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Адрес редакции: 100028, г. Караганда, ул. Университетская, 28.
Тел.: (7212) 77-03-69 (внутр. 1026); факс: (7212) 77-03-84.
E-mail: vestnick_kargu@ksu.kz. Сайт: vestnik.ksu.kz

Редакторы
И.Д.Рожнова, Ж.Т.Нурмуханова

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Tel.: (7212) 77-03-69 (add. 1026); fax: (7212) 77-03-84.
E-mail: vestnick_kargu@ksu.kz. Web-site: vestnik.ksu.kz

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КОНСТИТУЦИЯЛЫҚ ЖӘНЕ ХАЛЫҚАРАЛЫҚ ҚҰҚЫҚ

МЕМЛЕКЕТ ЖӘНЕ ҚҰҚЫҚ ТЕОРИЯСЫ МЕН ТАРИХЫ

ҚЫЛМЫСТЫҚ ҚҰҚЫҚ ЖӘНЕ КРИМИНОЛОГИЯ

ҚЫЛМЫСТЫҚ ПРОЦЕСС ЖӘНЕ КРИМИНАЛИСТИКА

АЗАМАТТЫҚ ҚҰҚЫҚ ЖӘНЕ АЗАМАТТЫҚ ПРОЦЕСС

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D.K. Rustembekova[1], K. Complak[2]

[1]Ye.A. Buketov Karaganda State University, Kazakhstan;
[2]University of Wroclaw, Poland
(E-mail: dinara_226@mail.ru)

The concept and classification of legal guarantees

The article deals with the concept and classification of legal guarantees. The concept of guarantees as social and legal measures comprehensively show the level of development of the state, the democratic character of society, the public and legal consciousness of the population. Guarantees bind together the legal and factual position of a person in civil society, they serve as an expression of social freedom, responsibility and activity of citizens. In a broader sense, the concept of guarantees the rights and freedoms of a person and a citizen is a component of, on the one hand, the legal status of the individual, on the other, a more capacious concept of «constitutional guarantees», which means a set of legal norms and institutions that protect the constitutional principles, human rights, the foundations of the constitutional system, the fulfillment of constitutional duties and the functioning of various public authorities. Thus, it can be concluded that guarantees of human and citizen's rights and freedoms are a combination of constitutional and legal norms, institutions, means, methods, mechanisms and procedures that ensure the implementation, protection and protection of constitutional rights and freedoms of a person and citizen. In addition, it is fair to say that political, economic, spiritual prerequisites and conditions do not in themselves serve as a basis for realization of individual rights and freedoms. It should be noted that they become guarantees only through the legal form and organizational efforts of the state and society. Hence the allocation of guarantees of human and citizen's rights from the standpoint of a system that includes guarantees of general and legal. The article considers in detail the types of guarantees that have their content and forms of expression.

Keywords: the concept of guarantee, legal guarantees, domestic guarantees, the classification of legal guarantees, legal guarantees of the legal status of the individual.

Observance of public recognition rights and freedoms is the duty of the state. For this, the state develops and creates relevant guarantees and establishes the legal mechanisms for their implementation [1; 254].

The guarantee (from the French garantie) is a warranty, errand, a security, a condition providing for anything. The guarantees of the rights and freedoms of a person and a citizen are part of the legal status of the individual, on the one hand, and on the other hand, of a more capacious concept of «constitutional guarantees», which means a set of legal norms and institutions that protect the constitutional principles, human rights, the foundations of the constitutional system, the fulfillment of constitutional duties and the functioning of various public authorities. Thus, guarantees of human and citizen's rights and freedoms are a set of constitutional legal norms, institutions, means, methods, mechanisms and procedures that ensure the realization, protection and protection of constitutional rights and freedoms of a person and citizen [2; 14].

Guarantees are a system of socioeconomic, political, moral, legal, organizational prerequisites, conditions, means and methods that create equal opportunities for the individual to exercise his rights, freedoms and interests. Guarantees as social and legal measures comprehensively show the level of development of the state, the democratic character of society, public and legal consciousness of the population. Guarantees bind together the legal and factual position of a person in civil society, they serve as an expression of social freedom, responsibility and activity of citizens.

There are much attention is paid to the classification of guarantees of individual rights in the legal literature. It is true that political, economic, spiritual prerequisites and conditions in themselves do not serve as a basis for realizing the rights and freedoms of the individual. Actually, they become guarantees only through the legal form and organizational efforts of the state and society. Hence the allocation of guarantees for human and citizen's rights from the position of a system that includes general and legal guarantees. In turn, these types of guarantees have their content and forms of expression.

Thus, general guarantees are divided according to social orientation into material, political and spiritual.

Material guarantees are the unity of the economic space, the free movement of goods, services and financial resources, the support of competition, the freedom of economic activity, the recognition and protection of private, state, municipal and other forms of ownership, and the social partnership between a person and the state, an employee and an employer, producer and consumer.

Political guarantees are system of people's power, the ability of the individual to take part in managing the affairs of the state and society. The Russian Federation recognizes and guarantees local self-government, political diversity, the right of the people of Russia to preserve and develop their native language, as well as opportunities to enjoy human rights and fundamental freedoms, and to protect their interests.

Spiritual guarantees are system of cultural values based on love and respect for the Fatherland, faith in good and justice; this is the public consciousness and education of man. Among the spiritual guarantees are: ideological diversity, prohibitions on the monopolization of ideology, incitement of social, racial, national and religious discord, universal access to and free basic general and secondary vocational education, freedom of creativity.

Legal guarantees are system of means and ways of protecting and protecting human rights and citizenship.

First of all, it is the responsibility of the state to provide the individual with the right to judicial protection, the right to receive qualified legal assistance, access to justice and compensation for the damage caused [3; 623].

Guarantees of individual rights are defined as general conditions and special (legal) means that provide an actual opportunity to use the underlying benefits and protect them reliably. With reference to the constitutional status of a person under safeguards, one should understand the conditions and means that actually provide a person and citizen with the opportunity to enjoy basic rights and freedoms and strictly fulfill their duties. In its essence, the guarantee is a system of conditions that ensure the satisfaction of the needs and interests of man. Their main function is the fulfillment of obligations by the state and other entities in the sphere of realizing the fundamental rights of the individual. The object of guarantees are public relations related to the implementation, protection and protection of basic human rights.

Legal guarantees are characterized by a number of features: 1) they find their preferential expression in the rules of law; 2) represent specially designed legal means of real provision of legally protected interest; 3) are conditioned by political and economic peculiarities of the state; 4) in content they represent a combination of legal norms and procedural actions based on them, entrusted with certain powers and legal responsibilities.

Depending on the criterion underlying the classification of guarantees, there are several types of constructing a system of legal guarantees for the basic rights and freedoms of citizens, but as the leading criterion for such classification, it seems most expedient to divide them according to a functional feature. This criterion adequately reflects the most significant properties of guarantees of fundamental rights and freedoms.

The application of a functional criterion for classifying legal guarantees of fundamental rights and freedoms of citizens allows us to isolate two types of guarantees - guarantees of implementation and guarantees of protection (protection).

The analysis of literature available in the literature made it possible to formulate the notion of protection guarantees. Guarantees for the protection of individual rights are the means provided for in law to allow individuals, firstly, independently or with the assistance of law enforcement agencies to restore or intercept a violated right by means not prohibited by law, and secondly, the existence of a system and a special procedure of justice - a system of state bodies, carrying out an objective resolution of disputable situations and determining the degree of guilt of the perpetrators of the offense and making a decision on the measures of legal responsibility, and, thirdly, digits together with the individual's right to seek protection of the right violated international human rights organizations.

Legal guarantees of protection are only relevant when they can really ensure the operation of the mechanism for the protection of human rights and freedoms (that is, they do not remain de jure declared in the law, for example), but actually implement the required interaction between the established competence of the

subject to exercise his right and the mechanism its implementation. In this connection, an important condition for this interaction is the real provision of strict execution of the assigned corresponding responsibilities to the relevant state bodies, municipal bodies and their officials, as well as to other persons [4; 53].

The term «protection» should be used when it comes to the application by the competent authorities of the state, local authorities, or a person whose rights are violated, in the manner prescribed by law, measures to restore violated rights and legitimate interests.

Guarantees of protection of constitutional rights are specific, which is dictated by their universality, since their implementation is a necessary prerequisite for the implementation of all other subjective rights of citizens. The specificity of the norms of constitutional law is that all of them, regardless of the degree of abstractness, are norms of direct action. Their purpose is to ensure the prescriptions of sectoral norms regulating the scope of these personal rights of citizens. In essence, they are general guidelines that indicate to the state, its bodies, public organizations and citizens a certain version of the behavior aimed at ensuring conditions for the unhindered enjoyment of fundamental rights and freedoms.

Legal guarantees (funds) - the totality of the funds fixed in the legislation, as well as organizational and legal activities for their application, aimed at ensuring lawfulness, for the unimpeded exercise and protection of rights and freedoms. This is, first of all, the legally-mediated activity of special law enforcement and justice bodies. The following legal guarantees are distinguished: 1) means for detecting (detecting) offenses. These guarantees are related to the work of the competent authorities aimed at detecting offenses with a view to their suppression and elimination of consequences; 2) means of preventing offenses. These are legal means, which allow to prevent possible offenses; 3) measures of restraint of offenses are used in those cases when it is necessary to forcibly stop illegal actions; 4) measures to protect and restore violated rights, to eliminate the consequences of offenses; 5) legal responsibility is also the most important and necessary means of ensuring legality, and its effectiveness is determined not by cruelty, but by the inevitability of punishment; 6) a special role is assigned to procedural guarantees among legal guarantees. The process is a form of the life of the law, therefore the formal rights and freedoms can only be obtained by having procedural support, a clear order of realization. 7) Finally, an important guarantee of the rule of law is justice - the activities of the courts, carried out through the consideration of civil and criminal cases in order to strengthen the rule of law in every way. 8) In addition to legal means, special guarantees also include organizational means. These include various activities of an organizational nature specifically aimed at improving the activities to ensure the rule of law [5; 122].

Legal guarantees of the legal status of the individual. Human rights and citizenship, according to many domestic and foreign legal scholars, often do not have the necessary protection mechanism. Many constitutional provisions can not be objectively implemented in full, as they are not provided with legal guarantees. At the same time, «legal protection is one of the main goals of state activity, a condition for the exercise of freedom and human rights, a guarantor, its legal protection», forces «the power to give legal status to a person of legal significance». In this connection, the issue of legal guarantees for ensuring the legal status of a person acquires special significance.

Legal guarantees for ensuring the legal status of an individual are the conditions provided by law, with the availability of which the legislator connects the real possibility and maximum effectiveness of the exercise of rights, freedoms and duties in the complex of legal status components.

The modern system of legal guarantees of a person's legal status is divided into three levels:

1) international;

2) regional;

3) national.

International level of guarantees of legal status. One of the characteristic features of the rule of law is the priority of international law over domestic law. The formation of such mechanisms and guarantees is primarily connected with the United Nations, the Charter of the United Nations and the Universal Declaration of Human Rights (10 December 1948) [6].

The international human rights law is based on two international pacts on civil and political and social, economic and cultural rights. In addition, a sufficiently effective mechanism for the protection of human rights within the UN is developed, which is a system of special bodies, including the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat. In addition, there are many so-called non-governmental international organizations set up to protect human rights and freedoms («Amnesty International», «Médecins Sans Frontières», «International Red Cross», etc.).

At the regional level, it is possible to single out, first of all, the American, African and European systems of guarantees of the legal status of the individual. At the same time, the system functioning in Europe can be considered a kind of standard. It was formed within the framework of the Council of Europe, the oldest regional organization. The two most important bodies of the Council of Europe are: the Committee of Ministers, which includes the Ministers for Foreign Affairs of the Member States and the Parliamentary Assembly representing the national parliaments.

The main forms of norm-setting activities of the Council of Europe are the creation of conventions and agreements, the most important of which are the European Convention on Human Rights and the European Social Charter. The first of them was adopted on November 4, 1950 in Rome by 15 members of the Committee of Ministers of the Council of Europe and entered into force on September 3, 1953. This document was the first international treaty at the regional level that transformed the principles proclaimed by the Universal Declaration of Human Rights of 1948 in specific legal obligations.

On the basis of this Convention, two bodies were established - the European Commission on Human Rights and the European Court of Human Rights, which are empowered to deal with complaints from both States and individuals.

National (internal) level of guarantees of the legal status of the individual. In recent years, many countries have become parties to the main human rights treaties, which entail legal obligations for their implementation at the international level. The practical task of guaranteeing, protecting and promoting human rights is a task, primarily national, and each state must bear responsibility for its solution. At the national level, the protection of rights can best be ensured through appropriate legislation, an independent judiciary, and the creation of democratic legal institutions [7; 13].

In accordance with this domestic guarantees are divided into: judicial and non-judicial.

In addition, domestic legal guarantees of a person's legal status can also be divided into two large groups:

1) guarantees of the realization of the legal status of the individual;

2) guarantees of protection of a person's legal status.

The first group of guarantees includes:

– normative consolidation of fundamental rights, freedoms and duties in the current legislation and, first of all, in the Constitution of the state;

– providing a person with the opportunity to realize legitimate interests by his lawful actions;

– stimulation (from the state side) of certain activities and, thus, encouraging people to engage in this activity (lending to education, housing construction, establishing benefits for servicemen, etc.);

– state care for the socially unprotected strata of the population (pensions, government programs to support maternity and childhood, etc.).

The second group of legal guarantees are:

– personal guarantees that entitle the individual to defend their legitimate interests independently by all means not prohibited by law;

– guarantees in the law enforcement sphere, presupposing the creation of state bodies that protect human and civil rights and freedoms on a professional basis (police, prosecutor's office, institution of the Ombudsman for Human Rights, etc.);

– guarantees in the field of justice that presuppose the formation and functioning of state bodies (courts), carrying out on behalf of the state an objective resolution of disputes, as well as determining the degree of culpability of persons accused of committing offenses, and deciding on the measures of legal responsibility with respect to these persons.

Recall that legal guarantees in the legal literature are understood to mean various legal means, ways and mechanisms that help to ensure the exercise of rights, legitimate interests and duties of subjects of law, the maintenance of a certain legal status, the order of public relations. Even from this definition it can be seen that there are many such means, methods and mechanisms that are closely interrelated, which, firstly, necessitates their certain systematization and, secondly, consideration of all these legal guarantees as a system [8; 35].

The analysis of the entire system of legal guarantees and, above all, the rights and legitimate interests of subjects of educational relations in general and pedagogical workers, in particular, does not lead to the objectives of this manual. We confine ourselves to a few general remarks and to the allocation of the most important groups of such guarantees.

First of all, we note that all guarantees are, in effect, legal prescriptions (general obligations and / or general prohibitions) addressed to the state, its authorized bodies, municipal authorities, educational institutions and their governing bodies. In other words, guarantees of the rights and legitimate interests of pedagogical workers are realized through the implementation of the relevant regulatory and legal obligations (compliance with prohibitions) of the said subjects of educational relations. These duties and prohibitions can be formulated in different ways, but their essence as guarantees is unchanged.

Depending on various criteria, we can distinguish the following groups of legal guarantees.

1. Depending on the ownership of the legal norms in which such guarantees are enshrined, two main groups of guarantees are allocated to international or domestic (national) law: international legal guarantees and guarantees enshrined in national legislation. The material of the subsequent sections of this chapter is devoted to their characterization.

2. In accordance with the branches of legislation, it is possible to single out constitutional, administrative-legal, civil-law, criminal-legal guarantees, guarantees provided for by labor, arbitration, educational, financial, arbitration law and other branches. In addition, it is of great importance to allocate material and procedural guarantees, which is especially important for judicial practice.

3. Depending on the legal nature of legal guarantees, there are:

a) normative guarantees, i.e. fixed in the regulatory legal acts of different legal force (laws and by-laws, local regulations);

b) law enforcement guarantees, i.e. guarantees contained in decisions of law enforcement agencies in the implementation of various types of law enforcement and justice (judicial, investigative, administrative, arbitration).

4. Depending on the specifics of bodies that manage education at various levels and with various elements of the educational system and operate on the basis of legislation and in accordance with it, it is possible to distinguish the guarantees provided by:

a) bodies of legislative power and bodies of local self-government implementing educational standard-setting;

b) bodies of executive power;

c) education authorities;

d) educational institutions and bodies of its administration (trustees' councils, scientists and pedagogical councils);

e) professional and human rights organizations of educators;

f) public organizations established and operating in the field of education (associations of teachers and university professors, parental councils (committees), etc.).

5. Based on the kind of rights, freedoms and legitimate interests that are subject to legal guarantees, such guarantees are given to education workers as guarantees for them:

– constitutional rights (the right to honor and dignity, freedom of speech, etc.;

– social rights (pensions, eligibility for benefits, etc.);

– labor rights (the right to rest, the right to work part-time, etc.);

– educational (professional) rights and freedoms (the freedom of the teacher in the choice and use of teaching and educational methods, textbooks, teaching aids and materials, methods of assessing the knowledge of students, etc.).

6. Depending on the degree of coverage of different categories of pedagogical workers, it is possible to single out general guarantees (relating both to all categories of pedagogical workers and other india types - subjects of educational relations), and special guarantees for their rights and legal interests relating to certain categories pedagogically the freedom of the teacher in choosing and using: methods of teaching and education, textbooks, teaching aids and materials, methods for assessing the knowledge of students, workers in general education institutions, pedagogical workers (the teaching staff of higher educational institutions, pedagogical workers of special types of educational institutions, etc.).

7. Depending on the nature of the regulatory framework, the guarantees may be mandatory (that is, unconditionally binding) and recommendatory. Examples of the first are guarantees established in legislative acts and therefore are mandatory for all participants of educational relations — from the state to the head of educational institutions. Recommendation guarantees, as a rule, are fixed in international legal acts (for example, in the above-mentioned «ILO / UNESCO Recommendations»).

In conclusion, it is necessary to identify the following conclusions:

– the main functional purpose of legal guarantees of individual rights and freedoms, as well as other guarantees, is that they are all aimed at the practical feasibility of individual rights and freedoms;

– legal guarantees are, first of all, the means provided by law, directly ensuring the legitimacy of the behavior of subjects of social relations and, accordingly, their own rights and freedoms, i.e. the common property of legal guarantees is their consolidation in the law and other normative acts.

References

1 Плескач В.Н. Понятие и классификация основных гарантий прав и свобод человека и гражданина: учебник / В.Н. Плескач. — СПб.: СПбГУСЭ, 2011. — 615 с.

2 Черкасов А.В. Гарантии защиты конституционных прав несовершеннолетних / А.В. Черкасов. — М.: Норма, 2005. — 23 с.

3 Саутбаева С.Б. Правовые гарантии реализации социально-экономических прав и свобод личности в Республике Казахстан // Молодой ученый. — 2016. — № 6. — С. 623–626.

4 Астрахань А.А. Юридические гарантии и пределы осуществления конституционных прав и свобод советских граждан / А.А. Астрахань // Известия высших учебных заведений. Правоведение. — Санкт-Петербургский гос. ун-т. — 1986. — № 6. — С. 53–56.

5 Бойцова В.В. Правовое государство: гарантии реализации прав, свобод и законных интересов граждан / В.В. Бойцова // Вестн. Санкт-Петербургского ун-та. — 1990. — № 1. — С. 122–125.

6 Universal Declaration of Human Rights [Электронный ресурс]. — Режим доступа: http://www.un.org/en/universal-declaration-human-rights/ http://www.un.org/en/universal-declaration-human-rights/.

7 Игитова И.В. Механизм реализации международных стандартов в области прав человека в рамках европейской конвенции «О защите прав человека и основных свобод» / И.В. Игитова. — М.: Норма-К, 1994. — 25 с.

8 Эбзеев Б.С. Государство, гражданское общество и защита прав человека / Б.С. Эбзеев // Государство и право. — 1994. — № 10. — С. 35–38.

Д.К. Рүстембекова, К. Цомплак

Құқықтық кепілдіктің түсінігі мен жіктелуі

Мақалада құқықтық кепілдіктің түсінігі мен жіктелуі туралы мәселе қарастырылған. Кепілдіктер әлеуметтік-құқықтық шаралар ретінде мемлекет дамуының деңгейін, қоғамның демократиялық сипатын, халықтың қоғамдық және құқықтық сана-сезімін жан-жақты көрсетеді. Олар адамның азаматтық қоғамдағы заңды және нақты жағдайын біріктіреді, азаматтардың әлеуметтік бостандығын, жауапкершілігін және қызмет етуін білдіреді. Адамның және азаматтың құқықтары мен бостандықтарының кепілдігі, түсінігі, кең мағынасында, бір жағынан, жеке тұлғаның құқықтық мәртебесінің бір бөлігі болып табылады, екінші жағынан, «конституциялық кепілдіктер» конституциялық қағидаларды, адам құқықтарын, конституциялық құрылыстың негіздерін қорғайтын құқықтық нормалар мен институттардың жиынтығын, көпшілік биліктің конституциялық міндеттерді орындауын және әртүрлі мемлекеттік органдарының жұмыс істеуін білдіреді. Сонымен, адамның және азаматтың құқықтары мен бостандықтарының кепілдіктері — адам мен азаматтың конституциялық құқықтары мен бостандықтарын іске асыруды, сақтауды және қорғауды қамтамасыз ететін конституциялық-құқықтық нормалар, институттар, құралдар, әдістер, механизмдер мен рәсімдердің жиынтығы болып табылады деген қорытынды жасауға болады. Шын мәнінде, саяси, экономикалық, рухани алғышарттар мен шарттар адамның жеке құқықтары мен бостандықтарын іске асыру үшін негіз болып табылмайды. Одан басқа, шын мәнінде, олар мемлекет пен қоғамның құқықтық нысаны мен ұйымдастырушылық күші арқылы ғана кепілдікке айналатынын атап өткен жөн. Демек, адамның және азаматтың құқықтарының кепілдіктерін жалпыға ортақ және құқықтық кепілдіктерді қамтитын жүйе ұстанымынан бөлу. Мақалада аталған кепілдіктердің бұл түрлері толық зерттелген, олардың мазмұны мен білдіру нысандары болатындығы дәлелденген.

Кілт сөздер: кепілдіктің түсінігі, құқықтық кепілдіктер, мемлекетішілік кепілдіктер, құқықтық кепілдіктерді жіктеу, жеке тұлғаның құқықтық мәртебесін қамтамасыз ететін құқықтық кепілдіктер.

Д.К. Рустембекова, К. Цомплак

Понятие и классификация юридических гарантий

В статье рассмотрены вопросы понятия и классификации юридических гарантий. Гарантии как социально-правовые меры всесторонне показывают уровень развития государства, демократичности общества, общественного и правового сознания населения. Гарантии связывают воедино и правовое, и фактическое положения человека в гражданском обществе, служат выражением социальной свободы, ответственности и активности граждан. В более широком смысле гарантии прав и свобод человека и гражданина являются составляющей, с одной стороны, правового статуса личности, с другой — более емкого понятия «конституционные гарантии», под которыми следует понимать совокупность правовых норм и институтов, обеспечивающих защиту конституционных принципов, прав человека, основ конституционного строя, выполнения конституционных обязанностей и функционирования различных органов публичной власти. Таким образом, можно заключить, что гарантии прав и свобод человека и гражданина — это совокупность конституционно-правовых норм, институтов, средств, способов, механизмов и процедур, обеспечивающих реализацию, охрану и защиту конституционных прав и свобод человека и гражданина. Кроме того, справедливо утверждение, что политические, экономические, духовные предпосылки и условия сами по себе не служат основанием для реализации прав и свобод личности. Следует отметить, что гарантиями они становятся лишь через юридическую форму и организационные усилия государства и общества. Отсюда и выделение гарантий прав человека и гражданина с позиции системы, включающей в себя гарантии общие и юридические. В статье подробно рассмотрены названные виды гарантий, которые имеют свое содержание и формы выражения.

Ключевые слова: понятие гарантии, юридические гарантии, внутригосударственные гарантии, классификация юридических гарантий, юридические гарантии обеспечения правового статуса личности.

References

1 Pleskach, V.N. (2011). *Poniatie i klassifikatsiia osnovnykh harantii prav i svobod cheloveka i hrazhdanina [The concept and classification of basic guarantees of human and citizen's rights and freedoms]*. Saint Petersburg: SPbHUSE [in Russian].

2 Cherkasov, A.V. (2005). *Harantii zashchity konstitutsionnykh prav nesovershennoletnikh [Guarantees for the protection of the constitutional rights of minors]*. Moscow: Norma [in Russian].

3 Sautbayeva, S.B. (2016). Pravovye harantii realizatsii sotsialno-ekonomicheskikh prav i svobod lichnosti v Respublike Kazakhstan [Legal guarantees of realization of social and economic rights and personal freedoms in the Republic of Kazakhstan]. *Molodoi uchenyi – Young Scientist, 6,* 623–626 [in Russian].

4 Astrakhan, A.A. (1986). Yuridicheskie harantii i predely osushchestvleniia konstitutsionnykh prav i svobod sovetskikh hrazhdan [Legal guarantees and limits for the exercise of the constitutional rights and freedoms of Soviet citizens*]. Izvestiia vysshikh uchebnykh zavedenii. Pravovedenie – Izvestiya High School. Jurisprudence, 6,* 53–56 [in Russian].

5 Boytsova, V.V. (1990). Pravovoe hosudarstvo: harantii realizatsii prav, svobod i zakonnykh interesov hrazhdan [The legal state guarantees the implementation of rights, freedoms and legitimate interests of citizens]. *Vestnik Sankt-Peterburhskoho universiteta — Bulletin Saint Petersburg, 1,* 122–125 [in Russian].

6 Universal Declaration of Human Rights. *un.org.* Retrieved from http://www.un.org/en/universal-declaration-human-rights/ http://www.un.org/en/universal-declaration-human-rights/.

7 Igitova, I.V. (1994). *Mekhanizm realizatsii mezhdunarodnykh standartov v oblasti prav cheloveka v ramkakh evropeiskoi konventsii «O zashchite prav cheloveka i osnovnykh svobod» [Mechanism for the implementation of international human rights standards in the framework of the European Convention «On the Protection of Human Rights and Fundamental Freedoms»]*. Moscow: Norma-K [in Russian].

8 Ebzeev, B.S. (1994). Hosudarstvo, hrazhdanskoe obshchestvo i zashchita prav cheloveka [State, civil society and the protection of human rights]. *Hosudarstvo i pravo – State and Law, 10,* 35–38 [in Russian].

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N.S. Ternovaya

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

General characteristics of representative bodies of local self-government in the Republic of Kazakhstan and the Russian Federation

In this article, the author conducts a comparative legal analysis of the system of local self-government in the two largest countries of the post-Soviet space - the Republic of Kazakhstan and the Russian Federation. Having many similarities and differences, local government systems have one common feature - the primacy of the representative body and its top priority in matters of local importance. Taking into account the conditions in which the system of local self-government developed in both countries, the author of the article, by means of a comparative legal method, determines the criteria that occupy the dominant position when taking into account the construction, organization, functioning and prospects for the development of the local government system through the prism of local representative bodies of the Russian Federation and the Republic Kazakhstan. The urgency of this issue has both scientific and practical significance for the purpose of increasing the effectiveness of the work of the representative body in the framework of local self-government.

Keywords: local government, representative body, municipal entity,maslikhat, apparatus of the representative body, local government system, territorial subdivision of the central state body, maslikhat session, local state administration, akim, akim machinery, local issues.

The successful functioning of the local government system directly depends on the local government, namely how they are structured in the local government system, what powers they have and how they interact with each other. The definition of these basic characteristics must begin, first, with the device of local self-government enshrined in legislation, and secondly with an analysis of the mechanisms by which these bodies function separately and among themselves. According to A.Kostyukov the system of local government can be seen in two senses - narrow and broad, depending on the scale. In a narrow sense, the system of local self-government bodies is a system of bodies with an independent legal status, through which the functions and powers of local governments are exercised in the respective territory. In a broad sense, these are internal divisions of the created bodies of local self-government. In addition to these definitions, the structure of the local self-government bodies is also understood as the structure of the system of the main local self-government bodies, endowed with their own competence, and the internal structure of each of these bodies [1; 199].

Bases of local government in the Republic of Kazakhstan is the 1995 Constitution, namely Article 86 Section 8. It says that dominant bodies in the structure of local government are m estno representative bodies - maslikhats. They express the will of the population of the relevant administrative-territorial units and, taking into account national interests, determine the measures necessary for its implementation, control their implementation [2]. In the Russian Federation, however, the Constitution defines the following provisions for a representative body: through it, citizens exercise their political rights and exercise local government within the boundaries of the municipal entity [3].

As a rule, some bodies of executive power, as well as representative bodies, are included in the system of local self-government bodies. In the Republic of Kazakhstan, the number of bodies of local self-government is covered by all bodies for which, in accordance with the Law «On Local Government Management and Self-Government», functions are assigned to address issues of local importance. Such bodies are primarily the local executive collegial bodies, headed by the akim of the region, the city of the republican significance and the capital, the district (the city of regional importance) that carries out within its competence local state administration and self-government in the corresponding territory. It should be noted that in addition to the local executive body, the central executive body is also actively involved in the work of the local government system, which, in accordance with the legislation, is authorized to develop a system of local government in the regions. However, territorial subdivisions of the central state body were created to fully cover the territories controlled by the central executive body and to strengthen the effectiveness of work on the development and strengthening of settlements. They are a structural subdivision of the central executive body that performs the functions of the central executive body within the respective administrative-territorial unit [4].

In the legislation of the Russian Federation for securing the legal status of local self-government bodies, a separate section is allocated, which allows a much more detailed disclosure of the structure of the local government. Its basis, as in the Republic of Kazakhstan, is the representative body of the municipal formation and the local executive and administrative body of the municipal entity, that is, the local administration. The work of local government necessarily involves the head of the municipal formation, as well as a separately established control and accounting body of the municipal formation. The above-mentioned bodies are mandatory for each municipal entity, since they are called upon to ensure full exercise of the functions of local self-government. However, considering the vast territory and numerous ethnic composition of the Russian Federation, municipal entities are given the right to independently create the internal structure of representative bodies of local self-government. The procedure and organizational forms of their activities are determined by the municipal entity independently, by introducing the relevant provisions in the statutes, regulations, as well as other legal acts adopted by these bodies [5]. Such a provision in the Law «On General Principles of Local Self-Government in the Russian Federation» allows municipal entities to have the authority to establish special bodies necessary for a particular local government unit that facilitate more effective resolution of issues of local importance.

In the Republic of Kazakhstan maslikhats occupy a dominant position in the implementation of local self-government within certain administrative-territorial units, as they represent a representative body that embodies the democratic foundations of local self-government and democracy. Maslikhat is an elected body elected by the population of the region, the city of the republican significance and the capital or district (city of regional significance) expressing the will of the population and in accordance with the legislation of the Republic of Kazakhstan, determining the measures necessary for its implementation and supervising their implementation [4].

As well as it is necessary to the countries with democratic way of development, maslikhats are selected by the population of corresponding administrative-territorial units on the basis of universal, equal, direct suffrage by secret ballot for the period of five years. Maslikhats are formed from deputies who, on the basis of the Law of the Republic of Kazakhstan «On Local Government Administration and the Administration of the Republic of Kazakhstan», may be a citizen of the Republic of Kazakhstan who has reached the age of twenty. Depending on the scale of the administration in the no-territorial unit where local self-government is exercised, the Central Election Commission of the Republic of Kazakhstan establishes the limits of the number of deputies of the Maslikhat . Thus , in the regional maslikhat, as well as the maslikhats of the capital of Astana and the city of the republican significance of Almaty, their number can not exceed fifty people. In the city maslikhats there are no more than thirty deputies, in the district no more than twenty-five. Maslikhat is considered eligible subject to the election of at least three-fourths of the total number of its deputies, determined by the Central Election Commission of the Republic of Kazakhstan [4].

In the Russian Federation, in the system of local self-government bodies, a representative body also occupies a dominant position. The representative body of the municipal formation is an elected collegial body of local self-government, consisting of deputies and vested with the power to represent interests and act on behalf of the population of the municipality. The dominant position of the representative body in the structure of local self-government is determined by the right to form other bodies of local self-government within the territorial boundaries of the municipality, to take decisions on behalf of the population of the municipality within their competence that are legally binding for all legal and physical persons in the territory falling under jurisdiction of the representative body of the municipal territory [5].

