601].

Таким образом, было положено начало созданию транспортных прокуратур в системе наркоматов юстиции союзных республик. Создание транспортных прокуратур означало не просто рождение структурного подразделения, а возникновение новой системы органов с конкретными задачами, функциями, компетенцией по обеспечению законности на транспорте.

Однако на первых порах деятельность железнодорожных прокуроров не давала ощутимых результатов. Поэтому, вскоре после учреждения прокуратуры СССР, Постановлением ЦИК и СНК СССР от 27 августа 1933 г. [8; 200] транспортные прокуратуры переданы из системы народных комиссариатов юстиции в систему Верховного Суда и Прокуратуры СССР, где и был создан Отдел транспортной прокуратуры, реорганизованный затем в Главную транспортную прокуратуру, осуществляющую непосредственное организационное и оперативное руководство транспортными прокуратурами союзных республик [9; 252].

Постановлением ЦИК и СНК СССР от 7 июня 1934 г. «Об организации водных транспортной прокуратуры» были созданы водные транспортные прокуратуры морских и речных бассейнов, руководство которыми осуществляла Главная прокуратура водного транспорта [10; 251].

Изучение архивных материалов и законодательных актов того времени позволило установить, что в Казахстане прокуратура была учреждена 13 июля 1932 г. Постановлением 3 сессии КазЦИК 2-го созыва, утвердившим Положение «О прокурорском надзоре» [11; 18]. На прокуратуру КазАССР были возложены следующие полномочия: осуществление от имени государства надзора за законностью деятельности всех органов власти, хозяйствующих учреждений, общественных организаций путем возбуждения уголовного преследования и опротестования нарушающих закон постановлений; наблюдение за деятельностью органов дознания и предварительного следствия; поддержание обвинения в суде; наблюдение за правильностью содержания задержанных.

Согласно принятой дополнительной 13-й статье в Положении «О прокурорском надзоре», военные прокуроры, состоящие при военно-транспортных трибуналах, действующих на территории КазАССР, оставаясь в прямом подчинении помощнику прокурора Российской республики, работают в контакте с прокурором КазАССР, сообщая ему в целях информации периодические отчеты о своей деятельности и доставляя требуемые сведения о положении и обстоятельствах дел, находящихся в их производстве, поскольку деятельность названного военно-транспортного трибунала выполняется в территориальных пределах Казахской Республики [11; 49].

В документах Центрального государственного архива Республики Казахстан прокуратура Туркестано-Сибирской железной дороги упоминается с 1934 г., кроме того, в приказе НКЮ Киргизской АССР по прокурорскому надзору имеется указание на водную прокуратуру Балхаш-Илийского бассейна [12; 65].

Прокурор Туркестано-Сибирской железной дороги обслуживал Турксиб протяженностью 3200 км железной дороги. Участки прокуратуры располагались на территории трех союзных республик: Казахстана, РСФСР, Киргизии. Для обеспечения работы прокуратуры на каждом отделении дороги были созданы прокуратуры: Алма-Атинского, Аягузского, Джамбулского, Защитинского, Матайского, Пишпекского, Семипалатинского, Рубцовского, Павлодарского, Усть-Каменогорского, Чуйского участков железой дороги [13; 10].

Особые условия окраинной Казахской республики, отсталой в то время во всех отношениях, сказались и на организации транспортной прокуратуры. Ощущался огромный недостаток квалифициро-

ванных работников, вызванный неграмотностью большинства населения [14; 11]. Не могло не влиять на решение организационных вопросов деятельности транспортной прокуратуры ограниченность материальных и денежных ресурсов. Поэтому организационный период становления транспортной прокуратуры Казахстана значительно затянулся.

Согласно приказу по прокуратуре СССР от 1 июня 1938 г. № 574/25 с, прокурор Туркестано-Сибирской железной дороги осуществлял следующие полномочия: участие в работе суда, общий надзор, рассмотрение жалоб и заявлений граждан [15; 15, 16, 26, 30, 76, 77].

Несмотря на несовершенство структуры транспортной прокуратуры, нельзя не отметить, что уже в то время были правильно, в общем, выделены структурные подразделения, в основу чего легли основные направления деятельности транспортной прокуратуры.

Изучение архивных документов показало, что в работе транспортных прокуроров Туркестано-Сибирской железной дороги существовал ряд недостатков, на которые неоднократно указывал Главный транспортный прокурор в своих директивах, в частности на:

– неудовлетворительную борьбу с крушениями на Турксибе, т.е. на ряд крушений транспортные прокуроры вовсе не выезжают, а если выезжают, то с большим опозданием, установленный трехдневный срок следствия не соблюдается, для расследования крушений не привлекаются территориальные прокуроры;

– прокуратура дороги не реагирует на грубые нарушения закона, допускаемые линейным судом;

– транспортные прокуроры не присутствуют на допросах обвиняемых;

– обвинительные заключения в ряде случаев не утверждаются прокурорами дороги;

– указание о принятии участия в судебном разбирательстве не выполняется [16; 99, 100].

Правовое регулирование организации и деятельности прокуратуры Казахстана советского периода не имело принципиальных отличий от других республик и Союза ССР в целом [3; 9].

К 1940 г. транспортная прокуратура КазССР осуществляла свою деятельность в следующих направлениях: следственная работа, надзор за органами милиции, судебный надзор по уголовным делам, судебный надзор по гражданским делам, надзор за местами заключения, общий надзор, работа по специальным делам.

Согласно отчету о работе прокуратуры Туркестано-Сибирской железной дороги за 1940 г., в порядке общего надзора вынесено 38 представлений, из них удовлетворено 18 (47 %); просмотрено 1726 приказов о наложении дисциплинарного взыскания, по ним вынесено 75 протестов, из них удовлетворено 25 (33 %); просмотрено 321 иных приказов и инструкций, по ним вынесено 197 протестов, из которых удовлетворено — 63 (31 %) [17; 2]. Анализ приведенных данных показывает, что в целом работа в данном направлении велась удовлетворительно, однако еще на низком уровне оставался контроль за исполнением решений транспортных прокуроров. В порядке судебного надзора, количество дел рассмотренных в подготовительном заседании суда, составило в линейном суде — 227, в народном суде — 754; из них с участием транспортного прокурора соответственно — 227 и 672; вынесено протестов — 10 и 17; рассмотрено дел в судебном заседании — в линейном суде — 162, в народном суде — 121; из них поддержано обвинение транспортным прокурором, соответственно 127 и 120 [17; 2].

В годы Великой Отечественной войны внесены существенные изменения в структуру и характер деятельности транспортной прокуратуры. В связи с переводом железнодорожного и водного транспорта на военное положение Приказом прокурора СССР ПР–144/с от 29 декабря 1941 г. органы прокуратуры железнодорожного транспорта Омской, Карагандинской, Туркестано-Сибирской, Пермской и Ашхабадской дорог преобразованы в Военные прокуратуры соответствующих дорог [18; 45].

Руководство работой военных прокуратур железнодорожного транспорта с первых дней войны осуществляла Главная военная прокуратура Красной Армии. В январе 1942 г. была создана Главная военная прокуратура железнодорожного транспорта. Транспортная прокуратура осуществляла общий надзор за бесперебойной доставкой на фронт войск, вооружения, боеприпасов, продовольствия, за вывозом фабрик, заводов на восток, за эвакуацией населения в тыл; принимала меры к борьбе с хищениями грузов, простоями воинских вагонов. Дезорганизация работы железнодорожного транспорта, как в районах военных действий, так и в тылу, возлагала на военные прокуратуры железных дорог обязанности по проверке в порядке общего надзора соблюдения законов об охране железнодорожных объектов. После окончания Великой Отечественной войны военные прокуратуры железнодорожного транспорта преобразованы в Прокуратуры железнодорожного транспорта [19; 47, 48].

Определенные изменения в системе транспортной прокуратуры произошли в июне 1953 г., когда, в соответствии с Указом Президиума Верховного Совета от 24 июня 1953 г. «Об объединении линейных судов железнодорожного и водного транспорта», Приказом Генерального прокурора СССР № 162 от 27 июня 1953 г. транспортные железнодорожные и водные прокуратуры были объединены в одну транспортную прокуратуру КазССР [20; 55]. В связи с объединением транспортных прокуратур в Казахстане произведены следующие преобразования в системе транспортной прокуратуры:

– прокуратуры Туркестано-Сибирской железной дороги и Верхне-Иртышского бассейна были объединены в Алма-Атинскую транспортную прокуратуру;

– прокуратура Защитинского участка Туркестано-Сибирской железной дороги и прокуратура Усть-Каменогорского участка Верхне-Иртышского бассейна объединены в Усть-Каменогорскую транспортную прокуратуру участка;

– была организована прокуратура Семипалатинского участка Верхне-Иртышского бассейна.

В результате данной реорганизации Алма-Атинской транспортной прокуратуре были подчинены:

– транспортные прокуратуры участков Туркестано-Сибирской железной дороги: Алма-Атинского, Аягузского, Джамбулского, Матайского, Рубцовского, Пишпекского;

– транспортные прокуратуры Верхне-Иртышского бассейна: Павлодарского, Семипалатинского участков;

– Усть-Каменогорская транспортная прокуратура.

Прокуратура Карагандинской железной дороги с подчиненными ей прокуратурами была оставлена без изменений [21; 124].

Сохранен централизованный принцип организации управления органами транспортной прокуратуры. В составе Генеральной прокуратуры СССР организован отдел Главной транспортной прокуратуры, на всех железнодорожных и водных участках — транспортные прокуратуры с подчинением транспортным прокурорам союзных республик.

В 1955 г. Алма-Атинская транспортная прокуратура была переименована в Транспортную прокуратуру Туркестано-Сибирской железной дороги, а Усть-Каменогорская транспортная прокуратура — в транспортную прокуратуру Защитинского участка Туркестано-Сибирской железной дороги [22; 160]. К этому году сложилась следующая система транспортной прокуратуры:

– Главная транспортная прокуратура СССР, в которой функционировали отделы: общего надзора, по надзору за следствием и дознанием в органах МВД, уголовно-судебного надзора, следственный, контрольно-инспекторский, кадровый;

– транспортные прокуратуры союзных республик, округов, железных дорог, водных бассейнов, объединенные (железнодорожные и водные) транспортные прокуратуры;

– транспортные прокуратуры железнодорожных участков, транспортные прокуратуры водных участков и объединенные транспортные прокуратуры участков.

В связи с упразднением в 1957 г. по прокуратуре Туркестано-Сибирской железной дороги ряда участков (Аягузского, Джамбулского, Семипалатинского) надзор за соблюдением законов на транспорте осуществлялся в следующих территориальных пределах:

– в Рубцовской транспортной прокуратуре — Рубцовское отделение дороги — в пределах границ Верхне-Иртышского пароходства от пристани Павлодар со всеми объектами до государственной границы Китая, включая пристань Усть-Каменогорск, Семипалатинский аэропорт, строительное управление № 905 и все строительные участки;

– в Алма-Атинской транспортной прокуратуре — в пределах Алма-Атинского отделения дороги, Аягузского отделения дороги со всеми учреждениями и объектами, Аягузский аэропорт, Балхаш-Илийское пароходство, строительство Актогай – государственной границы, строительные участки, расположенные в пределах железных дорог г. Алма-Аты;

– в Защитинской транспортной прокуратуре — в пределах Защитинского отделения дороги, строительные участки, Усть-Каменогорский аэропорт;

– в Сары-Шаганской транспортной прокуратуре — в пределах Сары-Шаганского и Джамбулского отделения дороги, Джамбульский аэропорт и все строительные участки [23; 156, 157].

В соответствии с Постановлением Совета Министров СССР № 631 от 13 июня 1958 г. «Об организации Казахской железной дороги» транспортная прокуратура Туркестано-Сибирской железной дороги переименована в Казахскую транспортную прокуратуру [24; 132]. В соответствии с Постановлением и Приказом Генерального прокурора № 349-л и 350-л от 25 июня 1959 г. была уп-

разднена Прокуратура Карагандинской железной дороги с передачей ее функций Казахской транспортной прокуратуре [25; 183–186], утвержден штат Казахской транспортной прокуратуры в количестве 50 единиц: в Казахской транспортной прокуратуре — прокурор 1 единица, помощник прокурора — 3 единицы, старший следователь — 1 единица, бухгалтер — 1 единица, курьер — 1 единица, водитель — 1 единица; в транспортных прокуратурах участков дорог штат по три единицы — прокурор — 1 единица, следователь 1 единица, секретарь-машинистка — 1 единица.

В подчинении Казахской транспортной прокуратуры в 1958 г. находились транспортные прокуроры: Актюбинского, Алма-Атинского, Гурьевского, Пишпекского, Джамбулского, Аягузского, Защитинского, Кзыл-Ординского, Акмолинского, Кушмурунского участков дороги [25; 183–186].

Указом Президиума Верховного Совета СССР от 3 марта 1960 г. «Об упразднении транспортной прокуратуры» в системе Прокуратуры СССР упразднена транспортная прокуратура, а ее функции возложены на территориальные органы прокуратуры союзных республик [26; 48–50].

После расформирования транспортной прокуратуры эффективность прокурорского надзора на транспорте снизилась, вследствие незнания территориальными прокурорами специфики работы транспорта, отсутствия опыта работы в данной сфере и единых, выработанных в новых условиях методов и форм надзора.

Принятие решения об упразднении транспортной прокуратуры не было оправданным. Многие участки работы транспорта практически выпали из поля зрения территориальных прокуратур, что отразилось на эффективности надзора за расследованием уголовных дел в органах внутренних дел на транспорте. Данные трудности возникли из-за линейного несоответствия построения транспортных предприятий, в том числе и органов внутренних дел на транспорте, и территориальных прокуратур, так как железные дороги проходят через территорию нескольких областей. В результате надзор на железной дороге осуществлялся сразу несколькими территориальными прокурорами, которые редко согласовывали свои действия при его осуществлении.

Так, в Обзоре работы органов прокуратуры за исполнением законодательства об охране грузов на железнодорожном транспорте указано, что проверки, проводимые лишь в отдельных подразделениях железной дороги, не дают должного результата, потому что не отражают состояния законности на дороге в целом. Прокуроры не координируют свои действия для проведения общих проверок соблюдения законности на железнодорожном транспорте. Не обеспечивается должный надзор за соблюдением законности в деятельности ОВДТ, не осуществляется проверка деятельности этих органов на тех участках, которые проходят по территории других краев, областей, городов. Увеличилось количество хищений грузов, особенно в КазССР [27; 7].

И только почти через двадцать лет, на основании Конституции КазССР 1978 г. и Закона «О прокуратуре СССР» от 30 ноября 1979 г. [28; 843], Генеральный прокурор издал приказ № 46 от 5 ноября 1980 г., которым в системе Прокуратуры СССР образована Транспортная прокуратура.

В соответствии с Постановлением Совета министров СССР от 11 апреля 1977 г. № 282 на территории Казахстана были организованы Алма-Атинская железная дорога с местонахождением управления в г. Алма-Ате; Западно-Казахстанская железная дорога с местонахождением управления в г. Актюбинске; Целинная железная дорога с местонахождением управления в г. Целинограде. На этих дорогах были образованы Алма-Атинская, Целинная, Западно-Казахстанская транспортные прокуратуры, которые подчинялись прокурору КазССР.

В 1984 г. протяженность Целинной железной дороги составляла 5689 км, грузооборот — 4,52 %, пассажирооборот — 1,06 %; Западно-Казахстанская железная дорога имела протяженность в 3825 км, грузооборот — 2,71 %, пассажирооборот — 1,59 %; эксплуатационная длина Алма-Атинской железной дороги составила 4402 км, грузооборот — 3,02 %, пассажирооборот — 1,48 % [29; 947].

Система органов транспортной прокуратуры в 80-е гг. состояла из четырех звеньев: Транспортные прокуратуры, действующие на правах районных; Транспортные прокуратуры, действующие на правах областных; Отделы Генеральных прокуратур союзных республик по надзору за исполнением законов на транспорте; Управление по надзору за исполнением законов на транспорте при Генеральной прокуратуре СССР.

Воссоздание транспортной прокуратуры в системе Прокуратуры СССР дало свои позитивные результаты, что нашло свое отражение в следующих данных. Так, в 1954 г. транспортными прокурорами КазССР вынесено 58 протестов, 193 представления, возбуждено 69 дисциплинарных производств; в 1958 г. вынесено 93 протеста, что на 60 % больше, чем в 1954 г., 169 представлений, что на 13 % меньше, чем в 1954 г., возбуждено 66 дисциплинарных производств 66, что на 5 % меньше, чем

в 1954 г.; в 1964 г. вынесено 67 протестов, что на 28 % меньше, чем в 1958 г., 98 представлений, что на 43 % меньше, чем в 1958 г.; возбуждено 60 дисциплинарных производств, что на 10 % меньше, чем в 1958 г.; в 1975 г. вынесено 98 протестов, что на 60 % больше, чем в 1964 г., 52 представления, что на 47 % меньше, чем в 1964 г.; возбуждено 50 дисциплинарных производств, что на 17 % меньше, чем в 1964 г.; в 1981 г. вынесено 137 протестов, что на 39 % больше, чем в 1975 г., 126 представлений, что на 142 % больше, чем в 1975 г.; возбуждено 95 дисциплинарных производств, что на 90 % больше, чем в 1975 г.; в 1985 г. вынесено 77 представлений, что на 44 % меньше, чем в 1981 г., 142 предписания, что на 12 % больше, чем 1981 г.; возбуждено 72 дисциплинарных производства, что на 25 % меньше чем в 1981 г. [30; 139, 140, 156, 157, 160, 161, 172, 173, 144, 145, 128, 129].

Эти данные свидетельствуют, что показатели резко сократились в те годы, когда транспортная прокуратура была упразднена в системе Прокуратуры СССР, а увеличение показателей наблюдается после воссоздания последней.

Согласно Конституции КазССР 1978 г., высший надзор за точным и единообразным исполнением законов всеми министерствами, государственными комитетами и ведомствами, предприятиями, учреждениями и организациями, исполнительными и распорядительными органами местных Советов народных депутатов, колхозами, кооперативами и иными общественными организациями, должностными лицами, а также гражданами на территории КазССР осуществляется Генеральным прокурором и подчиненными ему прокурорами КазССР и нижестоящими прокурорами [31].

Транспортная прокуратура на правах районной имела узкую специализацию, т.е. она осуществляла надзор либо только на воздушном, водном или железнодорожном транспорте. Транспортная прокуратура на правах областной вела надзор на всех видах транспорта.

Областная транспортная прокуратура имела следующую организационную структуру: отдел общего надзора, следственный отдел, а в тех случаях, когда не было отделов, имелись старшие помощники по надзору за рассмотрением дел в суде [32; 56]. В подчинении областной транспортной прокуратуры находились районные транспортные прокуратуры.

На транспортную прокуратуру был возложен общий надзор, надзор за исполнением законов органами дознания и предварительного следствия, надзор за исполнением законов при рассмотрении дел в суде, надзор за соблюдением законов в местах содержания задержанных, в местах предварительного заключения.

С 1990 г. в истории Казахстана начался новый период развития политической, экономической и социальной систем общества. В 1990–1995 гг. начался распад «Республики Советов». Медленно и, отчасти, противоречиво реализовывалась линия на создание цивилизованной системы сдержек и противовесов между высшими государственными органами [33]. Наряду с основополагающими документами, провозглашающими независимость и суверенность Казахстана, 6 декабря 1991 г. принято Постановление Президиума Верховного Совета КазССР «Об образовании единой системы органов прокуратуры КазССР, обеспечении их самостоятельности и независимости», согласно которому на базе действующих на территории КазССР органов прокуратуры была образована единая система органов прокуратуры КазССР, в которую вошли Алма-Атинская, Западно-Казахстанская, Целинная транспортные прокуратуры (на правах областных), транспортные прокуратуры на правах районных [34; 28]. В 1993 г. на базе Алма-Атинской, Западно-Казахстанской, Целинной транспортной прокуратуры образована Казахская транспортная прокуратура, возглавляемая транспортным прокурором, являющимся по занимаемой должности заместителем Генерального прокурора Республики Казахстан. Казахская транспортная прокуратура просуществовала одиннадцать месяцев, обусловлено это тем, что система и структура Казахской транспортной прокуратуры не совпадали с системой и структурой организации транспортных объектов.

Конституционная реформа, развернувшаяся в нашей стране, ознаменовалась принятием на республиканском референдуме 30 августа 1995 г. новой Конституции Казахстана. Это важная веха конституционного процесса, которая носит многоплановый и комплексный характер, охватывая все стороны не только государственной, но и общественной жизни. И это вполне закономерно, поскольку суть конституционной реформы заключается в создании новой нормативной макромодели обновляемого казахстанского общества [35].

Составной частью правовой реформы явилось реформирование правоохранительной системы — прежде всего органов прокуратуры и правопорядка. На основе Конституции Республики Казахстан принят Указ Президента РК, имеющий силу Закона, «О прокуратуре Республики Казахстан» от 21 декабря 1995 г., в котором нашли отражение основополагающие принципы организации и дея-

тельности органов прокуратуры. В нем подчеркивается, что органы прокуратуры составляют единую централизованную систему, в которую входят специализированные прокуратуры.

На основании данного закона Приказом Генерального прокурора № 101/6 от 12 марта 1996 г. образованы Алматинская, Западно-Казахстанская, Целинная транспортные прокуратуры Республики Казахстан со статусом прокуратуры области. В этой связи в структуре аппарата Генеральной прокуратуры Республики Казахстан образован самостоятельный Отдел по надзору за применением законов на транспорте.

Согласно Приказу Генерального прокурора Республики Казахстан № 18 от 10 июля 1997 г. «Об организации работы транспортной прокуратуры» транспортные прокуроры обеспечивают надзор за точным и единообразным исполнением законов на железнодорожном, водном, воздушном транспорте, а также на автомобильном, входящем в систему Министерства транспорта и коммуникаций Республики Казахстан [34; 351].