The representative body of the municipal formation, as in the Republic of Kazakhstan, is formed by equal, direct, universal expression of will of the citizens of the Russian Federation residing on the territory of the municipality within whose borders elections are held. However, as A.N. Kostyukov, in accordance with Federal Law No. 131-F3 «On general principles of the organization of local government in the Russian Federation», there are certain exceptions to the rules for the formation of representative bodies in municipal areas. In addition to direct suffrage, direct indirect election of members of a representative body of local self-government is already practiced from among the heads of settlements elected by the population as part of a municipal formation, as well as from deputies of representative bodies of these settlements, elected by the representative bodies of settlements from their composition in accordance with the norm of representation, regardless of the population of the settlement.

As in the Republic of Kazakhstan and the Russian Federation, the legislator established the procedure for the formation of a representative body and the limit of the number of deputies who make up its membership. The expediency of this activity consists in the need to find a balance in the optimal number of deputies

required to solve the tasks falling within the competence of local self-government. The number of deputies should not be too large, or rather inadequate for effective work of the collegial body. In contrast, and by the Republic of Kazakhstan, which establishes a limit on the number of deputies, the Russian legislator sets the minimum number of deputies of a certain population. The specific number of deputies of the representative body is established by the charter of the municipal formation, but it can not be less than the requirement established in the law. This minimum depends directly on the population of the municipality.

Such distinctive differences in the formation of deputies in the two countries are connected with the need for universal coverage by the local government of the population and territories on which it lives. This distribution occurred in order to maximize the effectiveness of the work of deputy groups with a certain number of people. In the Republic of Kazakhstan, the limit on the number of deputies in the representative body is dictated by the lack of the need for a large number of representatives for a relatively small number of people. However, domestic legislator nevertheless found that maslihat is not entitled thereto if its composition will be elected at least two thirds of the total number of seats [4].

Also, the fulfillment of the direct responsibilities of local self-government also depends on the number of deputies involved in the work of the representative body. The Law of the Republic of Kazakhstan «On Local Government Management and Self-Management» singles out sessions as the main form of activity of the bodies of maslikhat. Authority of making any decisions and accomplishing tasks that fall within the competence of the representative body of local self-government are determined by the number of deputies present at the session. Maslikhat session is qualified if at least two thirds of the total number of Maslikhat deputies are present at the session . Maslikhat session is held in the form of plenary sessions. The first session of the newly elected maslikhat shall be convened by the chairman of the relevant territorial election commission no later than within thirty days after the registration of the deputies of the maslikhat. The next session of the maslikhat is convened at least four times a year and is conducted by the chairman of the maslikhat session. An extraordinary session of the maslikhat is convened and chaired by the chairman of the maslikhat session on the proposal of at least one third of the number of deputies elected to this maslikhat, as well as akim. An extraordinary session shall be convened no later than within five days from the date of adoption of the resolution on holding an extraordinary session [4].

In the Russian Federation, the activities of the representative body are conducted in the form of sessional meetings, for which a quorum is mandatory. A quorum is a normatively established minimum required number of deputies for consideration and resolution of issues within the competence of the representative body. However, for the initial meeting and for the next meeting there are two different types of quorums, as in the Republic of Kazakhstan. The first meeting calls for a mandatory, statutory number of elected deputies in the amount of two thirds of the total number of seats. Regular sessions are held in accordance with the charter of each individual municipal entity, or according to the rules of the representative body.

In the Republic of Kazakhstan, due to the unitary nature of the state, the procedure for holding sessions is strictly regulated by law, and has little difference from the order in the Russian Federation. However, when convening an extraordinary session of a representative body, namely a maslikhat, the presence of a complete or even dominant majority of the composition of deputies is not necessary, in view of the urgency and the urgency of the meeting. One-third of the total number of deputies is sufficient for holding an extraordinary meeting, but it is true that in such a small convocation the powers will be very limited: when convening an extraordinary session, deputies have the right to consider only those issues that caused the convocation of an extraordinary session. The proper functioning of the sessional body of maslikhat is extremely important for the work of all local bodies of local self-government, since it is the maslikhat session thatis the main form of activity of local self-government in the person of deputies When this session organ necessarily present maslihat chairman. The maslikhat chairman is a maslikhat official, elected from among his deputies, who performs organizational and managerial functions at a maslikhat session [4]. However, in addition to regulating the activities of the representative body directly at the session, it seems necessary to carry out organizational and managerial work both at the maslikhatsession and with its other bodies.This role is performed by the Secretary of Maslikhat, who is an official working on an ongoing basis. He is elected from among the deputies by open or secret ballot by a majority of votes of the total number of deputies and dismissed from office by the maslikhatat the session. Secretary of Maslikhat elected for a term of office of maslikhat Candidates for the post of Secretary of maslikhat deputies nominated o maslikhat maslikhat session. In addition to the fact that this official acts with the deputies of the maslikhat in the exercise of their powers, provides them with the necessary information, considers the issues, it also coordinates the interac-

tion of themaslikhat with the rest of the local self-government bodies, and also is the head of the maslikhat apparatus [2].

Being by their nature a compound and rather complex body, maslikhats have their own apparatus and secondary bodies, facilitating the work of deputies of local representative bodies. Such bodies include not only the maslikhat session , but also the maslikhat apparatus . The maslikhat apparatus is a kind of service for the work of the maslikhat organ, ensuring the normal functioning of its other bodies, deputies, as well as sessions held in the executive body. This body also carries out organizational, legal, logistical and other support of the maslikhat and its bodies, assists the deputies in the exercise of their powers. The maslikhat apparatus is a state institution, which is maintained at the expense of the local budget. In the Russian Federation, there is also the apparatus of a representative body that bears the status of a legal entity, it performs all the functions characteristic for it, as well as the Maslikhat apparatus in the Republic of Kazakhstan. Financing of this body is also carried out from the local budget, which, in the opinion of A.N. Kostyukov allows local self-government bodies to exercise more independence in carrying out their activities, and also makes it possible to take into account all costs and other financial aspects of the body's activities, which certainly affects the effectiveness of the whole process of local self-government [1].

Thus, having analyzed the structure of the representative body in the two countries, it can be concluded that the local government system in the two countries is adjusted in accordance with the needs for exercising power over the administrative-territorial units of the two countries. Taking into account all the peculiarities of local self-government of the Russian Federation and the Republic of Kazakhstan, it can be unequivocally asserted that the account of the area, density and number of people living on the territory plays a leading role in determining the structure of local self-government: the larger the scale of the territory covered by the system of local self-government, the more complex and ornate will be there is a power over it.

Referenses

1 Муниципальное право: учебник для студентов вузов, обучающихся по специальности «Юриспруденция», «Государственное и муниципальное управление» / под ред. А.Н. Костюкова. — 2-е изд., перераб. и доп. — М.: ЮНИТИ-ДАНА: Закон и право, 2011. — 791 с.

2 Конституция Республики Казахстан от 30 августа 1995 года [Электронный ресурс]. — Режим доступа: http://www.constitution.kz.

3 Конституция Российской Федерации 1993 г. [Электронный ресурс]. — Режим доступа: http://www.constitution.ru.

4 Закон Республики Казахстан «О местном государственном управлении и самоуправлении в Республике Казахстан» от 23 января 2001 года № 148 [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz.

5 Федеральный закон «Об общих принципах организации местного самоуправления в Российской Федерации» от 06.10.2003 N 131-ФЗ (последняя редакция) [Электронный ресурс]. — Режим доступа: http://www.consultant.ru.

Н.С. Терновая

Қазақстан Республикасында және Ресей Федерациясында жергілікті өзін-өзі басқару құрылымындағы өкілді органның жалпы сипаттамасы

Мақалада посткеңестік аумақтағы ең ірі екі мемлекеттің — Қазақстан Республикасы мен Ресей Федерациясының жергілікті өзін-өзі басқару жүйелерінің салыстырмалы құқықтық талдамасы жасалып отыр. Жергілікті өзін-өзі басқару жүйесі көптеген ұқсастықтар мен ерекшеліктерге ие бола отырып, ең басты жалпы ерекшелікке тән болып отыр — жергілікті мәселелерді шешуде өкілді органның басымдылығы. Екі мемлекеттегі жергілікті өзін-өзі басқару органдары жүйелерінің даму ерекшеліктерін ескере отырып, мақала авторы құқықтық-талдама тәсіл арқылы Ресей Федерациясы мен Қазақстан Республикасында жергілікті өкілді органдардың өкілеттіліктеріне назар аудара отырып, жергілікті өзін-өзі басқару органдарының жүйесін құру, қалыптастыру және даму болашағының ерешеліктерін анықтап отыр. Жергілікті өзін-өзі басқаруды жүзеге асыру аясында өкілді орган жұмысының тиімділігін арттыру мақсатында бұл мәселенің ғылыми және тәжірибелік өзектілігі анықталып отыр.

Кілт сөздер: жергілікті өзін-өзі басқару, өкілді орган, муниципалдық мекеме, мәслихат, өкілді орган аппараты, жергілікті өзін-өзі басқару жүйесі, орталық мемлекеттік органның аумақтық бөлімшесі, мәслихат сессиясы, жергілікті мемлекеттік басқару, әкім, әкім аппараты, жергілікті мәселелер сұрақтары.

Н.С. Терновая

Общая характеристика представительного органа в структуре местного самоуправления в Республике Казахстан и Российской Федерации

В данной статье автор проводит сравнительно-правовой анализ системы местного самоуправления в двух крупнейших странах постсоветского пространства — Республике Казахстан и Российской Федерации. Имея множество сходств и различий, системы местного самоуправления имеют общую особенность — главенство представительного органа и его первоочередная значимость в вопросах местного значения. Учитывая те условия, в которых система местного самоуправления развивалась в обеих странах, автор статьи путём сравнительно-правового метода определяет критерии, занимающие доминирующее положение при учете построения, организации, функционирования и перспектив развития системы местного самоуправления, через призму местных представительных органов Российской Федерации и Республики Казахстан. Актуальность данного вопроса имеет как научное, так и практическое значение, так как цель исследования — повышение эффективности работы представительного органа в рамках осуществления местного самоуправления.

Ключевые слова: местное самоуправление, представительный орган, муниципальное образование, маслихат, аппарат представительного органа, система местного самоуправления, территориальное подразделение центрального государственного органа, сессия маслихата, местное государственное управление, аким, аппарат акима, вопросы местного значения.

Referenses

1 Kostiukova, A.N. (Ed.). (2011). Munitsipalnoe pravo [Municipal law]. Moscow: YuNITI-DANA: Zakon i pravo [in Russian].

2 Konstitutsiia Respubliki Kazakhstan ot 30 avhusta 1995 h. [The Constitution of the Republic of Kazakhstan of August 30, 1995]. *constitution.kz*. Retrieved from // http://www.constitution.kz [in Russian].

3 Konstitutsiia Rossiiskoi Federatsii 1993 h. [The Constitution of the Russian Federation, 1993]. *constitution.kz.* Retrieved from http://www.constitution.kz [in Russian].

4 Zakon Respubliki Kazakhstan «O mestnom hosudarstvennom upravlenii i samoupravlenii v Respublike Kazakhstan» ot 23 yanvaria 2001 hoda № 148 [Law of the Republic of Kazakhstan «On local government and self-government in the Republic of Kazakhstan» of January 23, 2001 No. 148]. *adilet.zan.kz*. Retrieved from http://adilet.zan.kz [in Russian].

5 Federalnyi zakon «Ob obshchikh printsipakh orhanizatsii mestnoho samoupravleniia v Rossiiskoi Federatsii» ot 06.10.2003 N 131-FZ [Federal Law «On General Principles of Organization of Local Self-Government in the Russian Federation» of October 6, 2003 N 131-FZ]. *consultant.ru.* Retrieved from // http://www.consultant.ru [in Russian].

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A. Bozhkarauly[1], K. Complak[2]

[1]Ye.A. Buketov Karaganda State University, Kazakhstan;
[2]University of Wroclaw, Poland
(E-mail: altai6969@mail.ru)

Reform of electoral legislation in the Republic of Kazakhstan

This article considers the issue of reforming the electoral legislation of the Republic of Kazakhstan. One of the actual directions within the framework of the organizational and legal measures being carried out in the Republic of Kazakhstan is the improvement of the electoral legislation. It should be noted that for the years of independence in the Republic of Kazakhstan, a solid legal basis has been created for the implementation of the electoral right stipulated in Article 33 of the Constitution of the Republic of Kazakhstan. What was, in my opinion, the main drawback of Western models of the modernization of the twentieth century as applied to the realities of our time? That they transferred their unique experience to all peoples and civilizations without taking into account their characteristics. That is why the first condition for the modernization of a new type is, as the Head of State notes, «the preservation of its culture, its own national code. Without this, modernization will turn into an empty sound». The new modernization should not, as before, look arrogantly at historical experience and traditions. On the contrary, it must make the best traditions a prerequisite, an important condition for the success of modernization. The centuries-old history of Kazakhstan contains an invaluable historical experience of legal regulation of various aspects of society. With regard to the electoral law and process worthy of attention the study and analysis of the institutions of the Kazakh customary law as: the election khans, election management bodies and local self-government, etc.

Keywords: electoral law of the Republic of Kazakhstan, electoral process, Constitution of Kazakhstan, political reform, elections.

In the program article of April 12, 2017, the President of the Republic of Kazakhstan, «Course towards the future: modernization of Kazakhstan's identity», the Head of State noted: «we launched two most important processes of modernization - the political reform and the modernization of economy. The goal is to join the world's 30 most developed countries. Both modernization processes have crystal-clear goals along with the tasks, priorities and methods to achieve them».

Within the framework of political reform, one of the priority areas is to improve the legislation of the Republic of Kazakhstan, ensure the rule of law in all spheres of life of our society.

The Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan», adopted on September 28, 1995, determines that this Constitutional Law regulates the relations that arise in the preparation and conduct of presidential elections, deputies of the Senate and Mazhilis of the Parliament, maslikhats and members of other bodies of local self-government of the Republic of Kazakhstan, and also establishes guarantees that ensure the freedom of expression of the will of citizens of the Republic [1].

The experience of the conducted election campaigns for the election of the President of the Republic of Kazakhstan, the Parliament, local representative bodies, assessment of the legal community, including authoritative world organizations and experts, polls show that, in general, the current Constitutional Law «On Elections in the Republic of Kazakhstan» and the process of exercising the electoral rights of citizens is comprehensively regulated. This, however, does not mean that the electoral legislation of the Republic of Kazakhstan does not need further improvement. This circumstance prompts the need to further search for the optimal legal forms of the current legislation and law enforcement practice. In the development strategy of the Republic of Kazakhstan until 2050, the program article of the Head of State «A look into the future: the modernization of public consciousness» clearly identifies benchmarks for improving the legislation of the Republic of Kazakhstan, to which the improvement of the electoral law and process can be fully included.

At the meetings of the research institute of «Legal Studies and State Studies» at the Faculty of Law of the Karaganda State University named after Ye.A. Baketov, issues related to the constitutional and legal framework for regulating the electoral process in the Republic of Kazakhstan, modern problems of implementing Kazakhstan's electoral legislation, gaps and collisions in the legislation of the Republic of Kazakhstan, a comparative legal analysis of the legislation R republics of Kazakhstan, international legal acts and the foundations of law of foreign countries in the field of electoral law and process, analyzes the current electoral law of the country in the field of regulatory consolidation of international principles of electoral law.

1. 1. The 1995 Constitution of the Republic of Kazakhstan needs amendments and additions.

1.1 The general legitimate trends in the development of modern constitutionalism dictate the need for a political and legal consolidation of the principle of political pluralism in the Republic of Kazakhstan. Effective functioning of the political system is inconceivable without the active participation of political parties in state and public life. The legislator should take into account the tendency of increasing the role and importance of non-state organizations, citizens, their associations in the political life of the state, and the expansion of their rights and freedoms.

Ideological and political diversity, multi-party system are a substantial characteristic of democracy, as it is enshrined in the Constitution of the RK, and the political parties themselves are an institution necessary for its functioning within the framework of the rule of law. It is the parties that are called upon to ensure the stability of the state's political system of the country, to include broad sections of voters in the process of managing the affairs of the state. Strengthening the role of parties in the political life of countries is a general trend in the development of the country's political process [2].

At the same time, during the constitutional reform, it did not adequately reflect the issue of civil society and its institutions, parties and public associations in the Constitution of the Republic of Kazakhstan. Elaboration of these issues at the constitutional level would exclude the possibility of the state, if necessary, to ignore the institutions of civil society, which would create prerequisites for a correct attitude to their representatives.

These changes and additions to the constitutional and legal legislation will serve as a stabilizing factor and will allow us to quickly establish in the life of our society the various forms of political pluralism and developed democracy.

It is necessary, in our opinion, to supplement Kazakhstan's Constitution with the following provisions:

1) to consolidate in the Constitution of the Republic of Kazakhstan provisions on the role and significance of political parties in society and the state;

2) on the inclusion in the Constitution of the RK of such principles of the principle of political pluralism, as competition, competition of parties.

1.2 The 1995 Constitution of the Republic of Kazakhstan does not mention the role of election commissions in the organization and conduct of elections. This approach seems to be erroneous, because in Kazakhstan, a new system of state bodies is formed, which does not belong to any of the three branches of power and has a number of features.

The consolidation and development in the Constitution of the issues of the organizational design of the will of the people, giving it a normative and binding character to all state bodies, officials, public associations, citizens would, in our opinion, create clear legal bases for the establishment in our society of various forms of political pluralism and developed democracy. The constitutional status, in our opinion, deserves the function of election commissions.

Thus, further reform of the constitutional legislation is advisable. In the Constitution of the Republic of Kazakhstan, we should, in particular, in our view:

1) to consolidate the principles of adversarial and alternative elections;

2) determine the place and role of election commissions as bodies that ensure the legitimacy of the formation of the will of voters.

2. The Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan» needs to be improved.

2.1. We believe that the court extensively interprets the provisions of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan» [2]. In this regard, we propose to amend Part 2 of Article 27 of the Constitutional Law «On Elections in the Republic of Kazakhstan» in the following wording: «Election agitation begins on the next day, after the termination of the registration of candidates and ends at zero hours at the local time of the day preceding the election day».

2.2. To supplement clause 4 of Article 50 of the Constitutional Law «On Elections in the RK» with the provision that in the event that it is proved that the candidate for deputies destroyed the propaganda materials of political competitors, the decision to register such candidature must be abolished immediately.

2.3. It is necessary to differentiate the bases of the «administrative» and «other» responsibilities, which is mentioned at the beginning of Part 2 of Art. 50 of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan». Remove the words «and other responsibility» in Part 2 of Article 50 of the Election Law.

2.4. It is necessary to regulate in detail the issue of establishing the responsibility of election commissions for violating the norms of Kazakhstan's election legislation, as this violates the electoral rights of citizens guaranteed by the Constitution of the Republic of Kazakhstan. In addition, such violations of the electoral law may entail the recognition of the invalidity of the results of voting in the respective territory. Forms of such liability may be administrative penalties for members of the election commission, the dissolution of the election commission in whole or in part, and others.

3.1. In order to guarantee equal representation of political parties participating in elections in election commissions, we believe that the composition of election commissions should include equally representatives of all political parties. It is necessary to amend the Election Law to ensure a broader representation of parties in election commissions and to ensure the independence of the commissions. Thus, it is necessary to reform Kazakhstan's electoral legislation, in particular, to change the procedure for the formation of election commissions with the participation of all participating political parties. To this end, the number of election commissions should be legislatively expanded, indicating the number of members of election commissions in the Election Law, or without specifying such.

The number of commission members should be proportional to the number of voters at polling stations and be no less than the number of registered political parties.

3.2. In order to ensure a democratic procedure for the formation of election commissions with objective criteria not related to political considerations, as well as the independence of election commissions, it is necessary to modernize the system of election commissions in the direction of establishing a system of permanent election commissions. In this regard, it is possible to establish either a single term for all election commissions in Kazakhstan, which is equivalent, for example, to the term of office of the deputies of the Majilis, the President, or a single term of office, but divorced in time intervals for various sections of election commissions (first a central election commission, for the next year — territorial election commissions, then - district election commissions, Precinct Election Commissions).

3.3. In order to ensure the re-representation of the party with the replacement of the relevant commission members, one can turn to the experience of foreign countries. Thus, in the Russian Federal Law No. 157-FZ of 2012 «On Amendments to the Federal Law» On Political Parties «and the Federal Law» On Basic Guarantees of Electoral Rights and the Right to Participate in the Referendum of Citizens of the Russian Federation, «provision is made for the formation of a pool of candidates , proposed to the precinct election commission, but not appointed by the members of the commission. The appointment of a new member of the precinct election commission instead of the retired will be made from this reserve. Such a mechanism also makes it possible to ensure the training of the personnel reserve of electoral commissions [3].

3.4. In order to give greater organizational transparency and validity to the formation of the composition of election commissions, one can use the institution of an alternate member of the election commission (electoral body) operating in some foreign countries, which also makes it possible to give continuous work to the commissions, but also to conduct targeted training and increase the professional qualifications of members of commissions.

4. In order to ensure legal protection of participants in the electoral process, the Election Law should clearly establish procedures for handling complaints, provide for the provision of written, informed and publicized responses.

4.1. We believe that it should be in Art. 49 of the Constitutional Law «On Elections in the Republic of Kazakhstan» establish a provision stating that citizens or public organizations can apply to election commissions with proposals, statements, complaints, requests or responses and give definitions to these concepts. This will make it possible to delineate complaints from other types of appeals to election commissions. In the final report of the OSCE mission, complaints about violations of electoral rights are subjected to analysis.

4.2. It is advisable in the Constitutional Law «On Elections in the Republic of Kazakhstan» to regulate in more detail the procedure for consideration by the electoral bodies of appeals from individuals and legal entities, including complaints about violations of electoral legislation. As an initial option for amending the Constitutional Law «On Elections in the Republic of Kazakhstan», it would be possible to recommend the basic procedures for considering petitions of individuals and legal entities, laid down in the Law of the Republic of Kazakhstan «On the Procedure for Considering Appeals from Individuals and Legal Entities», taking into account the specifics established in Constitutional Law «On Elections in the Republic of Kazakhstan».

4.3. With a view to registering and analyzing incoming appeals to election commissions of appeals and, first of all, complaints from citizens and public associations, it is necessary to establish in the Constitutional Law «On Elections in the Republic of Kazakhstan RK» the provision that accounting in the statistics bodies and special accounts be subject to citizens' the implementation of the electoral law, coming to all election commissions. Through this account, you can create a complete and objective picture of all appeals, identify the nature and dynamics of violations of electoral rights of citizens. The data of these reports would be an objective and complete picture of the nature and number of violations of electoral rights for the OSCE mission.

4.4. We believe that in Article 49 of the Constitutional Law «On Elections in the Republic of Kazakhstan» it is necessary to establish the duty of election commissions to provide objective, comprehensive and timely consideration of appeals from individuals and legal entities, if necessary with their participation, to inform individuals and legal entities about the adopted decisions in writing or in the form of an electronic document.

5. In order for voters to make an informed choice, it is necessary to provide the public with information on candidates in party lists.

The right to nominate candidates for deputies of the Majilis elected by party lists belongs to political parties registered in accordance with the established procedure (Article 87 of the Constitutional Law of the Republic of Kazakhstan «On Elections»). At the same time, parties can only include party members in party lists.

In Kazakhstan, the election of 98 deputies of the Majilis of the Parliament is carried out through a system of closed party lists. Political parties make lists on the territory of a single national constituency in alphabetical order. Inclusion in the party list of persons for election to the Majilis deputies is made by a majority of votes of the total number of members of the supreme body of the political party. Political parties may not include in the party lists persons who are not members of this political party. The party list is submitted to the Central Election Commission by a representative of a political party at the same time as an extract from the protocol of the supreme body of a political party on the nomination of a party list (Article 87 par. 2-3 of the Constitutional Law of the Republic of Kazakhstan «On Elections»). The nomination of candidates to the Majilis deputies elected by party lists begins two months and ends forty days before the election, unless otherwise established in the appointment of elections (art. 87 para. 5 of the Constitutional Law of the Republic of Kazakhstan «On Elections»).

Registration is allowed only one list from one political party with the number of candidates not exceeding the established number of deputy mandates distributed among political parties by thirty percent. Thus, voters vote for political parties, and not for specific candidates for deputies, since the principle of closed lists operates. Voters choose this or that party, not having ideas about who exactly will enter the Parliament. The mechanism of inclusion in party lists remains unclear for the bulk of voters.

If the list of candidates compiled by the party does not make any changes to the voter, it is hard, closed lists. If you can make changes, then such party lists are open. Free lists are used in combination with preferential voting. The Institute of Preferential Voting (Belgium, Holland, Sweden, etc.) enables voters to vote not only for the list of candidates of a certain party, but also to give their preference to certain candidates within this list. We consider it possible to use the system of free party lists with preferential voting, in which case the voter can facilitate the election of a candidate placed at the beginning, middle or end of the list.

The distribution of deputy mandates after the elections is not carried out in accordance with the location of data on the candidate on the party list, as was the case with a mixed proportional-majority electoral system, but in accordance with the decision of the party's governing body. In particular, Article 97-1.5 of the Constitutional Law of the Republic of Kazakhstan «On Elections» stipulates that the priority of the distribution of deputy mandates is determined by the governing body of the political party from among those included in the party list of candidates not later than ten days after the publication of election results. If in the established time the governing body of the political party does not determine the order of distribution of the obtained deputy mandates, the CEC decides to distribute the deputies' mandates received by the party according to the registered lists in the alphabetical order of the state language [5].

Under the previously existing mixed majority-proportional system of elections to the Majilis, the order of distribution of deputy mandates was decided at the party congress, thus the electorate had a clear idea of the elected deputies. This procedure of drawing up party lists was quite optimal.

With the introduction of a proportional electoral system and closed (rigid) party lists, new problems have appeared. The main disadvantage of the proportional system is the partial loss of the votes of voters, the loss of communication between deputies and voters. Closed party lists enable the leader of the party to de-

termine the order of candidates, which can influence the distribution of mandates, and lead both to the undemocratic internal organization of the political party and to internal split due to unfair competition among party members. In addition, when forming party lists and distributing deputy mandates, it is necessary to take into account and ensure the regional representation in the Majilis of the Parliament of the Republic of Kazakhstan.

The corresponding norms on the compulsory registration of the regional representation in the compilation of party lists, as well as in the distribution of deputy seats, should, in our opinion, be included in the Constitutional Law of the Republic of Kazakhstan «On Elections».

5.1. We consider it expedient to study the experience of foreign countries, including in terms of the possibility of using a system of free party lists with preferential voting, since in this case a voter can facilitate the election of a candidate placed at the beginning, middle or end of the list.

5.2. It is necessary, in our opinion, to include in the Constitutional Law of the Republic of Kazakhstan «On Elections» the relevant norms on the compulsory registration of the regional representation in drawing up party lists, as well as in the distribution of deputy mandates.

6. Judicial decisions of republican courts were studied during the preparation and holding of early elections of deputies of the Mazhilis of the Parliament of the Republic of Kazakhstan and maslikhats - local representative bodies of the Republic of Kazakhstan in 2016. The purpose of the analysis is to study the practice of the courts applying the legal norms of the election legislation, investigating the causes and conditions that lead to a violation of the law in the consideration of civil cases on applications for the protection of the electoral rights of citizens and public associations participating in elections, identifying problematic issues in the application of substantive and procedural law , which regulate the protection of citizens' electoral rights.

The analysis showed that the courts of the republic, basically, correctly apply the rules of law when considering cases of this category. At the same time, on various issues there is a different interpretation and application of the law.

6.1. The study of cases in this category showed that in some cases courts allow for broad interpretation of the law.

It is necessary, when resolving these cases, to strictly follow the norms of law governing disputable legal relations, to resolve cases of this category taking into account the circumstances in each case, applying the principles of justice and reasonableness, legality [4].

6.2. The analysis of judicial practice showed that when considering applications for the protection of electoral rights of citizens and public associations participating in elections, there is no uniform judicial and law enforcement practice.

In order to ensure the correct application by the courts of electoral legislation, it is necessary to adopt the normative Resolution of the Supreme Court of the Republic of Kazakhstan «On the practice of consideration by courts of civil cases on applications for the protection of the electoral rights of citizens and public associations participating in elections, the republican referendum».

In this Resolution it is necessary to consider the following issues: delineation of the basis for administrative and other liability; clarification of the provisions on the timing of the start of election campaigning. They require interpretation of the provisions of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan» regarding the possibility of appealing to the election commission in the conditions of an alternative: to a higher election commission, to a court or to the prosecutor's office. There are ambiguities in the application of the rules governing the procedure for making decisions by election commissions, in particular, on registration, cancellation of registration, restoration of registration of candidates.

It is necessary to eliminate gaps in the interpretation of the provisions of the law regarding the drafting of a protocol in which all decisions of the election commission are fixed: on registration, refusal to register or restore candidates for deputy, and others. Actually, the protocols are only referring to decisions on registration (clause 8 of Article 14 of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan»). Decisions on registration, on refusal of registration, on refusal to restore the list of candidates are categories of one series. Therefore, it seems that they require official registration, despite the absence of a direct indication of this in the law. For today, courts are forced to make decisions based on their own interpretation of the articles of the law.

6.3. It is desirable to create, under the auspices of the Central Election Commission, an electronic basis for the legal positions of election commissions. The legal positions of election commissions are understood as the documented formal system of judgments of the collegial body (election commission) on the validity of

the application of legislative provisions in the sphere of implementation and protection of the electoral rights of citizens of the RK, organization and conduct of elections, as well as other activities to implement the competence of the election commission. The legal positions of election commissions fulfill an important function with regard to giving real guarantees to electoral rights, their limitations and conditions of implementation, when organizing and conducting elections in the Republic of Kazakhstan, when considering cases on the protection of electoral rights of citizens.

You can also think over and implement a mechanism for automatic monitoring of the legal position of election commissions. Such a mechanism could include the automated processing of all decisions of electoral commissions on the characteristics of an electoral dispute and the decision taken on them; automated processing of all decisions of election commissions to identify a problem for a particular model and to compare it with the decision adopted by this model by a higher-level election commission.

References

1 Конституционный закон Республики Казахстан от 28 сентября 1995 г. № 2464 «О выборах в Республике Казахстан» (с изм. и доп. от 15.06.2017) [Электронный ресурс]. — Режим доступа: http://http://adilet.zan.kz/rus/docs/Z950002464_/history.

2 Конституция Республики Казахстан от 30 августа 1995 г. (с изм. и доп. от 07.10.1998; 21.05.2007; 02.02.2011, 10.03.2017) [Электронный ресурс]. — Режим доступа: http://www.akorda.kz/ru/.

3 Жакаева Л.С. Проблемы правового регулирования законодательного процесса в Республике Казахстан / Л.С. Жакаева // Конституционное и муниципальное право. — 2007. — № 1. — С. 30–35.

4 Сарсембаев М.А. Конституционные принципы избирательного права в Казахстане и их соответствие международным обязательствам страны / М.А. Сарсембаев // Право и государство. — 2014. — № 3. — С. 18–23.

5 Официальный сайт ЦИК Республики Казахстан [Электронный ресурс]. — Режим доступа: www. election.kz.

А. Божқараұлы, К. Цомплак

Қазақстан Республикасындағы сайлау заңнамасын реформалау

Мақалада Қазақстан Республикасының сайлау заңнамасын реформалау мәселесі қаралды. Қазақстан Республикасындағы ұйымдастырушылық-құқықтық шаралар шеңберінде нақты бағыттардың бірі сайлау заңнамасын жетілдіру болып табылады. Қазақстан Республикасында тәуелсіздік жылдарында Қазақстан Республикасы Конституциясының 33-бабында көзделген сайлау құқығын жүзеге асыру үшін берік құқықтық негіз құрылды. Біздің ойымызша, XX ғасырдың модернизациясының Батыс үлгілерінің басты кемшілігі біздің уақытымызға байланысты. Өздерінің бірегей тәжірибесін барлық халықтар мен өркениеттерге олардың сипаттамаларын есепке алмастан берген. Сондықтан жаңа модернизациялаудың алғашқы шарты, Мемлекет басшысы атап өткендей, «өзінің мәдениетін, меншікті ұлттық кодын сақтау болып табылады. Онсыз жаңғырту бос дыбысқа айналады». Жаңа модернизация бұрынғыдай тарихи тәжірибе мен салт-дәстүрге бойұсынбай көрінуі керек. Керісінше, ол жаңғыртудың сәттілігі үшін маңызды шарттардың ең жақсы дәстүрлерін қажет ету керек. Қазақстанның ғасырлық тарихында қоғамның түрлі аспектілерін құқықтық реттеудің баға жетпес тарихи тәжірибесі бар. Сайлау заңнамасына және процесіне қатысты әдеттегі қазақ заңнамасының осындай институттарын: хандарды сайлау, мемлекеттік органдардың және жергілікті өзін-өзі басқаруды және тағы басқа сайлау және талдау мәселелеріне ерекше назар аудару керек.

Кілт сөздер: Қазақстан Республикасының сайлау құқығы, сайлау процесі, Қазақстан Республикасының Конституциясы, саяси реформалар, сайлау.

А. Божкараулы, К. Цомплак

Реформа избирательного законодательства в Республике Казахстан

В данной статье рассматривается одно из актуальных направлений в рамках проводимых в Республике Казахстан организационно-правовых мероприятий — совершенствование избирательного законодательства. Необходимо отметить, что за годы независимости создана прочная правовая основа для реализации избирательного права, закрепленного в ст. 33 Конституции РК. В чем был, на наш взгляд, главный недостаток западных моделей модернизации XX в. применительно к реалиям нашего времени? В том, что они переносили свой уникальный опыт на все народы и цивилизации, без учёта их особенностей. Именно поэтому первым условием модернизации нового типа является, как отмечает Глава государства, «сохранение своей культуры, собственного национального кода. Без этого модерниза-

ция превратится в пустой звук». Новая модернизация не должна, как прежде, высокомерно смотреть на исторический опыт и традиции. Наоборот, она должна сделать лучшие традиции предпосылкой, важным условием успеха модернизации. Многовековая история Казахстана содержит бесценный исторический опыт правового регулирования различных сторон жизни общества. Применительно к избирательному праву и процессу заслуживают пристального внимания изучение и анализ таких институтов обычного казахского права, как выборы ханов, выборы органов управления и местного самоуправления и т.д.

Ключевые слова: избирательное право Республики Казахстан, избирательный процесс, Конституция РК, политическая реформа, выборы.

References

1 Konstitutsionnyi zakon Respubliki Kazakhstan ot 28 sentiabria 1995 hoda № 2464 «O vyborakh v Respublike Kazakhstan» [The Constitutional Law of the Republic of Kazakhstan of September 28, 1995, No. 2464 «On Elections in the Republic of Kazakhstan»]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/rus/docs/Z950002464_/history [in Russian].

2 Konstitutsiia Respubliki Kazakhstan ot 30 avhusta 1995 h. [Constitution of the Republic of Kazakhstan of August 30, 1995]. *akorda.kz/ru/.* Retrieved from http://www.akorda.kz/ru/ [in Russian].

3 Zhakaeva, L.S. (2007). Problemy pravovoho rehulirovaniia zakonodatelnoho protsessa v Respublike Kazakhstan [Problems of legal regulation of the legislative process in the Republic of Kazakhstan]. *Konstitutsionnoe i munitsipalnoe pravo – Constitutional and municipal law, 1,* 30–35 [in Russian].

4 Sarsembaev, M.A. (2014). Konstitutsionnye printsipy izbiratelnoho prava v Kazakhstane i ikh sootvetstvie mezhdunarodnym obiazatelstvam strany [Constitutional principles of electoral law in Kazakhstan and their compliance with the country's international obligations]. *Pravo i hosudarstvo – Law and the state, 3,* 18–23 [in Russian].

5 Ofitsialnyi sait TsIK Respubliki Kazakhstan [Official website of the Central Election Commission of the Republic of Kazakhstan]. *election.kz.* Retrieved from www. election.kz [in Russian].

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K.S. Amirbek[1], A. Lavnichak[2]

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

Formation and development of legal framework of the EAEU states-founders integration

The present article addresses the task to examine the main questions of formation and development of the legal framework of the new Union Association of states – the Eurasian Economic Union (EAEU). The development of international economic integration is impossible without a legal basis, because it is through bilateral and multilateral treaties and also domestic legislation the states-participants of the international economic integration carried out in real life political solutions and ideas. Prospects of development of the Eurasian Economic Union require the analysis of new approaches to the integration interaction, as well as solutions of certain legal issues. First of all, it concerns the functioning of the legal support of both the EAEU, and the introduction of the acts of its bodies. Particular attention in this article is given to the solution of many legal problems in the framework of implementation of customs cooperation between the Union's Member States, as well as the adoption of national regulations, amendments and additions into the national law. The article states that it is necessary to clearly define the system of mutually views on their common objectives and priorities for the development of the legal framework of the Union in the sphere of customs by EAEU member states. The authors notes that these measures should be based on voluntary participation and independence of states in determining of the directions and depth of the participation in the processes of convergence, harmonization and unification of customs legislation.

Keywords: interstate economic integration, the Customs Union (CU), the Eurasian Economic Space (EES), the Eurasian Economic Community (EurAsEC) the Eurasian Economic Union (EAEU), the formation of legal base of the EAEU, the sources of EAEU law, international personality of the EAEU, the Customs Code of the EAEU (EAEU CC), the decisions of the Eurasian economic Commission.

The formation of the EurAsEC Customs Union (hereinafter – CU), and subsequently the Eurasian Economic Space (hereinafter – EES), the Eurasian Economic Community (EurAsEC), has set scientists studying the Customs Law, the task is not only to analyze more than 2,000 regulations, but also to try in constantly changing conditions to find answers on specific questions, summarize tried and tested materials, revealing the general laws of development of legal regulation to define new categories.

The beginning of the legal framework of integration EAEU founding members can be regarded in 1991 the formation of the Commonwealth of Independent States (CIS) – association that is very soft in legal essence (according to the opinions of some researchers, «at the initial period of CIS creation of and activities integration aspirations were declared more than fulfilled in reality» [1; 94]), but wider in scope of participants.

In 2000 a number of member states of the CIS (Russia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan) established the «second floor» of post-Soviet integration – the Eurasian Economic Community (hereinafter - EurAsEC). It was more effective: in its framework nearly 200 international treaties were adopted; States participants were able to unify the domestic legal systems in part of trade and the economy in general. At the same time there was a definite imbalance in their rights and obligations: some states have not ratified certain treaties, haven't satisfied them [2; 127].

The problem was in the method of making and implementing decisions, so Russia, Belarus and Kazakhstan as the states more prepared decided to change the method – to transfer some part of the competences to the supranational level. In 2010, the Customs Union of three countries has been established, and as its main body – the Commission of the Customs Union with supranational powers was. Later, the Customs Union was amended by draft of the Common Economic Space; Eurasian Economic Commission was established instead of the Customs Union Commission (hereinafter – EEC).

In 2014, three countries signed the Treaty establishing the Eurasian Economic Union – the next «level» of integration. EurAsEC, which has performed its task, has been abolished. An optimization of the integration of the control system by means of international legal instruments, «multiplicity» of integration structures was eliminated, which are drawn to the attention of experts [3].

For a more complete understanding of the concept of the «EAEU law», which is formulated in Article 6 of the EAEU Founding agreement should apply to the formation of its origins and evolution within the Customs Union and Common Economic Space, which were the forerunners of the Union.

The foundations of the Customs Union between Belarus, Republic of Kazakhstan and the Russian Federation have been formulated January 6, 1995, when the Heads of this States signed in Minsk Agreement on the Customs Union between the Russian Federation and Belarus, and on January 20 of the same year Kazakhstan acceded to this Agreement. In 1996 the Kyrgyz Republic joined to this agreement, and in 1999 – Republic of Tadzhikistan.

In the future, the legal framework of the Customs Union has been supplemented by such agreements as the Treaty on the deepening of integration in economic and humanitarian spheres (1996), the Treaty on the Customs Union and the Common Economic Space (1999) and a number of others.

October 10, 2000 the Agreement on the Establishment of the Eurasian Economic Community (EurAsEC) was signed in Astana, an international organization, which has put in Article 2 the own aim the effective promotion of the formation process by its member states of the Customs Union and Common Economic Space, as well as other goals and tasks defined in the previously mentioned agreements on the Customs Union, the Treaty on the deepening of integration in economic and humanitarian spheres, and the Treaty on the Customs Union and Common economic space, according to the chalked out steps identified in the above documents [4].

Treaty establishing a single customs territory of the Customs Union on October 6, 2007 was the founding (basic) international legal instrument establishing a framework for cooperation among States Parties (Russian Federation, Belarus and Republic of Kazakhstan) in the formation process of the customs union. On the same day the Agreement on the Customs Union Commission was signed, which was established by a single permanent regulatory body of the Customs Union.

December 9, 2010. three CU member states signed 17 documents on the creation of the Eurasian Economic Space (hereinafter – EES), among which the Action Plan for 2010-2011 on the formation of the Eurasian Economic Space of three states, which includes the development and signing during two years, to January 1, 2012, twenty international agreements, ensuring the creation of the EES was. The whole package of documents forming the EES, ratified by the parties and entered into force for the States Parties to January 1, 2012.Finally, November 18, 2011 three CU Member States signed the Treaty on the Eurasian Economic Commission (hereinafter - EEC), which replaced the CU Commission. EEC was established as a single permanent regulatory body of the CU and EES.

At the same day, presidents of the CU and the EES member states signed a document that opens the next stage of integration. We are talking about the Declaration of the Eurasian economic integration, which expresses the transition from 1 January 2012 to the next stage of the integration building – EES, based on the norms and principles of the World Trade Organization (WTO) and open at any stage of its formation for accession by other States. The final goal of this stage – the creation in 2015 of the Eurasian Economic Union (EAEU), has been successfully implemented.

Within the framework of the Customs Union of Russia, Republic of Belarus and Republic of Kazakhstan (CU) was formulated the concept of the legal base of the Customs Union, that is complex of international agreements concluded between States Parties, the implementation of which creates the Customs Union.

In CU practice, all international treaties constituting the contract legal base, were divided into three groups:

a) international treaties acting in the framework of the Eurasian Economic Community (altogether 13 international agreements);

b) international agreements, aimed at completing the formation of the contract legal base of the Customs Union (38 international agreements);

c) other international treaties (42 international agreements).

This classification is based on the provisions of the Protocol on the procedure of entry into force of international treaties aimed at the formation of the contract legal base of the Customs Union, out of them and joining them taken October 6, 2007.

After the establishment of the Eurasian Economic Space in the decision of the board of the Eurasian Economic Commission on April 12, 2012 were specified the basic parameters of the contract legal framework of the CU and EES. In that decision the EEC departments responsible for monitoring realization process of the agreements forming the legal base of the Customs Union and Eurasian Economic Space were listed.

The document specified for four groups of agreements:

a) international agreements aimed at the completion of the formation of the contract legal base of the Customs Union (29 international agreements);

b) list of international agreements provided for the Action Plan for the introduction of the Customs Code of the Customs Union (16 international agreements);

c) other international agreements of the Customs Union (23 international agreements);

d) international treaties on the formation of the Eurasian Economic Space (17 agreements).

Unlike the list drawn up by the CU, from consideration international agreements acting in the EurAsEC were excluded [5; 52].

Article 6 of the Founders Agreement describes the EAEU law, which allows making the conclusion that the authors have overcome the narrowness of the concept of «the contract legal framework» of integration. It is established that the right of the Union consists of as international treaties: Founders Agreement of the Union, international agreements in the framework of the Union, the International contracts of the Union with third party, as well as acts of secondary order, namely the international legal acts adopted by EAEU bodies. These include: the decisions and orders of the Supreme Eurasian Economic Council, the Eurasian Intergovernmental Council and the Eurasian Economic Commission, adopted within the framework of their powers stipulated by the Founders Agreement and international treaties within Union frameworks [3].

Outside the Article 6 of the Treaty establishing the EAEU some international legal instruments and norms of international law were still, which, apparently, will play a role in the legal regulation of the integration process and take its place in the legal system of the EAEU. First of all, we are talking about judicial acts taken by the Court of the Eurasian Economic Union. According to Chapter VII of the Statute of the Court it is as a result of the dispute shall decide, and at the request of explanation – provides advisory opinion.

It should be emphasized that the Statute of the Court quite carefully formulated legal nature and value of judgments. Thus, according to p.98 of the Statute of the advisory opinion at the request of clarification has recommendation character. In turn, the Court's judgments will be binding on the parties to the dispute or by the EAEU Commission (p.99-100). In this case, the Court's judgment could not go beyond specified in the statement of issues (claim 101). In addition, the Court's judgment does not change and (or) does not change the existing rules of Union law, the legislation of the Member States and does not create new (p. 102) [6].

Finally, the concept of the legal system (or law) EAEU will inevitably include the norms of «soft law», adopted by EAEU bodies and Member States, which will also affect the international legal regulation of the Eurasian economic integration.

Determination of the normative legal base regulating customs relations in the EAEU Customs Union is the one of the basic questions, the answer to which depends on the methodology of solving other facing customs law problems. The study of the Supreme Eurasian Economic Council, the legal status showed that the legal regulation of the main body of the Common Economic Space is not without flaws; violating one of the principles law established activity — the principle of systematic.

Only a few studies are devoted to the legal regulation in the EAEU. This is probably one of the reasons that the customs relations between the EAEU Member States «number of exceptions and limitations have not diminished, and in some areas even increased». Study summarizing and systematizing knowledge about the sources of legal regulation in the framework of the EAEU, are of particular relevance in relation to the intensity of the legislative process [7; 111].

Recall that from January 1, 2018 the Treaty on the Customs Code of the Eurasian Economic Union (hereinafter –EAEU CC), adopted April 11, 2017 in Moscow came into force. Simultaneously with the entry into force of the Treaty on the Customs Code of the Eurasian Economic Union on April 11, 2017 the Agreement on the Customs Code of the Customs Union on 27 November 2009 ceased to operate, as well as a number of international agreements, which were subject to the customs legal and signed at the stage of the Customs Union (Annex 2 and Annex 3 to the Treaty of EAEU CC).

In the study of the legal regulation of sources it is important to organize them and define the limits of the normative legal acts on each of the regulatory levels (international, national or supranational). However, despite ongoing researches, features of the legal framework regulating specific relations remain unexplored. In particular, international legal base of regulation of custom-tariff relations has not been investigated customs tariff of relations, which were a key in the formation of the EAEU.

Since the beginning of the XX century international customs and treaties concern to the sources of international law. Sources of international law are characterized as «official-legal form of the existence of international law norms ... and represent the external form in which the normative content of the rules embodied» [8; 387].

All sources of international law are combined by the concept of international legal framework. There is a classification, according to which all sources of international law are divided into major (international trea-

ty, international customs and general principles of law) and additional (regulations, decisions of international institutions and bodies).

Creating of the EAEU led to arising of new classifications of sources of international law in the EAEU: legal and doctrinal.

Legally in the EAEU customs legislation there are three groups of legal acts:

– The EAEU Customs Code;

– International treaties of the Member States of the EAEU regulating customs relations in the EAEU;

– The decisions of the Eurasian Economic Commission, including the decision of the Commission of the Customs Union (abolished with the transfer of the powers of the Eurasian Economic Commission).

Doctrinal classification is wider than legal classification, which indicates that the number of normative legal acts regulating customs relations, more than the number of normative legal acts constituting the customs legislation of the EAEU.

Allocation of a special group of legal acts – Customs legislation of the EAEU – solves several problems. Firstly, in addition to Art. 1 of the Treaty «On the Customs Code of the Customs Union» establishes a hierarchy of legal acts, which are taken in the framework of the EAEU [9]. Secondly, it makes a distinction between the laws of the Member States of the EAEU and the other normative legal acts adopted in the framework of the EAEU and components EAEU customs legislation. However, the introduction of the term «customs legislation of the Customs Union» led to the fact that the definition of international legal sources that regulate customs relations in the EAEU, is not a trivial task.

For example, why EAEU CC doesn't mention international treaties which Member States EAEC concluded with states which are not members EAEU? These contracts are not included in the customs legislation of the EAEU and, as rightly A.N. Kozyrin observes, «they will be used as the international legal sources of national customs law» [10; 65]. Exclusion of international agreements concluded by the EAEU Member State with non-members of the EAEU, of the customs legislation of the EAEU is fundamentally different from the approach used in the definition of the customs legislation of the Customs Code of the European Union.

In accordance with Art. 4 p. 2 of the new Customs Code of the European Union (Union Customs Code), which entered into force on 1 May 2016, the customs legislation includes not only the Code and adopted in accordance with it the positions, but also the Common Customs Tariff, legislation establishing a Community system of exemption from customs duties but also international agreements containing provisions on customs matters, to the extent that they are applicable in the European customs Union.

Commitments made by one of the CU Member States within the framework of international agreements concluded between the Member State of CU and non-CU member states, may be contrary to the interests of other CU Member States and the EAEU in general and deal with the legal regulation of relations associated with the movement of goods across the customs border of the EAEU. Realizing the potential risks, but taking into account the importance of the conclusion of certain international agreements, the obligations which may interfere with the consensus reached within the framework of the EAEU, the CU Member States have concluded the Treaty on the functioning of the Customs Union within the framework of the multilateral trading system (signed in Minsk on May 19, 2011). At that time, an agreement was signed by Russia, Kazakhstan and Belarus.

In accordance with this Treaty, EAEU Member States committed themselves to co-ordinate the conditions of accession to the World Trade Organization (hereinafter – the WTO) and to comply with the commitments made by States members of the EAEU accession to the WTO. However, even the existence of the Treaty cannot guarantee to reach a compromise. For example, the WTO can deliver to the Republic of Belarus the condition of a significant reduction in import duties on cars. For the economy of the Republic of Belarus the implementation of such conditions has no significant risk, at the same time the interests of the Russian Federation can be observed only at high rates of import customs duties on cars.

In what way and at what price compromise in this and other similar situations will reach, it is impossible to predict. It is possible that one of the ways could be the development of national regulations, restricting the movement of goods within the EAEU. For example, the Russian Federation Government is considering question about development of regulations, «providing the establishment of restrictions on the import by persons on the territory of Russia in Kazakhstan and Belarus alcoholic products».

At the same time, in accordance with sub-paragraph 1 of Art.3 of the Treaty establishing a single customs territory and formation of the Customs Union (signed in Dushanbe on October 6, 2007) since the establishment of a single customs territory the EAEU Member States shall not apply customs duties, quantitative restrictions and equivalent measures in mutual trade, although it is not excluded various measures aimed at

protecting the national interests of the EAEU Member States. The adoption of such normative legal acts by the EAEU Member States could be the beginning of the end of one of the most successful integration associations.

Thus, international treaties of the EAEU Member States with third countries to the extent that they are applicable to the regulation of customs and tariff relations in the EAEU, should be included in the international legal framework of customs and tariff regulation in the EAEU, and the process of signing such agreements should always pass the stage of coordination with the EAEU Member States.

There is no definite answer to the question of the legal nature of the decisions of the Eurasian Economic Commission in the regulatory legal acts. The researchers note that «the legal nature of the decisions of some intergovernmental bodies of integration associations are not defined, it is not always a positive effect on their implementation». A.A. Kashirkina and A.N. Morozov believe that the described problem concerns including the decisions of the Commission of the Customs Union and the Eurasian Economic Commission, which, in their opinion, are not international treaties, but researchers do not answer what the legal nature of these solutions are supranational bodies.

The authors propose the construction, according to which «the decisions of the Eurasian Economic Commission are included into the «fabric» of the national legal order» through the Regulation on the Eurasian Economic Commission, in accordance with sub-paragraph 13 of Art. 1of which «the Commission within its powers takes decisions with regulatory and binding for Member States, resolutions which have organizational and administrative character, and recommendations have no binding character. Decisions of the Commission are part of Union law and are directly applicable in the territories of Member States» [11; 250].

The proposed construction makes it possible to explain why the decision of the Eurasian Economic Commission have direct effect in the territory of the Member States of the EAEU, but did not give an answer to the question of the legal nature of the Eurasian economic Commission decisions.

If the decisions of the Eurasian Economic Commission are not an international treaty, on what basis they are part of the contractual and legal base of the EAEU? If the decisions of the Eurasian Economic Commission are not an international treaty, then what kind of normative legal act they are and whether or not the decisions should be seen as a new kind of normative legal act? If this is a new kind of normative legal act, it is necessary to highlight the characteristics that distinguish the decisions of the Eurasian Economic Commission on the other types of normative legal acts, such as trying to make to the technical regulations of interstate integration associations.

It is possible that the problem of determining the legal nature of the decisions of the Eurasian Economic Commission is the fact that at the beginning of the formation of the EAEU role of the Commission of the Customs Union, and now the Eurasian Economic Commission, was not sufficiently clear. An indirect confirmation of this is still occurring attempts to consider the Eurasian Economic Commission, not as a supranational body, but as an «international inter-governmental autonomous body, created on the basis of international law in order to ensure the conditions for the functioning and development of the Customs Union and the Common Economic Space, as well as developing proposals the sphere of economic integration within the Customs Union and Common economic space» [11; 128].

Taking into account that the treaty «means an international agreement concluded between States in written form and governed by international law» (item «a» p. 1, art. 2 of the Vienna Convention on the Law of Treaties (concluded in Vienna on May 23, 1969), as well as the fact that the decisions of the Eurasian economic Commission de-facto reflected the will of the Member States of the EAEU, there are the prerequisites to refer the decisions of the Eurasian economic Commission to treaties.

The dispute about the legal nature of the decisions of the Eurasian economic Commission has theoretical character until then; the question of enforcement will not arise. This could happen if, the decision of the Board of the Eurasian Economic Commission will be contrary to the interests of one of the Member States of the EAEU. In this case, the lack of consensus would lead the parties to the EAEU Court, and further development of events will depend on the legal nature of the decisions of the Eurasian Economic Commission.

If we accept the decisions of the Board of the Eurasian Economic Commission for an international treaty, the court can resolve the dispute of the EAEU and, if necessary, it remains possible to apply to the International Court of Justice. Also in this case, the decision of the Eurasian Economic Commission could not be examined by the Court of the EAEU for compliance with international treaties constituting the contractual-legal base of the EAEU. If the decisions of the Board of the Eurasian Economic Commission regarded as normative legal act of any legal nature, in accordance with p. 1, Art. 34 of the Statute of the International

Court of Justice (signed in San Francisco June 26, 1945) Member State of the EAEU, do not agree with the decision of the question before the EAEU Court, we can only withdraw from the EAEU or to search for ways out of court settlement of the question.

Taking into account, the name of the normative legal act has no value to assign it to the international treaties, the inclusion of decisions of the Eurasian Economic Commission in the juridical EAEU framework as well as the real law-making conditions within the body, there are reasons to consider the decision of the Eurasian Economic Commission unless as international treaties, the regulatory acts included in the international framework customs tariff regulation EAEU.

A special place in the international legal framework of customs and tariff regulation belongs to the Customs Code of the EAEU, which is annexed to the Treaty «On the Customs Code of the EAEU» from April 11, 2017. The CC of the EAEU defined: types of customs duties, exemptions from payment of customs duties, the order of calculation of customs duties, the object of taxation, rates, payers, the origin and termination of the obligation to pay customs duties, terms and order of payment, ensure of payment, refund (offset) excessively paid or excessively collected amounts of customs duties, order of collection of customs duties. However, a large number of CC of the EAEU rules are blanket, which requires the adoption of legal acts, including the components of the international legal framework [9].

All Member States of the EAEU acceded to the International Convention on the simplification and harmonization of customs procedures, the provisions of which set the legal minimum that should be provided in the regulation, including customs and tariff relations. For example, it was found that the legislation should determine the conditions of occurrence of the obligation to pay customs duties; it determined that the rates of customs duties shall be published in the official publications; the requirements for the establishment of a minimum value and a minimum amount of customs duties, below which customs duties shall not be charged, etc.

The international legal framework regulating customs and tariff relations includes the International Convention on the Harmonized Description and Coding System of the goods, which was joined by all the Member States of the EAEU. This Convention is in the basis of the Common Customs Tariff of the EAEU, approved by the Board of the Eurasian Economic Commission decision dated July 16, 2012 number 54 and is based on:

– Harmonized system of description and coding of goods;

– Combined Nomenclature of the European Union (for most products);

– United commodity nomenclature of foreign economic activity of the EAEU.

Priority of the EAEU customs legislation should be the basic principle of the emerging law of the Customs Union within the EAEU, which implements the provisions of p. 2 of Art. 1 of the CC of the EAEU, according to which the regulation of customs relations in accordance with the legislation of the Member States of the EAEU is carried out only before establishing the appropriate relations at the level of the customs legislation of the EAEU. Therefore, the role of the international legal framework for the regulation of customs, in particular customs tariff relationship will grow.

However, it should refrain from the forced transition from the regulation at the national level to the international and supranational as long as Member States of the EAEU will be the prevailing understanding of the legal structure of the system within the EAEU, until the problems will not be resolved with the hierarchy of normative legal acts on the legal force and their place in the national legal systems of the Member States of the EAEU.

Referenses

1 Моисеев Е.Г. СНГ и ЕврАзЭС: история и современность / Е.Г. Моисеев // Российский ежегодник международного права. — 2012. — № 15. — С. 93–102.

2 Вишняков В.Г. Правовые проблемы становления Евразийского экономического сообщества / В.Г.Вишняков // Журнал российского права. — 2011. — № 10. — С. 126–134.

3 Договор о Евразийском экономическом союзе (заключен в г. Астане 29.05.2014.) [Электронный ресурс]. — Режим доступа: http: //online.zakon.kz/Document/?doc_id=31565247#pos=1;117.

4 Договор об учреждении Евразийского экономического сообщества (заключен в г. Астане 10.10.2000.) [Электронный ресурс]. – Режим доступа: http://evrazes.com/docs/view/3.

5 Козырин А.Н. Таможенное регулирование в Таможенном союзе ЕврАзЭС: международный, наднациональный и национальный уровни / А.Н. Козырин // Право и экономика. — 2013. — № 3. — С. 49–56.

6 Статут Суда Евразийского экономического союза. Приложение № 2 к Договору о Евразийском экономическом союзе [Электронный ресурс]. — Режим доступа: http://consultant.ru/document/cons_doc_LAW_163855/59c6c990db8e37a1c23e01df97ee446e834cf60b/.

7 Капустин А.Я. Право Евразийского экономического союза: подходы к концептуальному осмыслению / А.Я. Капустин // Современный юрист. — 2015. — № 1(10). — С. 110–115.

8 Большой юридический словарь / под ред. А.Я. Сухарева. — 3-е изд., доп. и перераб. — М.: ИНФРА-М, 2007. — 858 с.

9 Таможенный кодекс Евразийского экономического союза. Приложение № 1 к Договору о Таможенном кодексе Евразийского экономического союза (г. Москва, 11 апреля 2017 года) [Электронный ресурс]. — Режим доступа: http://consultant.ru/document/cons_doc_LAW_215315/.

10 Козырин А.Н. К вопросу о соотношении наднационального и национального регулирования в Таможенном союзе в рамках ЕврАзЭС / А.Н. Козырин // Правовые вопросы Евразийского таможенного союза. — М.: Инфотропик Медиа, 2012. — С. 51–94.

11 Каширкина А.А. Международно-правовые модели Европейского союза и Таможенного союза: сравнительный анализ: монография. / А.А. Каширкина, А.Н. Морозов. — М.: ИЗИСП, 2013. — 368 с.

К.С. Әмірбек, А. Лавничак

ЕАЭО құрушы-мемлекеттерінің интеграциясының құқықтық базасының қалыптасуы мен дамуы

Мақалада мемлекеттердің жаңа одағы — Еуразиялық экономикалық одақтың құқықтық базасын қалыптастыру мен дамытудың негізгі мәселелері қарастырылды. Халықаралық экономикалық интеграцияны дамыту заңдық негізсіз мүмкін емес, себебі екі- және көпжақты келісімдер арқылы, сондай-ақ халықаралық экономикалық интеграцияға қатысушы-мемлекеттер нақты саяси шешімдер мен идеяларды жүзеге асыратын ішкі заңдар арқылы жүзеге асырылады. Еуразиялық экономикалық одақтың даму перспективалары интеграциялық өзара әрекеттесудің жаңа тәсілдерін талдауды, сондай-ақ белгілі бір құқықтық мәселелерді шешуді талап етеді. Біріншіден, бұл ЕурАзЭҚ-ның өзі де, оның органдарының актілерін де қолдануға құқықтық қолдау көрсету. Осы мақалада Одаққа мүше-мемлекеттер арасындағы кедендік ынтымақтастық шеңберінде көптеген құқықтық мәселелерді шешу, сондай-ақ ұлттық актілерді қабылдау, ұлттық заңнамаға өзгерістер мен толықтырулар енгізу ерекше назар аударылды. Жұмыста Еуразиялық экономикалық одаққа мүше-мемлекеттердің Кеден одағының заңнамалық базасын дамытудың ортақ мақсаттары мен басымдықтары туралы өзара келісілген жүйені нақты айқындау қажет екенін айтады. Авторлар атап өткендей, бұл шаралар ерікті және тәуелсіз мемлекеттің жақындасу, кеден заңнамасын үйлестіру және біріздендіру процестеріне қатысудың бағытын және тереңдігін айқындауға негізделуі тиіс.

Кілт сөздер: мемлекетаралық экономикалық ықпалдастық, Кеден одағы, Еуразиялық экономикалық кеңістік, Еуразиялық экономикалық одақ, ЕАЭО құқықтық базасын қалыптастыру, ЕАЭО заңнамасының көздері, ЕАЭО халықаралық құқықтық субъектісі, ЕАЭО Кеден кодексі, Еуразиялық экономикалық комиссияның шешімі.

К.С. Амирбек, А. Лавничак

Формирование и развитие правовой базы интеграции государств-основателей ЕАЭС

В статье ставится задача рассмотреть основные вопросы формирования и развития правовой базы нового союзного объединения государств — Евразийского экономического союза (ЕАЭС). Развитие международной экономической интеграции невозможно без правовой базы, поскольку именно через двусторонние и многосторонние договоры, а также внутреннее законодательство государства-участники международной экономической интеграции проводят в реальную жизнь политические решения и идеи. Перспективы развития Евразийского экономического союза требуют проведения анализа новых подходов к интеграционному взаимодействию, а также решения определенных правовых проблем. Прежде всего это касается правового обеспечения функционирования как самого ЕАЭС, так и введения в действие актов его органов. Особое внимание в данной статье уделяется решению многих правовых проблем в рамках осуществления таможенного сотрудничества между государствами-членами Союза, а также принятию национальных актов, внесению изменений и дополнений в национальное законодательство. В работе говорится, что необходимо четко определить систему взаимосогласованных государствами-участниками ЕАЭС взглядов на общие для них цели и приоритеты развития правовой основы Союза в сфере таможенного дела. Авторы отмечают, что указанные меры должны основываться на добровольности и самостоятельности государств в определении направлений и глубины участия в процессах сближения, гармонизации и унификации таможенного законодательства.

Ключевые слова: межгосударственная экономическая интеграция, Таможенный союз, Евразийское экономическое пространство, Евразийский экономический союз, формирование правовой базы ЕАЭС,

источники права ЕАЭС, международная правосубъектность ЕАЭС, Таможенный кодекс ЕАЭС, решения Евразийской экономической комиссии.

Referenses

1 Moiseev, Ye.H. (2012). SNH i EvrAzES [CIS and EurAsEC]. *Rossiiskii ezhehodnik mezhdunarodnoho prava – Russian Yearbook of International Law, 15,* 93–102 [in Russian].

2 Vishniakov, V.H. (2011). Pravovye problemy stanovleniia Yevraziiskoho ekonomicheskoho soobshchestva [Legal problems of the formation of the Eurasian Economic Community]. *Zhurnal rossiiskoho prava – Journal of Russian Law, 10,* 126–134 [in Russian].

3 Dohovor o Yevraziiskom ekonomicheskom soiuze (zakliuchen v Astane 29.05.2014.) [Treaty on the Eurasian Economic Union (signed in Astana 05.29.2014)]. (n.d.). *online.zakon.kz.* Retrieved from http: //online.zakon.kz/Document/?doc_id=31565247#pos=1;–117 [in Russian].

4 Dohovor ob uchrezhdenii Yevraziiskoho ekonomicheskoho soobshchestva (zakliuchen v Astane 10.10.2000.) [Treaty on the Establishment of the Eurasian Economic Community (signed in Astana 10.10.2000.)]. (n.d.). *evrazes.com.* Retrieved from http://evrazes.com/docs/view/3 [in Russian].

5 Kozyrin, A.N. (2013). Tamozhennoe rehulirovanie v Tamozhennom soiuze YevrAzES: mezhdunarodnyi, nadnatsionalnyi i natsionalnyi urovni [Customs regulation in the Customs union of the Eurasian Economic Community: international, supranational and national levels]. *Pravo i ekonomika – Law and Economics, 3,* 49–56 [in Russian].