В современный период в единую централизованную систему входят Главная транспортная прокуратура Республики Казахстан, а также иные транспортные прокуратуры на правах районных и приравненных к ним городских и межрайонных транспортных прокуратур. Правовую основу деятельности которых составляет Закон Республики Казахстан № 81-VI от 30 июня 2017 г. «О прокуратуре».

*Выводы*

Недостаточная освещенность в юридической литературе правовых основ становления и развития транспортной прокуратуры Республики Казахстан вызвала необходимость в систематизации материалов по данной проблеме и выделения основных этапов становления и развития транспортной прокуратуры Казахстана:

• I этап (1922–1930 гг.) — осуществление прокурорского надзора за исполнением законов на железнодорожном транспорте военно-транспортными трибуналами;

• II этап (1930–1934 гг.) — создание и становление транспортной прокуратуры Туркестано-Сибирской железной дороги (прокуроры выделялись из штата областных прокуратур, они организационно входили в их состав);

• III этап (1934–1960 гг.) — полная централизация и специализация транспортной прокуратуры КазССР, создание водной транспортной прокуратуры, создание, наряду с узкоспециализированными транспортными прокуратурами, объединенных транспортных прокуратур, осуществляющих прокурорский надзор как на речном и морском транспорте, так и на железнодорожном транспорте;

• IV этап (1960–1980 гг.) — упразднение транспортной прокуратуры, осуществление прокурорского надзора на транспорте территориальными прокурорами;

• V этап (с 1980–1991 гг.) — воссоздание в системе прокуратуры СССР транспортной прокуратуры. Создание в 1991 г. в Республике Казахстан единой системы прокуратуры, в которую вошли Алма-Атинская, Западно-Казахстанская, Целинная транспортные прокуратуры;

• VI этап (с 1991 г.) — деятельность транспортной прокуратуры в системе органов прокуратуры Республики Казахстан.

Таким образом, проследив историю становления и развития транспортной прокуратуры Республики Казахстан, можно сделать вывод, что создание транспортных прокуратур, осуществляющих надзор на транспорте, несмотря на неоднократную реорганизацию и упразднение, выдержало испытание временем, практика показала необходимость специализации органов прокуратуры по осуществлению надзора за обеспечением законности на транспорте.

Выделенные этапы становления и развития транспортной прокуратуры Республики Казахстан свидетельствуют об их взаимосвязи с происходящими преобразованиями в обществе на том или ином этапе развития страны.

Список литературы

1 Биекенов Н.А. Правовой статус органов внутренних дел Республики Казахстан на транспорте: дис. … канд. юрид. наук: 12.00.02 – «Конституционное право; муниципальное право» / Н.А. Биекенов. — Алматы, 1997. — 169 с.

2 Советская прокуратура в важнейших документах. — М.: Госюриздат, 1955. — 506 с.

3 Туякбаев Ж.А. Развитие прокуратуры Казахстана в период государственно-правовой реформы / Ж.А. Туякбаев. — Алматы: Ғылым, 1997. — 158 с.

4 Декрет ВЦИК «О революционных военных железнодорожных трибуналах» от 18 марта 1920 г. // Советская прокуратура: сб. важн. док. — М.: Госюриздат, 1972. — 408 с.

5 Декрет ВЦИК «Об объединении всех военных трибуналов республики» от 23 июня 1921 г. // Советская прокуратура: сб. важн. документов. — М.: Госюриздат, 1972. — 408 с.

6 Положение «О прокурорском надзоре», утв. Постановлением ВЦИК от 22 мая 1922 г. // Советская прокуратура: сб. важн. док. — М.: Госюриздат, 1972. — 408 с.

7 КПСС в резолюциях и решениях съездов, конференций, пленумов (1927–1931) — Т. 4. — М.: Политиздат, 1970.

8 Советская прокуратура: сб. важн. док. — М.: Госюриздат, 1972. — 408 с.

9 О перестройке аппарата Прокуратуры в центре и на местах: приказ по Прокуратуре СССР от 25 марта 1934 г. № 76 // Советская прокуратура: сб. важн. док. — М.: Госюриздат, 1972. — 408 с.

10 Сборник законов и распоряжений Рабоче-крестьянского правительства СССР. — 1934. — № 33. — М., 1948. — Ст. 252.

11 Альдикеев А. На страже законности / А. Альдикеев. — Алма-Ата: Казахстан, 1981. — 128 с.

12 Центральный государственный архив Республики Казахстан. — Ф. 1380. — Оп. 3-л. — Д. 53. — Л. 65.

13 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 6. — Л. 10.

14 Зиманов С.З. Теория и практика автономизации в СССР / С.З. Зиманов. — Алматы: Жеті жарғы, 1998. — 144 с.

15 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 1. — Л. 15-16, 26, 30, 76, 77.

16 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 7. — Л. 99, 100.

17 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 10. — Л. 2.

18 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 34. — Л. 45.

19 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 107. — Л. 47, 48.

20 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 107. — Л. 55.

21 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 133. — Л. 124.

22 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 178. — Л. 160.

23 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 211. — Л. 156, 157.

24 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 213. — Л. 132.

25 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 211. — Л. 183–186.

26 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 234. — Л. 48–50.

27 Обзор работы органов прокуратуры за исполнением законодательства об охране грузов на железнодорожном транспорте. — М.: Госюриздат, 1970. — 12 с.

28 Закон «О Прокуратуре СССР» от 30 ноября 1979 г. // Ведомости Верховного Совета СССР. — 1979. — № 49. — Ст. 843.

29 Советский энциклопедический словарь / под ред. А.М. Прохорова. — М.: Сов. энцикл., 1989. — 1632 с.

30 Центральный государственный архив Республики Казахстан. — Ф. 309. — Оп. 1. — Д. 151. — Св. 20. — Л. 139, 140; — Д. 221. — Св. 29. — Л. 156, 157; — Д. 231. — Св. 30. — Л. 160, 161; — Д. 149. — Св. 32. — Л. 172, 173; — Д. 274. — Св. 27. — Л. 144, 145; — Д. 287. — Св. 34. — Л. 128, 129.

31 Конституция (Основной Закон) Казахской Советской Социалистической Республики от 20 апреля 1978 г. [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/? doc_id=1027292#pos=1;-123.

32 Компетенция Транспортного прокурора / под ред. И.Л. Шраги. — М.: Всесоюз. ин-т по изучению причин и разработке мер предупреждения преступности, 1986. — 84 с.

33 Малиновский В. Президент Республики и совершенствование государственной власти / В. Малиновский // Казахстанская правда. — 1996. — 22 авг.

34 Сборник нормативно-правовых актов о прокуратуре Республики Казахстан. — Алматы, 1997. — 372 с.

35 Ким Ю. Новую конституцию предложила жизнь / Ю. Ким // Казахстанская правда. — 1996. — 16 авг.

Н.В. Сидорова, К.Ж. Магдатова, Д.Ш. Мейрманова

## Қазақстан көлік прокуратурасының қалыптасуы мен дамуының құқықтық негіздері

Мақалада Қазақстан көлік прокуратурасының қалыптасуы мен дамуының құқықтық негіздері қарастырылған. Осы зерттеудің мақсаты Қазақстанның прокуратура органдары жүйесінің мамандандырылған органы ретінде көлік прокуратурасының құрылуы мен жұмыс істеуінің тарихи-құқықтық алғышарттарын анықтау болып табылады. Қазақстан прокуратура органдарының көліктегі қадағалау бойынша мамандануының негізгі кезеңдерін көрсететін мұрағаттық материалдарды зерттеуге басты назар аударылды. Осы жұмыстың әдіснамалық негізін көлік прокуратурасының даму тарихын, сондай-ақ танымның жалпы ғылыми әдістерін көрсететін құқықтық актілерді зерделеудің жүйелі тәсілдері құрады. Жүргізілген зерттеу көлік прокуратурасы экономика, қоғам және мемлекет дамуының қажеттіліктеріне сүйене отырып құрылғаны туралы қорытынды жасауға мүмкіндік берді. Қазақстан Республикасы көлік прокуратурасының қалыптасуы мен дамуын зерттеу авторларға осы

органның тарихи мақсатын және оның прокуратура органдары жүйесіндегі орнын Қазақстан Республикасының заңнамасына және қоғамның қажеттіліктеріне сәйкес көлік прокуратурасына жүктелген функцияларды орындау қажеттілігінің призмасы арқылы негіздеуге мүмкіндік берді. Көлік прокуратурасы органдарының қалыптасуы мен дамуының тарихи аспектілерін зерттеу қызметтің құқықтық және ұйымдастырушылық негіздерін жетілдіруге бағытталған қорытындылар мен ұсыныстарды тұжырымдауға мүмкіндік береді.

*Кілт сөздер:* көлік прокуратурасы, көлік прокуратурасының тарихы, құқықтық негіздері, көлік прокуратурасының қалыптасуы, көлік прокуратурасының дамуы, мұрағат материалдары, мамандандырылған прокуратура, кезеңдер.

N.V. Sidorova, K.Zh. Magdatova, D.Sh. Meirmanova

## Legal bases of formation and development of transport Prosecutor's office of Kazakhstan

The article deals with the legal basis of the formation and development of the transport Prosecutor's office of Kazakhstan. The purpose of this study is to determine the historical and legal prerequisites for the creation and functioning of the transport Prosecutor's office as a specialized body of the system of Prosecutor's offices of Kazakhstan. The main emphasis is made on the study of archival materials reflecting the main stages of specialization of the Prosecutor's office of Kazakhstan on transport supervision. The methodological basis of this work consists of systematic approaches to the study of legal acts reflecting the history of the transport Prosecutor's office, as well as General scientific methods of knowledge. The conducted research allowed to draw a conclusion that the transport Prosecutor's office was created proceeding from needs of development of economy, society and the state. The study of the formation and development of the transport Prosecutor's office of the Republic of Kazakhstan allowed the authors to justify the historical purpose of this body and its place in the system of prosecution through the prism of the need to perform the functions assigned to the transport Prosecutor's office in accordance with the legislation of the Republic of Kazakhstan and the needs of society. Research of historical aspects of formation and development of bodies of transport Prosecutor's office allows to formulate conclusions and the offers directed on improvement of legal and organizational bases of activity

*Keywords:* transport Prosecutor's office, history of transport Prosecutor's office, legal bases, formation of transport Prosecutor's office, development of transport Prosecutor's office, archival materials, specialized Prosecutor's office, periodization.

## References

1 Biekenov, N.A. (1997). Pravovoi status orhanov vnutrennikh del Respubliki Kazakhstan na transporte [The legal status of the internal affairs bodies of the Republic of Kazakhstan on transport]. *Candidate s thesis'.* Almaty [in Russian].

2 (1955). Sovetskaia prokuratura v vazhneishikh dokumentakh [Soviet prosecutor's office in the most important documents]. Moscow: Hosiurizdat [in Russian].

3 Tujakbaev, Zh.A. (1997). *Razvitie prokuratury Kazakhstana v period hosudarstvenno-pravovoi reformy [Development of the prosecutor's office of Kazakhstan during the period of state legal reform]*. Almaty: Hylym [in Russian].

4 (1972). Dekret VCIK «O revoliutsionnykh voennykh zheleznodorozhnykh tribunalakh» ot 18 marta 1920 h. [All-Russian Central Executive Committee On Revolutionary Military Railway Tribunals of March 18, 1920]. *Sovetskaia prokuratura: sbornik vazhneishikh dokumentov — Soviet Prosecutor's Office: Collection of Essential Documents.* Moscow: Hosiurizdat [in Russian].

5 (1972). Dekpet VCIK «Ob obedinenii vsekh voennykh tribunalov respubliki» ot 23 iiunia 1921 h. [Decree of the All-Russian Central Executive Committee «On the Association of All Military Tribunals of the Republic» of June 23, 1921]. *Sovetskaia prokuratura: sbornik vazhneishikh dokumentov — Soviet Prosecutor's Office: Collection of Essential Documents.* Moscow: Gosjurizdat [in Russian].

6 (1972). Polozhenie «O prokurorskom nadzore», utverzhdennoe Postanovleniem VTSIK ot 22 maia 1922 h. [Regulation «On Prosecutorial Supervision», approved by the Decree of the All-Russian Central Executive Committee of May 22, 1922]. *Sovetskaia prokuratura. Sbornik vazhneishikh dokumentov — Soviet Prosecutor's Office: Collection of Essential Documents.* Moscow: Hosiurizdat [in Russian].

7 (1970). *KPSS v rezoliutsiiakh i resheniiakh sezdov, konferentsii, plenumov (1927–1931) [CPSU in resolutions and decisions of congresses, conferences, plenums (1927–1931)]*. Moscow: Politizdat [in Russian].

8 (1972). *Sovetskaia prokuratura. Sbornik vazhneishikh dokumentov [Soviet Prosecutor's Office: Collection of Essential Documents]*. Moscow: Hosiurizdat [in Russian].

9 (1972). *Prikaz po Prokurature SSSR № 76 «O perestroike apparata prokuratury v tsentre i na mestakh» ot 25 marta 1934 h. Sovetskaia prokuratura. Sbornik vazhneishikh dokumentov [Soviet Prosecutor's Office: Collection of Essential Documents]*. Moscow: Hosiurizdat [in Russian].

10 (1934). Sbornik zakonov SSSR [Collection of laws and decrees of the workers 'and peasants' government of the USSR]. — No. 33 [in Russian].

11 Al'dikeev, A. (1981). *Na strazhe zakonnosti [Guard the rule of law]*. Alma-Ata: Kazakhstan [in Russian].

12 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 1380. Op. 3-liter. D. 53. L. 65 [in Russian].

13 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 6. L. 10 [in Russian].

14 Zimanov, S.Z. (1998). *Teoriia i praktika avtonomizatsii v SSSR [Theory and practice of autonomy in the USSR]*. Almaty: Zheti zharhy [in Russian].

15 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 1. L. 15, 16, 26, 30, 76, 77 [in Russian].

16 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 7. L. 99, 100 [in Russian].

17 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 10. L. 2 [in Russian].

18 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 34. L. 45 [in Russian].

19 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 107. L. 47, 48 [in Russian].

20 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 107. L. 55 [in Russian].

21 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 133. L. 124 [in Russian].

22 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 178. L. 160 [in Russian].

23 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 211. L. 156, 157 [in Russian].

24 The Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 213. L. 132 [in Russian].

25 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan. – F. 309. Op. 1. D. 211. L. 183–186 [in Russian].

26 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. F. 309. Op. 1. D. 1. L. 15, 16, 26, 30, 76, 77 [in Russian].

27 (1970). *Obzor raboty orhanov prokuratury za ispolneniem zakonodatelstva ob okhrane hruzov na zheleznodorozhnom transporte [Overview of the work of prosecution authorities in the implementation of legislation on the protection of goods in rail transport]*. Moscow: Hosiurizdat [in Russian].

28 (1979). Zakon «O Prokurature SSSR» ot 30 noiabria 1979 hoda [Law «On the Prosecutor's Office of the USSR» dated November 30, 1979]. *Vedomosti Verkhovnoho Soveta SSSR — Vedomosti of the Supreme Soviet of the USSR, No. 49,* Art. 843 [in Russian].

29 (1989). *Sovetskii entsiklopedicheskii slovar [Soviet Encyclopedic Dictionary]*. Moscow: Sovetskaia entsiklopediia [in Russian].

30 Tsentralnyi hosudarstvennyi arkhiv Respubliki Kazakhstan [The Central State Archive of the Republic of Kazakhstan]. (F. 309, Op. 1, D. 151, Sv. 20, L. 139, 140; D. 221, Sv. 29, L. 156, 157; D. 231, Sv. 30, L. 160, 161; D. 149, Sv. 32, L. 172, 173; D. 274, Sv. 27, L. 144, 145; D. 287, Sv. 34, L. 128, 129 [in Russian].

31 Konstitutsiia (Osnovnoi Zakon) Kazakhskoi Sovetskoi Sotsialisticheskoi Respubliki ot 20 aprelia 1978 hoda [Constitution (Basic Law) of the Kazakh Soviet Socialist Republic of April 20, 1978]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/Document/? doc_id=1027292#pos=1;-123 [in Russian].

32 (1986). *Kompetentsiia transportnoho prokurora [Competence of the transport prosecutor]*. Moscow: Vsesoiuznyi institut po izucheniiu prichin i razrabotke mer preduprezhdeniia prestupnosti [in Russian].

33 Malinovskij, V. (1996). Prezident Respubliki i sovershenstvovanie hosudarstvennoi vlasti [President of the Republic and the improvement of state power]. *Kazakhstanskaiia pravda. — 22 avhusta — Kaz true,* 22 avhusta [in Russian].

34 (1997). *Sbornik normativno-pravovykh aktov o Prokurature Respubliki Kazakhstan [Collection of regulatory legal acts on the prosecutor's office of the Republic of Kazakhstan]*. Almaty [in Russian].

35 Kim, Yu. (1996). Novuiu konstitutsiiu predlozhila zhizn [Life proposed a new constitution]. *Kazakhstanskaiia pravda. — 16 avhusta — Kaz true,* 16 avhusta [in Russian].

# ЭКОЛОГИЯЛЫҚ ҚҰҚЫҚ
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[1]A.B. Sopykhanova, [1]L.S. Shoshayeva, [2]B.A. Zhussipova

*[1]Karaganda Economic University of Kazpotrebsoyuz, Kazakhstan;*
*[2]L.N. Gumilyov Eurasian National University, Nur-Sultan, Kazakhstan*
*(E-mail: sopyhanova09@mail.ru, keukonf2012@mail.ru, bakyt-enu@yandex.kz)*

## Revisiting the concept of a recreational zone

The article analyses various scientists' points of view, as well as the legislation of Russia, Kazakhstan and Belarus, which regulates the legal status of recreational areas. The aim of the research work is the study of the effectiveness of environmental legislation in terms of the grounds for the emergence and registration of the right of recreational natural resources management, the analysis of legislation on recreational nature management and the identification of the peculiarities of this legal phenomenon, the development of recommendations and proposals aimed at improving environmental law. The method logical basis of the study is the modern doctrine of the interaction of economics and the environment, constitutional provisions in the field of nature management and environmental protection. In the work, general scientific methods were used: comparative legal, logical, systemic and historical methods. The novelty of the article lies in the fact that a definition of the right of recreational nature management is given and its classification is developed, a system of principles of the right of recreational nature management is developed, the place of norms on recreational nature management in the system of environmental law of the Republic of Kazakhstan is determined, the state-legal mechanism in the field of recreational nature management is studied, and also the ways to improve it were proposed, a comparative analysis of the legislation of the countries of the near abroad in the field of creation nature management is made. As a result, the author argues the conclusion that there is a need to regulate the use of existing terms. In this regard, a recreational zone should be understood as a part of the natural environment (natural habitat) or human environment (artificial environment), intended for recreation, restoration of the population's forces.

*Keywords:* land plot, recreation area, forest parks, beaches, resorts, body of water, specially protected natural areas, recreation areas, tourism, safari tourism.

### *Introduction*

With the acquisition of state independence by the Republic of Kazakhstan in 1991 and the proclamation of the transition to a market economy, the need for transforming nature management relations arose, adapting them to market conditions, creating legal, economic and organizational conditions for the equal development of all forms of ownership and derivatives of nature management rights, protecting rights to natural resources of citizens and legal entities. As a result of this, the composition of the subjects of nature management relations on natural resources has fundamentally changed in the Republic, new types of property rights to natural resources have arisen. However, the problem of rational use of natural resources and environmental protection has remained to this day. «... over the course of many decades, Kazakhstan has developed a predominantly resource-based environmental management system with extremely high technogenic environmental loads. Therefore, a radical improvement of the environmental situation has not yet occurred and it is still characterized by the degradation of natural systems, which leads to the destabilization of the biosphere and the loss of its ability to maintain the quality of the environment necessary for the life of society».

Preservation of a favorable natural environment is an important task at this stage of development of our state. This statement is fixed at the constitutional level. So, Article 31 of the Constitution of the Republic of Kazakhstan states: «The state sets the goal of protecting an environment favorable to human life and health». It is easy to imagine a thriving economy in which people from year to year become sicker as a result of an incorrect approach to their health and a polluted environment. As we build our society, we must apply increasing efforts to ensure that our citizens are healthy throughout their lives and are surrounded by a healthy natural environment. Our strategy to achieve this goal consists of the following components: prevention of diseases and promotion of a healthy lifestyle. World experience shows that the most important factor affecting the health of the population of countries is the state's steps to prevent disease, on the one hand, and to stimulate a healthy lifestyle, on the other. Disease prevention involves the use of clean water and healthy food, the availability of treatment systems, the reduction of facilities that pollute the

So, at the present stage, the preservation of the of Kazakhstan people's health and the protection of the environment are becoming the dual goal of our state.

Creating conditions for a complete rest of the population of the Republic of Kazakhstan is one of the tasks to achieve this goal. This opportunity is provided by the use of the natural environment for recreation and tourism, namely, the right of recreational nature management.

The objects of research in this case are legislative and other regulatory legal acts in the field of recreational nature management and the practice of their application.

The purpose of the study is to study the issues of the effectiveness of environmental legislation in terms of the grounds for the emergence and execution of the right of recreational nature use, analysis of legislation on recreational nature use and the identification of the features of this legal phenomenon, the development of recommendations and proposals aimed at improving environmental law.

Based on the purpose of the study, the author sees its achievement by solving the following tasks:

– explore the environmental legislation of the Republic of Kazakhstan from the moment of the formation of the Republic of Kazakhstan as a sovereign state to the present and identify the main stages of its development;

– assess the state of existing environmental legislation in relation to recreational nature management and the practice of its application in order to identify shortcomings and gaps in legal regulation;

– consider the concept and content of the right of recreational nature management in accordance with the legislation of the Republic of Kazakhstan and formulate its optimal definition;

– identify the principles of the right of recreational nature management;

– determinethe placeoftherightofrecreationalnaturemanagementinthesystemofenvironmentallaw;

– explore the state-legal mechanism in the field of recreational environmental management;

– to conduct a comparative analysis of the legislation of the countries of the near abroad in the field of recreational nature management;

– on the basis of the study, develop theoretical provisions and recommendations aimed at improving environmental legislation, as well as the practice of its application.