6 Statut Suda Yevraziiskoho ekonomicheskoho soiuza. Prilozhenie № 2 k Dohovoru o Yevraziiskom ekonomicheskom soiuze [Statute of the Court of the Eurasian Economic Union. Annex No. 2 to the Treaty on the Eurasian Economic Union]. (n.d.). *consultant.ru.* Retrieved from http://consultant.ru/document/cons_doc_LAW_163855/59c6c990db8e37a1c23e01df97ee446e834cf60b/ [in Russian].

7 Kapustin, A.Ya. (2015). Pravo Yevraziiskoho ekonomicheskoho soiuza: podkhody k kontseptualnomu osmysleniiu [The Law of the Eurasian Economic Union:approaches to conceptual comprehension]. *Sovremennyi yurist – The modern lawyer, 1(10),* 110–115 [in Russian].

8 Sukharev, A.Ya. (Eds.). (2007). *Bolshoi yuridicheskii slovar [Big law dictionary]*. Moscow: INFRA-M [in Russian].

9 Tamozhennyi kodeks Yevraziiskoho ekonomicheskoho soiuza. Prilozhenie № 1 k Dohovoru o Tamozhennom kodekse Yevraziiskoho ekonomicheskoho soiuza (Moskva, 11.04.2017.) [The Customs Code of the Eurasian Economic Union. Annex No. 1 to the Treaty on the Customs Code of the Eurasian Economic Union (Moscow, 2017, 11 april)]. (n.d.). *consultant.ru.* Retrieved from http://consultant.ru/document/cons_doc_LAW_215315/ [in Russian].

10 Kozyrin, A.N. (2012). K voprosu o sootnoshenii nadnatsionalnoho i natsionalnoho rehulirovaniia v Tamozhennom soiuze v ramkakh YevrAzES [On the issue of the correlation of supranational and national regulation in the Customs Union within the framework of the Eurasian Economic Community]. *Pravovye voprosy Yevraziiskoho tamozhennoho soiuza – Legal issues of the Eurasian Customs Union*. Moscow: Infotropik Media [in Russian].

11 Kashirkina, A.A., & Morozov A.N. (2013). *Mezhdunarodno-pravovye modeli Yevropeiskoho soiuza i Tamozhennoho soiuza: sravnitelnyi analiz [International legal models of the European Union and the Customs Union: Comparative analysis]*. Moscow: IZISP [in Russian].

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F.A.Yerzhanova[1], A. Bozhkarauly[1], A. Lavnichak[2]

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

On the issue of the legal status and formation of election commissions in the Republic of Kazakhstan

The subject of research of a scientific article is the election commissions in the Republic of Kazakhstan. The authors show the role and significance of this institution. In the present work, the issues of the constitutional and legal status of bodies carrying out the preparation and conduct of elections in the Republic of Kazakhstan are being investigated. The object of study are normative and legal acts regulating the formation and powers of election commissions in Kazakhstan. Based on a comparative legal analysis, the article deals with issues related to the organization and activities of election commissions in the Russian Federation and the Republic of Kazakhstan. Much attention is paid in the article to actual issues of functioning of election commissions, as well as to certain aspects of regulating the constitutional and legal status of these bodies. The modern problems of the domestic institute of election commissions indicate the need for further improvement of the constitutional and legal regulation of this institution in the context of the overall task of forming a civil society and a rule-of-law state in the Republic of Kazakhstan. The authors come to the conclusion that it is necessary to modernize election commissions in the direction of establishing a system of permanent election commissions. The article also proposes improvement of the procedure for forming the composition of election commissions in order to ensure equal representation of political parties participating in elections.

Keywords: The Constitution of the Republic of Kazakhstan, direct democracy, elections, electoral law, election commissions of the Republic of Kazakhstan, the formation of election commissions, the legal status of election commissions, the rule of law, civil society

The Constitution of the Republic of Kazakhstan in 1995 [1] enshrined the most important guarantees for the development of Kazakhstan as a democratic rule-of-law state, which recognizes, respects and protects the rights and freedoms of the people and the citizens. Ownership of all the power by its multinational population is the fundamental principle of state and public life as well as an inseparable part of the foundations of the Kazakhstan's constitutional system.

The highest direct expression of the power of the people are referendums and free elections.

The functioning of election commissions is, in our opinion, an important principle ensuring the freedom of elections, guaranteed by the Constitution of the Republic of Kazakhstan, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights.

At the same time, the legal regulation of the organization and activity of election commissions in the Republic of Kazakhstan is not without a number of significant shortcomings.

The legal properties of the election commissions, the principles of their formation and activity need to be determined, their rights to organize and conduct elections need to be clarified, the status of its members who have either a right for a decisive vote or a right of an advisory vote needs to be specified.

Let`s consider the question of the election commissions formation procedure in the Republic of Kazakhstan.

Analysis of the current Kazakhstan electoral legislation shows that, in accordance with Article 10 of the Constitutional Law of the Republic of Kazakhstan of September 28, 1995, No. 2464 «On Elections in the Republic of Kazakhstan» [2], elections are carried out by a unified system of electoral bodies: the central, regional, territorial and precinct election commissions.

According to Article 10 of the Law «On elections in the Republic of Kazakhstan» [2], election commissions are the state electoral bodies that organize the preparation of and conduct the elections in the Republic.

A unified system of election commissions consists of:

1) Central Election Commission of the Republic;
2) territorial election commissions;
3) district election commissions;
4) precinct election commissions.

Important to note that from the above-mentioned electoral bodies, the Central Election Commission of the Republic of Kazakhstan has the status of a state body in accordance with Article 1 of the Regulation on the Central Election Commission, approved by the Decree of the President of the RK of November 11, 1996, No. 3205.

The Central Election Commission of the Republic of Kazakhstan is a permanent state body of the Republic of Kazakhstan, presiding over a unified system of election commissions of the Republic.

The Central Election Commission of the Republic of Kazakhstan is a permanent body responsible for the implementation and uniform application of the electoral legislation.

The President of the Republic of Kazakhstan appoints the Chairman and two members of the Central Election Commission of the RK; the Senate and Majilis appoint two members of the Central Election Commission each.

The term of office in an election commission is five years.

Territorial, district and precinct electoral commissions are elected by the appropriate maslikhats based on the proposals from the political parties.

Each political party has the right to submit one candidature to the relevant election commission. A political party has the right to submit a candidate who is not a member of this political party to the election commission candidates.

In the absence of proposals from the political parties by the deadline, which must be at least one month before the formation of election commissions and is set by the maslikhat, maslikhats elect an election commission based on the proposals of other public associations and superior election commissions.

The commissions of all levels consist of seven members.

In accordance with paragraph 6 of Article 20 of the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan» [2], political parties that do not have a representative in the election commissions have the right to delegate their representative to the relevant election commission with a right of a consultative vote for the period of preparation and conduction of the election campaign.

Thus, the Constitutional Law «On Elections in the Republic of Kazakhstan» considers all election commissions as state bodies. However, in fact, territorial, district and precinct election commissions operate on a voluntary basis and are elected by the respective maslikhats based on proposals from political parties, therefore, they are not state bodies.

In the Kazakh legal literature, the issues of forming and functioning of election commissions are the subject of attention of scientists who believe that democratic changes in society will go much faster when the mechanism for holding elections will work smoothly in the country. The problem is composed not only of the procedure for the formation of election commissions, but of all of their activity in general as well. E.B. Mukhamedzhanov notes that, «analyzing the provisions related to the status and procedure for the formation of election commissions, you ask yourself a question: is an election commission a state body or a public team? If the first, then, probably, clear requirements should be set for candidates for the membership in the election commissions, a section «Responsibility of commissions» should be introduced into the Constitutional law on elections, and their activities should be put on a professional basis» [3].

As for the procedure for the formation of the election commissions, to ensure the most important principle of the electoral process - the neutrality of the state apparatus - the most acceptable and democratic approach is the collective formation of the electoral bodies, which is very common in the practice of developed countries. In our opinion, only the «collective» principle of the formation of electoral bodies will ensure the expansion of the electoral democracy, and, most importantly, real public control over the course of the election campaign.

While the electoral commission will not be truly independent of the government, there will always remain a danger of falsification of the election results in favor of the current authorities. Therefore, the election commissions should be equally composed of representatives of all political parties, including the opposition ones [4; 7].

It is necessary to amend the Election Law to ensure a broader representation of parties in the election commissions to ensure the independence of the commissions. However, as noted by M.A. Sarsembaev, it should be borne in mind that it is simply impossible to ensure equal representation in the election commissions for parties, simply because there are seven seats in an election commission, while there are ten political parties in Kazakhstan. Whatever we do, it is inevitable that three parties will not be represented in the election commission [5; 108]. In the opinion of M.A. Sarsembaev, the solution is in ensuring equal representation of parties in election commissions at the level of chairmen and commission secretaries [5; 108].

E.B. Mukhamedzhanov suggests to use the experience of the electoral legislation of the Russian Federation, and to include in the members of election commissions one representative from the candidate who is running for election [6; 158].

Paragraph 4 of Article 22 of the Federal Law «About basic guarantees of electoral rights and the right to participate in a referendum of citizens of the Russian Federation» [7] states that no more than one commission member with the right of decisive vote may be appointed to the commission from each political party, each electoral association or other public association based on their proposals. A political party, an electoral association, or another public association cannot simultaneously offer several candidates for appointment to a single commission.

In order to prevent abuses by the members of the election commissions of the Republic of Kazakhstan, it seems appropriate to change the procedure of their formation. It is necessary to include representatives from political parties as members of the election commissions, with the right to a decisive vote.

In Kazakhstan's legislation, in our opinion, the legal status of a member of an election commission with an advisory vote is not fully regulated. For example, in accordance with paragraph 6 of Article 20 of the Constitutional Law of the Republic of Kazakhstan «On Elections in the RK» [2], a representative of a political party with the right to advisory vote, has the right to speak at a meeting of the election commission, make proposals on matters within the competence of the election commission, have the right to appeal against the actions (inaction) of the election commission to a higher election commission or court.

Thus, it is necessary to reform Kazakhstan's electoral legislation. In particular, it is necessary to change the procedure for the formation of election commissions in order to ensure membership in their composition of all participating political parties. For these purposes, the quantitative composition of election commissions should be legislatively expanded, with indication of the number of members of election commissions in the Election law, or without specifying such.

The number of commission members should be proportional to the number of voters at the polling stations, and should be no less than the number of registered political parties.

The election commissions of the constituent entities of the Russian Federation and district election commissions for elections to federal bodies of state power are created by the legislative (representative) and executive bodies of state power of the constituent entities of the Federation on a parity basis: half of the composition of the commission is appointed by a legislative body, and the other half — by the executive body.

The appointment is based on the proposals of the electoral associations, electoral blocks, public associations, elected bodies of local self-government, election commissions of the previous composition.

As an additional guarantee of the independence of election commissions, the Federal law «About basic guarantees of electoral rights and the right to participate in the referendum of citizens of the Russian Federation» [7] establishes in clause 5 of article 22 that state and municipal employees can not constitute more than one half of the total number of members of the election commission of a constituent entity of the Russian Federation, election commission of a municipal formation, a district election commission, a territorial commission or a precinct commission.

In the Russian legal literature, the object of increased attention of the scientists is the problem of ensuring equal participation of the political parties in the organization and activities of election commissions. For example, N.Yu. Turishcheva believes that the requirement established by the Federal law «About basic guarantees of electoral rights and the right to participate in the referendum of citizens of the Russian Federation», on mandatory appointment of at least half of the election commission members on the basis of the proposals of the political parties whose lists of candidates are admitted to the distribution of deputy mandates in the State Duma, the legislative body of the constituent entity of the Federation, the representative body of local self-government, «was easily executed in the period when only 7 political parties were registered and participated in the elections in the country. Significant increase in the number of the political parties that occurred in 2012-2014, highlighted the problem of ensuring equal representation of parties in the composition of electoral commissions with even more acuteness» [8; 37].

The federal law of the Russian Federation on basic guarantees [7] for the first time establishes the possibility of dissolution of the electoral commissions of the subjects of the Federation, district, territorial, precinct election commissions in the event of such violation of the citizens' electoral rights, which resulted in the invalidation of the results of voting in the relevant territory or the results of the election as a whole. The decision to disband the election commission can be made only by the court upon the application of the depu-

ties of the legislative (representative) body of the appropriate level, or the Central Election Commission (in respect of the commission of the constituent entity of the Federation).

In order to ensure a democratic procedure for the formation of election commissions with objective criteria, not influenced by politics, as well as to guarantee the independence of election commissions, it is necessary to modernize the system of election commissions in the direction of establishing a system of permanent election commissions.

In this regard, one option is to establish a single term of office for all election commissions in Kazakhstan, equivalent, for example, to the term of office of the deputies of the Majilis, and that of the President. Another option is establishing a unified term of office, but with the gradual formation of various parts of election commissions (first, the Central Election Commission is formed, next year - the territorial election commission, then a year later - the district election commission, in two years - the precinct election commission).

In the Russian Federation, since 2012, there has been a transition to the work of precinct election commissions was established on a regular basis, that is, their formation is carried out by territorial election commissions for a period of 5 years at permanent polling stations. According to the amendments, the transition to the work of precinct election commissions was established on a regular basis, that is, their formation is carried out by territorial election commissions for a period of 5 years at permanent polling stations.

In order to ensure the continued representation of a party with the replacement of the relevant commission members, it is possible to refer to the experience of the foreign countries. For example, Russian legislation provides for a formation of a reserve from the candidates proposed but not appointed to the precinct election commission. The appointment of a new member of the precinct election commission instead of the retired will be made from this reserve. Such a mechanism also makes it possible to ensure the training of the reserve candidates of election commissions in a broader sense.

In order to give greater organizational transparency and validity, the mechanism for forming the composition of election commissions requires further improvement. Currently, in some foreign countries there is an institute of deputy member of election commission that makes the work of the commissions uninterrupted and allows carrying out targeted work on training and improving the professional qualifications of commission members. For example, in Mexico, the election commission includes commissioners from national political parties and deputies of all the commissioners.

Thus, it is necessary to reform Kazakhstan's electoral legislation. In particular, it is necessary to change the procedure for the formation of election commissions in order to ensure membership in their composition of all participating political parties. For these purposes, the quantitative composition of election commissions should be legislatively expanded, with indication of the number of members of election commissions in the Election law, or without specifying such.

In order to ensure a democratic procedure for the formation of election commissions with objective criteria, not influenced by politics, as well as to guarantee the independence of election commissions, it is necessary to modernize the system of election commissions in the direction of establishing a system of permanent election commissions.

The question of supplementing the Constitution of the Republic of Kazakhstan with a new chapter on the electoral law and the electoral system in Kazakhstan is now pertinent. This would make it possible to include the most important relations concerning to elections to the bodies of state power and local self-government to the subject of constitutional regulation, as well as to consolidate more weighty guarantees of citizens' electoral rights, in particular, the basis of the legal status of election commissions.

The list of functions, the scope of powers and the nature of the activity of the election commissions should be carefully analyzed in order to make the electoral process as accessible as possible for the voters, increase confidence in elections, and create new contacts with civil society institutions.

References

1 Конституция Республики Казахстан 1995 г. от 30 августа 1995 г. [Электронный ресурс]. — Режим доступа: http://online.zakon.kz/document/?doc_id=1005029.

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.

3 Мухамеджанов Э.Б. Выборы прошли, что дальше? / Э.Б. Мухамеджанов // Юрист. — 2005. — № 2. — С. 53–55.

4 Мицкая Е.В. Совершенствование законодательства в области реализации политических прав и свобод граждан Казахстана / Е.В. Мицкая // Правовая реформа в Казахстане. — 2007. — № 4. — С. 3–8.

5 Сарсембаев М.А. Проблемы совершенствования казахстанского выборного законодательства / М.А. Сарсембаев // Заңгер. — 2007. — № 12. — С. 102–108.

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

7 Федеральный закон Российской Федерации «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации» от 12.06.2002 [Электронный ресурс]. — Режим доступа: http://www.consultant.ru/document/cons_doc_LAW_37119/4127054690afff1948e55e379e3119eb1908ba97/.

8 Турищева Н.Ю. Правовое регулирование участия партий в выборах / Н.Ю. Турищева // Государство и право. — 2016. — № 8. — С. 29–39.

Ф.А. Ержанова, А. Божқараұлы, А. Лавничак

Қазақстан Республикасындағы сайлау комиссияларының құқықтық мәртебесі мен қалыптастыру мәселесі туралы

Мақаланың зерттеу пәні болып Қазақстан Республикасының сайлау комиссиялары табылады. Авторлар осы институттың рөлі мен мәнін ашып көрсетті. Қазақстан Республикасындағы сайлауды дайындауды және өткізуді жүзеге асыратын органдардың конституциялық және құқықтық мәртебесін зерттеді. Зерттеу нысаны ретінде Қазақстандағы сайлау комиссияларының қалыптасуы мен өкілеттіктерін реттейтін нормативтік-құқықтық актілер болып табылады. Сондай-ақ Ресей Федерациясында және Қазақстан Республикасындағы сайлау комиссияларының қызметін ұйымдастыру мен қызметіне қатысты мәселелерді салыстырмалы құқықтық талдау негізінде қарастырылған. Авторлар сайлау комиссияларының жұмыс істеуінің өзекті мәселесіне, сондай-ақ осы органдардың конституциялық және құқықтық мәртебесін реттеудің белгілі бір аспектілеріне көп көңіл бөлді. Отандық сайлау комиссияларының қазіргі заманғы проблемалары Қазақстан Республикасында азаматтық қоғам мен заңдылықты қалыптастырудың жалпы міндеті тұрғысынан осы мекеменің конституциялық және құқықтық реттеуін одан әрі жетілдіру қажеттігін куәландырды. Авторлар тұрақты әрекет етуші сайлау комиссияларының қызметін құру бағытында сайлау комиссияларының жүйесін жаңғырту қажет деген тұжырымға келеді. Мақалада сайлауға қатысатын саяси партиялардың тең өкілдік етуін қамтамасыз ету мақсатында сайлау комиссияларының құрамын қалыптастыру тәртібін жетілдіру ұсынылды.

Кілт сөздер: Қазақстан Республикасының Конституциясы, тікелей демократия, сайлау құқығы, Қазақстан Республикасының сайлау комиссиясы, сайлау комиссияларын құру, сайлау комиссиясының құқықтық мәртебесі, құқықтық мемлекет, азаматтық қауымдастық.

Ф.А. Ержанова, А. Божкараулы, А. Лавничак

К вопросу о правовом статусе и формировании избирательных комиссий в Республике Казахстан

Предметом исследования научной статьи являются избирательные комиссии в Республике Казахстан. Авторы показывают роль и значение данного института. В настоящей работе исследуются вопросы конституционно-правового статуса органов, осуществляющих подготовку и проведение выборов в Республике Казахстан. Объектом изучения являются нормативно-правовые акты, регламентирующие формирование и полномочия избирательных комиссий в Казахстане. На основе сравнительно-правового анализа в статье рассматриваются вопросы, касающиеся организации и деятельности избирательных комиссий в Российской Федерации и Республике Казахстан. Большое внимание уделяется актуальным вопросам функционирования избирательных комиссий, а также отдельным аспектам регулирования конституционно-правового статуса данных органов. Современные проблемы отечественного института избирательных комиссий свидетельствуют о необходимости дальнейшего совершенствования конституционно-правового регулирования данного института в контексте общей задачи формирования гражданского общества и правового государства в Республике Казахстан. Авторы приходят к выводу о необходимости модернизации системы избирательных комиссий в направлении создания системы постоянно действующих избирательных комиссий, В статье предлагается также совершенствование порядка формирования состава избирательных комиссий в целях обеспечения равного представительства политических партий, участвующих в выборах.

Ключевые слова: Конституция Республики Казахстан, непосредственная демократия, выборы, избирательное право, избирательные комиссии Республики Казахстан, формирование избирательных комиссий, правовой статус избирательных комиссий, правовое государство, гражданское общество.

References

1 Konstitutsiia Respubliki Kazakhstan ot 30 avhusta 1995 hoda (1995) [The Constitution of the Republic of Kazakhstan]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/?doc_id=1005029 [in Russian].

2 Konstitutsionnyi Zakon Respubliki Kazakhstan «O vyborakh v Respublike Kazakhstan» ot 28 sentiabria 1995 h. № 2464 [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 [in Russian].

3 Mukhamedzhanov, E.B. (2005). Vybory proshli, chto dalshe? [Elections have passed, what's next?]. *Yurist – Iurist, 2,* 53–55 [in Russian].

4 Mitskaya, E.V. (2007). Sovershenstvovanie zakonodatelstva v oblasti realizatsii prav i svobod hrazhdan Kazakhstana [Perfection of legislation in the field of realization of political rights and freedoms of citizens of Kazakhstan]. *Pravovaia reforma v Kazakhstane – Legal reform in Kazakhstan, 4,* 3–8 [in Russian].

5 Sarsembaev, M.A. (2007). Problemy sovershenstvovaniia kazakhstanskoho vybornoho zakonodatelstva [Problems of improving Kazakhstan's electoral legislation]. *Zanher – Zanger, 12,* 102–108 [in Russian].

6 Mukhamedzhanov, E.B. (2001). *Izbiratelnoe pravo Respubliki Kazakhstan [The electoral law of the Republic of Kazakhstan]* [in Russian].

7 Federalnyi Zakon Rossiiskoi Federatsii «Ob osnovnykh harantiiakh izbiratelnykh prav i prava na uchastie v referendume hrazhdan Rossiiskoi Federatsii» ot 12.06.2002 [Federal Law of the Russian Federation «On basic guarantees of electoral rights and the right to participate in a referendum of citizens of the Russian Federation»] [in Russian].

8 Turishcheva, N.Iu. (2016). Pravovoe rehulirovanie uchastiia partii v vyborakh [Legal regulation of the participation of parties in elections]. *Hosudarstvo i pravo – State and Law, 8,* 29–39 [in Russian].

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G.T. Nurbekova, S.V. Polevoy

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

EEC: its integration role in region, examples of law problems in financial-tariff aspect and meaning for Kazakhstan's economy in their context for today

Connection of Eurasian Economic Union is the newest integration project at large of Commonwealth of Independent States. Its foundation was determined by the fact, that previous integration alliances like CU and CIS were feeble in their economic function. The biggest part of experts estimate new format of EEU positively, because they think that it is going to be better than ex in aspect of economic cooperation. These statements are not unreasonable. However, on the assumption of political and law tendencies in this state block, EEU's legislation also has a set of unfounded preferences, which induce discussions about its foundation and following collisions. Many points of financial – tariff regulation are written in very indistinct manner, and also their law content is written in favour of other participants of integration agreement, or just it doesn't match with economic and political interests of Republic of Kazakhstan. Similar facts shouldn't be out of consideration, because Kazakhstan became a participant of all customs agreements in integration projects on the CIS territories voluntarily, and it has all rights to rely on profits from its membership in EEC. In consequence of these integration processes, problems, appearing on practice, must be marked for the next decision and such need was a task for this article.

Keywords: integration, EEU, economical – law problems, Republic of Kazakhstan, export, customs law, business competition, financial – tariff, regulation, political interests, integration block, union, law regulation.

Economic integration implies by itself unification of economic policy between different states through the partial or full cancellation of tariff and non – tariff limits in trade, what happens among them before their union [1]. This definition is more common in economical law literature.

History of economical integration development in countries of Europe, Asia and America is frequently conditioned by the necessity of long – term economic relations alignment. After all, creation of ECSC, ASEAN, NAFTA and other integration unions has primarily economical character, even in spite of explicit political overtone of Bangkok declaration about ASEAN creation (from 8th August of 1967) [2] and American expansion in neighbour countries. Certainly, it manifested itself on different developmental stages of these integrations: in postbellum Europe economic vector was the base of ECSC block becoming in 1957, in South – East Asia unification was an investigation of anticommunist hysteria of local elites, however, already in the end of 70th countries – participants fully estimated its economic benefits. Adoption of Vietnam in ASEAN in 1995 really brightly stresses the priority changing of this kind [3; 36].

Despite this fact, there are also many other integrations for today, which cover political purposes of some countries. League of Arab States is bright example for it, what was created, it would seem, for purposes of consolidation and support of the poorest participants only, it always prioritize political questions. For example, when Egypt and Jordan have signed an agreement with Israel about ceasefire, LAG «attacked» them with sharp criticism, suspending their membership. There is also an indicative nowadays example of Syrian boycott in LAG.

Integration of EEC block, what was appeared on the base of agreement «About creation of Eurasian economic union» from 29th May of 2014, also has ambiguous character. As it was shown by experience of CIS and EurAsEC, the biggest part of same unions on post — Soviet lands were created on necessity in political consolidation. That means that this vector was always in priority and wasn't hidden. Result of interaction also left much to be desired for efficiency of economic policy for its members in format of these integrations. «Does Eurasian economic union have a chance to be transformed in Eurasian Union as analogy of European Union in time, or it waits a destiny of other unsuccessful integration projects of CIS?» Professor of Russian Academy of Sciences, N. Ziyadullaev asks this question [4].

Despite the availability of a number of political and even economic benefits, we shouldn't forget about necessity for Russian Federation to take the own lead in decision of different foreground questions of this integration. This state, what has GDP in block's format more than 85 %, it is simultaneously and stimulus and barrier for deep integration, because its economy is really different in amount from trade partners. For example, potential countries for entering in the original format of European Union had approximately equa-

ble economic institutes by scale on the share of participants. In opinion of academician Ziyadullaev, even Russia, with emphasizing attention on this purpose and having giant economy, bears losses in different branches with a need of improvements for integration development.

Other republics are also not an exception. Adoption of the last members like Armenia and Kyrgyzstan in the union was a really negative repercussion for Kazakhstan. For the first one: adoption of Armenia in this union automatically prevents for adoption of Azerbaijan in this block. If these countries can relatively calm coexist in format of other regional unities, it is only for a reason of absence of conditions about opened borders. This factor hinders for establishing of closer relations of block with «Turkish world» and for Kazakhstan in particular. (A number of experts think that this economic union is de – facto «Christian block» or «block of derelict – countries» by its role). Certainly, these statements have extremely dubious argumentation, however, lack of alternatives for Kazakhstan, in view of close integration with potentially more attractive country from political and economic side of question became a very negative fact.

Membership of Kyrgyzstan also provides a number of economic inconveniences in keeping of regions for sales of agricultural products, as for domestic market, as for foreign one. For example, livestock products of Kyrgyzstan is more developed and oriented on foreign market, than Kazakhstani products.

Removal of customs borders won't let for Kazakhstan to create artificial barriers for export from this state. In this way, republic risks not only to full a segment of domestic consumption by foreign products, but also to do a part of their own perspective manufactures unprofitable. After all, besides livestock sphere, there are also well developed agricultures in Kyrgyzstan. In their comparison, south regions of Kazakhstan are also weak and have no ability for market competition.

Creation of covered barriers in question of quality is also ineffective, as it was shown on practice with Belarusian milk products. Kazakhstan will have to make concessions for Kyrgyz partners, and membership in WTO does it to encouraging free trade.

In opinion of professor Ziyadullaev, the biggest profits from union's creation had Belarus, by export rearranging of their own products in countries – participants, Russia became a «sponsor of this project», Kazakhstan, with a very wide range of unsolved market problems, extracted from this union the smallest benefit. In despite of presence of many tax privileges, which Kazakhstan provides to foreign investors, there is no significant inflow of capital in republic, when much more conservative Belarus had from Russia about 70 billion dollars of subsidies and preferences, including some for reorganization of potential exporting manufactories [4].

Despite of such uneven encouragement for keeping of Customs Union in the newest format, Kazakhstan and Belarus expressed their support and loyalty to Russia in connection with economic sanctions, and indirectly divided their negative macroeconomic effect with it. But Russian Federation declares to partners some statements about profits about potential of import substitution policy, caused by contra - sanctions of Moscow.

But import substitution in this interpretation seems unlikely. It entails with itself a cardinal reconstruction of economy for the newest vector of development, with condition of availability of free and in the same time competitive production capacities. In Kazakhstan and in Belarus the availability of such funds is unlikely, and their realization in conditions of crisis will be extremely difficult.

By these reasons, EEC is not very perspective variation for Kazakhstan in the context of integration institute for the nearest years.

In financial – tariff aspect all also is not so uniquely. Decision of The Council of Eurasian economic commission from 16.07.2012 №54 (red. from 05.04.2016) «About affirmation of united Trade nomenclature of foreign economic activity of Eurasian economic union and United customs tariff of Eurasian economic union» has converted the previous set of tariffs for Customs Union (from 16.07.2012) [5]. These measures were really important for coming reunification and now, thanks to these amendments, states – participants reached a simplified ubiquitous system of tariff stakes. That was one of the purposes of the modernization for this aspect in EEC format.

Despite that fact, that according with the new amendments, Kazakhstan receives the largest part of profit from customs tariff after Russia (7,5 %), what is a fully acceptable mark in comparison with other participants, there are many stayed unsolved problems of tariff regulation.

As narked The President of Republic of Kazakhstan N.A. Nazarbayev in the course of the XVI regular Congress of party «Nur Otan»: «there is a need to simplify a tariff policy in EEC». «Our customs procedures take a lot of time for now, tariff policy is really difficult and intricate. Tariff barriers go against world practice. We need in large – scale work to reform it by simplification of these tariffs in Eurasian economic union» [6].

For example, European Economic Commission recently revealed a number of shortcomings in parity of tariff policy of CIS and EEC, and according them even simplifications are not always legal in the law practice, where principles of the newest customs regulations really poorly work. «Commission intends to consider the application of internal tariffs in railway transit with antimonopoly authorities of EEC countries, reported the member of the board (minister) for competition and antimonopoly regulation of European Economic Commission, Nurlan Aldabergenov». «Every our subject, moving around the territory of state (-member of EEC), pays by internal tariffs. But we envisages this measure for sea ports. When we move on the territory of other state, these tariffs increase to 40 % at once», - marked N. Aldabergenov on the conference «Advocacy of competition in sphere of manufacturing on transboundary markets of Eurasian economic union» in Astana.

By calculation of European Economic Commission, if we have transit from Russian ports, Kazakhstani consignors must overpay for transportation of ferroalloys in containers in 1,7 times, for coal - in 2,3 times, for aluminium – in 2,1 times, as here applied boost coefficient TP (of trade policy) CIS. In particular, in the transit of Kazakhstani products through the Russia to Riga: we have a boost coefficient for ferroalloys in containers 1,40 TP of CIS; for coal in gondola cars - 0,70 TP of CIS; for aluminium in boxcar – 0,77 TP of CIS.

According to the words of N. Aldabergenov, saving from tariff alignment will offer for Belarus to have additional savings in money about 14 million in dollars, for Kazakhstan – 329 million in dollars, for Russian Federation – 246 million in dollars. «As a matter of fact, we always hear when they say for us, that we are in one united Eurasian economic union and we need to have the same conditions respectively. It is equal in union and in CIS for us today. I think that we and our national antimonopoly authorities will carry out necessary work and will present our own suggestions to the national governments of our states immediately» – he added [7].

This is far from being the only example of discrepancy of declared norms in well – established customs practice of Eurasian states. However, besides problems of state scale, there is also more covered problematic. It is reflected in conformity of the real state of affairs to EEC conception about that fact, when this integration is in the interests of «citizen's economy».

But how citizens satisfied by the tariff policy of EEC? For example, for today we have a question about ubiquitous licensing for auto - dealers in Kazakhstan. Licensing will offer to equalize prises for auto in EEC. The Head of Association of Kazakhstani Auto – Business (AKAB), Andrey Lavrentyev, talks about this.

«When we talk about licensing of dealers, we got a talk more about secondhand dealers, who select the cheapest autos and deliver them here. There can be such cars, which were staying on stocks, were keeping in abnormal conditions etc. Finally, consumer receives a «pig in a poke». Licensing provides not only for simple limit, but monitoring and control of companies, which participate in process of realization of new and used automobiles in Republic of Kazakhstan. This is a control for prices on auto and for their quality. This mechanism will be contributed for alignment of auto prices with Russia and in whole EEC. There will be precise and clear system of pricing».

He marked, that innovation, what has no clear terms of inculcation, won't touch individuals. Kazakhstani citizens can easily bring own automobile from abroad. As for the methods for price levelling on the market of used auto, for it can be used program Trade In and cheap auto – credits for the newest domestic produced cars, said Lavrentyev. These mechanisms are aimed on the need to have cheaper prices for auto in Kazakhstan.

But by the fact, local distributors in any way will be investing in marketing and salary, and that's why risk of rise in prise for cars is high as never been. Besides that, we shouldn't forget that officials of Kazakhstan can have indirect influence on dealers with prediction for them large profits from licensing, and «pushing» citizens to by automobiles of domestic assembly by this way, which are cheaper at production cost and do not provide tariff pay. Not by chance previous expert marked that local automobiles will be noticeably cheaper, than imported from abroad [8].

Consumer, who waited facilitation in price policy from customs after accession to the WTO, receives artificial barriers of new format in fact, which were done in interests of local business and state import substitution (we should mark that this situation is typical not only for auto building).

We also shouldn't forget about tastes of consumers here: for example, if the same barriers stimulate local auto manufacturing in Turkey, it is rentable only by its productive diversity. In Kazakhstan auto manufacturing is presented by some car assembly plants, which cooperate with East – European or with Korean companies. By consumer stereotypes, quality of their automobiles is very doubtful in comparison with West – European, Japanese and American. And that means, potential consumer, who was deprived of the part of

his consumer choice, will continue to «hold on» the «checked, well proved», but used autos of their brands, and no customs or price type privileges for automobiles of the newest assembly won't force him to buy production of local manufactures. Segment of consumers, who support such buying policy is very big in Kazakhstan, it can be proved by current state of cars on the roads of our country.

This practice undermines ecological conception of automotive industry in state, because there are not many people, who is agree to buy newest cars, when they are not applicable for accepted purchasing representations, especially in period of crisis in national economy.

After considering of all these examples, we can see, that EEC is not such uniquely perspective on practice, how politicians and propagandistic economists coerce us to think. However, this article is not an exhortation for cardinal review of Kazakhstani membership in this block.

Unification and integration achievements of EEC for the last years were mostly approximated to practical understanding of economy, than all previous variations of united blocks. There was done a colossal work, for integration of economies of countries – participants, as in format of Customs Union, as in nowadays now. Kazakhstan became one of the most important subjects – participants, what was repeatedly proved in nowadays integration realities.

However, if we want to see integration like European, we will hardly reach it in the nearest future: there is too heterogeneous composition of block members in the context of development of national economics.

That's why for saving of last year achievements, EEC really needs in work for continuous law unification and interrelation of its results with objective economical practice. If these norms go contrary with citizens preferences, we need to abolish them completely, or try to achieve of «smoothing» on certain, more problematic integration - legal aspects.

After all, without high – grade economy, what is directly oriented on needs of citizens, what is the base of every economic integration, this block can be in «economical fiasco», as all previous alliances, it would be looking unprofitable under the strike of new economic crises and by many other reasons.

Confidence of countries citizens for this format, what is proved by objective practice, will be a catalyst for saving of this union. And problematic aspects for its building, which seem to be «temporary trivia» , must be decided immediately, with support of business and official governments.

References

1 Портал по тематике «мировая экономика» EREPORT, теоретический раздел, «Экономическая интеграция» [Электронный ресурс]. — Режим доступа: http://ereport.ru/articles/mirecon/ecint.htm.

2 Carolyn L. Gates & Mya Than. ASEAN Enlargement: impacts and implications. — Institute of Southeast Asian Studies, 2001 [Электронный ресурс]. — Режим доступа: https://bookshop.iseas.edu.sg/publication/1301.

3 Фыонг Х.Д. АСЕАН и Вьетнам: пути сближения: дис. ... канд. экон. наук: 08.00.14 «Мировая экономика» / Х.Д. Фыонг. — М., 1996. — 172 с.

4 Зиядуллаев Н.С. Евразийский экономический союз: история успеха или мыльный пузырь. «Независимая газета», 15.09.2014 [Электронный ресурс] / Н.С. Зиядуллаев. — Режим доступа: http://www.ng.ru/courier/2014-09-15/11_soyuz.html.

5 Решение Совета Евразийской экономической комиссии от 16 июля 2012 г. № 54 «Об утверждении единой Товарной номенклатуры внешнеэкономической деятельности Евразийского экономического союза и Единого таможенного тарифа Евразийского экономического союза» (с изм. и доп.) [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/H12EV000054.

6 Бондарева В. «В ЕАЭС необходимо упростить тарифную политику», – Н.Назарбаев [Электронный ресурс] / В. Бондарева // «BNEWS», Астана. — 2015. — Режим доступа: http://bnews.kz/ru/news/obshchestvo/v_eaes_neobhodimo_uprostit_tarifnuu_politiku__nnazarbaev-2015_03_11-1131903.

7 ЕЭК предлагает применять внутренние тарифы при транзите через страны ЕАЭС. 2015. Портал «Zakon.kz» [Электронный ресурс]. — Режим доступа: http://www.zakon.kz/4750992-ejek-predlagaet-primenjat-vnutrennie.html.

8 Прокопенко В. Лицензирование автодилеров в РК позволит уравнять цены на авто в ЕАЭС // Информационный портал «TengriNews» [Электронный ресурс] / В. Прокопенко. — Режим доступа: https://tengrinews.kz/kazakhstan_news/litsenzirovanie-avtodilerov-rk-pozvolit-uravnyat-tsenyi-avto-272751/.

Г.Т. Нұрбекова, С.В. Полевой

ЕАЭО: аймақтағы оның интеграциялық рөлі, қаржылық және тарифтік аспектілердегі құқықтық мәселелердің мысалдары және бүгінгі күні олардың контекстіндегі Қазақстан экономикасы үшін маңызы

Еуразиялық экономикалық одақты біріктіру Тәуелсіз Мемлекеттер Достастығындағы жаңа интеграциялық жоба болып табылады. Оның құрылуы Кеден одағы және Тәуелсіз Мемлекеттер Достастығы мысалында өткен интеграциялық құрылымдардың экономикалық функцияларын нашар орындағандығымен негізделген. Көптеген сарапшылар ЕАЭО жаңа форматына оң баға бере отырып, бұл экономикалық ынтымақтастық аспектілерінде өткеннен гөрі жақсы болады деп есептейді. Мұндай мәлімдемелер негізсіз емес. Дегенмен, осы блоктың саяси және құқықтық үрдістеріне сүйене отырып, ЕурАзЭҚ заңнамасында оның негізділігі мен кейінгі қақтығыстары туралы пікірталас тудыратын бірқатар негізсіз жеңілдіктер бар. Тарифтік және қаржылық реттеудің көптеген пунктері олардың заңдық мазмұны интеграциялық келісімдердің басқа қатысушыларының пайдасына жазылған немесе Қазақстан Республикасының экономикалық және саяси мүдделеріне сәйкес келмейтіні туралы өте сирек сипатталады. Мұндай фактілерді қараусыз қалдырмау керек, себебі Қазақстан ТМД аумағында интеграциялық жобалар бойынша өз еркімен барлық кедендік келісімдерге қатысушы болып табылады және ЕАЭО-ға мүшелігінен түскен пайдаға сенім артуға құқылы. Осы процестердің арқасында мақаланың мақсаты болып табылатын кейінгі шешім үшін практикада пайда болатын жаңа проблемаларды анықтау қажет.

Кілт сөздер: интеграция, ЕАЭО, экономикалық және құқықтық мәселелер, Қазақстан Республикасы, экспорт, кеден құқығы, бәсекелестік, қаржы-тарифтік аспект, реттеу, саяси мүдделер, интеграциялық блок, одақ, құқықтық реттеу.

Г.Т. Нурбекова, С.В. Полевой

ЕАЭС: его интеграционная роль в регионе, примеры правовых проблем в финансово-тарифном аспекте и значимость для экономики Казахстана в их контексте на сегодняшний день

Объединение Евразийского экономического союза является новым интеграционным проектом на просторах СНГ. Его создание обосновано тем, что предыдущие интеграционные образования на примере ТС и СНГ слабо выполняли свою экономическую функцию. Большинство экспертов позитивно оценивают новый формат ЕАЭС, полагая, что он будет лучше прошлых в аспекте экономического сотрудничества. Подобные высказывания небезосновательны. Однако, исходя из политико-правовых тенденций данного блока, законодательство ЕАЭС имеет также ряд необоснованных преференций, что вызывает дискуссии о его обоснованности и последующих коллизиях. Многие пункты тарифно-финансового регулирования описаны весьма невнятно, к тому же их правовое содержание прописано либо в пользу других участников интеграционного соглашения, либо просто не совпадает с экономическими и политическими интересами Республики Казахстан. Подобные факты не должны оставаться без рассмотрения, поскольку Казахстан добровольно стал участником всех таможенных соглашений в интеграционных проектах на территории СНГ и имеет полное право рассчитывать на прибыль от своего членства в ЕАЭС. Вследствие данных интеграционных процессов появляющиеся на практике новые проблемы должны быть обозначены для последующего решения, что и стало целью данной статьи.

Ключевые слова: интеграция, ЕАЭС, экономико-правовые проблемы, Республика Казахстан, экспорт, таможенное право, конкуренция, финансово-тарифный аспект, регулирование, политические интересы, интеграционный блок, союз, правовое регулирование.

References

1 Portal po tematike «mirovaia ekonomika» EREPORT, teoreticheskii razdel, «Ekonomicheskaia intehratsiia» [Portal on thematic of «world economy» EREPORT, theoretical section, «Economic integration»]. *ereport.ru.* Retrieved from http://ereport.ru/articles/mirecon/ecint.htm [in Russian].

2 Carolyn, L., Gates, Mya Than. (2001). ASEAN Enlargement: impacts and implications. Institute of Southeast Asian Studies. *bookshop.iseas.* Retrieved from https://bookshop.iseas.edu.sg/publication/1301.

3 Fyong, H.D. (1996). ASEAN i Vetnam: puti sblizheniia [ASEAN and Vietnam: the ways of convergence]. *Candidate's thesis.* Moscow [in Russian].

4 Ziyadullaev, N.S. (2014). Evraziiskii ekonomicheskii soiuz: istoriia uspekha ili mylnyi puzyr [Eurasian economic union: history of success or a soap bubble]. «Nezavisimaia hazeta», 09.15.2014. *ng.ru.* Retrieved from http://www.ng.ru/courier/2014-09-15/11_soyuz.html [in Russian].

5 Reshenie Soveta Evraziiskoi ekonomicheskoi komissii ot 16 iiulia 2012 hoda № 54 «Ob utverzhdenii edinoi Tovarnoi nomenklatury vneshneekonomicheskoi deiatelnosti Evrasiiskoho ekonomicheskoho Soiuza i Edinoho tamozhennoho tarifa Evraziiskoho ekonomicheskoho Soiuza [Decision of the Council of Eurasian Economic Commission from 16th of July 2012 №54 «About statement of unified Commodity nomenclature of foreign economic activity of Eurasian economic union and United customs tariff of Eurasian economic union»]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/rus/docs/H12EV000054 [in Russian].

6 Bondareva, V. (2015). «V EAES neobkhodimo uprostit tarifnuiu politiku», – N. Nazarbyaev [«There is a need to simplify tariff policy in EEC», – N. Nazarbayev]. «BNEWS» analiticheski portal – Analytical portal «BNEWS», Astana5. Retrieved from http://bnews.kz/ru/news/obshchestvo/v_eaes_neobhodimo_uprostit_tarifnuu_politiku__nnazarbaev-2015_03_11-1131903 [in Russian].

7 EEK predlahaet primeniat vnutrennie tarify pri tranzite cherez strany EAES (2015) [EEC suggests to use internal tariffs in transit throw the states of EEC]. *zakon.kz.* Retrieved from http://www.zakon.kz/4750992-ejek-predlagaet-primenjat-vnutrennie.html [in Russian].

8 Prokopenko, B. (2015). Litsenzirovanie avtodilerov v RK pozvolit uravniat tseny na avto v EAES [Licensing of auto dealers in RK will offer to equalize prices for autos in EEC]. Informatsionniy portal «TengriNews» – Informational portal «TengriNews». *tengrinews.kz.* Retrieved from https://tengrinews.kz/kazakhstan_news/litsenzirovanie-avtodilerov-rk-pozvolit-uravnyat-tsenyi-avto-272751/ [in Russian].

МЕМЛЕКЕТ ЖӘНЕ ҚҰҚЫҚ ТЕОРИЯСЫ МЕН ТАРИХЫ
ТЕОРИЯ И ИСТОРИЯ ГОСУДАРСТВА И ПРАВА
THEORY AND HISTORY OF STATE AND LAW

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Б.Ю. Задорожный

Киевский национальный экономический университет им. В.П. Гетьмана, Украина
(E-mail: kdavtdekan8@ukr.net)

К вопросу о приобретении правосубъектности: проблемы теории и практики

В статье исследованы теоретические и практические вопросы в аспекте идентификации наличия (или отсутствия) в физических лицах специальной правосубъектности, необходимой для приобретения ими такого конституционно-правового статуса, как глава государства. Учитывая доктринальную неоднозначность понимания дефиниции «правосубъектность» и ее составляющих, а также законодательную неопределенность этой дефиниции, автором статьи сформулировано понятие «правосубъектность», проанализированы ее составляющие. Установлено, что правосубъектность главы государства — это закрепленная в законодательстве и обеспеченная государством его юридическая возможность и личная способность, определенные на основе установления соответствия конституционно-правовым требованиям, осуществлять государственно-властные полномочия в соответствии со своим функциональным назначением в механизме государственной власти. Сделан вывод, что конституции стран мира закрепили практически одинаковый подход к установлению специальных требований к кандидату на пост главы государства. Такими критериями являются: возраст, политико-гражданская и национальная принадлежность, ценз проживания, нередко религиозная определенность, порядок занятия поста главы государства (инаугурация, коронация), основания и порядок прекращения полномочий, срок компетенции, порядок временного замещения главы государства, имущественный ценз (денежный залог). Установлено, что такие требования играют роль определенных «юридических фильтров», благодаря чему обеспечивается более качественный подбор кандидатов на этот важный государственный пост. На основе сравнительного анализа конституционного законодательства установлены критерии, необходимые для приобретения статуса главы государства в монархиях и республиках. Предложено внести изменения в национальное законодательство с целью усиления «юридических фильтров» для кандидатов на пост главы государства.

Ключевые слова: специальная правосубъектность, конституционно-правовой статус, порядок занятия поста главы государства, ценз проживания, порядок временного замещения поста главы государства.

Доктринальные концепции обязанностей государства в юриспруденции не исследованы, хотя любое государство, начиная с давних и заканчивая современными, несмотря на форму правления, государственное устройство, политический режим и другие отличительные признаки, неминуемо должно повиноваться определенным требованиям. Такие публичные требования государство нередко определяет самостоятельно, исходя из своей воли и различного рода объективных обстоятельств (внешняя угроза, сохранение государственной власти, защита граждан страны и права собственности и т.д.). В то же время античные мыслители, философы, профессора права и другие представители умственной деятельности высказывали свое мнение о том, какие обязанности должно выполнять государство.

Целью этой публикации является определить на уровне постановки проблемы концепции формирования обязанностей государства, начиная с времен античности и по сегодняшнее время. Применение исторического, аналитико-системного и логического методов исследования позволит не

только исследовать видовой спектр этих концепций, но и проанализировать обязанности государства как правовую категорию, а также определить функциональную действенность самого государства.

Древнеримский философ Цицерон одним из первых обратился к вопросу долга как объективной необходимости общественного бытия. Цицерон, занимая политические должности в государстве, был подвластным лицом и предметно понимал исключительную важность обязанностей в сфере публичных отношений. Он в своем трактате «Об обязанностях» (*De officio*) (65) утверждал: «кто не изучал истину обязанностей, тот не достоин называться философом», поскольку «ни одна сфера жизни — ни государственные дела, ни частные, ни судебные, ни домашние, ни в случае заключения соглашения с ближним ... — не может быть свободна от обязанностей» [1; 299]. Такой вектор доктринального рассуждения имеет объективное основание, поскольку институт долга является неотъемлемой составляющей публично-властных отношений.

Системный анализ национальных и зарубежных источников права, начиная со времен античности и до наших дней, свидетельствует, что вопрос института обязанностей государства, несмотря на исключительную его важность, так и не стал предметом комплексных фундаментальных исследований. Отдельные обобщения об обязанностях государства можно выделить в трудах тех ученых, которые исследовали формы правления, государственное устройство, место и роль главы государства в системе государственно-властных координат, межгосударственные отношения и т. п. Доктринальные источники именно такого содержания составят восходящую основу исследования обязанностей государств — это во-первых.

Во-вторых, исследование темы статьи целесообразно выстраивать путем логически-содержательного группирования многовековых предметных наработок ученых, восходящим центром которых являются наиболее значимые идеи, обобщения, концепции, раскрывающие сущность и значимость обязанностей государств. Такой подход в аспекте тематической исследовательской деятельности имеет свои преимущества, поскольку предопределяет возможность в полной мере системно, поступательно и целостно проследить генеалогию развития той или иной доктринальной идеи (концепции) об обязанностях государства начиная с момента ее обоснования, утверждения, продуцирования и возможного отрицания, непризнания, или, наоборот, современного ее содержательного доктринального «насыщения» и «обогащения». Предполагается, что такой исследовательский прием позволит концептуально и практически в наднациональном измерении проанализировать доктринальные концепции обязанностей государств в странах европейского пространства.

Национальное и зарубежное законодательство не содержит устойчивого нормативного определения такого термина, как «концепция», поэтому обратимся к другим источникам информации. Филологическая трактовка данного термина такова: это система доказательств определенного положения, система взглядов на то или иное явление. Ключевыми в этом определении есть два семантических аспекта: первый — обоснованные рассуждения, второй — объект соображения. Эти две категории взаимосвязаны между собой, поскольку только в действенной и логической их связке возможен ожидаемый результат: векторно-теоретические обобщения (направления), предметом которых выступает определенное явление. Мы склонны относить к категории «явления» все то, что имело или имеет место в реальном бытии.

Наука философии толкует слово «явление» как «внешние, реально существующие особенности предметов, процессов, их свойств, которые непрерывно наблюдаются» [2; 369]. Возникает вопрос: где наблюдаются явления? Ответ на поверхности: они наблюдаются в природе или в социуме. Следовательно, явления условно делятся, как минимум, на две категории: естественные и социальные. Природные явления, в отличие от социальных, не представляют для нас никакого научного интереса, что обусловлено темой и предметом данного научного исследования. Поэтому остановимся на содержательном анализе такого социального явления, как обязанности государства и попытаемся выделить определенные концептуальные исторические учения об обязанностях государства.

Концепция обязанностей государства может быть как нормативной, т.е. объективированной в определенном правовом акте государства (государств), официально принятом специально уполномоченными органами власти, так и доктринальной. *Доктринальная концепция обязанностей государства* — это содержательно-смысловые, логически-обобщенные положения ненормативного характера, продуцируемые учеными в аспекте такого социального явления, как обязанности государства.

Государство — неотъемлемый спутник социума в течение нескольких десятков веков, его обязанности перманентно формировались в социуме, исходили из его потребностей, что является логичным и закономерным явлением, поскольку и само государство представляет объективный результат развития самого общества. Философ Рене Вормс (1869–1926) в своей работе «Общественный организм» (1896) признал государство высшей формой общества, в котором имеют место осознанное отношение людей к политическому общежитию, правилам публичного управления, взаимное подчинение положительным законам, в которых воплощены идеи политического союза, т.е. государства [3]. Поэтому общество является материальной основой формирования государства и его обязанностей.

Представители общества в течение многовековой истории тех или иных государств, начиная с древнейших времен и по сей день, пытались высказать свои пожелания, требования, идеи и соображения относительно того, каким должно быть государство, в чем заключается его сущность, какое его назначение и какова роль в цивилизационном развитии, бремя каких именно обязанностей должно быть возложено на государство. Доктринальный багаж таких предметных учений, соображений имеет многовековую историю, он отличается по источникам объективизации (трактаты, монографии, письма и др.), по субъектам выработки (ученые, священники, политики и др.), по сферам общественной жизни (экономические, политические, культурно-духовные и др.), по векторности обязанностей государства (внутренние, внешние), по своему объему в сравнении с обязанностями членов общества перед государством и т. п.

Предметный анализ научного багажа свидетельствует, что определенные доктринальные рассуждения ученых, мыслителей в аспекте обязанностей государства возникли в античные времена и не утратили своей актуальности и по сей день, другие — практически не нашли своего дальнейшего развития за пределами античной цивилизации, третьи — были заявлены только два-три века назад и в дальнейшем нашли поддержку среди ученых, четвертые — формируются в современных условиях и т. п. Предметные доктринальные достояния ученых в целом группируются вокруг определенных восходящих идей, сквозь призму которых раскрываются не только целесообразность, значимость, необходимость или полезность существования государства, государственного строя в целом, практическая необходимость возложения на государство ряда общественно значимых обязанностей, но и ментально-научное отношение человечества к самому государству и его сущности.

Системное изучение доктринальных источников права, авторами которых являются философы, социологи, экономисты, теологи, правоведы, общественные деятели, политики и другие представители умственного труда, позволяет выделить следующие концепции обязанностей государства. Ими, по нашему мнению, являются:

1) *концепция персонифицированно-репрезентативных обязанностей государства;*

2) *социальная концепция обязанностей государства;*

3) *позитивистско-правовая концепция обязанностей государства;*

4) *концепция широких обязанностей государства.*

В подтверждение изложеной нами мысли раскроем некоторые аспекты названых выше концепций обязанностей государства.

Концепция персонифицированно-репрезентативных обязанностей государства возникла и утвердилась, как свидетельствуют многочисленные источники, в античный период. Следовательно, возникает ряд вопросов: в чем заключается восходящая идея названной выше концепции обязанностей государства; кто является ее учредителем (учредителями) и сторонниками; имело ли место историческое изменение доктринальных позиций ученых в аспекте обязанностей государства, если да, то чем это было обусловлено?

Основоположником концепции персонифицированно-репрезентативных обязанностей государства является древнегреческий мыслитель Платон (427–347/348 до н.э.), который обязанности античного государства, т.е. такой публичной организации, как «полис», «civitas», «город-государство» и другие, возлагал на конкретную персону — правителя античного государства. В античный период к числу правителей в различные периоды относились: архонт (др.-греч. ἄρχων от др.-греч. ἀρχη — «власть», «властитель», «руководитель»), василевс, принцепс, принц, публичные ректор или губернатор (*rector et gubernator rei publicae*), император, диктатор и др.

Платон в своих трудах не исследовал вопроса «обязанности государства», только обязанности его правителя, поскольку ментальное осознание античных философов основывалось на идее правителя как олицетворения публичной власти. Он считал, что на правителя, который наделен

публичной властью в политически организованном обществе, следует возлагать и многочисленные публичные обязанности, подобно тому, как на *pater familias*, т.е. на отца, возлагаются обязанности относительно его рода, семьи (*familias*). Правитель, по мнению Платона, обязан, прежде всего, заботиться о своем государстве как о «матери». Идея и необходимость такого попечительства формируется исходя не из собственного блага, а в интересах всего общества, всех граждан [4; 104]. В общем доктринальная заслуга Платона заключается в том, что он впервые выделил и обосновал идею публичных обязанностей, носителем которых от имени политико-территориального образования («полис», «civitas» и др.) выступал его правитель.

Тему публичных обязанностей правителя развил в своих трудах и другой древнегреческий философ — Аристотель (384–322 гг. до н. э.). Так, Аристотель в трактате «Политика» подчеркнул: «Во всяком государстве и человек или те сборы, воли которой ... подчинили свою волю отдельные лица, обладает ... высшим могуществом (*summam potestatem*), или верховной властью (*summum imperium*), или господством (*dominum*), однако такая власть является производной от воли народа, поэтому она является верховной, но не безграничной» [5; 332]. Из приведенного следует, что восходящей обязанностью правителя античного государства, по мнению Аристотеля, является обязанность самоограничения государственной власти. Идея, а затем и требование о самоограничении власти, как правителя государства, так и самого государства, пронизывает многие доктринальные труды выдающихся ученых начиная со времен античности и до наших дней (Дж. Локк, Л. Дюги, В. Сиренко и др.).

Заслуживает особого внимания доктринальное достояние философа, сенатора Древнеримского государства Марка Туллия Цицерона (106–43 гг. до н. э.). Его взгляды относительно сущности, содержания публичных обязанностей в основном исходят из практики и потребностей античного государства. Он достаточно убедительно позиционирует обязанности государства сквозь призму обязанностей правителя государства. В своем трактате «Об обязанностях» (*De officio*), который он написал в конце своей жизни, Цицерон заостряет внимание не на обязанностях государства, а на обязанностях того, кто будет им управлять, т.е. он пишет об обязанностях правителя государства и как бы пытается дать ему практические советы. Правитель, по мнению Цицерона, обязан, пренебрегая личной выгодой, быть «опекуном» государства, заботиться о государственных делах, заботиться о его благополучии и прочности. Это, во-первых. Во-вторых, обязанность правителя, по мнению мыслителя, состоит в том, чтобы действовать от имени государства в интересах всех его граждан, в частности «пользы тех, кто верен» государству, а не выгоде тех, кому «доверено государство» [4; 325]. В-третьих, Цицерон, как следует из содержания его труда «Диалоги о государстве», возлагал на правителя обязанность обеспечить порядок и спокойствие в государстве, осуществлять справедливое управление, способствовать общественной взаимопомощи, не нарушать имущественных прав граждан [6; 39]. Государство, как и правила общественного сожительства в нем, были созданы, по мнению Цицерона, для того чтобы обеспечить, гарантировать право собственности, поскольку люди по своей природе являются существами социальными. Так, под сенью государства ищут не только личной защиты, но и защиты своих имущественных прав (*ut communibus pro communibus utatur, privatis ut suis*). В случае несостоятельности государства обеспечить личную безопасность и порядок в социуме, теряется и смысл государственного бытия, целесообразность подчинения власти правителя, полиса, государства и т.п. Приведенные выше рассуждения имеют особую доктринальную значимость, поскольку их автор был авторитетным представителем политической элиты мощного античного государства, осознавал всю шаткость и уязвимость стабильности паритета интересов общества и представителей власти. Исходя из этого правитель обязан согласовывать свою государственную деятельность с интересами и потребностями добропорядочных граждан. В общем Цицерон, ратуя в своих трактатах «О государстве», «О законе», «Об обязанностях» за возложение на главу государства ряда положений общественного поведения, одновременно отстаивал идею о наделении его достаточным объемом полномочий, поскольку государственные дела требуют не только воли правителя, но и возможностей по ее осуществлению.

Таким образом, Цицерон очертил обязанности государства сквозь призму обязанностей его правителя (*rector et gubernator rei publicae*), через сферу публичных обязанностей обосновал идею «правителя-гаранта» (*gubernators-garants*), который представлял публичную власть и как бы олицетворял само государство, поскольку действовал от его имени.

Последователем учения Цицерона о публичных обязанностях был древнеримский историк Гай Саллюстий Крисп (86–35 гг. до н.э.), который пришел к обобщению: именно правитель государства

должен нести бремя публичных обязательств, основным из которых является повседневная «забота о государственных делах».

Известный римский юрист Доминиций Ульпиан (170–228), доктринальным обобщением которого, в том числе и в сфере публичных обязанностей, что содержались в многочисленных его трактатах («О обязанности консула» (*De officio consulis*), «Об обязанностях преторов» (*De officio praetorium*), «Об обязанностях проконсула и легата» (*De officio proconsulis et legati*), «Об обязанностях префекта города» (*De officio praeffecti urbi*), «Об обязанностях квестора» (*De officio quaestoris*), «Об обязанностях президиумов» (*De officio praesidis*), «Об обязанностях руководителя императорскими финансами» (*De officio vel rationais*) и др.), предоставлялась сила закона в Древнеримском государстве, он возлагал также публичные обязаности на должностные лица, первым из которых был правитель [7; 162–181].

Важность публичных обязанностей представителей власти в античном государстве объективно подчеркнута: во-первых, большим количеством приведенных выше трактатов; во-вторых, субъектным составом разного рода правителей этого государства — от фактического главы государства (*consulis*), помощника императора в административных делах государства (*praefectus praetorio*) до чиновников низших рангов, например, наместника провинции (*praeses*) или префекта города (*praeffecti urbi*) [7; 162–181]; в-третьих, значительным перечнем императивных требований, выполнение которых возлагалось на приведенный выше круг публичных лиц. Например, опека о государстве (городе, провинции), завоевание территорий, заключение мира, объявление войны, разрешение споров, установление и сбор налогов, обеспечение порядка в социально неоднородном обществе, локализация и подавление различного рода восстаний и т.п. Таким образом, из персонифицированных обязанностей представителей публичной власти фактически образуются обязанности Древнеримского государства.

Концепция персонифицированно-репрезентативных обязанностей государства, благодаря богатым теоретическим обобщениям догматиков христианского государства, получила свое развитие и в послеантичный период. Так, богослов Фома Аквинский (1225–1274) утверждал, что правитель государства имеет не только земной (светский) статус императора, короля, царя или князя, но и статус «помазанника Божия», т.е. представителя Бога на земле. Поэтому правитель христианского государства, следуя Божьим заповедям, обязан осуществлять публичное управление на основе определенных правил (требований), установленных прежде всего Законом Божьим, а уже потом светскими законами (ордонансами, хартиями, указами и др.). В своей работе «О правлении властителей» богослов очертил важнейшие публичные обязанности в государстве, выполнение которых возложил на его правителя. В систему таких обязанностей, по мнению Фомы Аквинского, входят: управление государством в соответствии с Законом Божьим и духовно-христианскими ценностями, обеспечение мира в государстве, развитие образования, а также духовное просвещение и воспитание общества [8; 29], непосредственное участие в котором должна принимать и христианская церковь в лице ее служителей.

Утверждение учения персонифицированно-репрезентативных обязанностей государства обусловлено, по нашему мнению, таким форматом концептуального единства составляющих: «сильный правитель — слабая централизация античного государства». Во-первых, сильный правитель представлял и олицетворял определенное величие и единство античного государства. Действительно, античные государства объединялись в единый военный, политико-территориальный союз в основном усилиями признанных полководцев, правителей, что, в конце концов, обусловило появление даже именных государств (империя Александра Македонского, царство Селевкидов, государство Солона и др.). В таких государствах именно правитель (не государство) наделялся всей полнотой публичной власти, содержание которой предусматривало соответствующие властные права и обязанности. Однако такое уполномочивание публичными обязанностями было обусловлено не личными качествами, добродетелями, военными и другими умениями первого лица государства, т.е. правителя, а его статусом — правитель государства. Поэтому публичные обязанности правителя были неразрывно связаны с делами государственными. Во-вторых, античному миру, государствам раннего средневековья свойственна слабая административно-территориальная централизация. Формат государственного устройства таких стран получил объективизацию преимущественно в виде городов-полисов или империй. Империи же составляла конгломерация (лат. *conglomeratio* — собираю, накапливаю), т.е. сочетание отдельных образований в одно целое, при котором они и в дальнейшем сохраняли свои черты и свойства.

Поэтому государство воспринималось древними и многими раннесредневековыми учеными как абстрактное явление, которое не является полноценным участником правоотношений. В-третьих, в античной философии и даже в средневековой доктрине права не было сформировано понятие «государство», не определены его признаки, не охарактеризован его правовой статус, поэтому весь спектр общественных обязанностей был обращен к личности правителя государства и т.п.

Системный анализ приведенных выше и других источников информации времен античности и средневековья направляет нас к таким обобщениям: а) объем исследований отношений публичного властвования, по сравнению с частным правом, был довольно скудным, в том числе и в аспекте публичных обязанностей, поскольку, с одной стороны, государство не воспринималось философами, теоретиками права как самодостаточный субъект политико-правовых отношений, который способен выполнять определенную функциональную нагрузку в обществе, а с другой — исследование содержания и сферы деятельности правителя государства нередко позиционировалось как посягательство на статус правителя. Поэтому публичные обязанности главы государства определялись не как принуждение к определенным действиям (или необходимость воздержания от них), а как незаменимая его избранность быть почетным носителем таких обязанностей.

Таким образом, концепция персонифицированно-репрезентативных обязанностей государства возникла и утвердилась в античный период, получила подтверждение в период средневековья, однако в периоды Новой и Новейшей истории не получила признания и развития у представителей научной элиты, поскольку государство приобрело новый статус: оно стало признанным субъектом не только публичных обязанностей, но и над индивидуальной формой общественного бытия.

Следующей является *социальная концепция обязанностей государства*. Ее появление имеет объективное основание: обязанности государства не имеют внесоциального характера, они выделены из системы социальных явлений и феноменов общественной жизни. Слово «социальный» означает: «связан с жизнью и отношениями людей в обществе», «порожден условиями общественной жизни, определенной среды», существует в «определенном обществе». Обязанности государства, как доказывают ученые, «рождаются» в социуме, поэтому они не только формируются из его потребностей, но и «вдохновляются» его идеями [9; 29].