Conclusions, suggestions and recommendations contained in the paper are both theoretical and practical importance and can be used in the determination and the basic directions of legislative activity in the field of environmental management, in improving the work of the executive authorities and management, management of enterprises and organizations carrying out their activities in recreational areas.

*Methods and materials*

The methodological basis of the study is the modern doctrine of the interaction of economics and the environment, constitutional provisions in the field of nature management and environmental protection.

In the work, general scientific methods were used: comparative legal, logical, systematic and historical methods.

In formulating the theoretical principles, the author relied on the works of domestic and foreign leading legal scholars in the field of the general theory of law, environmental science, and administrative law.

The works of ecologists, economists, representatives of other branches of knowledge, who studied environmental problems were used in the paper.

When conducting the study, the author was guided by the provisions of the Constitution of the Republic of Kazakhstan, the current environmental legislation, legislation on tourism, reviews, generalizations, and statistical reporting documents on recreational nature management were also used.

*Results*

In the last decade in the Republic of Kazakhstan, more and more attention has been paid to the development of leisure and tourism in the Republic. In accordance with the Concept for the Tourism Industry Development of the Republic of Kazakhstan dated June 30, 2017, recreational zones of two large regions are actively developing, in which two capital cities of Kazakhstan are located (the old one is Almaty and the new is Astana), which is due in the first case to the proximity of the Great Silk Road (Almaty is nodal complex of the tourism system of the Silk Road part), in the second — the proximity of the Shchuchinsko-Borovskayaresort zone, the Kurgaldzhino nature reserve [1].

Taking into account the growing interest in the legal provision of tourism and recreation, the need for a more detailed and thorough study of the conceptual apparatus of the Institute of Recreational Nature Management arose. Moreover, the development of the concept of «recreational zone» is very relevant, since in our legislation there is no official definition of a recreational zone, although there are references to recreational zones and recreational activities.

So, in the Law of the Republic of Kazakhstan «On Architectural, Urban Planning and Construction Activities in the Republic of Kazakhstan» dated July 16, 2001 the purpose of the recreational areas in the settlements is indicated. According to Article 51 of this law, recreational areas in settlements are intended for the organization and arrangement of recreation facilities for the population and include gardens, forest parks, parks and squares, zoos, ponds, beaches, water parks, landscape architecture, other places of recreation and tourism, as well as buildings and facilities for leisure and (or) recreational purposes. Protected natural sites located within the boundaries (lines) of the settlement may be included in the recreation area. On the territory of the recreational zone the placement (construction) of new and expansion of existing industrial, communal and storage facilities, buildings and structures for civil purposes, not directly related to the functioning of the recreational zone are not allowed [2].

The government rules and regulations, concerning the development of tourism and recreation in Astana and Almaty, stipulate the creation of recreational areas, the development of a comprehensive urban program for the development of recreational infrastructure to serve the new economic sector of these cities — tourism. The aim of this program is to create a new efficient sector of the city's economy, using the potential of the historical and cultural heritage and the unique natural environment of the city and able to radically solve the financial problems of preserving, restoring and renewal the historical heritage and natural potential [3]. As a matter of fact, the mention of recreational areas is limited only by these normative acts.

*Discussion*

The Law of the Republic of Kazakhstan «On Specially Protected Natural Areas» of July 7, 2006 refers to the recreational load, recreational activities, recreational lands [4]. Land of recreational purposes in the Land Code of the Republic of Kazakhstan dated June 20, 2003 is considered in more detail. So, according to Article 126 of the Land Code of the Republic of Kazakhstan dated June 20, 2003, lands destined for recreational purposes are recognized as lands intended and used for organized public recreation and tourism. The structure of recreational land may include land on which there are rest houses, boarding houses, campsites, physical education and sports facilities, tourist camps, stationary and tent tourist camps, houses of fishermen and hunters, forest parks, hiking trails, trails, children's and sports camps, other similar facilities. Lands of recreational purposes also include the lands of suburban green areas [5]. As for the fundamental regulatory legal act in the field of use and environmental protection that is the Environmental Code of the Republic of Kazakhstan dated January 9, 2007, it does not only lack the concept of «recreational zone», but it does not even fix the environmental requirements for recreational lands.

So, in Environmental Code of the Republic of Kazakhstan there is Article 212 «Environmental requirements for the use of lands of specially protected natural territories and recreational lands», however, in addition to the indicated categories of lands in Kazakhstan, they are allocated as an independent category of recreational lands [6]. As you can see, there is a conceptual «vacuum» in the legal regulation of the institution of recreational environmental management. To eliminate this situation, it is necessary, first of all, to develop the concept of «recreational zone». The word «recreation» is of Latinorigin.

Recreation is recovery. Recreation is a rest, a restoration of human forces expended in the process of labor. «Zone» in Greek means belt. Here it is meant a strip, the space between any boundaries; territory, site of something characterized by certain signs [7; 1008]. Thus, a recreation zone is a territory, a site intended for recreation, restoration of human strength. In the legal literature, attempts have been made to determine the recreational area [8; 115].

V.V. Petrov, Dzhurovich M., Rode G., and others developedthe following definition: «recreational zones are natural or cultivated areas of land or water that are intended for organized or mass recreation or tourism of the population». This opinion is shared by B.V. Erofeev [9; 208].

In our opinion, this definition is not complete enough, since it does not include subsoil areas that are used for recreational purposes. For example, in paragraph 2 of Article 77 of the Law of the Republic of Kazakhstan «On Specially Protected Natural Areas» dated July 7, 2006, so-called geomorphological objects are indicated as terraces, floodplains, caves, gorges, canyons, waterfalls and other relief forms that clearly reflect the processes of relief formation and of particular value for tourism and recreation. Later V.V. Petrov proposed the following definition: recreation zones are a part of the environment used for recreation and tourism, including green, resort, health-improving zones [10; 431].

We also consider it insufficiently complete, since V.V. Petrov used the term «environment» in the definition, although he himself understands it as that part of the natural environment that has been transformed as a result of human activity. Consequently, in the definition of the recreational zone, only natural areas in settlements are indicated and areas of the natural habitat are not reflected. And we know that recreational areas are an integral part of national natural and regional natural parks. In our opinion, it should be indicated — «part of the space of the natural environment», since this concept is broader and includes both the natural habitat and the human environment. The legislation of some CIS countries defines the recreational area. So, in the Town Planning Code of the Russian Federation of December 29 , 2004 N 190-ФЗ the so-called recreational zones are indicated, which may include zones within the boundaries of territories occupied by city forests, squares, parks, city gardens, ponds, lakes, reservoirs, beaches, as well as within the boundaries of other territories used and intended for recreation, tourism, physical education and sports [11]. In accordance with the Law «On Architectural, Urban Planning and Construction Activities in the Republic of Belarus», recreational zones of settlements are territories intended for organizing places of recreation for the population and include parks, city forests, forest parks, beaches and other leisure and tourism facilities [12]. In the above two cases, the recreation area is considered as an integral part of the settlement, i.e. located within the city limits. In the Law of Ukraine «On Environmental Protection» dated June 25, 1991, a different concept of a recreation zone is given: «a recreation zone is land or water areas intended for organized mass recreation and tourism» [13]. In this case, the recreation area is considered as an integral part of the natural environment. It is worth mentioning another interpretation of the recreational area. Recently, many businessmen have been considering the recreational area as that part of the business center that is specially allocated for the rest, primarily of employees working in it [14].

Thus, the recreational area here is a completely artificial environment, with which we do not agree. Some scholars reject the concept of «recreational area» and propose replacing it with the term «recreational territory». For example, L.A. Samusenko believes that «the more acceptable general term for designating places intended for recreational use is the term natural recreational territories [15; 97] , and not «zones», «lands», etc. The preference for using the definition of «territory» is confirmed by an analysis of legal literature, as well as legislation on specially protected natural territories, urban planning legislation, in which it is widely used».

In contrast to this opinion, we believe that the term «recreational zone» is more preferable than «recreational territory», since the concept of «zone» involves not only the use of a territorial attribute, but also the establishment of a special regime of use and protection. In addition, the concept of «recreational land» has already been established in the legislation of the Republic of Kazakhstan, and some authors identify these two concepts. So, I.I. Pyrozhnik and V.M. Zaitsev consider recreational territories as lands acting as recreational lands, occupied by tourist complexes, infrastructure enterprises and communications, related to their maintenance, possessing resource potential, but do not clearly determine their composition [16; 54]. Some authors, when determining the composition of recreational territories, in spite of the fact that they distinguish recreational zones as independent objects, indicate as a constituent part precisely «land» and not «territory». So, according to A.G. Bobkova natural recreational territories — territories suitable for organizing recreation for the population, renewing vitality and human energy, recognized as such in the manner prescribed by law, the regular use of which is possible in the implementation of recreational activities [17; 64]. Itrefers:

– health, recreational, historical and cultural lands;

– plots of land for environmental purposes, having a regime of recreational use;

– separate plots of land of forest and water resources suitable for recreational use;

– certain land plots of settlements with recreational purposes (parks (culture and recreation, regional, sports, children's, historical, memorial and others), public gardens, boulevards, embankments, forest parks, meadow parks, water parks, gardens of residential areas, etc.);

– other territories suitable for recreational use.

Some authors consider recreational areas as places that are ofmass organized recreation for the population. At the same time, they believe that «recreational territories may consist, firstly, of recreational lands proper and, secondly, of economic lands, that is, lands of various types of activity, but specializing in servicing recreants» [18; 129].

*Conclusions*

As one can see, the meaning of distinguishing an independent category of «recreational territories» is that this concept is broader than «recreational land», because for the recreation and the rest we use other categories of land, for example, recreational, historical and cultural land destination; separate plots of land of forest and water resources suitable for recreational use; lands of specially protected natural territories.

So, G.A. Potaev believes that «recreational areas should be considered as an integral part of a unified system of protected natural areas, including: specially protected natural areas — nature reserves, wildlife sanctuaries, nature monuments, wildlife migration corridors, protective areas (water protection, road, soil and windbreaks, sanitary protection zones, etc.); territories on which environmental and recreational functions are combined — national parks, green zones of cities; recreational areas — resorts, long and short-term recreation areas, tourist centers and routes [19; 123].

At the same time, the meaning of the concepts «recreational territory», «recreational zone» can be expanded due to the literal interpretation of the term «recreation» –rest, leisure time. And not only the natural environment, but also the artificial environment can be used for relaxation: any room with upholstered furniture, a winter garden, a smoking room, a restaurant, etc.

Summarizing all of the above, we believe that there is a need to streamline the use of the above terms. In our opinion, a recreational zone should be understood as a part of the natural environment (natural habitat) or human environment (artificial environment), intended for recreation, restoration of the population's energy.

Recreational areas can be divided into natural recreational areas and artificial recreational areas.

Recreational areas can be located not only on lands of recreational purposes, but also on lands of settlements, lands of health, historical and cultural purposes, lands of specially protected natural territories.

The concept of «recreational zones» is synonymous with the concept of «recreational territories», since the concepts of «zone» and «territory» are identified in dictionaries («Zone» in Greek means a belt. It means a strip, the space between any boundaries; territory, site of something characterized by certain signs).

Analysis of the environmental and other legislation of the Republic of Kazakhstan shows that it is necessary to adopt new regulations and supplement existing ones.

Firstly, in the Environmental Code of the Republic of Kazakhstan in the conceptual apparatus there is no definition of a recreation zone. In our opinion, such a definition should be included in Article 1 of this law.

Secondly, this definition should be indicated in the Law of the Republic of Kazakhstan «On Architectural, Urban Planning and Construction Activities in the Republic of Kazakhstan» dated July 16, 2001.

Thirdly, the Code of the Republic of Kazakhstan on people's health and the healthcare system of September 18, 2009 should be supplemented and the definition of a recreational zone should be included in the conceptual apparatus.

References

1 Об утверждении Концепции развития туристской отрасли Республики Казахстан до 2023 года. Постановление Правительства Республики Казахстан от 30.06.2017 г. [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/P1700000406

2 Закон Республики Казахстан «Об архитектурной, градостроительной и строительной деятельности в Республике Казахстан» от 16.07.2001 г. [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/ docs

3 Указ Президента Республики Казахстан «О реализации Ташкентской декларации глав тюрко-язычных государств, проекта ЮНЕСКО и Всемирной туристской организации по развитию инфраструктуры туризма на Великом шелковом пути в Республике Казахстан» от 30.04.1997г. [Электронный ресурс]. — Режим доступа: http://online.zakon.kz

4 Закон Республики Казахстан «Об особо охраняемых природных территориях» от 07 07.2006 г. [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/ docs

5 Земельный кодекс РК от 20 июня 2003 г. [Электронный ресурс]. — Режим доступа: https://kodeksy-kz.com

6 Экологический кодекс РК от 9 января 2007 г. [Электронный ресурс]. — Режим доступа: http://online.zakon.kz

7 Советский энциклопедический словарь. — М.: Сов. энцикл., 1979. — 1128 с.

8 Правовая охрана окружающей природной среды в странах Восточной Европы. — М.: Высш. шк., 1990. — С. 311.

9 Ерофеев Б.В. Экологическое право России: учеб. / Б.В. Ерофеев. — 2-е изд., перераб. и доп. — М.: Юристъ, 1996. — С. 518.

10 Петров В.В. Экологическое право России / В.В. Петров. — М.: Бек, 1995. — 537 с.

11 Градостроительный кодекс Российской Федерации от 29.12. 2004 г. [Электронный ресурс]. — Режим доступа: www.consultant.ru

12 Закон Республики Беларусь «Об архитектурной, градостроительной и строительной деятельности в Республике Беларусь» от 5 июля 2004 г. [Электронный ресурс]. — Режим доступа: https://online.zakon.kz

13 Закон Украины «Об охране окружающей природной среды» от 25 июня 1991 г. [Электронный ресурс]. — Режим доступа: http://online.zakon.kz

14 Рекреационная зона — место особого назначения [Электронный ресурс]. — Режим доступа: http://www.cre.ru/journalnews/1096/

15 Самусенко Л.А. Правовое понятие и состав природных рекреационных территорий / Л.А. Самусенко // Право и демократия: сб. науч. тр. — Спец. вып. — Минск: БГУ, 2006. — С. 207.

16 Пирожник И.И. Рекреационные ресурсы БССР и проблемы их рационального использования/И. И. Пирожник, В. М. Зайцев // Природные и социально-экономические условия Белорусской ССР: науч. сооб. по Программе XXV Междунар. геогр. конгр. / под общ. ред. Н.Т. Романовского, В.М. Широкова. — Минск: Высш. шк., 1984. — 238 с.

17 Бобкова А.Г. Правовое обеспечение рекреационной деятельности / А.Г. Бобкова. — Донецк: Юго-Восток, 2000. — 327 с.

18 Нефедова В.Б. Рекреационное использование территорий и охрана лесов / В.Б. Нефедова. — М.: Лесная промышленность, 1981. — 293 с.

19 Потаев Г.А. Рекреационные ресурсы Беларуси: современное состояние, проблемы и перспективы использования / Г.А. Потаев // Природные ресурсы. — 2000. — № 3. — С. 123–125.

А.Б. Сопыханова, Л.С. Шошаева, Б.А. Жусипова

## Рекреациялық аймақтың түсінігі жөніндегі кейбір мәселелер

Мақалада рекреациялық аймақтың құқықтық мәртебесін реттейтін Қазақстан және Беларусь, Ресей заңдылықтары мен әр түрлі ғалымдардың көзқарастарына талдау жасалған. Зерттеудің мақсаты рекреациялық табиғат пайдалану құқығының пайда болуы мен рәсімделуіне байланысты экологиялық заңнамалардың тиімділігі мәселелерін зерттеу, рекреациялық табиғат пайдалану туралы заңнамаларына талдау жасау және осы құқықтық құбылыстың ерекшелігін анықтау, экологиялық құқық нормаларды жетілдіруге бағытталған әдістемелер мен ұсыныстарды өңдеу болып табылады. Зерттеудің әдістемелік негізі қоршаған орта мен экономиканың арақатынасы туралы қазіргі кездегі ілімдер, қоршаған ортаны қорғау мен табиғатты пайдалану саласындағы конституциялық ережелер болып табылады. Жұмысты жазу барысында жалпы әдістемелік ғылыми-танымдық сипаттағы салыстырмалы-құқықтық, қисындық, тарихи, жүйелік және басқа да әдістер қолданылды. Мақаланың зерттеу жаңалығы рекреациялық табиғат пайдалану құқығына анықтама берілуі және оның жіктелу негіздерінің өңделуі, рекреациялық табиғат пайдалану құқығы қағидаларының жүйесін ұсыну, Қазақстан Республикасы экологиялық құқық жүйесіндегі рекреациялық табиғат пайдалану туралы нормалардың алатын орнының анықталуы, рекреациялық табиғат пайдалану саласындағы мемлекеттік-құқықтық механизмі зерттеліп, сондай-ақ, оны жетілдіру жолдарының көрсетілуі мен кейбір шетел мемлекеттерінің рекреациялық табиғат пайдалану құқығы саласындағы заңнамаларына салыстырмалы талдау жасалынып, рекреациялық табиғат пайдалану қатынастарын құқықтық реттеу саласында экологиялық заңдарды жетілдіру бойынша ұсыныстар мен нұсқаулар ұсынылған. Нәтижесінде автор қолданыстағы терминдердің қолдануды оңайлату қажеттілігі туралы тұжырым жасайды. Осыған байланысты рекреациялық аймақты демалуға, халықтың күшін қалпына келтіруге арналған табиғи орта (табиғи тіршілік ету ортасы) немесе адами орта (жасанды орта) бөлігі ретінде түсіну керек.

*Кілт сөздер:* жер учаскесі, рекреациялық аймақ, орман парктері, жағажайлар, курорттар, су кеңістігі, ерекше қорғалатын табиғи аумақтар, демалыс орындары, туризм, сафари туризмі.

А.Б. Сопыханова, Л.С. Шошаева, Б.А. Жусипова

## К вопросу о понятии рекреационной зоны

В статье проанализированы точки зрения различных ученых, а также законодательства России, Казахстана и Беларуси, регулирующие правовое положение рекреационных зон. Целью исследовательской работы является изучение вопросов эффективности экологического законодательства в части, касающейся оснований возникновения и оформления права рекреационного природопользования, анализ законодательства о рекреационном природопользовании и выявление особенностей этого правового явления, разработка рекомендаций и предложений, направленных на совершенствование норм экологического права. Методологической основой исследования являются современное учение о взаимодействии экономики и окружающей среды, конституционные положения в области природопользования и охраны

окружающей среды. В работе применялись общенаучные методы: сравнительно-правовой, логический, системный и исторический. Новизна статьи заключается в том, что дано определение права рекреационного природопользования и разработаны его классификация, система принципов права рекреационного природопользования, определено место норм о рекреационном природопользовании в системе экологического права Республики Казахстан, исследован государственно-правовой механизм в области рекреационного природопользования. Предложены пути его совершенствования, проведен сравнительный анализ законодательства стран ближнего зарубежья в области рекреационного природопользования. В результате авторы аргументируют вывод о необходимости упорядочения использования существующих терминов. В связи с этим под рекреационной зоной следует понимать часть окружающей природной среды (естественной среды обитания) либо окружающей человека среды (искусственной среды), предназначенную для отдыха, восстановления сил населения.

*Ключевые слова:* земельный участок, рекреационная зона, лесопарки, пляжи, курорты, водное пространство, особо охраняемые природные территории, зоны отдыха, туризм, сафари туризм.

## References

1 Ob utverzhdenii Kontseptsii razvitiia turistskoi otrasli Respubliki Kazahstan do 2023 hoda. Postanovlenie Pravitelstva Respubliki Kazakhstan ot 30.06.2017 h. [On approval of the Concept for the development of the tourism industry of the Republic of Kazakhstan until 2023. Resolution of the Government of the Republic of Kazakhstan dated 30.06.2017]. *adilet.zan.kz.* Retrieved from http: adilet.zan.kz/rus/docs/P1700000406 [in Russian].

2 Zakon Respubliki Kazakhstan «Ob arkhitekturnoi, hradostroitelnoi i stroitelnoi deiatelnosti v Respublike Kazakhstan» ot 16.07.2001 h. [The Law of the Republic of Kazakhstan «On Architectural, Urban Planning and Construction Activities in the Republic of Kazakhstan» dated July 16, 2001]. *adilet.zan.kz*. Retrieved from http://adilet.zan.kz/rus/ docs [in Russian].

3 Ukaz Prezidenta Respubliki Kazakhstan «O realizatsii Tashkentskoi deklaratsii hlav tiurko-yazychnykh hosudarstv, proekta YuNESKO i Vsemirnoi Turistskoi Orhanizatsii po razvitiiu infrastruktury turizma na Velikom shelkovom puti v Respublike Kazakhstan» ot 30.04.1997 h. [Decree of the President of the Republic of Kazakhstan «On the Implementation of the Tashkent Declaration of the Heads of Turkic-speaking States, a UNESCO project and the World Tourism Organization for the Development of Tourism Infrastructure on the Great Silk Road in the Republic of Kazakhstan» dated April 30. 1997]. *online.zakon.kz.* Retrieved from http://online.zakon.kz [in Russian].

4 Zakon Respubliki Kazahstan «Ob osobo okhraniaemykh prirodnykh territoriiakh» ot 7 07.2006 h. [The Law of the Republic of Kazakhstan «On Specially Protected Natural Territories» dated 07.07.2006]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/rus/ docs [in Russian].

5 Zemelnyi kodeks Respubliki Kazakhstan ot 20 iiunia 2003 hoda [The Land Code of the Republic of Kazakhstan dated June 20, 2003]. *kodeksy-kz.com.* Retrieved from https://kodeksy-kz.com [in Russian].