Идея социальных обязанностей государства как концепция утвердилась благодаря доктринальным достижениям ряда ученых (Т. Гоббс, Дж. Локк, Б. Спиноза, Л. Штейн, М.Ориу, Н. Коркунов и др). Доктринальная основа социальной концепции обязанностей государства была заложена английским философом Томасом Гоббсом (1588–1679) в работе «Левиафан, или Суть, строение и полномочия государства церковного и гражданского» (1651) [10]. Ее автор был непреклонным сторонником абсолютной монархии, однако это ему не помешало сформировать социально направленную концепцию обязанностей государства.

Государство как политическое объединение граждан, т.е. политическая организация общества, может, по Гоббсу, безопасно существовать только в случае реализации им такого основополагающего долга, как обеспечение общего социального блага. Средством реализации такой обязанности государства является обеспечение мира, правопорядка, в основе которого лежит принцип нерушимости права собственности. Граждане обязаны подчиняться воле государства при условии, если оно защищает их личные и имущественные интересы. Философ определил, что люди в крайних ситуациях руководствуются в своих действиях инстинктом самосохранения, если же государство нарушает эти естественные основы человеческого начала (право на жизнь, право на собственность, право на получение прибыли от своей работы и др.), то человек имеет право не подчиняться воле государства, в том числе и приказам монарха. Итак, английский философ Т. Гоббс системно отстаивал идею обеспечения общего социального блага, основываясь на незыблемости сохранения права собственности членов государства как политического объединения граждан.

Такие идеи в аспекте обязанностей государства созвучны тем, которые содержатся в произведении «Политический трактат» (1677) голландского философа Бенедикта Спинозы (1632–1677). По его убеждению, государство обязано делать все возможное, чтобы не допустить разного рода массовых восстаний, социальных беспорядков, поскольку это может представлять угрозу существованию самого государства. Следовательно, государство должно поддерживать общезначимые социальные интересы и не проводить политику, которая массово противоречит интересам людей, в том числе имущественным.

Социальная концепция обязанностей государства получила должное обоснование и у английского философа Дж. Локка (1632–1704), который в трактате «О цели политического общества»

пришел к выводу, что государство обязано обеспечить защиту права собственности, личных прав человека, неотъемлемой частью которых являются имущественные права [11; 72].

Обязанность социального обеспечения граждан государства отстаивали и другие философы, теоретики права. Так, немецкий ученый Лоренц фон Штейн (1815–1890) доказывал, что государство может обеспечить мир и спокойствие в обществе путем выполнения им такого базового обязательства, как обеспечение общественного порядка в государстве и недопущение массового обнищания народа [12; 115].

Французский ученый-юрист Морис Ориу (1859–1929) в работе «Основы публичного права» сделал вывод: государство обязано обеспечить паритет социально-экономических интересов и равновесия в обществе, а также между обществом и государством. Поэтому вмешательство государства в сферу экономики должно быть соразмерным, оправданным и основываться на консенсусном сочетании публичных интересов, в том числе и материальных [13; 607, 608].

В целом социально направленная концепция обязанностей государства была сформирована в XVII в. и получила дальнейшее развитие, включая современность (О.В. Зайчук, А.В. Петришин, М.В. Цвик). В то же время противниками учения о социальных обязанностях государства были такие ученые, как И. Кант, В. Гумбольдт, К. Ясперс и другие, которые считали, что государство должно создавать условия для социального развития, а не обеспечивать граждан своей страны различными видами пособий и материальных благ.

Позитивистско-правовая концепция обязанностей государства получила научное обоснование в трудах Г. Аренса, С. Десницкого, В. Гессена, Р. Иеринга, С. Котляревского, Ф. Шеллинга и других. Содержательную сущность этой концепции составляют положения: государство обязано создавать позитивное право и действовать в его рамках (С. Десницкий); главная обязанность государства не забота о каждом, а забота о праве (Р. Иеринг); обеспечение действия права в государстве — основополагающая его обязанность, поскольку посредством законов надлежит удерживать порядок в государстве (Ф. Шеллинг) и др. В целом позитивистско-правовая концепция обязанностей государства была обоснована в XVIII в. и получила дальнейшее свое развитие практически во всех странах современного демократического строя.

Концепция широких обязанностей государства была сформулирована в период «Столетия конституций», т.е. в XIX в. В это столетие были приняты конституции Норвегии (1814), Португалии (1826), Бельгии (1831), Дании (1849), Пруссии (1850), Аргентины (1853), Мексики (1857), Греции (1864), Румынии (1866), Германии (1849, 1871), Испании (1876), Колумбии (1886), Нидерландов (1887), Сербии (1888), Швеции (1809), Канады (1867), Японии (1889) и др.

С принятием конституций институционализация обязанностей государства впервые получила унифицированный и системный подход, что дало толчок для новых доктринальных исследований. Дело в том, что в конституциях стран мира не только использовали термин «обязанности государства», но и определили сферы реализации таких обязанностей: политика, экономика, культура, экология, религия и др. Наличие в конституциях стран мира предписаний относительно конституционных обязанностей государства позволило, во-первых, определить сферы необходимой деятельности государства, а во-вторых, выяснить его место и роль в формате «государство и общество», «государство и человек». Таким образом, национальные конституции фактически заложили широкие восходящие основы доктринальных исследований в аспекте обязанностей государства, которые продуцируются и сейчас (А. Колодий, Ю. Тодыка, В. Погорилко, А. Худяков и др.).

Обобщая сказанное, приходим к выводам.

1. *Доктринальная концепция обязанностей государства* — это содержательно-смысловые, логически-обобщенные положения ненормативного характера, продуцируемые учеными в аспекте такого социального явления, как обязанности государства.

2. Установлено, что предметные доктринальные достояния ученых группируются вокруг определенных восходящих идей, сквозь призму которых раскрываются не только целесообразность, значимость, необходимость или полезность существования государства, государственного строя в целом, практическая необходимость возложения на государство ряда общественно значимых обязанностей, но и ментально-научное отношение человечества к самому государству и его сущности.

3. Системное изучение доктринальных источников права позволяет выделить следующие концепции обязанностей государства:

а) концепция персонифицированно-репрезентативных обязанностей государства;
б) социальная концепция обязанностей государства;
в) позитивистско-правовая концепция обязанностей государства;
г) концепция широких обязанностей государства.

Список литературы

1 Цицерон М.Т. О государстве. – О законах. – О старости. – О дружбе. – Об обязанностях. – Речи / М.Т. Цицерон; (авт. предисл.) Е.И. Темнов. — М.: Мысль, 1999. — 782 с.

2 Философия [Текст]: учеб. пособие / Ю.В. Осичнюк [и др.]; ред. Ю.В. Осичнюк. — М.: Атика, 2003. — 464 с.

3 Вормс Р. Общественный организм / Р Вормс; пер. с фр.; под ред. А.С. Трачевского. — СПб.: Тип. Павленкова, 1897. — 246 с.

4 Собрание сочинений: [в 4 т.] / пер. с др.-греч.; общ. ред. А.Ф. Лосева. — М.: Мысль, 1994. — Т. 3. — 654 с.

5 Аристотель. Сочинения: [в 4 т.] / пер. с др.-греч.; общ. ред. А.И. Доватура. — М.: Мысль, 1983. — Т. 4. — 830 с.

6 Цицерон. О государстве // Цицерон. Диалоги. О государстве. О законах. — М.: Наука, 1966. — 224 с.

7 Дигесты Юстиниана [Текст]: пер. с лат.; отв. ред. Л.Л. Кофанов. — М.: Статут, 2008. — Т. 1. — М.: Статут, 2008. — 584 с.

8 История политических и правовых учений. Средние века и Возрождение [Текст] / РАН; отв. ред. В.С. Нерсесянц. — М.: Наука, 1986. — 349 с.

9 Матвійчук А.В. До питання про соціальну сутність обов'язків держави // Конституційно-правові академічні студії. — 2017. — № 4. — С. 28–34.

10 Гоббс Т. Левиафан, или Суть, строение и полномочия государства церковного и гражданского / Т. Гоббс; пер. с англ.; науч. ред. Т. Польская. — М.: Дух и Литера, 2000. — 600 с.

11 Локк Дж. О целях политического общества / Дж. Локк; под общ. ред. А.А. Макаровского // Избранные философские произведения: В 2 т. — Т. 2. О государственном правлении. — М.: Соцэкиздат, 1960. — С. 72–158.

12 Stein L. Von. Die Verwaltungslehre. 2Aufl. Dd. I. — Stuttgart: Berlay der J.G. Gottatchen Buch band lung, 1865. — 647 s.

13 Ориу М. Основы публичного права // Антология мировой правовой мысли: в 5 т. — Т. III. Европа. Америка: XVII–XIX вв.; общ. ред. Г.Ю. Семигин. — М.: Мысль, 1999. — С. 604–610.

Б.Ю. Задорожный

Құқықсубъектілікке ие болу мәселелері: теориясы мен тәжірибелік мәселелері

Мақалада мемлекет басшысы ретінде қажетті тиісті конституциялық-құқықтық мәртебеге ие болу үшін, жеке тұлғалардағы арнайы құқықсубъектілігін сәйкестендіру аспектісінің болуы (немесе болмауы) туралы теориялық және тәжірибелік мәселелер зерттелген. «Құқықсубъектілігі» және оның құрамын түсіну дефициясындағы доктриналалық түсініксіздіктерді ескере отырып, сондай-ақ осы дефицияның заңнамалық белгісіздігінен, автор «құқықсубъектілігі» ұғымын қалыптастырған және оның құрамдас бөліктерін талдаған. Мемлекет басшысының құқықсубъектілігі – бұл мемлекеттік билік механизмінде өзінің функционалдық мақсатына сәйкес, мемлекеттік-биліктік өкілеттікті жүзеге асыратын, белгілі бір конституциялық-құқықтық талаптар негізінде анықталған, мемлекетпен қамтамасыз етілген және заңнамамен бекітілген оның заңды мүмкіндігі және жеке қабілеті деп бекітіледі. Мемлекет басшысы лауазымына үміткерлерге қойылатын арнайы талаптар, әлем елдерінің конституциясында біркелкі көзқараспен бекітілгені туралы тұжырым жасалған. Осындай өлшемдер мыналар болып табылады: жасы, саяси-азаматтық және ұлттық тиесілігі, өмір сүру цензі, діни көзқарасы, мемлекет басшысы лауазымына отыру тәртібі (инаугурация, тәж кигізуі), өкілеттігін тоқтатудың негіздері мен тәртібі, құзыреттілік мерзімі, мемлекет басшысын уақытша алмастыру тәртібі, мүліктік цензі (ақшалай кепіл). Мұндай талаптар белгілі бір «заңды сүзгілерді» анықтауда маңызды рөл атқарады, соның арқасында мемлекеттік лауазымға үміткерлерді неғұрлым сапалы іріктеуді қамтамасыз етуде анықталады. Конституциялық заңнамаларды салыстырмалы талдау негізінде монархиялық және республикалық мемлекеттерде мемлекет басшысының мәртебесін алу үшін қажетті критерийлер белгіленген. Мемлекет басшысы лауазымына үміткерлер үшін ұлттық заңнамада «заңды сүзгілерді» күшейту мақсатында өзгерістер енгізу ұсынылған.

Кілт сөздер: арнайы құқықсубъектілік, конституциялық-құқықтық мәртебесі, тәртібі, мемлекет басшысы лауазымына отыру тәртібі, өмір сүру цензі, мемлекет басшысын уақытша алмастыру тәртібі.

B.Y. Zadorozhnyi

Doctrinal concepts of obligations of the state: the formulation of the problem

System analysis of national and foreign sources of philosophy, law, from the time of antiquity to our days, shows that the issue of the institution of state responsibilities, despite its exceptional importance, has not become the subject of complex fundamental research. Separate generalizations about the duties of the state can be identified in the writings of those scientists who explored the forms of government, the state structure, the place and role of the head of state in the system of state-power coordinates, interstate relations. It is established that the doctrinal concept of the state's duties is meaningful, logical, generalized provisions of a non-normative nature, produced by scientists in the aspect of such a social phenomenon as the state's duty. The doctrinal concepts of state duties are formed around certain upward ideas, through the prism of which not only the expediency, significance, necessity or usefulness of the existence of the state, the state system as a whole, the practical necessity of assigning a number of socially significant duties to the state, but also the mentally- state and its essence. It is suggested to highlight the following doctrinal concepts of state duties: the concept of personified-representative duties of the state; the social concept of state duties; positivist-legal concept of state duties; concept of broad responsibilities of the state.

Keywords: doctrinal concept of state duties, doctrinal research, constitutional duties of the state, concept of broad state responsibilities.

References

1 Tsytseron, M.T. (1999). O hosudarstve. – O zakonakh. – O starosti. – O druzhbe. – Ob obiazannostiakh. – Rechi [About the State. – About the laws. – About old age. – About friendship. – On the duties. Speeches] (Avt. predysl. E.I. Temnov). Moscow: Mysl [in Russian].

2 Osichnyuk, V.V. (2003). *Filosofiia [Philosophy]*. Moscow: Atika [in Ukrainian].

3 Vorms, R. (1897). *Obshchestvennyi orhanizm [Social organism]*. Saint Petersburg: Tip. Pavlenkova [in Russian].

4 Loseva, A.F. (Eds.). (1994). *Sobranie cochinenii [Collection of works]*. Moscow: Mysl [in Russian].

5 Dovatura, A.I. (Eds.). (1983). *Aristotel [Aristotle]*. (Vol. 1-4. Vol. 4). Moscow: Mysl [in Russian].

6 Tsitseron. O hosudarstve (1966) [On the State]. Moscow: Nauka [in Russian].

7 Kofanov, L.L. (Eds.). (2008). Digesty Yustiniana [Digestions of Justinian]. Moscow: Statut [in Russian].

8 Nersesyants, V.S. (Eds.). (1986). *Istoriia politicheskikh i pravovykh uchenii [History of political and legal doctrines]*. Moscow: Nauka [in Russian].

9 Matviychuk, A.V. (2017). Do pitannia pro sotsialnu sutnist oboviazkiv derzhavi [On the question of the social nature of the duties of the state]. *Konstitutsiino-pravovi akademichni studii – Constitutional and legal academic studies, 4,* 28–34. Kiev [in Ukrainian].

10 Gobbs, T. (2000). *Leviafan, ili Sut, stroenie i polnomochiia hosudarstva tserkovnoho i hrazhdanskoho [Leviathan, or Essence, structure and powers of the state church and civil]*. T. Polskaia (Ed.). Moscow: Dukh i Litera [in Russian].

11 Lokk, Dzh. (1960). *O tseliakh politicheskoho obshchestva [About the purposes of political society*]. (Vol. 1-2, Vol. 2). Moscow: Sotsekizdat [in Russian].

12 Stein, L. Von (1865). Die Verwaltungslehre [Like administration]. Stuttgart: Berlay der J.G. Gottatchen Buch band lung [in German].

13 Oriu, M. (1999). Osnovy publichnoho prava [Foundations of Public Law]. *Antolohiia mirovoi pravovoi mysli – Anthology of world legal thought, Vol. 1-5, Vol. 3,* 604–610. Moscow: Mysl [in Russian].

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A.S. Akhmetov

Pavlodar Pedagogical State Institute, Kazakhstan
(E-mail: arman.ahmetov@mail.ru)

Phenomenon of legal culture of kazakhstan society

This article is devoted to the analysis of the legal culture of civil society. The purpose of the article is to highlight the value orientations of the legal culture of the Republic of Kazakhstan in the process of developing a democratic state. The essence and structure of legal culture and its features are considered in the article. The author pays special attention to the study of the value aspects of the legal culture of the Republic of Kazakhstan in the development of a democratic state and the formation of a civil society. The author concludes that the main factors are the formation of an anti-corruption culture of anti-corruption education and training, and great importance is increasing the level of legal culture of the individual. In addition, the main approaches to understanding legal culture have been studied. The scientific work is written on the basis of scientific research of Kazakhstan and foreign authors on the nature of law, legal culture, its values in the formation of civil society and the rule of law in the Republic of Kazakhstan. It concludes that the main principle of civil society advocates free and comprehensive development of the individual in society, and that civil society starts with the appearance of the citizen as a free member of society who is aware of its purpose, endowed with a set of rights and freedom and the duty of responsibility for their actions to the society.

Keywords: law, culture, identity, legal culture, a democratic state and its values, civil society, legal education, legal upbringing.

The question of the formation of the legal culture of modern society is considered in direct connection with the development of universal human culture. The general level of culture of any society is determined by the material and spiritual successes and achievements of people, the results of which together determine the level of progress in the development of the state. In this dynamics of the development of the general level of culture, the important is the legal culture, which shows how developed the state and legal organization of life of each individual and society as a whole. A high indicator of legal culture is one of the main features of the rule of law and developed civil society. In our country active work is carried out in the field of raising the level of the legal culture of the population, eradicating legal nihilism and fighting corruption manifestations.

In the Address of the President of the Republic of Kazakhstan N.A. Nazarbayev clearly emphasizes the idea that «when moving to the number of 30 developed countries of the world we need an atmosphere of fair competition, justice, the rule of law and high legal culture» [1].

In the Concept of Legal Policy for the period from 2010 to 2020 «... an integral part of the legal policy is the legal regulation of scientific and educational activities that are an important condition for ensuring the country's industrial and innovative development, increasing its intellectual potential» [2].

This document shows the direction of development of our state in the field of implementing legal policy, which relies not only on the existing regulatory and legal acts, but also shows the need for the development of the education system at all levels, the actualization of scientific research in the main sections of this concept. All this will have a positive effect on the intellectual level of Kazakhstani society.

Legal culture now covers all spheres of society. It records the level of legal knowledge of people, the criteria for assessing acts in terms of their illegality, includes a system of legal values, beliefs, norms, traditions, as well as law-making and law enforcement activities. The product of legal culture is, first of all, legal documents that fix the established norms of law; organizations that develop and control the implementation of legal norms, as well as institutions that carry out punitive functions [3; 69].

Legal culture is an integral part of the culture of society as a whole, and its significance goes beyond the study of law and legal practice. In the legal culture, which represents a certain level of development of the regulatory qualities of law and legal values, legal progress and spiritual values, the legal consciousness of society and the individual is realized. The main interrelated and interacting elements of legal culture are the state of legality, legislation, practical work in the field of law and, above all, the state of legal consciousness in society.

Being a systemic education in the legal system of society, the legal culture at various stages of its history also changes, which allows to determine (measure) its value. In the broadest sense, the level of legal culture can be measured both in historical retrospect, and in relation to the existing state of legal life, in accord-

ance with the existing legal system of society. Narrowly, the level of the legal culture of society can be measured as the level of positive and negative manifestations of legal life achieved. In the studies of many scientists, the difficulties stemmed from attempts to strictly isolate the legal culture from the system of universal human culture, which is represented in the results of people's activities. The level of general culture determines the possibilities for the realization of law, and its own development depends on the existing legal norms. On the one hand, the development of law, hence the legal culture is conditioned by the economic structure, social structure, political system of society and its ideology, and on the other - the level, nature, traditions and tendencies of its culture.

The component of the legal culture - the right is called to ensure the functioning of society as a whole against the backdrop of the struggle and compromises of various forces that are ultimately interested in working out a certain program for carrying out common affairs. Thus, the degree of development of legal culture in a society with diverse interests in all spheres demonstrates not only the effectiveness of protecting the interests of the state and its citizens, but also demonstrates the ability of people to be resistant to destabilizing influences.

Legal culture is unthinkable without mastering the law. It allows to distinguish such typological features of the quality of a person and a citizen as knowledge and understanding of the essence and principles of law, its value properties, the degree of perception and respect for the law, the degree of conviction in the fairness of law and justice, the habits of observance of legal regulations, the ability to ensure the realization of law.

Understanding the phenomenon of legal culture is relevant both for the theory of law itself and for the formation of legal awareness and legal culture of citizens. In fact, it is the right, logically and historically, to realize everyone's freedom, giving it certainty and truly human value.

At present, there are a lot of problems in the process of forming a legal culture. This is, first of all, the legal illiteracy of the population, a complex process of law-making, a frequent contradiction of normative and legal acts of reality, as well as the not developed ideology of a strong rule of law and, as a consequence, legal nihilism, the denial of moral principles. To address these and other problems, a purposeful policy of the state is needed to improve the level of the legal culture of the society through the processes of lawmaking, the legislative process, as well as the media, fiction, cinema and art. The formation of a positive attitude towards law, law, citizens' knowledge of their rights and duties to the state and society are the main tasks in the process of forming a legal culture [4; 243].

It is worth saying that in the modern understanding of legal culture there are many poorly studied moments and unsolved problems, the solution of which requires a certain methodological approach, which is based on the peculiarities of the law itself. These features include:

1) there is a clear allocation of a social object, in relation to which the very concept of «legal culture» is formulated;

2) there is a definition of the structural content of legal culture, i.e. presence of the composition of its main components;

3) the availability of an understanding of the features of the quality of legal culture and its differences from the state of «outside the legal culture»;

4) determining the place and role of legal culture in the system of categories of theory of law.

The study of legal culture directly depends on the available scientific research of this concept. To date, there are many definitions and approaches of domestic and foreign scientists, the essence of which is reduced to an attempt to reveal the nature and nature of this phenomenon.

For example, according to the well-known domestic scholar-lawyer Ibraeva A.S. «... legal culture is a combination of positive phenomena in the legal life of society, as well as the extent to which the society assimilates legal values. The future of civil society depends on the level of the legal culture of society. Forming legal culture is a complex process. In the Republic of Kazakhstan, civil society passed the initial stage of formation. In the Republic of Kazakhstan, the legal foundations of civil society have been created, the necessary laws have been adopted, and at the level of legal awareness, the principle of the rule of law has been affirmed. The problem of realizing the principle of the rule of law is rooted, in our opinion, at the level of local executive bodies and the system of local self-government. That is why the issues of legal culture have a practical character» [5; 7].

We agree with the scientist's opinion that work with the population to raise the level of legal culture must begin, first of all, at the level of local executive authorities. It will be really practical. Existing state programs and concepts are mainly developed at the national level, which indicates the need to create a revitalization of this work at the local level.

The position of the Russian scientist, V.V. Gulyaikhin, who believes that «... legal culture is a very complex and changing phenomenon of a person's social life. The definition of its essential properties by scientists occurs within the framework of a specific methodology, in which all its «living» components do not fit into the «Procrustean lozhe». Therefore, at the modern level of the evolution of the theory of legal culture, scientists usually take a pragmatic position and are satisfied with the «working» definition that they use in the framework of either a specific study or in the context of a certain methodological approach. Therefore, based on the foregoing and remembering that practically all definitions have inevitable shortcomings, we formulate our own definition of this concept. The legal culture should be understood as the spiritual and material system of the legal life of a society determined by the socio-economic system and assessed based on the achieved level of development of legal awareness, legal activity, legal technique and the evolution of man as a subject of law» [6].

In addition to the above definition, it is worth noting the fact that the legal culture also represents a certain level of legal psychology, the content of which is based on ordinary legal ideas and emotions in relation to legal phenomena and processes in society and the state. Moreover, in studying the legal culture it is important to take into account its historical nature, the direct relationship with the social structure of society.

Legal culture is a socio-psychological phenomenon that is valuable only in a socially heterogeneous, contradictory society, where a legal culture can act as legal regulators of life support for this society. Legal culture has its specific content, which distinguishes it from such social phenomena as law, legal relations, etc. In essence, it reflects the level of development of legal values both of society as a whole and of individuals, their level of ability to create and effectively apply legal means to achieve their goals [7; 258].

Legal culture has a complex internal structure and at the same time has many socio-political connections in its content. This is not surprising, because Being a part of the general culture of a society, legal culture shows all the changes and deformities to which the general human culture of a society is exposed in general. It should be noted that legal culture not only boils down to knowledge of laws and the norms of law by every person, but shows how successfully an individual can realize himself in the legal field, how much civil responsibility and civil debt to the state are developed in him. In the opinion of N.A. Klevtsova. the main prerequisite for the study of legal culture is the awareness of the need for an in-depth development of the set of theoretical and applied problems of the formation of a system of human rights and duties that are directly dependence on the changing economic, political, social conditions of society [8; 134].

For example, A.V. Petrov believes that the legal culture must be viewed from its essential side, which will allow it to concentrate in it those legal phenomena and processes that correspond to the laws of legal reality, to all elements of its content and forms. Here it is quite appropriate to talk about the fact that the legal culture accumulates in itself and translates the totality of progressive elements of legal reality. The only question is what exactly should be attributed to these elements of value for legal reality and where that particular criterion that allows us to separate the «grains from the chaff» and distinguish between what is progressive and what is regressive [9; 201].

The position of S.V. Boshno is interesting, which considers that the legal culture is a component of the general culture of society (person), i.e. it obeys the general laws of the formation of culture. To form a legal culture, it is necessary:

1) the existence of a large social group that will be the bearer and custodian of culture and its values;

2) the existence of small social groups that will act as direct conductors (translators) of culture for individuals;

3) a strong dominant legal culture is necessary, in this case countercultures are not dangerous for it [10; 7].

According to A.S. Bondarev, legal culture does not represent a certain number of legal values or their characteristics. Legal culture is a specific property of subjects of law, i.e. it shows the level of their development in the legal field, the success of their abilities at a qualitative and effective level to use all the necessary legal means to achieve their legitimate goals [11; 13].

For example, the domestic scientist G.R. Absattarov believes that «... firstly, the legal culture of the Kazakh people is the initial defining ideas, demands, attitudes that make up the moral and social basis of the maturity of the Kazakh society; secondly, the main requirement for the legal culture of the Republic of Kazakhstan is the improvement of the quality and level of the social and legal life of society and the individual. This can be expressed in guaranteeing the status of citizens, in the consistency and predictability of the actions of Kazakhstan's political power. Today it is important that the solution of the urgent problems of the legal culture of Kazakhstan as a whole promotes the unity of society and social progress, the stability of a democratic, just society» [12; 189].

Formation of legal culture directly depends on the level of legal education in the country. The quality of higher legal education is an indicator of the development of the entire legal system and the readiness of the society to realize itself in the legal field, to participate in all processes occurring in the country.

Based on the above approaches to understanding legal culture, we can conclude that in the legal science there are various theoretical and methodological approaches to the legal culture, which gives us the opportunity to identify certain reasons for its structuring. These grounds differ in:

1) subjects, i.e. holders of legal culture, on its objective and subjective components;

2) in terms of the ratio of public and individual interests;

3) by the presence of ideological and socio-psychological values;

4) on behavioral and value components;

5) on the level and degree of legal knowledge obtained;

6) on the degree of consolidation of legal knowledge in the mind, implementation in practice.

For a more complete analysis of the structural elements of the content of legal culture, it is very important to take into account the general meaning of the term «culture», which means a certain level of development of social relations, as well as a synthetic characteristic of the person himself, the level and measures of his personal development. Today, unfortunately, there is a certain devaluation of traditional values of legal culture, and in turn the formation of modern values that would correspond to a developed rule of law, face a certain degree of immaturity of socio-economic and political conditions. Favorable social conditions are the determining factor in the development of a common culture, which, as a rule, is reflected in its content. The main role in shaping the development of the legal culture of the society is played by the awareness and realization of existing public interests and needs. Legal culture is formed only where there is a systematic reproduction of its conditions, ensuring the unity of the system of legal knowledge and values. The normative level of legal culture permeates almost all levels of basic public interests, i.e. sphere of legal consciousness, legal ideology, value orientations, etc.

When the activity approach to the definition of legal culture reveals its content, expressed in the form of ways of people's activities and the forms of their interaction in the system of legal relationships.

Legal culture under this approach is an element of a common culture that represents a certain specific way of human existence in the legal sphere.

To implement socially useful behavior of a person, certain mechanisms of its regulation are necessary, i.e. actions that organize, organize and direct the legitimate activity of a person in society and in various social groups. Regulators of such lawful behavior can be represented as «external», i.e. social and «internal», i.e. psychological.

Legal culture has a close connection with other types of general culture (economic, moral, professional, etc.). We can distinguish three main components of legal culture:

1) the cognitive component, i.e. knowledge of the law, legal and illegal conduct and their consequences. The cognitive component contains judgments (opinions) of an evaluation nature. On the basis of these judgments, the attributes are attributed to the qualities of «utility-harmfulness», «desirability-undesirability», «acceptability-unacceptability», etc .;

2) the affective component is the emotional attitude to the law. The emotional component contains certain feelings about the social object, i.e. «Pleasure-displeasure», «sympathy-antipathy», «love-hate» etc.

3) the conative component (behavioral). The co-operative component signals readiness for a particular action and contains tendencies of readiness for behavior relative to social objects.

The process of forming a legal culture has its own peculiarities, expressed in certain problems in creating a foundation for raising the level of legal culture of the population. The main difficulties in the formation of a legal culture include:

1) unformed civil society;

2) the absence in society of the unity of culture;

3) a large stratification in the social strata and a deep differentiation in one social group;

4) the crisis in the education system, expressed at all its levels;

5) reforming the law enforcement system without subsequent effectiveness;

6) the destruction of the institution of family and marriage;

7) lack of measures to prevent corruption;

8) lack of continuity of cultures between changing generations;

Thus, it can be concluded that the process of forming a legal culture requires a purposeful systematic work of all stakeholders, including a set of institutions of civil society, each person and the state as a whole.

Having studied a small part of the existing approaches to determining the nature and essence of the legal culture, it becomes obvious that the formation of a legal culture and its development is possible only when solving the following problems:

1. It is necessary to provide the necessary orientation in the fundamental principles and principles of the legal system of the state. This means the division of the principles of the legal system into: sectoral, interdisciplinary, constitutional. Knowledge of these principles allows an individual to understand the essence and content of law, to form his own legal knowledge and beliefs.

2. To expand the volume and increase the level of legal behavior of the addressees of the law, it is necessary to create a certain base. This should be done to create a social maturity of citizens and legal literacy, which will characterize their legal behavior. And this in turn will be a prerequisite for the normal functioning of the state with a high level of legal culture.

3. It is important to train highly qualified legal cadres, they are the «face» of the legal system, their activities are directly related to the implementation of state legal policy;

4. Higher professional education should meet international standards. Educational programs of legal specialties should include training courses, the study of which will form the professional competence of graduates of legal specialties;

5. Scientific research should not be limited to theoretical results. Their practical implementation is important. Existing scientific achievements in the field of studying and analyzing legal culture should be used in the development of state programs, concepts, etc.;

6. It is necessary to provide direct bearers of rights and obligations, conditions of struggle for their legitimate interests. This means creating conditions for excluding legal passivity, instilling a sense of justice and justice for every citizen.

7. It is necessary to carry out a permanent work to prevent offenses. It is important to fight against legal nihilism, poor public awareness of existing laws, and to constantly work on improving legislation.

8. It is necessary to pursue a policy of legal activation of the population. Stability of law and order in society directly depends on the activity and effectiveness of each individual with violations of the rule of law.

The solution of the set tasks in the field of raising the legal culture is based on the development of the main directions for enhancing the legal culture. We offer the following directions:

1) analysis and study of such concepts as «law» and «legality»;

2) constant improvement of the legal framework in the field of legal policy;

3) development of the level of legal activity;

4) development and assimilation of scientific research achievements in a given field;

5) analysis, processing and systematization of the results obtained, definition of new goals and objectives.

Thus, it can be argued that it is impossible to raise the level of legal culture without complex measures on the part of the state, without creating conditions under which society can realize its rights and freedoms. Each individual and society as a whole should be aware of the need to participate in the socio-economic and political life of the state, to contribute to the development of the state.

References

1 Послание Президента Республики Казахстан Н.А. Назарбаева народу Казахстана «Казахстанский путь-2050: Единая цель, единые интересы, единое будущее» от 17 января 2014 г. [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/K1400002014.

2 Указ Президента Республики Казахстан «О концепции правовой политики Республики Казахстан на период с 2010 до 2020 гг.» от 24 авг. 2009. №858 [Электронный ресурс]. — Режим доступа: www. zakon. kz.

3 Афасижев Т.И. Правовое образование и правовая культура: вопросы взаимодействия / Т.И. Афасижев, Я.В. Зубова // Вестн. Адыгейского гос. ун-та. — 2006. — № 2. — С. 68–71.

4 Попов Д.Е. Правовое воспитание как средство формирования правовой культуры / Д.Е. Попов // Аналитика культурологии. — 2010. — № 3. — С. 242–245.

5 Ибраева А.С. Роль правовой культуры в развитии местного самоуправления: опыт Республики Казахстан и Польши / А.С. Ибраева, А.М. Оразалиева, С.С. Дюсебалиева // Вестн. Казахского национального ун-та. Сер. юридическая. — 2015. — № 2(74). — С. 5–10.

6 Гуляихин В.В. Правовая культура как объект научного исследования: методологические подходы, структура и критерии оценки [Электронный ресурс] / В.В. Гуляихин. — Режим доступа: http://e-notabene.ru - Загл. с экрана.

7 Галстян И.Ш. К вопросу о правовой культуре молодежи / И.Ш. Галстян, О.Н. Лаута // Ленинградский юридический журнал. — 2015. — № 1(39). — С. 257–264.

8 Клевцова Н.А. Теоретические подходы к исследованию правовой культуры / Н.А. Клевцова // Территория науки. — 2016. — № 1. — С. 134–138.

9 Петров А.В. О единстве содержания правовой культуры / А.В. Петров // Вестн. Нижегородского ун-та им. Н.И. Лобачевского. Секция «Право». — 2015. — № 3. — С. 200–206.

10 Бошно С.В. Трудности формирования правовой культуры / С.В. Бошно // Территория науки. — 2016. — № 2. — С. 7–9.

11 Бондарев А.С. Правовая культура общества: проблемы понятия и структуры / А.С. Бондарев // Вестн. Пермского ун-та. — 2014. — № 4(26). — С. 10–20.

12 Абсаттаров Г.Р. Правовая культура: характеристики и специфика (на примере современного Казахстана / Г.Р. Абсаттаров // Вестн. Российского университета дружбы народов. Сер. «Социология». — 2014. — № 2. — С. 181–189.

А.С. Ахметов

Қазақстандық қоғамның құқықтық мәдениет феномені

Мақала азаматтық қоғамның құқықтық мәдениетін талдауға арналған. Мақаланың мақсаты болып демократиялық мемлекеттің даму үрдісінде Қазақстан Республикасы құқықтық мәдениетінің құндылықты бағыттарын бөліп көрсету табылады. Автор құқықтық мәдениеттің құрылымы мен оның ерекшеліктерін түсіну мақсатында бар көзқарастарды талдап зерттеген. Сондай-ақ демократиялық мемлекеттің дамуы мен азаматтық қоғамның қалыптасуы үрдісіндегі Қазақстан Республикасының құқықытық мәдениетінің құндылықты аспектілерін зерделеуге ерекше көңіл бөлген. Сыбайлас жемқорлыққа қарсы мәдениетті қалыптастырудың негізгі факторлары сыбайлас жемқорлыққа қарсы білім және тәрбие болып табылатынын, сонымен қатар жеке тұлғаның құқықтық мәдениетінің деңгейін арттырудың зор маңызы бар екенін қорытындылаған. Одан басқа, азаматтық қоғамның қалыптасу үдерісіндегі құқықтық мәдениеттің қызметтерін қолданудың құндылықтық аспектілері зерттелген. Ғылыми жұмыс құқық табиғаты, құқықтық мәдениет, азаматтық қоғамды қалыптастыру процесіндегі оның құндылықтық бағдарлары мәселелеріне қатысты қазақстандық және шетелдік авторлардың ғылыми зерттеулері негізінде жазылды. Соңында азаматтық қоғамның басты қағидасы тұлғаның қоғамда еркін және жан-жақты дамуы, сондай-ақ азаматтың өзінің міндетін түсініп, құқықтар мен еркіндіктердің жиынтығымен және де қоғам алдында өз әрекеттері үшін жауапкершілік міндеттерімен қамтылған қоғамның еркін мүшесі болып табылуынан азаматтық қоғам басталатыны туралы қорытындылар жасалды.

Кілт сөздер: құқық, мәдениет, тұлға, құқықтық мәдениет, демократиялық мемлекет және оның құндылықтары, азаматтық қоғам, құқықтық білім беру, құқықтық тәрбие.

А.С. Ахметов

Феномен правовой культуры казахстанского общества

Данная статья посвящена анализу правовой культуры гражданского общества. Её цель — выделение ценностных ориентиров правовой культуры Республики Казахстан в процессе развития демократического государства. Рассмотрены сущность и структура правовой культуры и ее особенности. Особое внимание автором уделяется изучению ценностных аспектов правовой культуры Республики Казахстан в процессе развития демократического государства и формирования гражданского общества. Автор приходит к выводу, что основными факторами формирования антикоррупционной культуры являются антикоррупционное образование и воспитание, также большое значение имеет повышение уровня правовой культуры индивида. Кроме того, изучены основные подходы к пониманию правовой культуры. Научная работа написана на основе научных исследований казахстанских и зарубежных авторов по вопросам природы права, правовой культуры, ее ценностных ориентиров в процессе формирования гражданского общества и правового государства в Республике Казахстан. Автором сделан вывод о том, что главным принципом гражданского общества выступает свободное и разностороннее развитие личности в обществе. Подчеркнуто, что гражданское общество начинается с момента появления гражданина как свободного члена общества, осознающего свое предназначение, наделенного совокупностью прав и свобод, обязанностью нести ответственность за свои поступки перед обществом.

Ключевые слова: право, культура, личность, правовая культура, демократическое государство и его ценности, гражданское общество, правовое образование, правовое воспитание.

References

1 Poslanie Prezidenta Respubliki Kazakhstan N.A. Nazarbayeva narodu Kazakhstana «Kazakhstanskii put-2050: Edinaia tsel, edinye interesy, edinoe budushchee» (2014) [Message of the President of the Republic of Kazakhstan N.A. Nazarbayev to the people of Kazakhstan. «Kazakhstan way-2050: One goal, common interests, common future»]. *adilet.zan.kz*. Retrieved from http://adilet.zan.kz/rus/docs/K1400002014 [in Russian].

2 Ukaz Prezidenta Respubliki Kazahstan «O kontseptsii pravovoi politiki Respubliki Kazakhstan na period s 2010 do 2020 hh.» ot 24 avh. 2009. № 858 (2009) [Decree of the President of the Republic of Kazakhstan «On the concept of the legal policy of the Republic of Kazakhstan for the period from 2010 to 2020»]. *zakon.kz.* Retrieved from www. zakon.kz.- Zagl. s jekrana [in Russian].

3 Afasizhev, T.I., & Zubova, Ja.V. (2006). Pravovoe obrazovanie i pravovaia kultura [Legal education and legal culture]. *Vestnik Adyheiskoho hosudarstvennoho universiteta – Bulletin of Adyghe State University, 2,* 68–71 [in Russian].

4 Popov, D.E. (2010). Pravovoe vospitanie kak sredstvo formirovaniia pravovoi kultury [Legal Education as a Means of Forming a Legal Culture]. *Analitika kulturolohii – Analytics of Culturology, 3, 242–245* [in Russian].

5 Ibraeva, A.S., Orazalieva, A.M., & Djusebalieva, S.S. (2015). Rol pravovoi kultury v razvitii mestnoho samoupravleniia: opyt Respubliki Kazakhstan i Polshi [The role of legal culture in the development of local self-government: the experience of the Republic of Kazakhstan and Poland]. *Vestnik Kazakhskoho natsionalnoho universiteta. Seriia yuridicheskaia – Bulletin of Kazakh National University. Legal Series, 2 (74),* 5–10 [in Russian].

6 Gulyaikhin, V.V. (2015). Pravovaia kultura kak obekt nauchnoho issledovaniia: metodolohicheskie podkhody, struktura i kriterii otsenki [Legal culture as an object of scientific research: methodological approaches, structure and evaluation criteria]. *e-notabene.ru.* Retrieved from http://e-notabene.ru [in Russian].

7 Galstjan, I.Sh., & Lauta, O.N. (2015). K voprosu o pravovoi kulture molodezhi [On the issue of the legal culture of youth]. *Leninhradskii yuridicheskii zhurnal – Leningrad Law Journal, 1 (39),* 257–264 [in Russian].

8 Klevcova, N.A. (2016). Teoreticheskie podkhody k issledovaniiu pravovoi kultury [Theoretical approaches to the study of legal culture]. *Territoriia nauki – The territory of science, 1,* 134–138 [in Russian].

9 Petrov, A.V. (2015). O edinstve soderzhaniia pravovoi kultury [On the unity of the content of legal culture]. *Vestnik Nizhehorodskoho universiteta imeni N.I. Lobachevskoho. Sektsiia «Pravo» – Bulletin of the Nizhny Novgorod University. N.I. Lobachevsky. Section «Law», 3,* 200–206 [in Russian].

10 Boshno, S.V. (2016). Trudnosti formirovaniia pravovoi kultury [Difficulties in the formation of legal culture]. *Territoriia nauki – The territory of science, 2,* 7–9 [in Russian].

11 Bondarev, A.S. (2014). Pravovaia kultura obshchestva: problemy poniatiia i struktury [Legal Culture of Society: Problems of Concept and Structure]. *Vestnik Permskoho universiteta – Bulletin of Perm University, 4(26),* 10–20 [in Russian].

12 Absattarov, G.R. (2014). Pravovaia kultura: kharakteristiki i spetsifika (na primere sovremennoho Kazakhstana [Legal culture: characteristics and specificity (on the example of modern Kazakhstan]. *Vestnik Rossiiskoho universiteta druzhby narodov. Seriia «Sotsiolohiia» – Bulletin of the Peoples' Friendship University of Russia. Series «Sociology», 2,* 181–189 [in Russian].

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Г.З. Кожахметов, Р.Б. Ботагарин

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

Избирательное право и его особенности в Казахстане в составе Российской империи в конце XIX - начале XX века

Научная статья посвящена становлению избирательного права на территории Степного и Туркестанского краев в период вхождения их в состав Российской империи. В статье раскрыто, что самодержавный режим царской России являлся одним из самых жестких, в котором не было представительных органов власти с законодательными полномочиями. Благодаря революции 1905 г. и учреждению первого российского парламента — Государственной думы в Российской империи и ее национальных окраинах стало формироваться избирательное право. Избирательное право было неравным, сословным, многоступенчатым, кроме этого, таким категориям населения, как женщины, студенты, военнослужащие, лица моложе 25 лет и «бродячие инородцы» вообще запрещалось участвовать в выборах. Показано, что царизм в своем избирательном законодательстве делил население на пришлое и коренное, а среди пришлых, т.е. переселенцев, отдавал предпочтение казачеству, которое являлось прочным оплотом царизма в проведении его колониальной политики в национальных окраинах. В то же время авторы отмечают, что выборы впервые открыли небывалые возможности участвовать колониальным народам России в выборах в Думу. На основе архивных материалов авторы статьи показали, что проведенные в начале XX в. избирательные кампании подняли на новый уровень общественную и идейную жизнь Казахстана и содействовали росту национального самосознания в борьбе за свои гражданские права и политические свободы.

Ключевые слова: Казахстан, Российская империя, Государственная дума, Манифест, Степной край, выборы, правила выборов, царизм, Временное положение, Советы, реформа, выборщики, законодательная власть.

К началу рассматриваемого нами времени в Российской империи назревал серьезный конфликт между нарождающейся капиталистической промышленностью и феодальными формами производства в сельском хозяйстве. Так как страна была аграрной, голод для нее был нередким явлением.

Одним из важных факторов, подорвавших власть самодержавия в начале XX в., был разгром российского флота в русско-японской войне. Поражение российских войск значительно ослабило политическое влияние державы среди крупных империалистических государств, что нанесло сильный удар по экономике российского государства. Как позже отмечал депутат от Казанской губернии И.В. Годнев в IV Государственной думе в 1914 г., «…русско-японская война обошлась Российской империи в 2 400 531 529 руб., в то время когда весь годовой бюджет страны составлял чуть больше 3 млрд руб. [1; 202].

В итоге в стране назревала революционная ситуация. Почти все слои населения, включая даже крупный капитал — дворянство, требовали преобразований в политической жизни общества.

Если вернуться к предыстории этих событий, то следует вспомнить, что в России в конце XIX в. не было парламентских учреждений или других представительных органов власти, имеющих полномочия издавать законы. Вся законодательная власть находилась в руках императора и его правительства. В то же время, в 1860–1870 гг. в России делались попытки создания ряда форм местного самоуправления. Например, городское самоуправление было введено 16 июня 1870 г., высшим органом этого выборного учреждения была Городская дума, которая возглавлялась городским головой. Члены городского самоуправления назывались «гласные», они избирались в соответствии с имущественным цензом из числа городских жителей. Городское самоуправление хоть и было полностью зависимо от царского правительства, т.е. от губернатора, тем не менее оно пыталось решать на местах проблемы градостроительства, налогообложения, образования, общественного правопорядка и т.д. В течение 70-х годов XIX в. городское самоуправление было введено почти по всей территории России, кроме Польши, Финляндии и Средней Азии. Единственным исключением стало принятие Городового положения в г. Ташкенте через 18 лет, в 1888 г. Обратим внимание на дискриминационную составляющую избирательной системы в этот представительный орган. Так, общее число городских «гласных» — депутатов составляло 72 человека, из них 48 избирались от пришлого населения, т.е. две трети, и 24 — от инородцев, т.е. от коренных жителей. При этом надо иметь в виду, что общее число при-

шлого населения в общей массе составляло всего 16 %. Выборщиками могли быть только те лица, кто знал русский язык и соответствовал установленному имущественному цензу. Аналогично, как и в России, по данному Положению избиралась городская управа, возглавляемая городским головой [2; 6].

Примерно в таком же духе реформ Александра II существовало в России и земское самоуправление, которое делилось на уездное и губернское. Они являлись теми представительными органами власти, которые существовали в Российской империи до революции 1905–1907 гг. При всем том, что Земства не имели законодательных полномочий и не влияли на политику царского правительства, однако они учили народ самостоятельности в управлении своими делами, поскольку каждый регион имел индивидуальные особенности. Обобщая, можно сказать, что они делали все для облегчения жизни простого населения страны.

Как отмечалось выше, Казахстан, как и многие другие национальные окраины, не имел даже таких форм самоуправления, так как приучать их к политической самостоятельности не входило в планы царского правительства. Степной край для самодержавия необходим был для использования его земельного фонда под переселение безземельных крестьян, рынка сбыта промышленной продукции, а также добычи богатых природных ресурсов Казахстана.

В законодательных актах царского правительства во «Временных Положениях» 1867–1868 гг. была сформирована единая для всего Степного края система колониального управления. По данному Положению население было поделено на области, они, в свою очередь, — на уезды, волости и аулы. Была создана жесткая система колониального контроля, которую возглавлял Генерал-губернатор, назначаемый самим царем; военные губернаторы возглавляли области, уездные начальники — соответственно волости и аулы. Согласно данному Положению население Степного края облагалось твердой покибиточной податью в пользу государства [3; 260, 261].

Во «Временном Положении» имеется термин «общественное управление», под ним понимались избираемые сроком на три года волостные управители, бии и аульные старшины. Аул, как административная единица, создавался при наличии от 100 до 200 кибиток, волость — от 1000 до 2000 кибиток. Волости возглавлялись волостными управителями, а аулы — аульным старшиной, причем были установлены Правила, по которым аульным старшиной и волостным управителем мог быть избран только местный житель, не опороченный по суду, не находящийся под следствием, не моложе 25 лет, а также пользующийся уважением и доверием у населения.

Выборы волостного управителя производились раньше, чем выборы аульных старшин. В каждой волости хозяева пятидесяти кибиток выдвигали одного выборного, съезд этих выборных избирал волостного управителя. Выборы проходили в присутствии уездного начальника и его помощников, наблюдавших за порядком и законностью.

Аульный старшина избирался по схожей системе. Хозяева десяти кибиток избирали одного выборного, сход этих выборных выбирал аульного старшину. Его выборы также проходили под усиленным контролем колониальных властей и волостного управителя. Избранные волостные управители утверждались военным губернатором, аульные старшины — уездным начальником. Время и место выборов определялись этими же чиновниками колониальной администрации. Съезды выборных определяли жалованье органам «общественного управления» казахов. Волостным управителям и аульным старшинам выдавались особые бронзовые знаки для ношения при осуществлении служебных обязанностей, а также служебные печати.

Волостные управители находились в подчинении уездного начальника и выполняли все его приказы. Кроме этого, они наделялись административно-полицейскими полномочиями: следили за общественным порядком и приводили в исполнение судебные решения народных судов, за немаловажные проступки они могли подвергать виновных аресту до трех дней и штрафу до трех рублей, а также следили за исправным сбором податей и налогов.

Аульный старшина, находясь в непосредственном подчинении волостного управителя, исполнял в ауле те же обязанности, которые лежали на волостном управителе в волости. Лиц, совершивших немаловажные преступления, аульный старшина направлял к волостному управителю для рассмотрения дела. При органах «общественного управления» казахов находился небольшой административный штат, состоявший из письмоводителя и рассыльных, которые содержались за счет средств населения [3; 262, 263].

Согласно «Степному положению» 1891 г. система колониального и местного управления не претерпела особых изменений. По-прежнему «общественное управление» казахов возглавлялось

волостным управителем и аульным старшиной. Практически не были изменены характер и порядок их выборов. Однако правительство, учитывая опыт прежних лет, постаралось увеличить их жалованье, а с другой стороны, усилило наказание за злоупотребление должностью. Так, например, жалованье волостного управителя определялось волостным съездом от 300 до 500 руб. Аульный старшина по новым «Правилам» мог получать до 200 руб. в год, тогда как в предыдущих правилах эта сумма вовсе не оговаривалась, а давалась на «усмотрение» населения. Круг полномочий «общественного управления» оставался прежним и касался сборов налогов и податей с населения, поддержания общественного порядка и реализации приказов колониальных властей среди местных жителей [3; 272]. Царизм в перспективе намеревался сделать «общественное управление» казахов чиновниками своего колониального аппарата.

Подытоживая сказанное, отметим, что органов самоуправления и избирательного права в Степном крае не было. В таком состоянии Степной и Туркестанский края находились вплоть до свержения императора Николая II и прихода к власти в России Временного Правительства.

Началом первой русской революции стал расстрел 9 января 1905 г. мирной демонстрации, шедшей с петицией к царю. В историко-правовой литературе это событие получило название «кровавое воскресенье» и стало детонатором взрывоопасной обстановки, царившей по всей Империи. После «кровавых» событий в Петербурге Министр иностранных дел П.Д. Святополк-Мирский был уволен, на его место был назначен бывший московский губернатор А.Г. Булыгин. Как отмечают российские ученые, зимой и летом 1905 г. по всей стране в городах и деревнях начались массовые беспорядки. В сельской местности грабили и жгли дворянские усадьбы, революционные настроения перекинулись и на армию.

В сложившихся политических условиях делегация от съезда земских и городских деятелей посетила императора и призвала его ввести в России представительный орган на выборных началах. Царь Николай II был вынужден согласиться на создание такого законодательного учреждения [4; 366].

Подготовка законопроекта о новом органе власти — Государственной думе проходила в Петергофе и именуется в истории как «Петергофское совещание». Поскольку разработкой данного закона занимались представители правящих кругов, крупная буржуазия и аристократия, он соответствовал духу государственной политики России и их отношениям к правам и свободам человека и гражданина. Итогом творческого совещания стал Манифест, опубликованный 18 февраля 1905 г., который объявил о намерении создать законосовещательную Государственную думу. Позже, 6 августа 1905 г., вышел сам Манифест, именуемый в истории «булыгинской думой», поскольку разрабатывался под руководством Министра внутренних дел России А. Булыгина.

Согласно данному закону предполагалось создать Думу не позднее января 1906 г. Суть закона заключалась в следующем: избирательных прав лишались женщины, военнослужащие, учащиеся и рабочие. Для крестьянства России устанавливались 4-ступенчатые выборы, для землевладельцев и горожан, обладающих имущественным цензом, — 2-ступенчатые; на крестьян в итоге приходилось 42 % выборщиков, на землевладельцев — 34 % и 24 % — на горожан, имевших имущество не менее 1,5 тыс. руб., а в столицах — не менее 3-х тыс. руб. [4; 367].

Невооруженным глазом видно, что выборы в Думу были непрямыми, неравными и многоступенчатыми. Все либеральные демократические партии и организации России объявили бойкот «булыгинской думе». Царизм вновь пошел на уступки. Следующий закон о Думе был оглашен в Манифесте 17 октября 1905 г., который закрепил за ней законодательные полномочия. Готовился данный закон премьер-министром С.Ю. Витте и именовался «Об усовершенствовании государственного порядка». В данном законе (п.1) отмечалось, что царь дарует основы гражданской свободы в виде неприкосновенности личности, свободы совести, слова, собрания и созывов; в п.2 говорится, что царь обещает привлечь те классы населения России, которые были лишены избирательных прав; в п.3 были установлены незыблемые правила, что никакой закон не имеет силы без одобрения Государственной думы, т.е. Дума объявлялась законодательным органом. В это же время вышел закон об образовании Совета министров и др. [5; 90, 91].

В соответствии с Манифестом 17 октября 1905 г. были изданы изменения о выборах в Государственную думу. Выборы впредь будут проходить по 4-м куриям, к 3-м ранее предложенным (земледельческой, крестьянской и городской) в новом законе была добавлена «рабочая» курия [5; 91]. Также права участия в избрании выборщиков в городские избирательные собрания были расширены за счет предоставления избирательных прав городским жителям, владеющим в течение года недвижимым имуществом, платящим квартирный налог, имеющим торгово-промышленное предприятие

в пределах города, а также лицам, проживающим в пределах города, получающим пенсию или содержание за службу в городских или земских сословных учреждениях, или городских железных дорогах. Были расширены избирательные права сельчанам (п.3) за счет предоставления лицам, которые не менее года на основе договора управляют имением, платят сборы и т.д., права участвовать в выборах в Думу. Предоставлялись избирательные права (п.4) настоятелям церквей или молитвенных домов всех вероисповеданий. Избирательные права были предоставлены рабочим фабрик и заводов (п.5), т.е. они могли участвовать, если предприятие имеет рабочих мужского пола не менее 50 человек.

В данном законе по каждому городу было определено количество выборщиков от губерний и городов: например, по Астрахани — 2 чел., по Казани — 2, Москве — 35, по Петербургу — 24, Самаре — 1, Перми — 10, Уфе — 4 и т.д. [5; 96].

В законе указывалось, что рабочие избирают из своей среды уполномоченных с общим числом рабочих от 50–1000 — один уполномоченный, а свыше тысячи — по одному уполномоченному от каждой тысячи. Далее уполномоченные от рабочих избирают из своей среды в губерниях и городах выборщиков на съезды губерний или городов. Избирательные права имеют рабочие, проработавшие на предприятиях не менее 6 месяцев и достигшие 25-летнего возраста.

Следует отметить, что избирательные права были предоставлены и колониальным окраинам, куда входили Степной и Туркестанский края. Его анализ будет рассмотрен чуть ниже, а сейчас необходимо указать, что вслед за изданием Закона об учреждении Государственной думы вышел Закон от 20 февраля 1906 г. об учреждении Государственного совета. Данный орган был учрежден для равновесия политических сил и сдерживания Государственной думы в интересах самодержавия. Он также имел законодательные полномочия, общая численность сенаторов составляла 200 человек, часть которых назначалось монархом, а оставшаяся была выборной.

Если Дума избиралась сроком на 5 лет, то Государственный совет — на 6 лет. Особенностью данного учреждения являлось то, что он был верхней палатой, поскольку все принятые Думой законопроекты должны были быть одобрены Советом, а затем подписаны императором. То есть сама законодательная процедура, при всех уступках царя восставшему народу, практически оставалась в его руках, и ни один закон не мог пройти без одобрения императора. Дума практически находилась в жестких тисках самодержавной власти.

Следует отметить, что Сенат осуществлял выборы из следующих сословий: 1) православного духовенства; 2) губернских земских собраний; 3) дворянских обществ; 4) академии наук и университетов; 5) торгово-промышленных кругов. В основе избирательного права в Государственный совет лежал высокий имущественный ценз [6; 15, 16].

Суть Закона о Государственном совете была в том, что он был предназначен играть роль барьера для защиты самодержавных устоев царской России и усмирения демократических партий и организаций, которые войдут в нижнюю палату парламента.

Для народов Степного и Туркестанского краев была создана особая комиссия, которая выработала специальные Правила Указом от 22 февраля 1906 г. «О применении к областям Акмолинской, Семипалатинской, Уральской и Тургайской Положения о выборах в Государственную думу». Политическая подоплека этих Правил заключалась в том, что пришлого — переселенческого населения было намного меньше, чем коренного. Поэтому царизм не мог допустить численности депутатов по количеству жителей, поскольку в парламенте могли возникнуть вопросы об изменении колониального управления и даже требования политических прав и гражданских свобод населению этих регионов. Так, например, некоренное население в Туркестане к 1905 г. составило в областях: Ферганской — 0,67 %, Самаркандской — 2 %, Сыр-Дарьинской — 5,4 %, Семиреченской — 12 %, Закаспийской — 15,7 % [7, л.67]. В Степном крае, например, он был несколько выше. Так, в Акмолинской области в этот период проживали 803 994 человека, из них пришлое население составляло всего 361 770, в Семипалатинской области из 686 053 чел. доля пришлого населения была 94 352. В среднем казахов в двух областях было 72,1 % [8; 178].

В связи с этим было создано Особое совещание под председательством графа Д.М. Сольского, в котором принимали участие главы колониальных администраций Казахстана и Туркестана. Например, Туркестанский генерал-губернатор Н.Н. Тевяшёв, обращаясь к Особому совещанию, указывал, что интересы пришлого, главным образом русского населения, во многом находятся в противоречии с интересами коренных жителей. По его мнению, предоставление равноправного представительства данным категориям населения нанесут ущерб колониальной политике правительства в регионе

[6; 38, 39]. По официальным данным в Туркестанском генерал-губернаторстве на 1 января 1904 г. проживали 5 млн 890 тыс. человек [7, л.69].

Для увеличения пришлого населения в Туркестанском крае действовало Правило: к русскому населению причисляются все лица, не принадлежащие к туземному населению, что вызвало возмущзение у местных общественных и политических организаций. В результате 25 марта 1906 г. Министр внутренних дел П.Н. Дурново в проект по выборам дал официальное уточнение, где было включено примечание: «…русское население — это только русские по происхождению» [7, л.84].

В ходе подготовки выборов в Думу у Особого совещания возник новый вопрос: как быть с населением, проживающим на территории бывшей Букеевской орды — между Волгой и Уралом? По решению Министра внутренних дел было предоставлено 1 депутатское место казахскому населению и 1 — калмыцкому [7, л.52]. В обеих Думах от данного региона избирался от казахского населения известный общественный деятель Бахтыкерей Кулманов. Он окончил Оренбургскую гимназию, позже, в 1889 г., — Санкт-Петербургский университет, факультет «Востоковедения». Б. Кулманов был одним из первых казахов, получивших степень магистра словесности, в совершенстве владел персидским, турецким, казахским и татарским языками [9; 129]. По архивным данным он служил в должности русского советника во Внутренней орде, имел чин титулярного советника [10, л.2-2 об.].

Возвращаясь к законодательству о полномочиях Государственной думы, следует отметить, что император в соответствии со ст.87 Правил о выборах, которые вышли за 3 дня до созыва парламента, 23 апреля 1906 г., мог в период каникул депутатов принять законопроект по собственной инициативе, а также имел право роспуска Государственной думы и Государственного совета. Согласно ст.14 данного закона государь являлся «вождем» армии и флота, в соответствии со ст.81 министры и все правительство несут ответственность только перед царем. Власть монарха в новом законе определена как верховная и самодержавная, Дума была ограничена в рассмотрении бюджета страны и т.д. [11; 22].

Это еще раз подтверждает слабость представительного органа, учрежденного в России, в то же время Государственная дума являлась небывалым явлением в области народовластия для истории страны с жестким тоталитарным режимом.

Особое совещание, наконец, выработало численность депутатов, которые должны представлять Степной и Туркестанский края в Государственной думе. В соответствии с решением Особого совещания 22 февраля 1906 г. были утверждены Правила в Степном крае, 23 апреля — в Туркестане и 25 марта — для кочевников Внутренней орды.

Законодательство для Степного края утвердило 10 депутатских мест, т.е. от каждой из областей, Акмолинской, Уральской, Семипалатинской и Тургайской, избирали по 1 депутату от русского и казахского населения, отдельно 2 места было выделено казачеству — Сибирскому и Уральскому войску.

Туркестанский край получил 5 мест для коренных жителей, столько же — переселенческому населению. Город Ташкент получил 2 места, казачество Семиреченских войск — 1 место. Общая численность депутатов от Степного и Туркестанского края составила 24 места, сюда же входил депутат от казахов Внутренней орды [6; 39, 40].

В Правилах о выборах в п.4 отмечалось, что в каждой области создается Областное собрание выборщиков от инородческих волостей. Выборщики избираются на волостных съездах — по 2 человека от каждой волости. Для избрания от городского и оседлого населения, не принадлежащего к инородцам и казакам, в каждой области также образуются собрания выборщиков. Выборщики избираются съездами городских избирателей, волостными и сельскими участковыми сходами уполномоченных от волостей [12, л.12].

В итоге получалось, что по новым Правилам, как и по всей России, в крае к выборам не допускались лица моложе 25 лет, студенческая молодежь, военнослужащие, «бродячие инородцы», иностранные подданные и женщины. В отличие от прежних «булыгинских» правил о выборах в Думу не допускались иностранцы и появился термин «бродячие инородцы». На наш взгляд, хотя инородцами называли всех представителей национальных окраин, к «бродячим инородцам» относились жители Крайнего Севера и Дальнего Востока, занимавшиеся охотой и рыбной ловлей, не имевшие постоянного места жительства.

Для различных категорий населения царизм установил отдельные Правила выборов. Например, казачество и кочевники Степного края проходили по 2-ступенчатым выборам, крестьяне Акмолинской и Семиреченской областей — по 4-ступенчатым, коренные жители Туркестанского края — по 4-ступенчатым, тогда как пришлому населению устанавливались 2-ступенчатые выборы [6; 40].

5 мая 1906 г. вышел Указ царя и правительствующего Сената о проведении выборов в национальных окраинах: 15 мая — в Уральской области, 17 мая — в Астраханской, 21 мая — в Тургайской и т.д. [13, л.48 об.].

Работа I Государственной думы началась 27 апреля 1906 г., тогда как в это время выборы в Степном крае еще продолжались. На места в регионы направлялись специальные телеграммы органам жандармерии и охранным отделениям (политической полиции), чтобы в Думу не прошли лица, оппозиционные существующей власти. На местах пришлое, казахское население и даже казачество отмечали многочисленные жалобы и нарушения. Об этом говорят следующие факты: например, Яков Егошкин в своей жалобе от 4 мая 1906 г. в комиссию по выборам писал, что практически тайного голосования не было, так как атаман со своими помощниками стояли возле ящика и смотрели, кто какие шары бросал за него или против него. Далее Я. Егошкин отмечал, что «…каждый выборный, таким образом, подвергался нравственному давлению со стороны атамана, и весьма возможно физическим намекам со стороны казначейства». Свою жалобу он завершает тем, что вся предвыборная работа была проведена секретно, а сами выборы проводились под давлением, и все это высшими властями признано правильным» [14, л.3].

Местные власти во время проведения выборов получали от Министерства внутренних дел Российской империи циркулярные письма. Например, в Степной край 29 января 1907 г. было направлено письмо, в котором требовалось дать срочно информацию о тех или иных кандидатах в депутаты и характеристику их политических взглядов [15, л.222].

Кроме этого, местные полицейские через свои структуры и информаторов негласно собирали всю информацию, которая касалась сведений, взглядов и высказываний того или иного кандидата. В конце они прогнозировали возможную их работу или участие в тех или иных партиях и фракциях. Такая подробная информация была собрана на всех кандидатов в депутаты, избранных во II Государственную думу [16, л.179].

При проведении выборов в Думу частым явлением были нарушения. Одними из причин данных обстоятельств были незнание русского языка местных жителей и благонадежность тех или иных кандидатов по отношению к существующей власти. Так, например, Пржевальская комиссия направила в областной избирком следующую телеграмму, в которой отмечалось, что комиссия не выдвинула выборщиков, поскольку нет «благонадежных» лиц, знающих русский язык [17, л.1]. Волостные управители использовали выборную комиссию для своего обогащения, проталкивая в депутаты наиболее богатых представителей феодальной знати. Колониальные власти «закрывали глаза» на эти вещи, поскольку сами имели выгоду в этом процессе. В ходе выборов использовались грубое насилие и незнание коренным населением всех тонкостей избирательной системы [18, л.1, 2].