6 Ekolohicheskii kodeks Respubliki Kazakhstan ot 9 yanvaria 2007 h. [Environmental Code of the Republic of Kazakhstan from January 9, 2007]. *online.zakon.kz.* Retrieved from http://online.zakon.kz [in Russian].

7 *Sovetskii entsiklopedicheski slovar [Soviet encyclopedic dictionary]*. Moscow: Sovetskaia entsiklopediia [in Russian].

8 *Pravovaia okhrana okruzhaiushchei prirodnoi sredy v stranakh Vostochnoi Evropy [Legal protection of the environment in Eastern Europe]*. Moscow: Vysshaia shkola [in Russian].

9 Erofeev, B.V. (1996). *Ekolohicheskoe pravo Rossii [Environmental Law of Russia]*. Moscow: Yurist [in Russian].

10 Petrov, V.V. (1995). *Ekolohicheskoe pravo Rossii [Environmental Law of Russia]*. Moscow: Bek [in Russian].

11 Hradostroitelnyi kodeks Rossiiskoi Federatsii ot 29.12.2004 h. [Town-planning code of the Russian Federation dated 29.12. 2004]. *consultant.ru.* Retrieved from http://www.consultant.ru [in Russian].

12 Zakon Respubliki Belarus «Ob arkhitekturnoi, hradostroitelnoi i stroitelnoi deiatelnosti v Respublike Belarus» ot 5 iiulia 2004 h. [The Law of the Republic of Belarus «On Architectural, Urban Planning and Construction Activities in the Republic of Belarus» dated July 5, 2004]. *online.zakon.kz.* Retrieved from https://online.zakon.kz. [in Russian].

13 Zakon Ukrainy «Ob ohrane okruzhaiushchei prirodnoi sredy» ot 25 iunia 1991 h. [The Law of Ukraine «On Environmental Protection» dated June 25, 1991]. *online.zakon.kz.* Retrieved from http://online.zakon.kz.[in Russian].

14 Rekreatsionnaia zona — mesto osoboho naznacheniia [Recreational area is a place of special purpose]. *shhshhshh.cre.ru.* Retrieved from http://shhshhshh.cre.ru/journalneshhs/1096/ [in Russian].

15 Samusenko, L.A. (2006). Pravovoe poniatie i sostav prirodnykh rekreatsionnykh territorii [The legal concept and composition of natural recreational territories]. *Pravo i demokratiia: sbornik nauchnykh trudov.* Minsk: BHU [in Russian].

16 Pirozhnik, I.I., & Zajcev, V.M. (1984). Rekreatsionnye resursy BSSR i problemy ikh ratsionalnoho ispolzovaniia [Recreational resources of the BSSR and problems of their rational use]. Prirodnye i sotsialno-ekonomicheskie usloviia Belorusskoi SSR: nauchnye soobshcheniia po prohramme HHV Mezhdunar. heohr. konhressa. N.T. Romanovskogo, V.M. Shirokova (Eds.). Minsk.: Vysshaia shkola [in Russian].

17 Bobkova, A.G. (2000). *Pravovoe obespechenie rekreatsionnoi deiatelnosti [Legal support of recreational activities]*. Doneck: Jugo-Vostok [in Russian].

18 Nefedova, V.B. (1981). *Rekreatsionnoe ispolzovanie territorii i okhrana lesov [Recreational use of territories and forest protection]*. Moscow: Lesnaia promyshlennost [in Russian].

19 Potaev, G.A. (2000). Rekreatsionnye resursy Belarusi: sovremennoe sostoianie, problemy i perspektivy ispolzovaniia [Recreational resources of Belarus: current status, problems and prospects of use]. *Prirodnye resursy –Legal Technology, 3,* 123–125 [in Russian].

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S.K. Tussupbekova[1], B.A. Taitorina[2], G.T. Baisalova[3]

*[1]Baltic International Academy, Latvia, Riga, Latvia;*
*[2]M.Kh. Dulaty Taraz State University, Kazakhstan;*
*[3]Eurasian Law Academy named after D.A. Kunaev, Almaty, Kazakhstan*
*(E-mail: s.tussupbekova@kaznmu.kz)*

# On the question of the justification of the principles international legal protection of atmospheric air from pollution

The article analyzes modern scientific approaches to substantiating the system of principles of international legal protection of atmospheric air from pollution at the present stage of international cooperation of States. The object of the study is the social relations of the planetary scale on the development and implementation of the principles of international legal protection of atmospheric air. The implementation of scientific analysis and generalization is based on an array of normative and scientific material: international legal acts, acts of national law, acts of international organizations, research scientists of the world. The study based on the analysis of international legal acts revealed the specificity of the basic principles of international law. In the context of substantiation of the principles of international environmental law, the role of international intergovernmental conferences, which adopted declarations of principles at the international level, is defined. The results of the scientific debate on the problem of classification of the principles of international legal protection of the environment in General and international legal protection of atmospheric air from pollution in particular are summarized. Based on the analysis of a wide range of sources, it is proved that at the present stage there is no single comprehensive legal framework that determines the legal status of the principles of international environmental law. Many principles lack both clarity and legal consensus on their applicability and are not recognized in legally binding instruments. As a result of the study, conclusions were drawn about the need to adopt a global Covenant on the environment, in which the principles of international environmental law would be systematized.

*Keywords:* atmospheric air, principles, environment, pollution, Convention.

## *Introduction*

In 1980, the WHO Expert Committee defined a challenge for the future in the protection of atmospheric air from pollution: achieving a level at which specific pollutants do not produce an adverse effect [1; 16]. The international community, represented by international organizations, came to this conclusion as a result of almost 30 years of practice of international cooperation to prevent air pollution.

The European Conference on Atmospheric Pollution (France, 1964) updated the problem of the need for effective legal regulation of control of emissions of harmful substances into the atmosphere. The 1st International Clean Air Congress was held in 1966, and in 1968 the EU Committee of Ministers adopted the Declaration of Principles for Air Pollution Control, which marked the beginning of the process of forming a set of international legal principles for the protection of atmospheric air from pollution. Subsequently, the system of principles evolved in accordance with the efforts undertaken by countries to preserve the atmosphere for future generations.

The purpose of this article is to justify the system of principles of international legal protection of atmospheric air from pollution at the present stage of international cooperation between countries.

The object of the study is the social relations of the planetary scale on the development and implementation of the principles of international legal protection of atmospheric air.

The novelty of the study of the problem of substantiation of the principles of international legal protection of atmospheric air is due to the lack of scientific developments of this topic in the modern world practice of cooperation of countries.

## *Materials and methods*

The methodological basis of the study of the problem of substantiating the principles of international legal protection of atmospheric air was made up of general and special scientific methods: analysis and synthesis, formalization, logical, comparative analysis, historical and legal, scientific generalization, as well as the method of legal modeling.

The implementation of scientific analysis and generalization is based on an array of normative and scientific material: international legal acts, acts of national law, acts of international organizations, research by scientists from around the world. In view of the relevance of the protection problems, scientific studies were carried out by scientists who studied various aspects of the problems Allen M.R., Alverson K., Angell JK, Baideldinova DL, Bengston L., Blackmon M., Boville V., Bradley RS, Brinchuk M.M., Bryan F., Vinogradova S.V., Erkinbaeva L.K., Christianson GE, Christy JR, Crowley TJ, Lobl ES, Mitchell JF, Oldfield F., Gabitova R.Kh., Malysheva N.G.., Minnekaeva D.R., Minniakhmetova R.G., Ryzhenkova A.Ya., Spencer RW, Stott R.A., Victor DG, Weyant J. and others.

*Discussion*

An important part of the conceptualization of international legal protection of air from pollution is the justification of its principles — the basic ideas, guidelines that determine the content and directions of legal regulation. On the one hand, they express the laws of law, and on the other, they represent the most general norms that apply in the entire sphere of legal regulation and apply to all entities. These standards are either explicitly stated in law. or derived from the general meaning of laws. The principles of law determine ways to improve legal standards, acting as guiding ideas for the legislator. They are the link between the basic laws of development and functioning of society and the legal system [2; 55]. In the literature, legal principles are defined as the basic starting points that enshrine the objective laws of public life, the specific legal expression of the objectively existing socio-economic and political laws of social development [3; 215]. A more detailed definition of the principles of law is given by B. Grefrat: «A) principles are norms, they are not only political and legal points of the program or theoretical and legal generalizations of norms; b) principles are universal norms. Not all generally accepted norms are principles, but not all principles can only be universal norms; c) fundamental principles differ from other generally accepted norms in that they reflect certain basic laws of historical development; d) principles — peremptory norms. This means that all other norms must be brought into line with them; e) principles are not only a criterion for the validity of other norms, they are at the same time guiding provisions for the further development of international law, its specific norms that serve to disclose and implement these principles» [4; 109–111].

Thanks to the principles, the legal system adapts to the most important interests and needs of a person and society, and becomes compatible with them. We believe that the key to achieving the goals and objectives of international legal protection of atmospheric air from pollution, construction of its integrated and effective system is to comply It lines Peninsula, ie basic rules covering legal regulation procedures.

Features of the basic principles of international law are that they are, firstly, the most important, fundamental; secondly, the most general norms; thirdly, generally accepted norms. At the XXV session of the United Nations General Assembly (October 24, 1970), a Declaration on the principles of international law regarding friendly relations and cooperation between states in accordance with the UN Charter was adopted. This Declaration on the Principles of International Law governs 7 basic principles: the principle of non-use of threats or use of force against the territorial integrity or political independence of any state, or in any other way incompatible with the goals of the UN; the principle of resolving international disputes by peaceful means; the principle of non-interference in the internal affairs of any state; principle of international cooperation; the principle of equal rights and self-determination of peoples; principle of sovereign equality of states; the principle of conscientious fulfillment by states of obligations undertaken by them in accordance with the UN Charter. As you know, on August 1, 1975, the Final Act of the Conference on Security and Cooperation in Europe was signed in Helsinki, in which the number of basic principles increased to 10: the principles of inviolability of borders, the territorial integrity of states and respect for human rights and fundamental freedoms. The principles of international law are endowed with the following features, that is, they are: a) the normative basis of the entire international legal system; b) general; c) generally recognized; d) universal in scope, e) complex, e) imperative. In modern international law, they have been developed as fundamental norms — the principles of international legal protection of air from pollution, which can be classified into general, i.e. characteristic for any sphere of international relations, and special (otral), inherent exclusively to the group of public relations under consideration. The generally recognized principles are enshrined in the UN Charter, the Declaration on the Principles of International Law Relating to Friendly Relations and Cooperation in accordance with the UN Charter adopted by the UN General Assembly in 1970. (Declaration of 1970), in the Final Act of the Conference on Security and Cooperation in Europe (CSCE) 1975, in a number of Resolutions of the UN General Assembly and other international legal acts.

In the context of substantiating the principles of international environmental law, the role of such international intergovernmental conferences as the United Nations Conference on the Protection of the Human Environment (Stockholm, 1972) and the United Nations Conference on the Environment and Development (Rio de Janeiro, 1992), on which were adopted respectively the Declaration of Principles, containing 26 principles, the Declaration on Environment and Development», consisting of 27 principles. The specificity of declarations lies in the fact that most of the principles proclaimed in them belong to the category of principles-ideas that are not normative, but generalized, abstract in nature and contain a worldview meaning.

A similar conclusion was made by scientists about the non-normative nature of the principles of another document of one of the oldest and most respected international non-governmental organizations. Commission on Environmental Law of the International Union for Conservation of Nature and Natural Resources in 1995, a draft International Covenant on Environment and Development (by definition, some authors called Harty her on Environment and Development), as a variant of informal codification of international environmental law [5].

However, the Declaration of Rio de F and Neuro (1992) contains a number of legal principles, the provisions of which are used in as specific measures and commitments in the form of certain international agreements: cooperation in countering the movement or transfer to other States of harmful for the environment and human activities and substances (Principle 14); taking precautions that mean that in the event of a serious or irreversible damage, lack of full scientific certainty should not be used as an excuse to delay the adoption of cost-effective measures to prevent environmental degradation (Principle 15); environmental impact assessment as a national instrument for proposed activities that may have an adverse environmental impact (Principle 17); sending notifications and relevant information to interested states or conducting consultations with them regarding activities that may have potentially adverse transboundary consequences (Principle 19); immediate notification of other states of any natural disasters or other emergency situations that could lead to unexpected harmful consequences for the environment in these states (Principle 18); assistance to States affected by the consequences of disasters and situations referred to in paragraph 5 (Principle 18) [6].

The main meaning of Principle 6 on the cessation of environmental emissions of toxic substances and other substances, as well as heat of the Stockholm Declaration (1972) is reflected in the contents of the 1979 Convention on Long-Range Transboundary Air Pollution, the 1985 Vienna Convention for the Protection of the Ozone Layer and the Convention (framework) on 1992 climate change.

The doctrine of international law contains sources containing various approaches to substantiating the substantive and quantitative assessment and classification of the principles of international legal environmental protection in general and international legal protection of atmospheric air from pollution in particular.

The industry (special) principles of international environmental law recognize the principle of ensuring compliance with constitutional environmental human rights; the principle of inadmissibility of causing transboundary damage; the principle of environmentally sound rational use of natural resources; the principle of inadmissibility of radioactive contamination of the surrounding country; the principle of protecting the ecological systems of the oceans; the principle of prohibition of military or any other hostile use of means of influence on the environment; the principle of environmental safety; the principle of international legal responsibility of states for damage to the environment; principle of precaution or precautionary approach [7; 236].

The most comprehensive list of industry principles of modern international environmental law is presented by N.A. Sokolova: the right of everyone to a healthy and fruitful life in harmony with nature; the priority of environmental rights and human interests in the process of continuous socio-economic development; the inherent sovereignty of the state over natural (natural) resources; sustainable, i.e. environmentally sound, social and economic development; equal environmental safety (the ecological well-being of one state cannot be ensured at the expense of or in isolation from another or other states); prohibition of environmental aggression; regular exchange of information on the environmental situation at the national and regional levels; cooperation in environmental emergencies; monitoring compliance with agreed environmental requirements; peaceful resolution of disputes related to transboundary environmental impact; international liability and compensation for environmental damage caused by actions on the territory of a state under its jurisdiction or control, which led to damage outside this territory [8; 112].

Experts in the field of international environmental law focus on the principle of x -norm s of international environmental law (§ The principle s 21, 22 and 24 of the Stockholm Declaration and n The principle s 11, 13, 26 and 27 of the Declaration of Rio — Janeiro) [9; 45].

An analysis of various sources shows that at the present stage there is no single comprehensive regulatory framework that defines what can be considered generally applicable norms and principles in international environmental law. Meanwhile, the definition and justification of these principles will become the basis for unification of the current sectoral approach to international environmental protection law and filling gaps and conflicts in the system of norms and provisions of international treaties. In fairness, it should be noted that certain principles of the branch of international environmental law (including its part — protection of the atmosphere) are widely recognized today due to their inclusion in multilateral environmental agreements on specific issues and are confirmed by a number of international courts and tribunals. However, with respect to many other principles, there is a lack of clarity and legal consensus regarding their applicability, and they are not recognized in legally binding documents. This circumstance affects the predictability and application of sectoral environmental protection regimes [10].

With regard to the study of the implementation of norms, provisions, principles of international law for the protection of atmospheric air from pollution in national law, it is interesting to illustrate the rationale for the principles of protection of atmospheric air and the mechanism of their implementation on the example of the Russian Federation. Depending on the role of principles in the structuring of law, Russian scientists distinguish subinstitutional, institutional, sub-sectoral, sectoral, intersectoral and General legal principles of law [11; 5]. Ryzhenkov A. justifiably refers the principles of the law of protection of atmospheric air from pollution to the number of institutional, defining the main principles and directions of development of only one institution of environmental law, providing protection of atmospheric air. The Russian Federal law «On protection of atmospheric air» includes three groups of principles: 1) set the General legal principles of mandatory compliance with the legislation of the Russian Federation in the field of protection of atmospheric air, liability for violation of this law and the priority of protecting the life and health of present and future generations; 2) the principles of overlapping sectoral and cross-sectoral principles set out in art. 3 of the Federal law «On protection of the environment — ensuring favorable ecological conditions for life, labour and recreation person (duplicates the principle of providing favorable conditions of human activity from article 3 of the Federal law «On protection of the environment) and the principle of transparency, completeness and reliability of information on the state of atmospheric air, its pollution» (duplicates the principle of respect for the right of everyone to obtain reliable information about the state of the environment» from article 3 of the RF Law «On environmental protection», did not substantially adding to it); 3) principles of public administration in the field of atmospheric air protection, which have no analogues in art. 3 of the Federal law «On environmental protection» and indicate the specific security that is of air as a natural object, prevent the irreversible consequences of air pollution for the environment, mandatory state regulation of emissions of harmful (polluting) substances in atmospheric air and harmful physical impacts on it, as well as the principle of scientific validity, systematic and complex approach to the protection of atmospheric air and environment in General. The last three principles, according to the researcher, are the most complete institutional principles in the field of atmospheric air protection in the Russian Federation [12; 135].

During the debate, scientists from different countries propose various models and sets of principles for application in the field of international legal protection of air from pollution. It should be noted that when the proposals are inconsistent, researchers unanimously express the need to adopt a global environmental pact, which summarizes and codifies the principles of international environmental law in a single document [13]. The report of the UNGA Secretary General at the 73rd session on November 30, 2018 announced 9 basic principles of the industry of international environmental law that apply to all its sub-sectors: prevention; precautions; «The one who pollutes pays»; environmental democracy; cooperation; rights to a clean and healthy environment; sustainable development; common but differentiated responsibilities and related capabilities; the inadmissibility of regression and moving forward. These principles as a novelty of international environmental law are designed to help unify the modern industry approach in international environmental law. A comprehensive and unifying international document explaining all the principles of environmental law will help to increase their effectiveness and strengthen their application [10].

The principle of prevention has been firmly established as a norm of customary international law, having found support in relevant practice under numerous environmental agreements and major codification initiatives [14]. The precautionary principle stipulates that States should take precaution when making decisions or regarding possible omissions that could be harmful to the environment.

The principle «pays those who pollute» means that states are obliged not only to take measures to combat environmental pollution, but also to cooperate on issues of liability regimes.

The principle of environmental democracy as a whole is a combination of three elements: access to information, participation in the decision-making process and access to environmental justice.

The principle of cooperation accumulates the obligation to cooperate in the spirit of goodwill and global partnership to achieve this goal and contributes to the progressive development and dynamic transformation of contract law [15].

The right to a clean and healthy environment as a principle of environmental law. Perceived by the constitutions of 155 states of the world [16; 19].

Sustainable development principle — Sustainable development issues are included in the wider global strategy as a result of the adoption of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals.

The principle of common but differentiated responsibility and corresponding capabilities was developed in the process of applying the principle of justice in general international law. This principle applies to cases in which developed countries have contributed more to the emergence of a particular environmental problem and have greater ability to respond to environmental challenges. Depending on the terms of the agreement, they can: 1) operate with the categories of Parties that are developed and developing countries, and significantly more stringent obligations are imposed on developed countries, and much less burdensome obligations on developing countries and countries with economies in transition, and they are also entitled to receive financial and technical assistance or capacity-building support [17]; 2) use the principle of self-selection [18]; 3) the issue of differentiation should be decided on the basis of criteria such as the availability of financial and technical resources and the ability to take cost-effective measures to reduce environmental impact, regardless of whether a particular state is an exporter or importer, or whether this issue affects one or another state, or some other categories. The Paris Agreement states that in the context of climate change, differentiation is dynamic, not limited to specific parameters and should be considered taking into account differences in national conditions [19].

The principle of the inadmissibility of regression is a relatively new principle of environmental law. A consequence of the principle of the inadmissibility of regression is the principle of moving forward. The principle of the inadmissibility of regression is aimed at ensuring that environmental protection is not weakened, while the principle of moving forward is aimed at improving environmental legislation, including by increasing the level of protection, based on the most modern scientific knowledge.

## *Conclusion*

Thus, despite the high level of elaboration of the problems of international legal protection of atmospheric air from pollution, as well as a sufficient number of international legal acts to regulate the protection of the Earth's atmosphere, the specifics of the principles of protection of atmospheric air from pollution in the system of principles of international law is insufficiently studied. The need for the adoption of a global Pact on the environment, which would generalize and codify the principles of international environmental law, justified by many scientists of the world, has been accepted by international organizations, primarily the UN. The report of the Secretary General of the UNGA at its 73rd session on 30 November 2018 was the first document to systematize the 9 basic principles of the branch of international environmental law applicable to all its sub-sectors: prevention; precautions; «pays the one who pollutes»; environmental democracy; cooperation; the right to a clean and healthy environment; sustainable development; common but differentiated responsibilities and opportunities; and the inadmissibility of regression and progress.

In the modern period, the scientific approach to the need to conclude a universal Convention on environmental protection is relevant in order to prevent and reduce global environmental problems [20; 517]. Such a Convention would provide a comprehensive international legal regulation of all types of the natural environment, which are related to the protection of the atmosphere, water, natural resources, flora and fauna, and humanity on the planet Earth. Comprehensive protection of The earth's atmosphere is possible only if all countries agree to comply with international legal norms to ensure the protection of the atmosphere.

## References

1 Руководство по контролю качества атмосферного воздуха в городах / под ред. М.Дж. Сьюэсса и С.Р. Крэксфорда. — Копенгаген: Медицина, 1980. — 261 с.

2 Тайторина Б.А. Государственный контроль в конституционной системе разделения власти Республики Казахстан: моногр. — Алматы: ТОО «Ақ шағыл», 2011. — 396 с.

3 Хропанюк В.Н. Теория государства и права: учеб. пос. для высш. учеб. завед. В.Н. Хропанюк; под ред. В.Г. Стрекозова. — М.: Интерстиль, 2000. — 378 с.

4 Грефрат Б. О месте принципов в системе современного международного права / Б. Грефрат // Правоведение. — 1969. — № 2. — С. 109–111.

5 International Covenant on Environment and Development (1995) [International Covenant on Environment and Development]. — The World Conservation Union (IUCN).

6 Рио-де-Жанейрская декларация по окружающей среде и развитию. Принята Конференцией ООН по окружающей среде и развитию. Рио-де-Жанейро, 3–14 июня 1992 г. [Электронный ресурс]. — Режим доступа: https://www.un.org/ru/documents/decl_conv/declarations/riodecl.shtml (дата обращения: 05.12.2019).

7 Копылов М.Н. Введение в международное экологическое право: учеб. пос. / М.Н. Копылов. — М.: РУДН, 2009. — 267 с.

8 Соколова Н.А. Теоретические проблемы международного права окружающей среды / Н.А. Соколова. — Иркутск. Изд-во Иркут. ун-та, 2002. — С. 111–154.

9 Дикусар В.М. Международно-правовые проблемы охраны окружающей среды: дис. ... д-ра юрид. наук / В.М. Дикусар. — М., 2007. — 327 с.

10 Пробелы в международном экологическом праве и касающихся окружающей среды документах: к заключению Всемирного пакта о защите окружающей среды. Докл. Генерального секретаря ГА ООН на 73 сессии 30 ноября 2018 г. [Электронный ресурс]. — Режим доступа: https://wedocs.unep.org/bitstream/handle/20.500.11822/27070/SGGaps_RU.pdf?sequence=5&isAllowed=y (дата обращения: 05.12.2019).

11 Тирских М.Г. Место принципов права в системе российского права / М.Г. Тирских, Л.Ю. Черняк // Акад. юрид. журн. — 2009. — № 2. — С. 4–10.

12 Рыженков А.Я. Принципы охраны атмосферного воздуха и механизм их реализации / А.Я. Рыженков // Вестн. Том. гос. ун-та. Сер. Право. — 2017. — № 26. — С. 135–144. doi: 10.17223/22253513/26/15

13 «Global pact for the environment», preliminary draft [Electronic resource]. — 2017. — Access mode: https://perma.cc/L4PM-PTV2; Le club des juristes, White Paper: Global Pact for the Environment (2017). (Date of treatment: 05/12/2019).

14 Leslie Anne Duvic-Paoli. «Principle 2: prevention», in Jorge E. Viñuales, ed., The Rio Declaration on Environment and Development: A Commentary / Leslie Anne Duvic-Paoli and Jorge E. Viñuales. — Oxford University Press, 2015. — P. 107, 120–121.

15 Peter H. Sand. «Principle 27: cooperation in a spirit of global partnership» / Peter H. Sand // in Viñuales, ed., The Rio Declaration on Environment and Development. — 2015. — P. 617.

16 David R. Boyd. «Catalyst for change: evaluating forty years of experience in implementing the right to a healthy environment», in John H. Knox and Ramin Pejan, eds., The Human Right to a Healthy Environment. — Cambridge University Press, 2018. — P. 17–42.

17 Lavanya, Rajamani Differential Treatment in International Environmental Law. — Oxford University Press, 2006.

18 Международная организация гражданской авиации. Резолюция А39–3: Consolidated statement of continuing ICAO policies and practices related to environmental protection — Global Market-based Measure (MBM) scheme (CORSIA).

19 Christina Voigt and Felipe Ferreira. «Dynamic differentiation»: the principles of CBDR-RC, progression and highest possible ambition in the Paris Agreement» / Voigt Christina, Ferreira Felipe // Transnational Environmental Law. — 2016. — Vol. 5, No. 2.

20 Шарипова Л.Р. О международно-правовой охране атмосферы Земли и предотвращении изменения климата / Л.Р. Шарипова // Молодой ученый. — 2016. — № 25. — С. 515–518. — [Электронный ресурс]. — [Режим доступа: https://moluch.ru/archive/129/35689/ (дата обращения: 05.12.2019).

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## Ауаны ластанудан құқықтық қорғау қағидаларын негіздеудің мәселесі

Мақалада атмосфералық ауаны халықаралық-құқықтық қорғау қағидаттарын енгізу және планетарлық ауқым бойынша қоғамдық қатынастар зерттеу объектісі болып табылады. Ғылыми талдау мен қорытуды жүзеге асыру нормативтік және ғылыми материалдар: халықаралық-құқықтық актілер, ұлттық құқық актілері, халықаралық ұйымдар актілері, әлем ғалымдарының зерттеулеріне негізделді. Зерттеуде халықаралық-құқықтық актілерді талдау негізінде халықаралық құқықтың негізгі қағидаларының ерекшелігі анықталды. Халықаралық қоршаған орта құқығы қағидаларын негіздеу контексінде халықаралық деңгейдегі қағидалардың декларациялары қабылданған халықаралық үкіметаралық конференциялардың рөлі анықталды. Жалпы алғанда, қоршаған ортаны халықаралық-құқықтық қорғау және атмосфералық ауаны ластанудан халықаралық-құқықтық қорғау қағидаларын жіктеу мәселесі бойынша ғылыми өріс қорытындылары шығарылды. Дереккөздердің кең спектрін талдау негізінде дәлелденді: қазіргі кезеңде халықаралық экологиялық құқық қағидаларының құқықтық мәртебесін анықтайтын біртұтас кешенді нормативтік-құқықтық база жоқ. Көптеген қағидалар үшін олардың қолданылуына қатысты айқындық немесе заңдық консенсус жоқ және олар заңды күші бар құжаттарда мойындалмайды. Зерттеу нәтижесінде халықаралық экологиялық құқық қағидалары жүйеленетін жаһандық экологиялық пактіні қабылдау қажеттілігі туралы қорытынды жасалды.

*Кілт сөздер:* атмосфералық ауа, қағидалар, қоршаған орта, ластану, конвенция.

С.К. Тусупбекова, Б.А. Тайторина, Г.Т. Байсалова

# К вопросу об обосновании принципов правовой охраны атмосферного воздуха от загрязнения

В статье объектом изучения являются общественные отношения планетарного масштаба по разработке и внедрению принципов международно-правовой охраны атмосферного воздуха. Осуществление научного анализа и обобщение базируется на массиве нормативного и научного материала: международно-правовых актов, актов национального права, актов международных организаций, исследований ученых мира. В исследовании на основе анализа международно-правовых актов выявлена специфика основных принципов международного права. В контексте обоснования принципов международного права окружающей среды определена роль международных межправительственных конференций, на которых были приняты декларации принципов международного уровня. Подведены итоги научной полемики по проблеме классификации принципов международно-правовой охраны окружающей среды, в целом, и международно-правовой охраны атмосферного воздуха от загрязнения, в частности. На основе анализа обширного круга источников сделано заключение, что на современном этапе отсутствует единая всеобъемлющая нормативно-правовая база, определяющая правовой статус принципов международного права охраны окружающей среды. В отношении многих принципов отсутствует как четкость, так и юридический консенсус относительно их применимости, и они не признаны в имеющих обязательную юридическую силу документах. В результате исследования сделаны выводы о необходимости принятия Глобального пакта по окружающей среде, в котором принципы международного экологического права были бы систематизированы.

*Ключевые слова:* атмосферный воздух, принципы, окружающая среда, загрязнение, конвенция.

## References

1 Sewess, M.J. & Craxford, S.R. (1980). *Rukovodstvo po kontroliu kachestva atmosfernoho vozdukha v horodakh [Guidelines for air quality control in cities]*. Copenhagen: Meditsina [in Russian].

2 Taitorina, B.A. (2011). *Hosudarstvennyi kontrol v konstitutsionnoi sisteme razdeleniia vlasti Respubliki Kazakhstan [State control in the constitutional system of separation of powers of the Republic of Kazakhstan]*. Almaty: «Ak shahyl» LLP [in Russian].

3 Khropanyuk, V.N. (2000). *Teoriia hosudarstva i prava [Theory of state and law]* V.G. Strekozov (Eds.). Moscow: Interstil [in Russian].

4 Grefrat, B. (1969). O meste printsipov v sisteme sovremennoho mezhdunarodnoho prava [On the place of principles in the system of modern international law]. *Pravovedenie — Jurisprudence, 2,* 109–111 [in Russian].

5 International Covenant on Environment and Development (1995) [International Covenant on Environment and Development]. The World Conservation Union (IUCN).

6 Rio-de-Zhaneirskaia deklaratsiia po okruzhaiushchei srede i razvitiiu. Priniata Konferentsiiei OON po okruzhaiushchei srede i razvitiiu (1992) [Rio Declaration on Environment and Development. Adopted by the United Nations Conference on Environment and Development]. Rio de Janeiro. *un.org/en.* Retrieved from https://www.un.org/en/documents/decl_conv/declarations/riodecl.shtml (Date of treatment: 05/12/2019) [in Russian].

7 Kopylov, M.N. (2009). *Vvedenie v mezhdunarodnoe ekolohicheskoe pravo [Introduction to international environmental law]*. Moscow: RUDN [in Russian].

8 Sokolova, H.A. (2002). *Teoreticheskie problemy mezhdunarodnoho prava okruzhaiushchei sredy [Theoretical problems of international environmental law]*. Irkutsk: Izdstelstvo Irkutskoho universiteta [in Russian].

9 Dikusar, V.M. (2007). Mezhdunarodno-pravovye problemy okhrany okruzhaiushchei sredy [International legal problems of environmental protection]. *Doctor s thesis.* Moscow [in Russian].

10 Probely v mezhdunarodnom ekolohicheskom prave i kasaiushchikhsia okruzhaiushchei sredy dokumentakh: k zakliucheniiu Vsemirnoho pakta o zashchite okruzhaiushchei sredy. Doklad Heneralnoho Sekretaria HA OON na 73 sessii (2018) [Gaps in international environmental law and environmental documents: towards the conclusion of the World Covenant on Environmental Protection. Report of the Secretary General of the UN General Assembly at the 73rd Session]. *wedocs.unep.org.* Retrieved from https://wedocs.unep.org/bitstream/handle/20.500.11822/27070/SGGaps_RU.pdf? sequence=5&isAllowed=y((Date of treatment: 05/12/2019).

11 Tirskikh, M.G., & Chernyak, L.Yu. (2009). Mesto printsipov prava v sisteme rossiiskoho prava [The place of the principles of law in the system of Russian law]. *Akademicheskii yuridicheskii zhurnal — Academic Law Journal, 2,* 4–10 [in Russian].

12 Ryzhenkov, A.Ya. (2017). Printsipy okhrany atmosfernoho vozdukha i mekhanizm ikh realizatsii [The principles of atmospheric air protection and the mechanism of their implementation]. *Vestnik Tomskoho hosudarstvennoho universiteta — Bulletin of Tomsk State University. Law, 26,* 135–144. doi: 10.17223 / 22253513/26/15 [in Russian].

13 «Global pact for the environment», preliminary draft (2017). *perma.cc.* Retrieved from https://perma.cc/L4PM-PTV2; Le club des juristes, White Paper: Global Pact for the Environment (2017). (Date of treatment: 05/12/2019).

14 Leslie Anne Duvic-Paoli & Jorge E. Viñuales. (2015). «Principle 2: prevention», in Jorge E. Viñuales, ed., The Rio Declaration on Environment and Development: A Commentary. Oxford University Press.

15 Peter H. Sand, (2015). «Principle 27: cooperation in a spirit of global partnership», in Viñuales, ed., The Rio Declaration on Environment and Development.

16 David R. Boyd, (2018). *Catalyst for change: evaluating forty years of experience in implementing the right to a healthy environment*. John H. Knox & Ramin Pejan (Eds.). The Human Right to a Healthy Environment. Cambridge University Press.

17 Lavanya, Rajamani (2006). *Differential Treatment in International Environmental Law*. Oxford University Press.

18 Mezhdunarodnaia orhanizatsiia hrazhdanskoi aviatsii. Rezoliutsiia A39–3: Consolidated statement of continuing ICAO policies and practices related to environmental protection [International Civil Aviation Organization, resolution A39–3: Consolidated statement of continuing ICAO policies and practices related to environmental protection]. Global Market-based Measure (MBM) scheme (CORSIA) [in Russian].

19 Christina Voigt & Felipe Ferreira (2016). Dynamic differentiation»: the principles of CBDR-RC, progression and highest possible ambition in the Paris Agreement. *Transnational Environmental Law, Vol. 5,* No. 2.

20 Sharipova, L.R. (2016). O mezhdunarodno-pravovoi okhrane atmosfery Zemli i predotvrashchenii izmeneniia klimata [On the international legal protection of the Earth's atmosphere and the prevention of climate change]. *Molodoy uchenyi — Young scientist, 25,* 515–518. Retrieved from https://moluch.ru/archive/129/35689/ (Date of treatment: 05/12/2019) [in Russian].

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A.K. Rakhmetollov[1], A.S. Kizdarbekova[2], S.D. Bekisheva[1], L.T. Tyll[3]

*[1]Academy of Law Enforcement Agencies under the General Prosecutor's Office of the Republic of Kazakhstan, Kosshy, Kazakhstan;*
*[2]Ye.A. Buketov Karaganda State University, Karaganda, Kazakhstan;*
*[3]Advocacy, Prague, Czech Republic*
*(E-mail: askar-step87@mail.ru)*

# On the issue of responsibility of officials for violation of the rights of entrepreneurs

The article is devoted to analysis of the effectiveness of the response of officials of state bodies and organizations to violations of the rights of entrepreneurs, ensuring their protection. One of the key indicators for assessing the performance of officials is the appeal of business entities. The work focuses on the characteristic violations of the rights of entrepreneurs encountered in law enforcement practice, as well as on the problems of legislative regulation of the responsibility of perpetrators. Along with officials of various bodies and organizations, violations of the rights of entrepreneurs are allowed by the law enforcement officials. The provision of Article 32 of the Code of the Republic of Kazakhstan On Administrative Infractions, according to which the law enforcement officials for administrative offenses, committed in the performance of official duties, are liable in accordance with regulatory legal acts regulating the procedure for serving in the relevant authorities, requires appropriate attention. The work also concludes that at present there is a need to distinguish between the limits of administrative and criminal liability, to specify at the legislative level the categories as «Illegal interference in entrepreneurial activity», «Interfering with legal entrepreneurial activity», and «Corporate raiding».

*Keywords:* entrepreneur, entrepreneurship, business, violation of rights, harm, appeals, officials, law enforcement agencies, responsibility, legality.

## *Introduction*

The effectiveness of relations between public authorities with citizens and a person depends not only on the observance of the rule of law, but, appearing as a general social phenomenon, also depends on the discipline of subjects of managerial relations. Discipline is an effective tool in the formation of high organization and coordination of actions of subjects of government, state regulation. In this context, legality serves as the basis of discipline, as one of the requirements for protecting discipline is to comply with laws and other regulatory legal acts.

The practice of recent years shows that cases of direct violation of laws and cases of official inaction of officials that are contrary to the principles of official discipline have become more frequent, as a result, the victims are innocent citizens [1; 333, 334], business, turning to them to protect their rights and legal interests.

Of course, this negative trend is reflected in the investment attractiveness of our state, increasing the level of well-being of citizens, and the quality of their life. In this regard, the analysis of the effectiveness of the response of officials of state bodies and organizations to violations of the rights of entrepreneurs, ensuring their protection is relevant.

*Methods and materials*

When writing this work, general scientific and private scientific methods of cognition of social and legal phenomena, logical, systemic, analysis, comparative and legal, regulatory and logical methods of interpretation of legal norms were used.

*Results*

The analysis of the law enforcement practice of the Ombudsman for the Protection of the rights of Entrepreneurs, the National Chamber of Entrepreneurs, Courts and Law Enforcement Agencies has allowed the formation of a number of provisions and recommendations on them.

1) Appeals by entrepreneurs regarding the protection of their rights are currently one of the main ways to respond to violations.

2) The Code of the Republic of Kazakhstan on administrative infractions requires a review of the issue of administrative responsibility of law enforcement officials for violation of the rights of entrepreneurs (part 2 of article 32).

3) It is necessary at the legislative level to normatively define the category of «illegal interference in entrepreneurial activity». Since in addition to paragraph 4 of the Normative Decree of the Supreme Court of the Republic of Kazakhstan «On Certain Issues of the Application by Courts of the Norms of the Special Part of the Code of the Republic of Kazakhstan on Administrative infractions» № 7 of October 6, 2017, any other normative legal acts do not properly define this category, but the existing definition does not correspond to actual reality. According to the specified regulatory decision, Illegal interference by government officials may result in abuse of power or abuse of authority. Illegal interference is accompanied by the issuance of an act, giving instructions or another action, which were subsequently declared illegal in the prescribed manner.

4) Along with the definition of the category «illegal interference in entrepreneurial activity», the issues of responsibility for such criminal offenses as «Interfering with legal entrepreneurial activity» and «Corporate raiding», which, due to conflicts in legal norms and their lack of a clear definition in the legislation, have acquired latentcharacter, do not find the appropriate response from the criminal prosecution authorities.

5) Currently, the institution of property liability for illegal actions (inaction) and decisions of officials of state bodies, in general, and law enforcement agencies, in particular, which have caused harm to citizens and business entities, are not properly applied in practice. As a response to the current situation, a separate regulation is proposed in the civil procedure legislation of the judicial procedure for the consideration of these proceedings, bringing them to the category of cases of mandatory categories.

*Discussion*

*Appeals of entrepreneurs.* The Head of State K. Tokayev in his speech at the extended meeting of the Government of the Republic of Kazakhstan held on July 15, 2019, noted: «... Domestic business, the so-called national bourgeoisie should be supported in every possible way, and those who interfering with its development by unreasonable checks, requisitions, raiding must be strictly punished. Finally, it is time to criminalize the actions of state bodies and their representatives aimed at undermining business, to envisage strict measures in the legislation, including criminal prosecution, as is the case in a number of states. Officials who interfering with business development are sent to prison...» [2].

We share the opinion of N.A. Rudakova, who believes that the right to a complaint, first of all, ensures a citizen's personal interest in protecting his (her) violated right. At the same time, each satisfied complaint is not just protection of the violated right or legitimate interest of the individual; at the same time, it should serve the cause of correcting deficiencies in the operation of the apparatus, of those negative phenomena that contributed to the infringement of the rights of a citizen, and stop violations of the law.The analysis of appeals to various bodies allows us to formulate on their basis public opinion on certain issues, to draw appropriate conclusions about the state of affairs in a particular area of public and state life [3; 43].

The complaints, appeals of entrepreneurs are one of the indicators of the effectiveness of the state activity and its individual institutions.

Thus, according to the Ombudsman for the Protection of Entrepreneurs' Rights, in 2018, the business ombudsman and his office received 4,633 requests from entrepreneurs, of which 1978 were positively resolved. The largest number of requests from entrepreneurs received by the business ombudsman concerned: administrative barriers (6 %); investments, subsidies, loans (6 %); land (17 %); taxes (9 %); procurement (7 %); complaints to law enforcement agencies (8 %); proposals for legislation (5 %); architecture and

construction (4 %); trading activities (3 %); civil-legal disputes of entrepreneurs with other business entities, non-profit organizations and individuals (6 %); agro-industrial complex (4 %); other issues (25 %) [4].

Compared with 2017, in 2018 there is an increase in the number of complaints from entrepreneurs on illegal actions by law enforcement agencies by 78 % *(in 2017, the Ombudsman received 4 % (207) of 5195 complaints; in 2018, 8 % (370) of 4633 complaints).*

The available facts of restoring the rights of business entities and holding guilty officials of both state bodies in general and law enforcement agencies, in particular, indicate the presence of a number of unresolved issues in the analyzed area.

Based on the law enforcement practice of the Ombudsman for the Protection of the Rights of Entrepreneurs, the National Chamber of Entrepreneurs [13; 94], Courts and Law Enforcement Agencies, it follows that violations of the rights of entrepreneurs are allowed in all regions of our state.

Currently, the criminal process continues to be one of the vulnerable areas, as evidenced by the reporting data of investigating judges to consider complaints of actions (inaction) and decisions of the prosecutor and criminal prosecution authorities.

For example, in 2018, investigating judges examined 3066 complaints about actions (inaction) and decisions of the prosecutor and criminal prosecution authorities, of which 32 % (983) were satisfied, 1834 complaints were examined in the first half of 2019, of which 41 % (754) satisfied.

The analysis established such shortcomings in the law enforcement practice of law enforcement officials in the criminal process as: unreasonable refusal to register applications (relationships) in the Unified Register of Pre-trial Investigations; failure to ensure lawfulness, comprehensiveness, completeness of pre-trial investigation; the issuance of illegal, unreasonable and unmotivated procedural acts; non-compliance with the procedure for considering petitions of participants in criminal proceedings; failure to comply with the procedure for the seizure of material evidence, as well as the removal of the relevant encumbrances; unreasonable involvement in the orbit of criminal prosecution.

We are not saying that the work in the field of ensuring the protection of the rights of entrepreneurs in the criminal process is not carried out. Over the period from 2016 to 2019, the General Prosecutor's Office, together with authorized organizations, carried out significant work in this direction, the results of which were repeatedly announced at the forums on the development and protection of the rights of entrepreneurs held by the General Prosecutor's Office in conjunction with the National Chamber of Entrepreneurs.

Unfortunately, to date, corruption, lack of professionalism, low qualifications of employees, formalism, and bureaucracy are not the only facts that manifest themselves in government bodies.

According to I.N. Pustovalova, the process of democratization of the society, its de-ideologization, reduction of the material level of public servants, the lack of an adequate legislative framework governing public service at the present stage, are one of the reasons that contribute to the high prevalence of criminal manifestations in government bodies, further development of legal nihilism, both in government bodies and in society as a whole.

Qualitative changes in the essence of regulation of public service relations require the improvement of legal regulation methods, one of which is state coercion in the form of legal responsibility of civil servants. Not a single law, no matter how well developed it is, will not operate without well-established mechanism for its implementation and the application of responsibility for non-compliance with the rules established therein[5; 4, 126].

We share the above point of view of I.N. Pustovalova about the need to strengthen the responsibility of officials for damage caused by improper official actions.

*Responsibility of officials.* The current legislation of the Republic of Kazakhstan provides for liability of officials for violation of the rights of entrepreneurs.

Meanwhile, in our opinion, a number of institutions and legal norms governing the relevant issues of responsibility are declarative in nature and in fact do not find proper application.

According to the reporting information of the Agency of the Republic of Kazakhstan for Civil Service and Anti-Corruption Affairs in the direction of protecting business, the National Anti-Corruption Bureau (Anti-Corruption Service) only in 2018 prevented 260 facts from illegal interference by government agencies, 199 officials were involved, 104 were convicted, more 400 entrepreneurs were protected [6].

Such impressive data on illegal interference in business give rise to the need for an appropriate response from the state and its authorized bodies.

The current legislation of the Republic of Kazakhstan provides 4 directions for responding to illegal actions (inaction) of officials in relation to business entities:

– disciplinary responsibility;
– administrative responsibility;
– criminal responsibility;
– civil-legal (material, property) responsibility.

*Disciplinary and administrative responsibility.* In accordance with parts 1, 3, 4, article 32 of the Code of the Republic of Kazakhstan On Administrative Infractions (hereinafter — the Code of Administrative Infractions), law enforcement officers for administrative offenses committed in the performance of official duties are liable in accordance with regulatory legal acts governing the procedure for serving in the relevant authorities.

Bodies (officials) that are granted the right to impose administrative penalties, instead of imposing administrative penalties on the persons specified in parts one and three of the Code of Administrative Infractions, must transfer materials on offenses to the relevant authorities to resolve the issue of bringing the perpetrators to disciplinary liability [7].

Thus, for violation of the legislation of the Republic of Kazakhstan, entailing the imposition of administrative penalties, law enforcement officers are subject to disciplinary responsibility.

The exception is the cases provided by Part 2 of Article 32 of the Code of Administrative Infractions, when the above officials committed violations of the regime of the State Border of the Republic of Kazakhstan, the regime at checkpoints across the State border of the Republic of Kazakhstan and the customs border of Eurasian Economic Union, the legislation of the Republic of Kazakhstan on state secrets, the sanitary and epidemiological welfare of the population, the fire safety requirements, the traffic rules, the customs regulations outside the duty station, the legislation of the Republic of Kazakhstan on accounting and financial reporting, the budget and tax law of the Republic of Kazakhstan, the legislation of the Republic of Kazakhstan on public procurement, the rules of hunting, fishing, other rules and norms for rational use and protection of natural resources, the persons specified in part one of this Article shall bear an administrative liability on common basis. These persons cannot be subject to administrative sanctions in the form of deprivation of the right to carry and store firearms and cold arms and administrative arrest [7].

The Code of Administrative Infractions provides for a number of articles entailing administrative liability for illegal interference in entrepreneurial activity, violation of the procedure for conducting inspections.

Thus, Article 173 of the Code of Administrative Infractions is dedicated to the illegal interference of officials of state bodies exercising supervisory and control functions, as well as local executive bodies, in the activities of individual entrepreneurs, legal entities by issuing illegal acts and giving illegal orders that impede their entrepreneurial activity, and entails a fine for perpetrators in the amount of one hundred monthly calculation indices [7].

Based on the data of legal statistics on the facts of illegal interference of officials in entrepreneurial activity in 2016, under Article 173 of the Code of Administrative Infractions, 4 penalties were issued. In 2017 there was zero statistics. In 2018, 2 decisions were issued, 1 of which was terminated due to the lack of an administrative offense. In the first half of 2019 there was 1 resolution, which was terminated due to the lack of an administrative offense.

Compared with the previous period, these statistics on the facts of illegal interference by officials in entrepreneurial activity have significant differences.

So, earlier the Code of the Kazakh Soviet Socialist Republic on Administrative Infractions, adopted at the eighth session of the Supreme Council of the Kazakh Soviet Socialist Republic of the tenth convocation on March 22, 1984, contained article 169–4, which read as follows: «Illegal interference of officials of state bodies exercising supervisory and control functions, as well as akims of all levels and their deputies in the activities of citizens (individual entrepreneurs) and legal entities, including in the form of issuing illegal acts and giving illegal orders that impede their business, entails a fine in the amount of twenty to fifty sizes of the monthly calculation indicator established by law» [8].

In 2000, under the aforementioned article, 98 materials were submitted to the court, decisions (decisions) were issued in relation to 112 persons, of which: 97 were brought to administrative responsibility, administrative penalties were imposed; 4 — terminated in connection with the transfer of cases to the prosecuting authority; 11 — terminated due to other circumstances.

In our opinion the main reason for the current situation is the absence in the law on administrative offences, a clear understanding of the category of «illegal interference in entrepreneurial activity» and the limits demarcate areas of administrative and criminal liability, and the dispositions of the article the clause

«...performing Supervisory and control functions...», narrowing the circle of subjects, to whom, on aforementioned formal basis, the question of liability do not apply.

According to paragraph 4 of the Normative Decree of the Supreme Court of the Republic of Kazakhstan «On Certain Issues of the Application by the Courts of the Rules of the Special Part of the Code of the Republic of Kazakhstan on Administrative Infractions» No. 7 of October 6, 2017, the courts, when considering cases of administrative offenses under Article 173 of the Code of Administrative Infractions, should take into account that the cancellation of decisions on cases of administrative infractions in relation to business entities indicates illegal bringing them to administrative responsibility and may entail consequences provided by law. However, such a cancellation alone is not enough for the actions of the bodies (officials) that issued the canceled decisions to be indicative of an offense under Article 173 of the Code of Administrative Infractions. An official may not be blamed for the performance of his (her) official duties in the absence of evidence of illegal interference in entrepreneurial activity.

Illegal interference by government officials may result in abuse of power or abuse of authority. Illegal interference is accompanied by the issuance of an act, giving instructions or other actions that are subsequently declared illegal in the prescribed manner [9].

As previously noted, according to the results of 2018, 260 facts were suppressed in the direction of protecting the business by the Anti-Corruption Service from illegal interference by state bodies, 199 officials were brought to justice, 104 were convicted, and the rights of more than 400 entrepreneurs were protected.

Meanwhile, based on the information of legal statistics, the issue of bringing to responsibility the indicated at least 95 not convicted officials under Article 173 of the Code of Administrative Infractions was not initiated, which also indicates the presence of relevant problems in law enforcement.

We share the opinion of Davydova N.Yu. that the task of protecting the rights, freedoms and legitimate interests of citizens is also solved by the institution of responsibility of bodies and officials to the state [14; 48].

Taking into account that the transfer of consideration of the issue of bringing to administrative responsibility to the category of disciplinary proceedings applies to the persons specified in Article 32 of the Code of Administrative Infractions, among whom are law enforcement officials, these statistics indicate that there are problems with the enforcement of Article 173 of the Code of Administrative Infractions. To reveal the full potential of the application of this article, careful legislative revision is necessary, with consideration of the prospects for a corresponding extension of Part 2 of Article 32 of the Code of Administrative Infractions.

*Criminal liability.* In the scientific world, a number of scholars' works are devoted to the issue of criminal liability for infringement of the rights of entrepreneurs, which focus on such criminal offenses as «Corporate raiding» and «Interfering with legal entrepreneurial activity».

It should be noted that the practice of initiating criminal cases and brining to the justice the perpetrators of these criminal offenses is actually identical with the enforcement of Article 173 of the Code of Administrative Infractions. Currently, these standards have practically zero statistics.

For the period from 1998 to the 1st half of 2019, 17 cases were submitted to the courts under the article «Interfering with legal entrepreneurial activity», and under the article «Corporate raiding» from 2011 to the 1st half of 2019 — 2 cases.

We do not exclude the fact that illegal actions of perpetrators who infringe on the rights of business entities find a corresponding response. The current criminal law provides for such criminal offenses as «Abuse of official authorities» (Article 361 of the Criminal Code of the Republic of Kazakhstan, hereinafter — the Criminal Code), «Excess of powers or official authorities» (Article 362 of the Criminal Code), «Inaction on service» (Article 370 of the Criminal Code), «Negligence» (Article 371 of the Criminal Code) [10], for each of which there are certain statistical indicators.

Meanwhile, a number of criminal offenses that affect the rights of business entities are also associated with other areas (for example, criminal offenses against property, individuals, in the economic sphere and others), do not belong to the sphere of corruption and other criminal infractions against the interests of the state service and the state management.

Taking into account the specifics of the objects of criminal offenses to which the wrongful acts of the guilty persons are directed, we believe that the current practice does not fully correspond to the level of proper response to ensure the protection of the rights of entrepreneurs. This circumstance is associated with such elements of the criminal offenses as the objective and subjective parties, which today in the legislation have a narrow form in relation to the victim side that is actually affected, to business entities.

*Civil responsibility.* In the scientific world and the business environment, the problem of property liability of officials is being actively discussed, which affects business entities and makes them defenseless.

Thefollowingscientists, suchas Suleymenov M.K., Basin Yu.G., NorV.S., Ripinsky S.Yu., Mirzoyev P.Z., Skaryukin V.P., Suprun S.V., Tarlo A.E., Stupnitskaya Yu.A., Zuyeva M.V., Ostrikova L.K., Minakov I.A., Koliyeva A.E., Voitenko O.N., Roshchin M.E., Muravsky V.F., Kovalenko A.A., Kirilova N.A., Nadezhdin N.N., Proschalygin R.A., Panteleyeva A.A., Korolev I.I., Popov V.V., Bogdanov V. P. andothers, devotedtheirscientificworkstothisissue.

According to professor M.K. Suleymenov, for property liability the main thing is the compensation function, the restoration of violated rights, and not punishment, as in other branches of law. When restoring rights, the main thing is to get compensation. In this case, no one is interested in the psychic attitude of the offender to the offense, the fact itself and its wrongfulness are important.

The statement made by G.F. Shershenevich has not lost its significance, he wrote: «The consequences of an offense are expressed mainly in two forms: 1) punishment and 2) compensation for harm.The punishment consists in causing to the violatorthe right to suffer by depriving him (her) of any good, secured to him (her), like all citizens, with the right: life, liberty, bodily integrity, property inviolability (fine, confiscation). The compensation of the victim of an offense for harm caused to him (her) by the violator consists in restoring the disturbed balance of interests; in the equation of the reduction in the value of one property at the expense of the value of the property of the offender» [11].

According to Ripinsky S.Yu., the right of the entrepreneur to claim to the state for compensation for harm, being private, being one of the civil-legal methods of protecting the violated right, should be governed by the same rules that govern the entrepreneur's corresponding right to persons who are in equal to him (her) position. The scope of the relevant powers should be the same for the exemptions established by law [12; 42].

Each state, which claims to be legal, must ensure the inevitability of the responsibility of all perpetrators, without exception: citizens, organizations, officials of state bodies. In the consciousness there constantly must be the idea of the possibility of «unpleasant» legal consequences for the violator, unprofitable for him (her) as in material, so and in moral terms.

According to the judicial report for 2018, 22,500 complaints were received by the judicial authorities on the issue of appealing against actions, decisions of state bodies and public servants. Taking into account that in this report there is no corresponding column on the total number of claims on disputes on compensation for the harm caused by illegal actions, decisions of state bodies and civil servants, as part of this work, data are presented on disputes on compensation for harm caused by illegal actions of inquiry bodies, preliminary investigation, Prosecutor's office and court.

As we noted above, in 2018 only investigating judges satisfied 983 (754 in the first half of 2019) complaints about actions (inaction) and decisions of the criminal prosecution authorities, the prosecutor. In disputes on compensation for harm caused by illegal actions of the inquiry bodies, preliminary investigation, Prosecutor's office, court, in 2018, the judicial authorities, taking into account the balance of unfinished cases for the previous period, received 107complaints (233 in 2016; 137 in 2017; 88 in the first half of 2019), of which 68 (140; 95; 40) were considered with a decision, 50 (110; 74; 35) were satisfied.

Considering as an error the statutory period of limitations for filing claims on disputes on compensation for the harm, considering the account in the statistical data of the claims made against the illegal actions of the court, as well as the presence of other mechanisms for appealing illegal actions (inaction) and decisions of officials of public authorities, in general, and law enforcement agencies, in particular, these statistical data indicate that this institution is not widely used in practice.

In our opinion, the main problems of the weak work of this institution are:

1) Difficulties in proving guilt, lengthy and high workload of judicial procedures related to filing lawsuits against specific state bodies and officials, which create obstacles for citizens and business entities to protect their rights. In our opinion, it is necessary to consider the issue of separate regulation in the civil procedure legislation of the judicial procedure of these proceedings.

2) Fear of business entities about possible subsequent problems with state authorities, in general, and law enforcement agencies, in particular, in case of the appeal to court with the issue of compensation of the caused harm, damage or restoration of the lost benefit. In this regard, as part of the ongoing digitalization, it is necessary to consider at the legislative level the issue of initiating these proceedings without fail, regardless of the amount of damage caused, thereby excluding direct contact between the business entity whose rights are violated and the persons who committed these violations.

*Conclusions*

Thus, a uniform practice of responding to violations of the rights of entrepreneurs by government officials and organizations is currently ensured. However, there are a number of difficulties in bringing the perpetrators to an established liability and redress for persons whose rights are violated. There has been a practice in the use by authorized bodies of alternative measures of responsibility against perpetrators, which is caused by such factors as a lack of a clear understanding in the categories of «Illegal interference in entrepreneurial activity», «Interfering with legal entrepreneurial activity», and «Corporate raiding». Generalizing the judicial practice, which we conducted in the framework of the study, showed that in order to ensure uniformity in the interpretation and application of legislation in the practice of authorized state bodies, it is necessary to eliminate conflicts, introduce clarifications, additions to certain norms of legislative acts and normative orders of the Supreme Court.

References

1 Жетписбаев Б.А. Теоретические проблемы административно-правового принуждения в Республике Казахстан: моногр. / Б.А. Жетписбаев. — Алматы: Данекер, 2001. — 410 с.

2 Выступление Главы государства К. Токаева на расширенном заседании Правительства [Электронный ресурс]. — Режим доступа: https://akorda.kz/ru/speeches/internal_political_affairs/in_speeches_and_adresses/vystuplenie-glavy-gosudarstva-k-tokaeva-na-rasshirennom-zasedanii-pravitelstva/ (дата обращения 18.12.2019 г.)

3 Рудакова Н.А. Конституционное право граждан на обращения в государственные органы и органы местного самоуправления: дис. ... канд. юрид. наук / Н.А. Рудакова. — М., 2002. — 176 с.

4 Ежегодный доклад Президенту Республики Казахстан [Электронный ресурс]. — Режим доступа: https://ombudsmanbiz.kz/rus/ezhegodnyi_doklad/? cid=38/ (дата обращения 18.12.2019 г.)

5 Пустовалова И.Н. Ответственность государственных служащих по законодательству Кыргызской Республики: дис. ... канд. юрид. наук / И.Н. Пустовалова. — Алматы, 1999. — 166 с.

6 Национальный доклад о противодействии коррупции [Электронный ресурс]. — Режим доступа: http://qyzmet.gov.kz/ru/kategorii/nacionalnyy-doklad-o-protivodeystvii-korrupcii/ (дата обращения 18.12.2019 г.)

7 Кодекс Республики Казахстан от 5 июля 2014 г. № 235-V «Об административных правонарушениях» (с изм. и доп. по сост. на 03.07.2019 г.) [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/K1400000235/ (дата обращения 18.12.2019 г.)

8 Кодекс Казахской ССР (принят на VIII сессии Верховного Совета Казахской ССР X созыва 22 марта 1984 г.) (утратил силу) «Об административных правонарушениях» [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/K840001000_/ (дата обращения 18.12.2019 г.)

9 Нормативное Постановление Верховного Суда Республики Казахстан от 6 октября 2017 г. № 7 «О некоторых вопросах применения судами норм Особенной части Кодекса Республики Казахстан об административных правонарушениях» (с изм. и доп. по сост. на 31.05.2019 г.) [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/P170000007S/ (дата обращения 12.12.2019 г.)

10 Кодекс Республики Казахстан от 3 июля 2014 г. № 226-V «Уголовный кодекс Республики Казахстан» (с изм. и доп. по сост. на 28.10.2019 г.) [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/K1400000226 / (дата обращения 18.12.2019 г.)

11 Сулейменов М.К. Ответственность в гражданском праве [Электронный ресурс] / М.К. Сулейменов. — Режим доступа: https://journal.zakon.kz/203608-otvetstvennost-v-grazhdanskom-prave.html (дата обращения 18.12.2019 г.)

12 Рипинский С.Ю. Имущественная ответственность государства за вред, причиняемый предпринимателям незаконными действиями (бездействием) органов исполнительной власти: дис. ... канд. юрид. наук / С.Ю. Рипинский. — СПб., 2002. — 203 с.

13 Киздарбекова А.С. Деятельность Национальной палаты предпринимателей как институциональный механизм снижения предпринимательских рисков в Республике Казахстан [Электронный ресурс] / А.С. Киздарбекова, А.Е. Карибаева, Г.Б. Асетова. Режим доступа: https://law-vestnik.ksu.kz/srch/2016_Law_3_83_2016.pdf (дата обращения 18.12.2019 г.)

14 Давыдова Н.Ю. Юридическая природа ответственности органов и должностных лиц местного самоуправления перед гражданами [Электронный ресурс] / Н.Ю. Давыдова. — Режим доступа: https://law-vestnik.ksu.kz/srch/2014_Law_3_75_2014.pdf (дата обращения 18.12.2019 г.)

А.Қ. Рахметоллов, А.С. Қыздарбекова, С.Д. Бекішева, Л. Тылл

## Кәсіпкерлердің құқықтарын бұзғаны үшін лауазымды тұлғаларды жауапкершілікке тарту туралы

Мақалада мемлекеттік органдар мен ұйымдардағы лауазымды тұлғалар кәсіпкерлердің құқықтары бұзылған жағдайда олардың қорғалуын қамтамасыз етуге жауап қайтарудың тиімділігін талдауға арналған. Шенеуніктердің қызметін бағалаудың маңызды көрсеткіштерінің бірі — кәсіпкерлік

субъектілерінің өтініштері. Авторлар құқық қолдану тәжірибесінде кездесетін кәсіпкерлердің құқықтарының бұзылуына, сондай-ақ кінәлілердің жауапкершілігін заңнамалық реттеудің қиыншылықтарына назар аударған. Әр түрлі органдар мен ұйымдардың лауазымды тұлғаларымен қатар, құқық қорғау органдарының қызметкерлері кәсіпкерлердің құқықтарының бұзылуына жол береді. Қазақстан Республикасының «Әкімшілік құқық бұзушылық туралы» кодексінің 32-бабының ережесі, оған сәйкес құқық қорғау органдарының лауазымды тұлғалары қызметтік міндеттерін орындау кезінде жасалған әкімшілік құқық бұзушылықтар үшін тиісті органдарда қызмет ету тәртібін реттейтін нормативтік құқықтық актілерге сәйкес жауаптылықта болады, тиісті назар аударуды қажет етеді. Сонымен бірге, қазіргі уақытта әкімшілік және қылмыстық жауапкершіліктің шектерін ажыратып, заңнамалық деңгейде «кәсіпкерлік қызметке заңсыз араласу», «заңды кәсіпкерлік қызметке кедергі жасау» және «рейдерлік» категорияларын белгілеу қажеттілігі туындайды.

*Кілт сөздер:* кәсіпкер, кәсіпкерлік, бизнес, құқықтардың бұзылуы, зиян, шағымдар, лауазымды тұлғалар, құқық қорғау органдары, жауапкершілік, заңдылық.

А.К. Рахметоллов, А.С. Киздарбекова, С.Д. Бекишева, Л. Тылл

## К вопросу ответственности должностных лиц за нарушение прав предпринимателей

Статья посвящена анализу эффективности реагирования должностных лиц государственных органов и организаций на нарушения прав предпринимателей, обеспечения их защиты. Одним из ключевых показателей оценки деятельности должностных лиц являются обращения субъектов предпринимательства. Авторами уделено внимание на характерные нарушения прав предпринимателей, встречающиеся в правоприменительной практике, а также на проблемы законодательного регулирования ответственности виновных лиц. Наряду с должностными лицами различных органов и организаций, нарушения прав предпринимателей допускаются сотрудниками правоохранительных органов. Положение ст. 32 Кодекса Республики Казахстан «Об административных правонарушениях», согласно которому сотрудники правоохранительных органов за административные правонарушения, совершенные при исполнении служебных обязанностей, несут ответственность в соответствии с нормативными правовыми актами, регламентирующими порядок прохождения службы в соответствующих органах, требует соответствующего внимания. В работе также сделан вывод о том, что в настоящее время назрела необходимость разграничения пределов административной и уголовной ответственности, конкретизация на законодательном уровне категорий «незаконное вмешательство в предпринимательскую деятельность», «воспрепятствование законной предпринимательской деятельности», «рейдерство».

*Ключевые слова:* предприниматель, предпринимательство, бизнес, нарушение прав, вред, обращения, должностные лица, правоохранительные органы, ответственность, законность.

## References

1 Jetpisbayev, B.A. (2001). *Teoreticheskie problemy administrativno-pravovoho prinuzhdeniia v Respublike Kazakhstan. [Theoretical problems of administrative law enforcement in the Republic of Kazakhstan]*. Almaty: Daneker [in Russian].

2 Vystuplenie Hlavy hosudarstva K. Tokaeva na rasshirennom zasedanii Pravitelstva [Speech by the Head of State K. Tokayev at an expanded meeting of the Government]. *akorda.kz.* Retrieved from https://akorda.kz/ru/speeches/internal_political_affairs/in_speeches_and_adresses/vystuplenie-glavy-gosudarstva-k-tokaeva-na-rasshirennom-zasedanii-pravitelstva/ (data obrashcheniya 18.12.2019 g.) [in Russian].

3 Rudakova, N.A. (2002). Konstitutsionnoe pravo hrazhdan na obrashcheniia v hosudarstvennye orhany i orhany mestnoho samoupravleniia [The constitutional right of citizens to appeal to state bodies and bodies of local self-government]. *Candidate's thesis.* Moscow [in Russian].

4 *Ezhehodnyi doklad Prezidentu Respubliki Kazahstan* [Annual report to the President of the Republic of Kazakhstan]. *ombudsmanbiz.kz.* Retrieved from https://ombudsmanbiz.kz/rus/ezhegodnyi_doklad/? cid=38/ (data obrashcheniya 18.12.2019 g.) [in Russian].

5 Pustovalova, I.N. (1999). *Otvetstvennost hosudarstvennykh sluzhashchikh po zakonodatelstvu Kyrhyzskoi Respubliki* [Responsibility of civil servants according to the legislation of the Kyrgyz Republic]. *Candidate's thesis.* Almaty [in Russian].

6 Natsionalnyi doklad o protivodeistvii korruptsii [National Anti-Corruption Report]. *qyzmet.gov.kz.* Retrieved from http://qyzmet.gov.kz/ru/kategorii/nacionalnyy-doklad-o-protivodeystvii-korrupcii/ [in Russian].

7 Kodeks Respubliki Kazakhstan ot 5 iiulia 2014 hoda No. 235-V «Ob administrativnykh pravonarusheniiakh» [On Administrative Infractions]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/rus/docs/K1400000235/ [in Russian].

8 Kodeks Kazahskoi SSR (priniat na VIII sessii Verkhovnoho Soveta Kazakhskoi SSR X sozyva 22 marta 1984 hoda) «Ob administrativnykh pravonarusheniiakh» [On administrative Infractions] (utratil silu). *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/rus/docs/K840001000_/ (data obrashcheniia 18.12.2019 h.) [in Russian].

9 Normativnoe postanovlenie Verhovnoho Suda Respubliki Kazakhstan ot 6 oktiabria 2017 hoda № 7 «O nekotorykh voprosakh primeneniia sudami norm Osobennoii chasti Kodeksa Respubliki Kazakhstan ob administrativnykh pravonarusheniiakh»

[On some issues of application by the courts of the norms of the Special Part of the Code of the Republic of Kazakhstan on Administrative Infractions]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/rus/docs/P170000007S/ [in Russian].

10 Kodeks Respubliki Kazahstan ot 3 iiulia 2014 hoda No. 226-V «Uholovnyi kodeks Respubliki Kazakhstan» [The Criminal Code of the Republic of Kazakhstan]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/rus/docs/K1400000226 [in Russian].

11 Suleymenov, M.K. Otvetstvennost v hrazhdanskom prave [Responsibility in civil law]. *journal.zakon.kz.* Retrieved from https://journal.zakon.kz/203608-otvetstvennost-v-grazhdanskom-prave.html [in Russian].

12 Ripinsky, S.Yu. (2002). Imushchestvennaia otvetstvennost hosudarstva za vred, prichiniaemyi predprinimateliam nezakonnymi deistviiami (bezdeistviem) orhanov ispolnitelnoi vlasti [Property liability of the state for harm caused to entrepreneurs by illegal actions (inaction) of executive authorities]. *Candidate's thesis.* Saint Petersburg [in Russian].

13 Kizdarbekova, A.S., Karibaeva, A.E., & Asetova G.B. Deiatelnost Natsionalnoi palaty predprinimatelei kak institutsionalnyi mekhanizm snizheniia predprinimatelskikh riskov v Respublike Kazakhstan [The activities of the National Chamber of Entrepreneurs as an institutional mechanism for reducing business risks in the Republic of Kazakhstan]. *law-vestnik.ksu.kz.* Retrieved from https://law-vestnik.ksu.kz/srch/2016_Law_3_83_2016.pdf [in Russian].

14 Davydova, N.Yu. Yuridicheskaia priroda otvetstvennosti orkhanov i dolzhnostnykh lits mestnoho samoupravleniia pered hrazhdanami [The legal nature of the responsibility of local authorities and officials to citizens]. *law-vestnik.ksu.kz.* Retrieved from https://law-vestnik.ksu.kz/srch/2014_Law_3_75_2014.pdf [in Russian].

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M.T. Akimzhanova[1], G.A. Ilyassova[1], D. Chankova[2]

*[1]Ye.A. Buketov Karaganda State University, Kazakhstan;*
*[2]South-West University, Blagoevgrad, Bulgaria*
*(E-mail: birmanova81@mail.ru)*

# Mediation as an alternative method for resolving disputes about children

The article is devoted to the study of the norms of the current legislation on mediation in order to apply the conciliation procedure in resolving family legal disputes affecting the interests of the child. The relevance is due to the fact that the introduction and application of mediation as an alternative method of resolving disputes related to the interests of children is a new, progressive step in the development of the culture of family and marriage relations in the Republic of Kazakhstan. At the same time, the author believes that, despite the great public importance of conciliatory mediation procedures, today it is obvious that there is no mass use of them. The author points to the necessity of applying a mandatory mediation procedure for a number of categories of disputes, the resolution of which is impossible without the participation of a professional conciliator, and this primarily applies to disputes about children. The article analyzes scientific and practical approaches to the definition of family mediation, studies its nature and determines its features. It is noted that the resolution of a dispute about children can not be effective, and the decision made is enforceable, without reaching an agreement by the parents on its merits. The results of the study are new and original, the author's position is justified and is of interest to employees whose activities are related to the interpretation and application of rules related to the settlement of a dispute in pre-trial proceedings.

*Keywords*: mediation, family law disputes, child, child interests, family mediation, family relations, conflicts, minor, the mediator, mediation agreement.

## *Introduction*

The problems of ensuring and protecting the rights of the child were and remain the most urgent. Foreign experience in the use of conciliation procedures, as well as the increasing number of family disputes considered in courts every year, indicate the need to introduce mediation in the family legal sphere. But, despite the obvious success of the use of family conciliation procedures abroad, there is still no consensus on some controversial aspects of the use of mediation.

At the level of scientific and practical research, the use of mediation in the resolution of so-called «juvenile problems» is considered mainly through the prism of alternative settlement of criminal law conflict, but, in our opinion, not enough attention is paid to other aspects of the use of mediation procedures in resolving conflict situations involving children. In this context, it should be about the possibilities of family mediation.

We analyzed showed that the lack of popularity of the use of mediation procedures in the resolution of disputes with children in the Republic of Kazakhstan, largely due to the unreliability of pre-trial treatment of the disputing parties by the mediator, poorly specific status of the mediation agreement, the impossibility of enforcement, lack of awareness of the disputing parties about the availability of this method of conflict resolution.

## *Methods and Materials*

The methodological basis of the research is presented by systematic approaches to the study of the theory and legal acts concerning the provision and protection of the rights and legitimate interests of the child. In addition, methods of analysis, synthesis, comparison, as well as dogmatic analysis, historical and normative, content and functional methods are used. The normative base of the study is represented by the Code of the Republic of Kazakhstan «On marriage (matrimony) and family», The law of the Republic of Kazakhstan «On mediation» and other normative legal acts. The works of such scientists as Zamriy O.N., Shelepina A.V., Ilyassova G. A. were laid the theoretical foundations of the study.

## *Results*

The integral signs of a democratic, competitive state are a developed civil society, favorable conditions for business development and a high level of legal culture of citizens. It is indisputable that on its way to the

improvement of the legal system, Kazakhstan needs to refer to the experience of developed countries and, after careful study, adopt progressive legal institutions. One of the fastest growing in the world, including in the CIS countries, the institute is mediation — a type of alternative dispute resolution.

The family, being a social institution, objectively presupposes the existence of disagreements and disputes between the participants of the relevant small social group, since the interests of each of them are not always, it is more correct to even say — often they are in conflict with the interests of other participants. Considering again the specifics of the family as a social group that unites participants on the basis of kinship, the presence of a marriage or other social connections, we can agree that many conflicts are resolved in local conditions, figuratively speaking, «they don't stand rubbish» [1; 20–28].

Relations between family members are governed by the norms of various sectoral laws, and the interests of individual family members, in particular minors, are subject to special protection and protection. The state takes care of the family through a number of measures (legal, socio-economic, cultural, demographic and other), among which a special place is occupied by legislative norms aimed at strengthening the family. They are aimed at establishing family relationships that maximize the full satisfaction of an individual's interests, create conditions that ensure a decent life and the free development of each family member, and educate children with harmonious and comprehensively developed members of society. Being the bearer of public authority, the state intervenes in family differences and disputes, establishing the grounds and procedure for their resolution. Among family law disputes addressed by the courts, a significant place is occupied by those that directly or indirectly affect the interests of children, the fate of the child depends on the correct resolution of which. The complexity of such cases is largely due not so much to the content of the family law norms to be applied in this case, as to the specifics of the particular family situation that needs to be assessed by the court.

Mediation as an alternative procedure for the settlement of disputes with the participation of an independent person as an intermediary according to the current legislation can be applied to disputes arising from family relations. For proper understanding, it is necessary to point out that the concept of «mediation» is also used in a different meaning [1; 20–28]. Some scientists argue about the need to use mediation in the so-called «juvenile justice», it is assumed that this form of conflict resolution is focused on «reaching an agreement of the parties, smoothing out harm and healing the victim». In addition, A.V. Davydenko believes not only possible, but also necessary interaction between guardianship and guardianship and the network of mediation services «in relation to compensation for harm to persons in respect of whom the socially dangerous act was committed by minors, including those who have not reached the age of criminal responsibility» [2; 54–58].

Thus, mediate techniques and technologies can be used to resolve disputes arising in various legal relationships that in one way or another affect the interests of minors. If we are talking about the mediation procedure, the grounds and application procedure, the legal consequences of which are provided for by the Law of the Republic of Kazakhstan «On mediation» [3], then we are guided exclusively by the norms of this source. In particular, not all legal relations (administrative, criminal, and others) may involve the mediator.

We agree with many scientists that the procedure of mediation is very effective in resolving the most common category of disputes arising from family relationships, such as divorce disputes: the division of common property of spouses, determination of the procedure for using jointly-owned property, etc [4; 26–30]. In accordance with Article 8 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family», family rights are protected by the court, and in cases stipulated by law, state bodies, including bodies performing guardianship and trusteeship functions [5]. Therefore, the activity of the body performing the functions of guardianship and guardianship should be aimed at solving the following tasks: protection and restoration of the violated rights of the child and parents; facilitating the resolution of conflict between family members, reconciliation of the parties; normalization of the psychological climate in the family; creating a psychologically comfortable atmosphere for the life and upbringing of the child; assisting the court in making a legal and fair decision on the merits of the dispute; facilitating the execution of a court decision. The fulfillment of the above tasks is possible only if active and intensive work is carried out with parents, aimed at resolving the conflict and facilitating their achievement of an understanding of all the negative consequences that this conflict may cause to the child..

The specificity of the resolution of disputes related to the upbringing of children is that the settlement in this case is subject to not only legal but also psychological conflict.

In this regard, it is extremely important to maximize the use of the mediation procedure in resolving family disputes.

On the instructions of the First President N.Nazarbayev, in 2010 began the active development of the legal institution — mediation. Legal grounds for the application of mediation as an independent method of settling disputes, including those under consideration by the court created the Law of the Republic of Kazakhstan dated January 28, 2011 No. 401-IV «On Mediation» and the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated November 29, 2018 «On the application by courts of law in resolving disputes relating to the upbringing of children» [6]. This legal institution is aimed at increasing respect for the rights, freedoms of a person, a legal entity, as well as at forming civilized civil relations, strengthening social harmony, resolving conflicts and disputes through constructive dialogue [7; 319–324].

In accordance with the basic principles of family law, the state guarantees the priority protection of the rights and interests of minor family members, parental rights cannot be exercised in contradiction with the interests of children, ensuring the interests of children should be the main concern of their parents. The basis for raising the relevant issue was paragraph 2 of Art. 1 of the Law of the Republic of Kazakhstan«On Mediation» [3] according to which «The mediation procedure does not apply to disputes (conflicts) arising from the relations specified in paragraph 1 of this article, in case such disputes (conflicts) affect or may affect the interests of third parties persons who are not involved in the mediation procedure, and persons recognized by the court as incapable or partially capable».

The analysis of the prescription contained in the above norm allows us to designate at least one fundamental question of theoretical and practical importance — is it possible to apply the mediation procedure to disputes affecting the interests of the child, since the child himself does not participate in the mediation procedure [1; 20–22].

*Discussion*

Strongly emphasizes the E.A. Shelepin, in the Federal Law «On Mediation» there are no norms obliging the parties to take into account the interests of children when mediating [8; 55–58]. The Law of the Republic of Kazakhstan «On Mediation» determines if during mediation facts are established that expose or may endanger normal growth and child development or cause serious damage to his legitimate interests, the mediator is obliged to apply to the authority exercising the authority to protect the rights of the child. Thus, in accordance with Article 25 of the Law of the Republic of Kazakhstan «On Mediation», when conducting mediation, the mediator must take into account the legitimate interests of the child. For comparison, the law of the Republic of Moldova «On Mediation» of June 14, 2007 stipulates the obligation of the mediator to ensure that the results of mediation do not contradict the best interests of the child and do not interfere with his normal growth and development [9].

It seems that first of all it is necessary to determine a tentative list of disputes arising from family relations and affecting the interests of the child. We agree that this is not only the dissolution of the marriage of the parents of a minor. It can also be independent disputes of parents about the division of common property, including that which a minor has the right to use; this and disputes about the provision of material content (alimony); disputes related to raising a child, and many others. Any dispute arising in a family where there are minor children affects the interests of the latter. It is possible to apply the mediation procedure, both in an out-of-court procedure, and within the framework of the judicial process at any time before the court makes a decision on the case. The mediation procedure is based on the fact that the parties, with the participation of the mediator, must come to a consensus and reach an agreement. This procedure is not in the nature of litigation. The mediator is not an arbitrator, a representative of any party to the dispute or a mediator between the parties, does not have the right to decide on the dispute. It only contributes to the settlement of the dispute, helps the parties to the dispute during the discussion to identify their true interests and needs, find a solution that satisfies all parties to the conflict. This is the main task of the mediator. There are a number of categories of disputes, the resolution of which is impossible without the participation of a professional conciliator, and this, first of all, refers to disputes about children.

When considering disputes about determining a child's place of residence, the procedure for a separate parent to communicate with him and the enforcement of judgments in these categories of cases, it is important that the parent has an intention to resolve the family conflict without harming the child. Unlike the trial, as a result of which one of the disputing parents turns out to be the winner, the mediation procedure makes it possible to make the child the «winner» of the dispute. As a rule, in most family disputes, including those related to determining the child's place of residence, the parents in dispute involve children in the conflict, thereby developing and deepening it. It is in such cases that the best way to settle a dispute can be a mediation procedure, during which, with the help of an impartial third party (mediator), parents can actually

assess the child's situation, needs and feelings when making decisions about his future, taking into account the interests of all stakeholders. The body responsible for guardianship and trusteeship should, if necessary, advise the conflicting parties to help the mediator, explain to them the essence of mediation, the conditions for its implementation, point out the advantages of using mediation in finding a solution to the disputants, recommend the disputant to jointly discuss the possibility of using mediation procedures, require explanations from hand, evading the use of mediation.

Therefore, mediation can be viewed as an informal, confidential process, during which the parties to the conflict with the help of a neutral, impartial third party, able to view the situation from different points of view, develop a solution that would meet the interests of all parties to the dispute. However, in family mediation it is important not only to work out a settlement to the parties as such, but also to make sure that it is in the interests of the child, is effective and safe for him. The goal of family mediation is to avoid a lengthy and, from the point of view of all parties to the dispute, an emotionally painful legal process and the associated application of measures to protect the rights of the child, through peaceful settlement of the conflict. Therefore, mediation in family disputes can be considered not only as an important socio-psychological and legal service, but also as a way to protect the child [10; 114–116].

If you turn to foreign experience in the application of mediation in resolving family disputes, you can see a twofold approach depending on the legal system. Thus, in the countries of the Anglo-American system of law, the use of mediation in some cases is mandatory before going to court in family disputes. Most states in the United States have laws that require family mediation in the custody and care of children after the parents divorce. As a rule, family mediation services are formed during the courts. In the UK, disputes of a family law nature are tentatively resolved without fail by a mediator with state accreditation. In Australia, an appeal to accredited mediators is mandatory on disputes about parenting after parents divorce. The agreement reached by divorcing spouses is submitted for approval by the court leading the divorce proceedings [11; 17–19]. The procedure for the participation of family mediators in resolving family disputes is widely used in the countries of the European Union, being a very popular reconciliation procedure. But, as in the Republic of Kazakhstan, Russia, the conciliation procedure in these countries is not mandatory when going to court [12; 16–19]. Moreover, both mediators engaged in private practice and «state mediators» (civil servants of state bodies and departments) can participate in resolving family law disputes. Moreover, for example, in Germany such a «state mediator» can be a judge in this kind of mediation, like mediation in the course of legal consultation established by the Federal Law «On the development of mediation and other methods of out-of-court settlement of disputes» in 2012 [13; 12–14]. Mediation in the course of legal advice is carried out by a mediating judge in the form of a special procedural procedure in which the judge who is considering the case cannot make a decision. He temporarily obtains the rights and obligations of an extrajudicial mediator and uses mediation methods to resolve a case without a court decision.

In the Republic of Kazakhstan in specialized juvenile courts in the order of mediation, civil cases are also examined, on determining the child's place of residence, on deprivation (restriction) and restoration of parental rights; on the adoption of a child; on disputes arising from custody and guardianship (patronage) over minor children.

These are precisely the categories of cases that require a careful and serious approach, because the fate of the child is being decided, which is sometimes the helpless subject of regulation of the internal conflict relations of parents and relatives. And it is precisely here that the participation of a mediator is necessary, which must sort out a complex, sometimes critical situation. Therefore, when applying to the juvenile court for child disputes, thorough pre-trial preparation is carried out, conversations are held with the parties, if the child is over 10 years old, if possible, with the consent of the psychologist, the child is interviewed, his opinion and attitude to the question regarding his upbringing.

In this regard, the question arises of applying Article 62 of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and the family», according to which the child has the right to express his opinion when solving a family issue of any issue affecting his interests. Moreover, taking into account the opinion of a child who has reached the age of ten years is obligatory, except in cases when this contradicts his interests.

As E.A. Shelepin believes, referring to article 62, mediation does not apply to judicial or administrative proceedings, it is therefore advisable to supplement this article of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and family» with an indication of the mediation procedure [8; 55].

In our opinion, this is not necessary. The child's opinion can be clarified and voiced in various procedural conditions: directly in the courtroom or in the custody and guardianship office, it is possible that the decision made in the case contradicts the opinion expressed by the child.

But in any case, the opinion of a child who has reached the age of ten years must be clarified by the direct prescription of Article 62 of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and the family». Moreover, in full compliance with this article, the child's opinion should be established in the framework of the mediation procedure on family law disputes, most of which, as already stated, in one way or another affect the interests of the child [1; 20–28].

Does this mean that a child who has reached the age of ten may be a participant in the mediation procedure? According to Art. 2 of the Law of the Republic of Kazakhstan «On Mediation», the mediation procedure should be understood as a method of settling disputes with the assistance of a mediator, which is used on the basis of the voluntary consent of the parties in order to reach a mutually acceptable solution [3].

Does this mean that the child can act as an independent party to the dispute and, therefore, as an independent party to the mediation procedure and the concluded mediation agreement?

In our opinion, in most cases — no, since a family and legal dispute arises between the parents of the child and, as a rule, is associated with their marital status, with the implementation of family rights and obligations arising from the status of the spouse. In this connection, disputes arise, as a rule, when resolving the issue of divorce.

As psychologists say, practicing in the reconciliation of spouses intending to dissolve the marriage, «successful resolution of the conflict requires consideration of the interests of all parties to the conflict. In this regard, it is important to keep in mind not only its immediate participants — those between whom the conflict interaction develops, but also other persons whose interests may be affected by this situation and whose position may influence the outcome of the conflict. In essence, they can be considered as indirect participants in the conflict» [14; 82].

However, when examining the legal aspects of the participation of a mediator in resolving a family dispute, it is necessary to strictly follow the legal regulations. Thus, in the dispute over divorce, the parties are spouses intending to dissolve the marriage. Therefore, only they can be parties to the mediation procedure. At the same time, the interests of other subjects of family relations (minor children, their grandparents) should be ensured at the conclusion of a mediation agreement both by the parties and directly by the mediator.

We believe it is possible to declare two types of disputes in which a minor can act as an independent party.

First, these are property disputes related to the exercise of the right of ownership. According to Art. 60 of the IC of the Russian Federation, the child does not have the right of ownership of the property of the parents, the parents do not have the right of ownership of the property of the children. In case of the emergence of the right of common ownership of parents and children, their rights to possession, use and dispose of property are determined by civil law.

Thus, in the event of a dispute arising from the exercise of the right of ownership by both the child and parents, the child acts as an owner of the dispute as an owner (although a legal representative may act in his interests), therefore, he is also an independent party in the mediation procedure [1; 20–23].

Secondly, according to Art. 16 of the Civil Code of the Republic of Kazakhstan, the place of residence of minors under the age of fourteen is recognized as the place of residence of their legal representatives. Consequently, a child over fourteen years old independently determines his place of residence [15]. Thus, if a dispute has arisen between the parents dissolving the marriage about determining the child's place of residence, then a child under the age of fourteen is subject to either parental agreement or a court decision. However, if a dispute arose in relation to a child over fourteen years old, then, by virtue of the requirements of Art. 16 of the Civil Code of the Republic of Kazakhstan, it is already an independent party to this family law dispute. Consequently, if the parents express an intention to apply for the services of an intermediary, the child will act as an independent party in the framework of the procedure and possible later mediation agreement [16, 17].

Perhaps, these are currently the only family-law disputes in which not only the interests of the child are affected, but also he acts as an independent party to the dispute. In turn, this suggests that the child is an independent party in the mediation procedure used in resolving the relevant family law dispute.

According to E.G. Kuropatskaya, «often in cases involving the protection of the rights of the child, is the peak of disagreement between the parties to the dispute at the time of the transfer of the child to one of the parties. In such cases, the possibility of resolving the conflict through mediation should not be underestimated, since this is a real chance to protect the child from serious emotional trauma» [17; 72].

It seems that at the stage of execution of court decisions on disputes over children, the mediation procedure is hardly acceptable. The court, as the carrier of public authority, has already determined, among other legal consequences, its special guarantees for ensuring the rights and interests of children (determining the place of residence of the child, determining the procedure for communicating with the child of the parent living separately from him, etc.). Any mediation agreement aimed at resolving a dispute arising during the execution of a court decision that has entered into legal force calls into question the legality and validity of the latter.

Note that, despite the prevailing public opinion that children left without parental care are orphans or children whose parents are deprived of parental rights, paragraph 2 of Article 117 of the Code of the Republic of Kazakhstan «About marriage (matrimony) and family» provides the creation, by the actions or inaction of the parents, of conditions that threaten the life or health of the children or interfere with their normal upbringing and development. We agree that during mediation a situation may also arise when the parents, choosing the best ways to resolve the conflict, can simultaneously create obstacles for the normal development of the child. In this case, the direct responsibility of the mediator will be to inform the body in charge of custody and guardianship of the violation of the interests of the child and the created threat to its development [16; 19].

At the same time, there are cases when mediation is not always appropriate when protecting the rights and interests of a child. Mediation may not be carried out with deprivation of parental rights [5]. Deprivation of parental rights is an extreme measure of family and legal responsibility; therefore, in such extremely dangerous situations for a child, it is impossible to resolve the conflict through mediation. The same applies to cases where a child is taken from parents on the basis and in accordance with Article 82 of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and family», if the family has a direct threat to his life or health. Disputes in these categories of cases can only be resolved by the court, and it is impossible for them to conclude a settlement agreement. However, in cases of restrictions on parental rights, provided for in Article 79 of the Code of the Republic of Kazakhstan «On Marriage (matrimony) and family», when parents' behavior is not due to alcoholism or drug addiction, mediation is possible, and sometimes even desirable.

## *Conclusion*

Returning to the discussion on the use of mediation as a way to resolve disputes arising from family relationships, we believe it is possible to draw the following conclusions:

– resolution of disputes through conciliation procedures (mediation) has great advantages: it gives the opportunity to keep the child in good relations with both parents, helps parents to formulate certain plans for raising the child in accordance with their capabilities, taking into account the interests of the child. At the same time, the agreements reached during reconciliation procedures are executed more successfully than the requirements of a judicial act.

– we believe that in accordance with the current realities, it is advisable to provide for the possibility of applying obligatory mediation procedure for disputes in the sphere of family relations. To date, disputes arising from family relations fall within the competence of the following bodies: bodies responsible for guardianship and custody, the commission on juvenile affairs, civil registry offices, notary bodies, courts of general jurisdiction. We believe that it is within the framework of the activities of these bodies that it is advisable to conduct family mediation. The use of family mediation, above all, must occur in court. Based on this, it is clear that the parties have taken all measures to resolve the dispute in the framework of pre-trial proceedings, including by contacting a professional mediator. In most cases, when a decision is made, a situation arises in which one of the parties is «won» and the second, respectively, «lost» Such a division is conditional, but fully underlines the fact that there is rivalry between the parties, often hostility, existing in connection with an unresolved dispute regarding the order of communication, upbringing and residence of children. Parents, on the other hand, should try as best as possible to reach agreement in resolving disputes over the upbringing of children, which in the end will also lead to the settlement of existing conflicts between them.

## References

1 Замрий О.Н. Интересы несовершеннолетнего как объект охраны при применении процедуры медиации / О.Н. Замрий // Вестн. ТвГУ. Сер. Право. — 2017. — № 1. — С. 20–28.

2 Давыденко А.В. Актуальность применения в российском судопроизводстве института медиации в отношении несовершеннолетних / А.В. Давыденко // Российская юстиция. — 2016. — № 2. — С. 54–58.

3 Закон Республики Казахстан от 28 января 2011 года № 401-IV «О медиации» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/? doc_id=30927376

4 Матросов Н.А. Медиация на стадии подготовки к судебному разбирательству о расторжении брака / Н.А. Матросов и др. // Российский судья. — 2015. — № 10. — С. 22–24; Трофимец И.А. Роль адвоката и медиатора в бракоразводном процессе / И.А. Трофимец // Семейное и жилищное право. — 2015. — № 1. — С. 26–30.

5 Кодекс Республики Казахстан от 26 декабря 2011 года № 518-IV «О браке (супружестве) и семье» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/? doc_id=31102748

6 Нормативное постановление Верховного Суда Республики Казахстан от 29 ноября 2018 года № 15 «О применении судами законодательства при разрешении споров, связанных с воспитанием детей» [Электронный ресурс]. — Режим доступа: https: //online.zakon.kz/ Document/? doc_id =38111660

7 Шайменова А.Б. История развития альтернативного разрешения споров в Казахстане / А.Б. Шайменова, Г.А. Ильясова // Правовая система Казахстанав условиях модернизации национального правосознания: сб. материалов Междунар. науч.-практ. конф. — Караганда: Изд-во КарГУ, 2018. — С. 319–324.

8 Шелепина А.В. Особенности применения медиации к спорам, возникающим из семейных правоотношений / А.В. Шелепина // Пробелы в российском законодательстве. — 2014. — № 6. — С. 55–58.

9 Закон Республики Молдова № 137 «О медиации» [Электронный ресурс]. — Режим доступа: https://mediation-eurasia.pro/zakonodatelstvo/zakon-respubliki-moldova-137-o-mediaci

10 Елисеева А.А. Медиация как способ урегулирования семейных споров / А.А. Елисеева // Семейное право на рубеже XX–XXI веков: к 20-летию Конвенции ООН о правах ребенка: сб. материалов Междунар. науч.-практ. конф. — Казань: Статут, 2011. — С. 114–116.

11 Трофимец И.А. Медиация и расторжение брака / И.А. Трофимец // Российский судья. — 2014. — № 10. — С. 17–19.

12 Соловьев А.А. Об актуальных проблемах и некоторых перспективах использования альтернативной процедуры урегулирования споров с участием посредника (процедуры медиации): российский и европейский опыт / А.А. Соловьев, Ю.М. Филиппов // Российский судья. — 2015. — № 1. — С. 16–19.

13 Бирюков П.Н. Об институте медиации в Германии / П.Н. Бирюков, А.В. Пронин // Российский судья. — 2015. — № 2. — С. 12–14.

14 Клюева Н.В. Медиация в ситуации конфликта между супругами, имеющими несовершеннолетних детей / Н.В. Клюева // Вестн. Удмурт. ун-та. Сер. «Философия, психология, педагогика». — 2016. — Т. 26. — Вып. 2. — С. 82–85.

15 Гражданский кодекс Республики Казахстан. (Общая часть), принят Верховным Советом Республики Казахстан 27 декабря 1994 года [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/? doc_id=1006061

16 Akimzhanova M. Extending legislation of the Republic of Kazakhstan by anchoring international child rights [Электронный ресурс] / M. Akimzhanova, G. Ilyassova, A. Nukusheva, D. Rustembeova // Journal of Legal, Ethical and Regulatory Issues. — 2018. —Vol. 21, Issue 3. — 17 p. — Режим доступа: https://www.abacademies.org/articles/extending-legislation-of-the-republic-of-kazakhstan-by-anchoring-international-child-rights-7480.html

17 Куропацкая Е.А. Медиация как способ защиты прав ребенка в Российской Федерации / Е.А. Куропацкая // Законы России: опыт, анализ, практика. — 2015. — № 8. — С. 72–76.

М.Т. Әкімжанова, Г.А. Ілиясова, Д.Чанкова

## Медиация балалар туралы дауларды шешудің баламалы тәсілі ретінде

Мақала балалардың мүдделерін қорғайтын отбасылық-құқықтық дауларды шешу кезінде бітімгерлік рәсімдерді қолдану мүмкіндігі мақсатында медиация туралы қолданыстағы заңнаманың нормаларын зерттеуге арналған. Тақырыптың өзектілігі медиация рәсімін балалардың мүдделеріне байланысты дауларды шешудің баламалы тәсілі ретінде енгізу және қолдану, Қазақстан Республикасында отбасылық-неке қатынастары мәдениетін дамытудағы жаңа, прогрессивті қадам болып табылатындығымен түсіндіріледі. Сонымен қатар, авторлар татуластыру медиативтік рәсімдерінің қоғамдық маңыздылығына қарамастан, бүгінгі таңда олардың жаппай қолданылмау фактісі бар деп санайды. Авторлар кәсіби татуластырушының қатысуынсыз шешу мүмкін емес бірқатар даулар санаттары бойынша медиацияның міндетті рәсімін қолдану қажеттігін көрсетеді және бұл бірінші кезекте балалар туралы дауларға жатады. Мақалада отбасылық медиацияны анықтаудың ғылыми-тәжірибелік тәсілдері талданды, оның табиғаты зерттелді және оның ерекшеліктері анықталды. Балалар туралы дауды шешу тиімді болмауы мүмкін, алайда, шығарылған шешімнің орындалуына ата-ананың келісімсіз қол жеткізе алмайтыны атап өтілген. Зерттеу нәтижелері жаңа және бірегей, авторлық ұстанымға негізделген және қызметі сотқа дейінгі іс қарау шеңберінде дауды реттеуге байланысты нормаларды түсіндіруге және қолдануға байланысты қызметкерлер үшін қызығушылық білдіреді.

*Кілт сөздер:* медиация, отбасылық-құқықтық даулар, бала, баланың мүдделері, отбасылық медиация, отбасылық құқықтық қатынастар, жанжалдар, кәмелетке толмаған, медиатор, медиативтік келісім.

М.Т. Акимжанова, Г.А. Ильясова, Д. Чанкова

# Медиация как альтернативный способ разрешения споров о детях

Статья посвящена исследованию норм действующего законодательства о медиации с целью возможности применения примирительной процедуры при разрешении семейно-правовых споров, затрагивающих интересы ребенка. Актуальность обусловлена тем, что внедрение и применение процедуры медиации как альтернативного способа разрешения споров, связанных с интересами детей, является новым, прогрессивным шагом в развитии культуры семейно-брачных отношений в Республике Казахстан. Вместе с тем, авторы считают, что, несмотря на большую общественную значимость примирительных медиативных процедур, на сегодняшний день является очевидным факт отсутствия их массового применения. Авторы указывают на необходимость применения обязательной процедуры медиации по ряду категорий споров, разрешение которых невозможно без участия профессионального примирителя, и это, в первую очередь, относится к спорам о детях. В статье проанализированы научно-практические подходы к понятию семейной медиации, изучена ее природа и определены ее особенности. Отмечено, что разрешение спора о детях не может быть эффективным, а вынесенное решение исполнимым, без достижения родителями соглашения по его существу. Результаты исследования являются новыми и оригинальными, авторская позиция обоснована и представляет интерес для работников, деятельность которых связана с толкованием и применением норм, связанных с урегулированием спора в рамках досудебного разбирательства.

*Ключевые слова:* медиация, семейно-правовые споры, ребенок, интересы ребенка, семейная медиация, семейные правоотношения, конфликты, несовершеннолетний, медиатор, медиативное соглашение.

## References

1 Zamrij, O.N. (2017). Interesy nesovershennoletneho kak obekt ohrany pri primenenii protsedury mediatsii [Interests of the minor as object of protection at application of procedure of mediation]. *Vestnik Tverskoho hosudarstvennoho universiteta. — Bulletin of Tver state University, 1, 20–28* [in Russian].

2 Davydenko, A.V. (2016). Aktual'nost' primeneniia v rossiiskom sudoproizvodstve instituta mediatsii v otnoshenii nesovershennoletnikh [Relevance of the application of the Institute of mediation in relation to minors in Russian legal proceedings] *Rossiiskaia iustitsiia — The Russian justice, 2, 54–58* [in Russian].

3 Zakon Respubliki Kazakhstan ot 28 yanvaria 2011 hoda № 401-IV «O mediatsii». [Law of the Republic of Kazakhstan No. 401-IV «on mediation» dated January 28, 2011.] *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/? doc_id=30927376 [in Russian].

4 Matrosov, N.A & et. al. (2015). Mediatsiia na stadii podhotovki k sudebnomu razbiratel'stvu o rastorzhenii braka [Mediation at the stage of preparation for the trial of divorce]. *Rossiiskii sudia. — Russian judge, 10, 22–24* [in Russian]; Trofimets, I.A. (2015). Rol' advokata i mediatora v brakorazvodnom protsesse. [The role of a lawyer and mediator in the divorce process] *Semeinoe i zhilishchnoe pravo — Family and housing law, 1, 26–30* [in Russian].

5 Kodeks Respubliki Kazakhstan ot 26 dekabria 2011 hoda № 518-IV «O brake (supruzhestve) i seme». [Code of the Republic of Kazakhstan No. 518-IV of December 26, 2011 «On marriage (matrimony) and family»]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/Document/? doc_id=31102748 [in Russian].

6 Normativnoe postanovlenie Verhovnoho Suda Respubliki Kazahstan «O primenenii sudami zakonodatel'stva pri razreshenii sporov, sviazannykh s vospitaniem detei» [Normative Resolution of the Supreme Court of the Republic of Kazakhstan «On the application of legislation by courts in resolving disputes related to the upbringing of children»] *online.zakon.kz.* Retrieved from https: //online.zakon.kz/ Document/? doc_id =38111660 [in Russian].

7 Shaimenova, A.B., & Ilyassova, G.A. (2018). Istorija razvitija al'ternativnogo razreshenija sporov v Kazahstane. [The history of the development of alternative dispute resolution in Kazakhstan]. Pravovaia sistema Kazakhstana v usloviiakh modernizatsii natsionalnogo pravosoznaniia. — The legal system of Kazakhstan in the conditions of modernization of the national legal consciousness — International scientific and practical conference. (pp. 319–324). Karaganda: Izd-vo KarGU [in Russian].

8 Shelepina, A.V. (2014). Osobennosti primeneniia mediatsii k sporam, voznikaiushhim iz semeinykh pravootnoshenii [Features of mediation application to disputes arising from family relations*]. Probely v rossiiskom zakonodatelstve — The gaps in the Russian legislation, 6, 55–58.* [in Russian].

9 Zakon Respubliki Moldova «O mediatsii» [Law of the Republic of Moldova «On mediation»]. Retrieved from *mediation-eurasia.pro* https://mediation-eurasia.pro/zakonodatelstvo/zakon-respubliki-moldova-137-o-mediaci [in Russian].

10 Eliseeva, A.A. Mediatsiia kak sposob urehulirovaniia semeinykh sporov (2011). [Mediation as a way to settle family disputes // Family law at the turn of XX-XXI centuries: to the 20th anniversary of the UN Convention on the rights of the child: collection of materials international. science- prakt. conf]. Kazan: Statut [in Russian].

11 Trofimec, I.A. (2014). Mediatsiia i rastorzhenie braka [Mediation and divorce]. Moscow: Russkii yazyk [in Russian].

12 Solov'ev, A.A., & Filippov, Ju.M. (2015). Ob aktual'nykh problemakh i nekotorykh perspektivakh ispol'zovaniia al'ternativnoi protsedury urehulirovaniia sporov s uchastiem posrednika (protsedury mediatsii): rossiiskii i evropeiskii opyt [On actual problems and some prospects of using an alternative dispute settlement procedure with the participation of a mediator (mediation procedure): Russian and European experience] *Rossiiskii sudia. — Russian judge, 1, 16–19* [in Russian].

13 Birjukov, P.N., & Pronin A.V. (2015). Ob institute mediatsii v Hermanii [About the Institute of mediation in Germany] *Rossiiskii sudia. — Russian judge, 2, 12–17* [in Russian].

14 Klueva, N.V. (2016). Mediatsiia v situatsii konflikta mezhdu supruhami, imeiushhimi nesovershennoletnikh detei [Mediation in a conflict situation between spouses who have minor children.]. *Vestnik Udmurtskoho universiteta. Seriia philosopiia, psiholohia, pedahohika — Bulletin of Udmurt University. Series «Philosophy, psychology, pedagogy»,2016, Vol. 2, 82–85.* [in Russian].

15 Hrazhdanskii kodeks Respubliki Kazakhstan. (Obshchaia chast), priniat Verkhovnym Sovetom Respubliki Kazakhstan 27 dekabria 1994 hoda. [Civil code of the Republic of Kazakhstan (common chest), adopted by the Supreme Council of the Republic of Kazakhstan on December 27, 1994] *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/? doc_id=1006061 [in Russian].

16 Akimzhanova, M., & Ilyassova, G., Nukusheva, A., & Rustembeova, D. (2018). Extending legislation of the Republic of Kazakhstan by anchoring international child rights. *Journal of Legal, Ethical and Regulatory Issues, Vol.21, Issue 3. www.abacademies.org* Retrieved from https://www.abacademies.org/articles/extending-legislation-of-the-republic-of-kazakhstan-by-anchoring-international-child-rights-7480.html [in English]

17 Kuropackaja, E.A. Mediatsiia kak sposob zashchity prav rebenka v Rossiiskoi Federatsii (2015). [Mediation as a way to protect the rights of the child in the Russian Federation] *Zakony Rossii: opyt, analiz, praktika. — Russian laws: experience, analysis, and practice, 8, 72–76* [in Russian].

# АВТОРЛАР ТУРАЛЫ МӘЛІМЕТТЕР
# СВЕДЕНИЯ ОБ АВТОРАХ
# INFORMATION ABOUT AUTHORS


**Abdakimova, M.Yu.** — Master of jurisprudence, Senior lecturer of department of chair of the constitutional and international law, Ye.A. Buketov Karaganda State University, Kazakhstan.

**Abdukarimova, Z.T.** — Candidate of juridical sciences, Associate professor, Dean of the Law Faculty, M.Kh. Dulaty Taraz State University, Taraz, Kazakhstan.

**Akimzhanova, M.T.** — Master of law, PhD, SENIOR lecturer, Ye.A. Buketov Karaganda State University, Kazakhstan.

**Assanova, A.A.** — Master of law, D.A. Kunaev Teacher Eurasian Law Academy, Almaty, Kazakhstan.

**Baisalova, G.T.** — Candidate of juridical sciences, Professor, D.A. Kunaev Eurasian Law Academy, Almaty, Kazakhstan.

**Balgimbekova, G.U.** — Doctor PhD, Head of the Department of constitutional and international law, Ye.A. Buketov Karaganda State University, Kazakhstan.

**Beisenbayeva, M.T.** — Candidate of juridical sciences, Associate professor, Kazakh National Agrarian University, Almaty, Kazakhstan.

**Bekisheva, S.J.** — Doctor of law, Professor, Academy of Law enforcement authorities at the General Prosecutor's Office of the Republic of Kazakhstan, Nur-Sultan, Kazakhstan.

**Birmanova, A.I.** — Master of jurisprudence, PhD the doctoral candidate, Ye.A. Buketov Karaganda State University, Kazakhstan.

**Bogatyreva, L.B.** — Doctoral candidate in the program Law in the Baltic International Academy, Riga, Latvia.

**Chankova, D.** — PhD, Professor, South-West University, Blagoevgrad, Bulgaria.

**Ilyassova, G.A.** — Candidate of juridical sciences, Full Professor, Professor of chair of the civil and labor law, Ye.A. Buketov Karaganda State University, Kazakhstan.

**Kizdarbekova, A.S.** — Candidate of juridical sciences, Associate professor, Dean of Faculty of Law, Ye.A. Buketov Karaganda State University, Kazakhstan.

**Lavnichak, A.** — Doktor of legal sciences, Professor of the Chair of Constitutional Law, University of Wroclaw, Poland.

**Magdatova, K.Zh.** — Teacher of the Department of legal regulation of economic relations, Karaganda Economic University of Kazpotrebsoyuz, Kazakhstan.

**Meirmanova, D.Sh.** — Teacher of a chair of legal regulation of economic relations, Karaganda Economic University of Kazpotrebsoyuz, Kazakhstan.

**Rakhmetollov, A.K.** — Master of jurisprudence, Doctoral PhD student, Academy of Law Enforcement Agencies under the General Prosecutor's Office of the Republic of Kazakhstan, Nur-Sultan, Kazakhstan.

**Shoshayeva, L.S.** — Master of jurisprudence, Senior lecturer, Karaganda Economic University of Kazpotrebsoyuz, Kazakhstan.

**Sidorova, N.V.** — Candidate in jurisprudence, Associate professor, Karaganda Economic University of Kazpotrebsoyuz, Kazakhstan.

**Sopykhanova, A.** — Candidate of juridical sciences, Associate professor, Karaganda Economic University of Kazpotrebsoyuz, Kazakhstan.

**Taitorina, B.A.** — Doctor of juridical sciences, Professor, M.Kh. Dulaty Taraz State University, Kazakhstan.

**Turlaev, A.V.** — Candidate of juridical sciences, Associate professor, Ye.A. Buketov Karagandy State University, Kazakhstan.

**Tyll, L.** — Doctor of juridical sciences, Professor, Advocacy, Prague, Czech Republic.

**Yerzhanova, F.A.** — Candidate of juridical sciences, Associate professor, Chair of constitutional and international law, Ye.A. Buketov Karaganda State University, Kazakhstan.

**Zhamiyeva, R.M.** — Candidate in jurisprudence, Associate professor, the Head of Criminal law, criminal procedure and criminalistics chair, Ye.A. Buketov Karagandy State University, Kazakhstan.

**Zhussipova, B.A.** — Candidate of juridical sciences, Associate professor, L.N. Gumilyov Eurasian National University, Nur-Sultan, Kazakhstan.