В целом, давая анализ исполнению Правил о выборах, следует отметить, что они были проведены во многих областях с большими нарушениями, а в особенности в Туркестанском крае. Однако, несмотря на деятельность правительства по отсеиванию кандидатов по политическим мотивам, выборы в Государственную думу не прошли напрасно, они дали толчок для объединения демократических сил в борьбе с самодержавием за свои избирательные права и участия в работе первого Парламента России.

Несмотря на все препятствия, чинимые колониальными властями, в I Государственную думу от Степного края прошли наиболее яркие личности, депутаты с демократическими взглядами. Например, от Семипалатинской области был избран А.Н. Букейханов — один из известных правозащитников и основатель движения казахской интеллигенции за свободу и независимость Казахстана, от Акмолинской области — Шаймерден Кощегулов, представитель духовенства и ярый противник колониальной политики царизма в крае. От Уральской и Тургайской областей были избраны А.К. Кальменов и А.К. Беремжанов — юрист, окончивший Казанский университет и имевший чин титулярного советника [6; 43–45].

От русского населения Семипалатинской области был избран Н.Я. Коншин, также юрист, политический заключенный дворянского происхождения, являлся другом А. Букейханова; от Тургайской области — Н.Е. Дыхнич, выходец из крестьян, принадлежал кадетской партии; от Уральской — В.В. Недоносков, юрист, являлся редактором газеты «Урал», по политическим взглядам — «трудовик». Казачество Уральской области выдвинуло Н.А. Бородина — выходца из казачьего дворянского сословия, за свои радикальные взгляды он не прошел во II Думу; от Акмолинской области были выдвинуты И.П. Лаптев и В.И. Ишерский. Лаптев был умеренных взглядов, а Ишерский — социал-демократ, вел активную борьбу с царизмом [6; 45–47].

Первая Государственная дума начала свою работу 27 апреля 1906 г. в Таврическом дворце в Петербурге. Партийный состав 478 избранных выглядел следующим образом: кадетов — 179, автономистов (депутатов национальных окраин) — 63, октябристов — 16, беспартийных — 105, трудовиков — 97, социал-демократов — 18 [5; 75].

Во II Государственную думу, которая начала работу 20 февраля 1907 г., после разгона I Думы 8 июля 1906 г., выборы прошли организованней, с учетом предыдущего опыта и практики борьбы оппозиционных сил с самодержавием. Это можно видеть по количеству и качеству депутатов, которые прошли во II Государственную думу. Вопреки ожиданиям правительства Дума II созыва была более левой и демократической. Из 490 избранных депутатов правых в ней было 97, беспартийных — 22, кадетов — 156, прогрессистов — 35, левых — 180 [5; 242].

К сожалению, депутаты первого созыва Букейханов и Ишерский не имели права участвовать в выборах ввиду того, что подписали «Выборгское воззвание», призывавшее бойкотировать царское правительство за разгон Думы. От русского населения Акмолинской области был избран социал-демократ А.К. Виноградов, от Тургайской и Уральской областей — также избраны социал-демократы, И.Ф. Голованов и И.И. Космодемьянский. От казаков Уральской области — Ф.А. Еремин, кадет; Акмолинской — И.П. Лаптев и Семипалатинской — Н.Я. Коншин, тудовик. Депутаты от казахского населения: Акмолинской области — Ш. Кощегулов, от Тургайской — А.К. Беремжанов, от Семипалатинской области — бывший волостной управитель А. Норекенов, от Уральской — Б.Б. Каратаев, юрист по образованию, закончил Санкт-Петербургский университет с золотой медалью. Ему одному из немногих удалось выступить с трибуны Думы по аграрному вопросу, он был близок к социал-демократам, позже Б. Каратаев был членом Казревкома [6; 49].

От Внутренней орды был вновь избран Кулманов, от Семиреченской области — М. Тынышбаев, который закончил Санкт-Петербургский институт путей сообщения и являлся начальником Средне-Азиатской железной дороги. Тынышбаев, как и Букейханов, Акбаев, Байтурсынов, М. Чокаев и другие, был одним из ярких деятелей казахской интеллигенции, желавших создать Казахскую государственность. В ноябре 1917 г. на IV краевом Мусульманском съезде в г. Коканде Тынышбаев был избран премьер-министром Кокандской автономии, позже он вошел в состав национальной автономии «Алаш-Орда». В условиях Советской власти Мухамеджан Тынышбаев трудился на Туркестано-Сибирской железной дороге, в 1937 г., как и многие другие, был репрессирован [6; 51, 52].

Противостояние по аграрному вопросу и по дальнейшей модернизации и либерализации режима России и ее национальных окраин привело к конфронтации с царизмом. 3 июня 1907 г. II Государственная дума была распущена, и одновременно с роспуском вышел новый Закон о выборах, который уменьшил количество депутатов с 524 до 442.

Третья Государственная дума начала свою работу 1 ноября 1907 г. Из 442 мест 147 получили правые, 154 — октябристы и близкие им группы, 82 — кадеты и сочувствующие, 13 — трудовики, польское коло — 18 и 19 — социал-демократы [19; 10]. Было сокращено количество депутатов от сельского населения и городских жителей, увеличено представительство духовенства, крупных землевладельцев, а национальные окраины вовсе были лишены избирательных прав. Поэтому в Думах III (1907–1912 гг.) и IV созыва (1912–1917 гг.) депутаты от Казахстана не участвовали.

В заключение можно сказать, что самодержавие изначально не собиралось делать Думу парламентом. Это был больше маневр для царизма, создание учреждения для остановки революции. Дума, официально обладая законодательными полномочиями, не могла решить ни одного серьезного вопроса. В то же время благодаря учреждению Думы появилось избирательное законодательство, что было важно для практического участия в государстве широких слоев населения. Благодаря Думе росло политическое сознание масс, через пробы и ошибки оттачивалась избирательная система, появились элементы, заимствованные из опыта европейских стран, характерные для проведения выборной кампании, например: подача жалоб на нарушения и сроки их рассмотрения, порядок голосования, первые бюллетени для голосующих, регламент работы уездных и областных комиссий по выборам в Думу и т.д.

К сожалению, пришедшие в 1917 г. Советы не признавали буржуазный парламентаризм, поэтому опыт избирательного права в Думу, накопленный за более чем десять лет, не был взят на «вооружение». Советская власть выдвигала своих депутатов на безальтернативной, классовой и партийной основе. Главными в советском избирательном праве были лояльность к существующей власти, возраст и классовый ценз.

Для современного Казахстана, строящего демократическое правовое государство, важен исторический опыт избирательного права, а в особенности первого парламента России — Государственной думы, который впервые дал возможность участвовать народам Степного края в деятельности представительного учреждения, а также появиться идеям автономии «Алаш-Орда» и ярким личностям, таким как Букейханов, Акбаев, Тынышбаев, Байтурсынов и многим другим, отдавшим жизнь за построение независимого Казахстана, в котором действует демократическая избирательная система, соблюдаются гражданские права и политические свободы.

Список литературы

1 Государственная дума. Стен. отчет. Созыв 4. Сессия 2. Ч. 5. — Петербург: Гостипография, 1914. — 1064 с.

2 Котляр П. Как проводились выборы в Туркестане / П. Котляр, М. Вайс. — Ташкент, 1947. — 83 с.

3 Ахметова Н.С. История государства и права Республики Казахстан. Ч.1. С древнейших времен – до начала XX века / Н.С. Ахметова, Г.З. Кожахметов. — Караганда: Изд-во КарГУ, 2001. — 334 с.

4 История России: с начала XIX до начала XXI века / под ред. А.Н. Сахарова. — М.: Астрель: Транзиткнига, 2006. — 862 с.

5 Калинычев Ф.И. Государственная дума в России. Сб. документов и материалов / Ф.И. Калинычев. — М.: Госюриздат, 1957. — 646 с.

6 Кожахметов Г.З. Первый парламент России и перспективы развития Казахстана в 1905-1917 годы: учеб. пособие / Г.З. Кожахметов. — Караганда: ТОО «Арко», 2012. — 176 с.

7 ЦГИА РФ. Ф.1278. Оп.1. Д.767. Л.67.

8 Россия. Полное географическое описание. Киргизский край. — СПб., 1903. — Т. 18. — 478 с.

9 Созакпаев С.У. Петербургский университет в истории политической и правовой мысли Казахстана (вт. пол. XIX – нач. XX вв.): дис. ... канд. юрид. наук: 12.00.01 «Теория и история права и государства; история учений о праве и государстве» / С.У. Созакпаев. — Алма-Ата., 1985. — 199 с.

10 ЦГИА РФ.1291. Оп.84. Д.69. Л.2-2 об.

11 Кетриц Б. Первая Государственная дума / Б. Кетриц. — СПб.: Брокгауз-Ефрон, 1907. — 90 с.

12 ЦГА РК Ф.322. Оп.1. Д.7. Л.12.

13 ЦГА РК Ф.540. Оп.1. Д.4. Л.48 об.

14 ЦГА РК Ф.161. Оп.1. Д.1. Л.3.

15 ЦГА РК Ф.44. Оп.1. Д.2662. Л.222.

16 ЦГА РК Ф.44. Оп.1. Д.2663. Л.179.

17 ЦГА РК Ф.161. Оп.1. Д.4. Л.1.

18 ЦГА РК Ф.161. Оп.1. Д.12а. Л.1, 2.

19 Аврех А.Я. Царизм накануне свержения / А.Я. Аврех. — М.: Наука, 1989. — 251 с.

Ғ.З. Қожахметов, Р.Б. Ботағарин

XIX ғасырдың аяғы — XX ғасырдың басында Ресей империясының құрамында болған Қазақстандағы сайлау құқығы және оның ерекшеліктері

Мақала Ресей империясының құрамында болған кездегі Дала және Түркістан өлкелерінің аумақтарындағы сайлау құқығының қалыптасуына арналған. Мақалада заң шығару өкілеттігіне ие өкілді билік органы болмаған патшалы Ресейдің самодержавиелік тәртібі қатаң саяси жүйе болғаны қарастырылған. 1905 ж. орын алған төңкерістің және Ресей империясындағы алғашқы ресей парламенті мен оның ұлттық шеттерінде – Мемлекеттік думаны құрылуының арқасында сайлау құқығы қалыптаса бастайды. Авторлар дауыс берудің тең болмағанын, сыныптық, көпсатылы екенін көрсетті, сонымен қатар халықтың кейбір санаттары: әйелдерге, студенттерге, әскери қызметкерлерге, 25 жасқа толмаған адамдарға және «қаңғыбас шетелдіктерге» қатысуға тыйым салынғанын атап өткен. Патшалық өзінің сайлау заңнамасында тұрғындарды көшіп келгендер мен жергілікті деп бөлгені анықталды, жаңадан келгендер арасында, яғни, қоныс аударушылар, ұлттық жағынан өздерінің отаршылдық саясатын жүзеге асыруда патшалықтың күшті қолы болған казактарға артықшылықтар берген. Сонымен қатар авторлар сайлау алғаш рет Ресей отарындағы халықтар үшін Думаға сайлауға қатысуға теңдессіз мүмкіндіктер ашқанын атап өтті. Мұрағат материалдарына негізделе отырып, мақала авторлары XX ғасырдың басында жүргізілген сайлау науқаны Қазақстанның әлеуметтік және идеологиялық өмірін жаңа деңгейге көтергенін, сонымен қатар азаматтық құқықтары мен саяси бостандықтары үшін күресте ұлттық сананың өсуіне ықпал болғанын көрсеткен.

Кілт сөздер: Қазақстан, Ресей империясы, Мемлекеттік дума, манифест, Дала өлкесі, сайлау, сайлау ережелері, Патша, Уақытша ереже, Кеңестер, реформа, сайлаушылар, заңшығарушы билік.

G.Z. Kozhakhmetov, R.B. Botagarin

Electoral law and its features in Kazakhstan as part of the Russian empire in the late XIX-early XX century

This scientific article is devoted to the formation of electoral law in the Steppe and Turkestan region during the period of their entry into the Russian empire. The article reveals that the autocratic regime of tsarist Russia was one of the rigid political systems, which did not have representative bodies of power with legislative powers. Thanks to the revolution of 1905 and the establishment of the first Russian Parliament – the state Duma in the Russian empire and its national suburbs was formed the right to vote. The authors show that the electoral right was unequal, class, multi-stage, in addition, some categories of the population were generally forbidden to participate in elections, they were: women, students, soldiers, persons under 25 years of age and «vagrant foreigners». It is revealed that tsarism in its electoral legislation divided the population into alien and indigenous, and among the newcomers, i.e. immigrants, preferred the Cossacks, which was a strong stronghold of tsarism in carrying out its colonial policy in the national suburbs. At the same time, the authors point out that the elections for the first time opened up unprecedented opportunities for the colonial peoples of Russia to participate in the Duma elections. Based on archival materials, the authors showed that the election campaigns conducted in the early twentieth century raised to a new level the social and ideological life of Kazakhstan and contributed to the growth of national consciousness in the struggle for their civil rights and political freedoms.

Keywords: Kazakhstan, Russian empire, State Duma, Manifesto, Steppe region, elections, rules of choice, Tsarism, Temporary position, Councils, reform, electors, legislative power.

References

1 Hosudarstvennaia duma. Sozyv 4. Sessiia 2. Chast 5 (1914) [The State Duma. Convening 4. Session 2. Part 5]. Petersburg: Hostipohrafiia [in Russian].

2 Kotlyar, P., & Weiss, M. (1947). *Kak provodilis vybory v Turkestane [How elections were held in Turkestan]*.Tashkent [in Russian].

3 Akhmetova, N.S., & Kozhakhmetov, G.Z. (2001). Istoriia hosudarstva i prava Respubliki Kazakhstan. S drevneishikh vremen – do nachala XX veka [History of the state and law of the Republic of Kazakhstan. From ancient times - until the beginning of the twentieth century]. (Part 1). Karaganda: Izdatelstvo KarHU [in Russian].

4 Sakharov, A.N. (Eds). (2006). *Istoriia Rossii: s nachala XIX do nachala XXI veka [History of Russia: from the beginning of XIX to the beginning of the XXI century]*. Moscow: Astrel: Tranzitkniha [in Russian].

5 Kalinychev, F.I. (1957). *Hosudarstvennaia duma v Rossii [The State Duma in Russia]*. Moscow: Hosiurizdat [in Russian].

6 Kozhakhmetov, G.Z. (2012). *Pervyi parlament Rossii i perspektivy razvitiia Kazakhstana v 1905-1917 hody [The first Russian parliament and the development prospects of Kazakhstan in 1905-1917]*. Karaganda: TOO «Arko» [in Russian].

7 CSHA of the Russian Federation. Found. 1278., Inventory. 1. Case.767. P.67 [in Russian].

8 Rossiia. Polnoe heohraficheskoe opisanie. Kirhizskii krai (1903) [Russia. Full geographical description. The Kirghiz Region]. (Vol. 18). Saint Petersburg [in Russian].

9 Sozakpaev, S.U. (1985). Peterburhskii universitet v istorii politicheskoi i pravovoi mysli Kazakhstana (vt. pol. XIX – nach. XX vv.) [St. Petersburg University in the history of political and legal thought of Kazakhstan (in the twentieth century - early XX century)]. *Candidate s thesis'*. Almaty [in Russian].

10 CSHA of the Russian Federation. 1291. Inventory.84 Case. 69. 2–2 t. [in Russian].

11 Ketrits, B. (1907). *Pervaia Hosudarstvennaia duma [The First State Duma]*. Saint Petersburg: Brokhauz-Efron [in Russian].

12 CSA of the RK F.322. I.1. C 7. P.12. [in Russian].

13 CSA of the RK F.540. I.1. C.4. P.48 t. [in Russian].

14 CSA of the RK F.161. I.1. C.1. P.3. [in Russian].

15 CSA of the RK F.44. I.1. C. 2662. P.222. [in Russian].

16 CSA of the RK F.44. I.1. C.2663. P.179. [in Russian].

17 CSA of the RK F.161. I.1. C.4. P.1. [in Russian].

18 CSA of the RK F.161. I.1. C.12a. P.1, 2. [in Russian].

19 Avrekh, A.Ya. (1989). *Tsarizm nakanune sverzheniia [Tsarism on the eve of the overthrow]*. Moscow: Nauka [in Russian].

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А.М. Хлус

Белорусский государственный университет, Минск, Беларусь
(E-mail: hlus.home@mail.ru)

Криминалистическое понимание объекта преступного посягательства при хищении путем злоупотребления служебными полномочиями

В статье проанализирована проблема понимания объекта преступного посягательства при хищении путем злоупотребления служебными полномочиями в криминалистике и уголовном праве. В научной, нормативной и учебной литературе по уголовному праву Республики Беларусь придерживаются традиционной концепции общественных отношений — как объекта посягательства при хищении путем злоупотребления служебными полномочиями. Абстрактность общественных отношений, социальных благ и интересов исключает возможность отразить систему следов, представляющих интерес с позиции криминалистики и содержащих значимую информацию о совершенном преступлении и его элементах. Являясь наукой «о реальностях уголовного права», криминалистика рассматривает объект посягательства в качестве материального элемента структуры преступления. Объектами преступного посягательства при хищении путем злоупотребления служебными полномочиями в их криминалистическом понимании являются материальные элементы преступной структуры, в числе которых человек, государственные и общественные организации. Человеку, государственным и общественным организациям, как элементам криминалистической структуры преступления, в результате хищения путем злоупотребления служебными полномочиями причиняются материальный вред (ущерб). В ряде случаев он может достигать крупного либо особо крупного размера. Для успешного развития интеграционных процессов в системе наук уголовно-правового цикла необходима унификация научных категорий, которыми оперируют эти науки.

Ключевые слова: уголовное право, хищение, злоупотребление служебными полномочиями, криминалистика, криминалистическая структура преступления, объект преступления.

Одной из важнейших составляющих социальной направленности белорусского государства в целом и правоохранительной деятельности в частности является уголовно-правовая политика. Направления ее действия определяются Конституцией Республики Беларусь. В соответствии со ст. 44 государство гарантирует каждому человеку и гражданину право собственности и ее неприкосновенность. Это и иные конституционные положения обязывают государство обеспечить защиту любой формы собственности. В связи с этим государство принимает меры по защите уголовно-правовыми средствами имущественных и других личных прав и свобод человека и гражданина, а также по защите общественных и государственных интересов.

Существенную помощь в этом могут оказать общество и непосредственно сами граждане. С этой целью общественные объединения и граждане наделяются соответствующими полномочиями в сфере противодействия преступлениям. Для уголовно-правовой политики характерна стратегия и тактика государства по искоренению преступных проявлений. Составляющей уголовно-правовой политики является борьба с преступлениями против имущества. Рассматриваемое в статье преступление оказывает огромное пагубное воздействие на общество, разрушая не только институт частной, но и государственной собственности. При этом нередко провоцируется совершение других преступлений, в том числе и коррупционной направленности.

Хищение путем злоупотребления служебными полномочиями часто совершается в группе. Это способствует распространению деструктивного поведения, что, подобно микробу, разлагает моральную составляющую социума. Эти на первый взгляд неочевидные, но крайне вредные последствия способствуют размыванию таких важнейших конституционных принципов консолидации нашего общества, как принцип социальной справедливости и равенство всех перед законом.

Хищение путем злоупотребления служебными полномочиями, в соответствии с законодательством Республики Беларусь [1] является коррупционным преступлением, уголовная ответственность за которое предусмотрена ст. 210 Уголовного кодекса Республики Беларусь (далее УК) [2].

Хищение путем злоупотребления служебными полномочиями является одной из форм хищения, под которым, в соответствии с примечанием к главе 24 УК, «понимается умышленное противоправное безвозмездное завладение чужим имуществом или правом на имущество с корыстной целью путем кражи, грабежа, разбоя, вымогательства, мошенничества, злоупотребления служебными полномочиями, присвоения, растраты или использования компьютерной техники» [2].

Хищение путем злоупотребления служебными полномочиями как преступление таит в себе особую социальную опасность. Оно, как и взяточничество, является одним из наиболее распространенных преступлений против интересов службы, несмотря на то, что в УК располагается в группе преступлений против собственности. Это преступление всегда связано с корыстным использованием должностным лицом своего служебного положения.

В подавляющем большинстве случаев хищение путем злоупотребления служебными полномочиями ведет к значительному материальному ущербу, который может быть причинен как государственной, так и частной собственности. Как правило, это деяние переплетается с такими корыстными преступлениями, как взяточничество, злоупотребление властью или служебными полномочиями и другие преступления, посягающие на экономическую безопасность государства.

Родовым объектом данного преступления, а равно иных преступлений, описанных в главе 24 УК, согласно теории уголовного права являются общественные отношения собственности [3; 438]. В объективном смысле право собственности — это совокупность правовых норм, которыми закреплено право физических и юридических лиц иметь имущество. Содержание права собственности в субъективном смысле составляют принадлежащие собственнику правомочия по владению, пользованию и распоряжению имуществом.

Право владения означает основанную на законе возможность иметь у себя имущество, содержать его в собственном хозяйстве, т.е. обладать им.

Право пользования предполагает возможность использовать имущество по назначению, путем извлечения его полезных свойств, т.е. его потребления.

Этими правами могут обладать и несобственники имущества. Тем не менее это не ограничивает их права на защиту имущества от противоправных посягательств, в том числе и преступного характера, связанного с хищением.

Право распоряжения выражается в возможности у собственника определять юридическую судьбу имущества путем изменения его принадлежности, состояния или назначения (например, продажа, дарение вещи).

По поводу этих прав физические и юридические лица вступают в отношения, которые выступают в качестве объекта уголовно-правовой защиты.

Такой подход к пониманию объекта преступления в уголовном праве является наиболее общим. Вместе с тем еще в прошлом столетии ученые в области уголовного права указали на важность и недостаточную разработанность проблемы объекта преступления [4; 188, 189] и на наличие многих спорных аспектов учения о нем [5; 111].

Для советской теории уголовного права с первых лет ее существования характерно рассмотрение общественных отношений в качестве объекта преступления [6; 133]. Такое мнение об объекте преступления остается доминирующим до сих пор.

В последние годы теория уголовного права пополнилась новыми концептуальными подходами к рассмотрению объекта преступления. По данному поводу В.Н. Винокуров пишет: «…общественные отношения как объект уголовно-правовой охраны — это социальное явление, не включающее в себя ничего материального, и, являясь основой правоотношений, составляют материальную предпосылку их возникновения. Элементами структуры общественных отношений являются субъекты отношений, их деятельность и предметы отношений» [7; 65]. Далее исследователь заметил, что «для вступления в общественные отношения необходим предмет, который бы представлял интерес для его участников

(как потребность и цель взаимоотношений), поэтому он позволяет определить суть и специфику конкретных общественных отношений». Автор ставит знак равенства между предметом отношений и непосредственным объектом: «Общественные отношения — это отношения по поводу каких-либо объектов, под которыми следует понимать все то, что входит в сферу потребностей людей» [7; 66, 67].

В теории уголовного права существуют и иные мнения по вопросу о понимании объекта преступления.

С теорией объекта преступлений как общественного отношения конкурирует теория правового блага или интереса, представленная в работах А.В. Наумова, С.А. Елисеева, Е. Фесенко и других.

По этому поводу А.В. Наумов заметил, что «…объектом преступления следует признать те блага (интересы), на которые посягает преступное деяние и которые охраняются уголовным законом…». Общим объектом преступления признается совокупность благ (интересов), охраняемых уголовным законом. Родовой (специальный) объект — это группа однородных благ (интересов), на которые посягает однородная группа преступлений. Непосредственный объект — благо (интерес), которому причиняется вред в результате преступления [8; 53].

По мнению С.А. Елисеева, понимание объекта преступления как благо (интерес) продолжает традиции уголовно-правовой науки и соответствует современным взглядам на сущность, социальную ценность права, содержание правоотношения [9; 15].

Е. Фесенко утверждает, что «именно ценности (личные, общественные, государственные) должны признаваться объектом преступления…». В качестве ценностей Е. Фесенко называет человека и объекты материального мира, значимые для отдельных лиц, социальных групп и общества в целом. Преступление, направленное против этих важнейших ценностей, создает угрозу причинения или причиняет им вред. «Именно поэтому указанные ценности и выступают в качестве объекта преступления» [10; 72].

Особенность позиции Е. Фесенко в признании человека одной из ценностей, являющейся объектом преступления. Эта идея ранее представлена в научном исследовании Г.П. Новоселова, который при любом посягательстве в качестве объекта рассматривал человека. Страдания физические лица испытывают не только в случае посягательства на их неотчуждаемое личное неимущественное право, но и тогда, когда похищается, уничтожается или повреждается их имущество. Всякий раз, как в уголовном законе говорится о преступных последствиях для человека, гражданина, потребителя и т.п., имеется в виду причинение вреда (нанесение ущерба) конкретным индивидам. Решение вопроса не может быть другим и в отношении преступлений, в которых в качестве обязательного их признака предусматривается причинение вреда обществу или отдельным организациям. Особенность такого рода преступлений в том, что ими наносится ущерб или создается угроза его нанесения некоторому множеству лиц, круг которых не всегда возможно установить в каждом отдельном случае как в правоприменительной, так и законотворческой деятельности [11; 51].

Криминалистика, являясь наукой «о реальностях уголовного права» [12; 109], рассматривает любое преступное деяние как систему [13; 71], структура которой образована материальными элементами. В их числе можно назвать: объект, предмет, средство преступного посягательства и предмет преступления [14; 48].

Объект преступного посягательства как элемент криминалистической (материальной) структуры преступления существенно отличается от соответствующего уголовно-правового элемента состава преступления. В теории и практике отечественного уголовного права до сих пор в вопросе понимания содержания объекта посягательства используется концепция общественного отношения. Данная концепция не приемлема для рассмотрения объекта посягательства как равноценного понятия для уголовного права и криминалистики. Дело в том, что абстрактные по своей сути общественные отношения, социальные блага или человек [15; 45], составляющие содержание концепций уголовно-правового понятия объекта посягательства, не отражают систему следов, содержащих криминалистически значимую информацию о совершенном преступлении и его элементах.

Объект как элемент криминалистической структуры преступления можно представить в виде материальной совокупности или системного образования, на которые оказывается непосредственное или опосредованное воздействие, одна или несколько составляющих их частей могут определять целевую направленность преступного деяния. Необходимо иметь в виду, что сам по себе объект как единое целое также может являться целью преступной деятельности. Это происходит в тех случаях, когда вина субъекта преступления связана с причинением объекту посягательства вреда.

Объект преступного посягательства может быть простым и сложным, единым и множественным, одно- и многоуровневым. Особенности объекта предопределяют специфику деятельности субъекта и механизм преступления, что в итоге сказывается на его следовой картине, следах-отражениях, той первооснове, на которой базируется вся криминалистическая деятельность [16; 284].

Объектами преступного посягательства являются человек (в единственном числе или группа людей), имущество (движимое и недвижимое), компьютерные и иные электронные системы, денежные средства и ценные бумаги, транспортные средства, предприятия и учреждения, фирмы, государственные органы. Действия в отношении объекта могут быть связаны как с причинением ему вреда (ущерба), так и без такового.

Криминалистическое рассмотрение объекта посягательства при хищении путем злоупотребления служебными полномочиями предполагает проведение криминалистического анализа его уголовно-правового состава.

В статье 210 УК дается легальное определение хищения путем злоупотребления служебными полномочиями — это завладение имуществом либо приобретение права на имущество, совершенные должностным лицом с использованием своих служебным полномочий.

Данное преступление совершается с использованием предоставленных должностному лицу служебных полномочий. Это объективное обстоятельство, которое в процессе расследования подлежит установлению и подтверждению указанием на конкретные деяния и соответствующие им служебные полномочия. Так, например, Е. занимала должность главного бухгалтера общества с ограниченной ответственностью «А-Трэйд». Осуществляя операции по приобретению иностранной валюты (долларов США, евро) в ОАО «Белорусская валютно-фондовая биржа» в интересах общества с ограниченной ответственностью «А-Трэйд» по безналичному расчету, Е. внесла заведомо ложные сведения в бухгалтерскую программу «Предприятие» о размере затраченных денежных средств в белорусских рублях на указанные цели. В результате действий обвиняемой были образованы неучтенные денежные средства на расчетном счете общества № 012356110012, открытом в банке, обслуживающем организацию. После этого главный бухгалтер создала в электронном виде в программе «Клиент-банк» платежные поручения с приложениями к ним в виде банковских списков на выплату заработной платы и иных выплат на свое имя. В эти документы опять же внесены заведомо ложные сведения об основаниях начислений и их размере в сумме неучтенных денежных средств. Она же экспортировала указанные документы посредством программы «Клиент-банк» в банк, обслуживающий общество с ограниченной ответственностью «А-Трэйд». На основании этих документов с расчетного счета общества на карт-счет обвиняемой, а также карт-счет А. перечислены денежные средства в белорусских рублях на сумму, эквивалентную 7 500 долларов США.

Обвиняемая, являясь должностным лицом, злоупотребила своими служебными полномочиями. Согласно должностной инструкции, а также Закону Республики Беларусь «О бухгалтерском учете и отчетности» от 12.07.2013 № 57-З в круг полномочий главного бухгалтера входит: осуществление организации бухгалтерского учета хозяйственно-финансовой деятельности, контроль за экономным использованием материальных, трудовых и финансовых ресурсов, сохранностью собственности организации, а также обеспечение контроля за проведением хозяйственных операций, соблюдением технологии обработки бухгалтерской информации и порядка документооборота, организация учета имущества, обязательств и хозяйственных операций, поступающих основных средств, товарно-материальных ценностей и денежных средств, своевременное отражение на счетах бухгалтерского учета операций, связанных с их движением, обеспечение законности, своевременности и правильности оформления документов, платежей в банковские учреждения, а также отчисления первичных учетных и бухгалтерских документов, расчетов и платежных обязательств, контроль за расходованием фонда заработной платы, за установлением должностных окладов работников организации и т.д. Беглый взгляд на неполный перечень служебных полномочий главного бухгалтера позволяет видеть ряд нарушений в связи с совершенными действиями [17].

Криминалистический анализ ст. 210 УК позволяет выделить общие признаки рассматриваемого преступления, которыми являются:

1) преступление совершается должностным лицом;

2) преступление совершается с использованием должностным лицом полномочий по службе;

3) служебные полномочия используются с целью завладения имуществом либо приобретения права на имущество;

4) имеется причинно-следственная связь между действиями должностного лица и наступившими последствиями.

В качестве дополнительных признаков данного преступления следует рассматривать причинение ущерба в крупном размере (ч. 3 ст. 210 УК) или в особо крупном размере (ч. 3 ст. 210 УК).

Крупным размером признается ущерб, который в двести пятьдесят и более раз превышает размер базовой величины, установленный на день совершения преступления. Для признания ущерба особо крупным необходимо, чтобы размер базовой величины был превышен в тысячу и более раз [3; 458].

Основываясь на предложенном криминалистическом определении понятия «объект преступного посягательства» в качестве такового в составе рассматриваемого преступления можно выделить несколько материальных элементов, которым в результате деяния причиняется вред. Термин «вред» в словаре русского языка трактуется как «ущерб, порча» [18; 84]. Вместе с тем данное понятие имеет как материальное, так и нематериальное проявление. В уголовном праве преимущественно рассматривается ущерб, имеющий материальную оценку. Также и в рассматриваемой ст. 210 УК речь идет об ущербе, который выражается в «крупном размере» или «особо крупном размере». В качестве примера нематериального проявления вреда (ущерба) можно назвать последствия, которые наступили как для здоровья потерпевшего, так и для иных отношений в результате совершенного преступления. Видом такого ущерба является моральный вред, который трудно оценить.

Объектами посягательства в их криминалистическом понимании для преступления, предусмотренного ст. 210 УК, являются человек, государственные и общественные организации.

Чаще всего объектами преступного посягательства, согласно ст. 210 УК, являются государственные и общественные организации. При этом следует иметь в виду, что совершаемым преступлением нарушаются их имущественные интересы. Похищаемое имущество может находиться во владении как должностного лица, так и других лиц, как правило, подчиненных субъекту совершения преступления. В обоих случаях, совершая хищение, должностное лицо реализует предоставленные ему полномочия по управлению и распоряжению данным имуществом. Таким образом, должностное лицо противоправно, безвозмездно завладевает чужим имуществом, злоупотребляя своими служебными полномочиями исключительно в силу занимаемой должности.

Изложенное выше можно рассмотреть на следующем примере. Ч. являлся должностным лицом субъекта хозяйствования — главным инженером строительно-монтажного треста № 766 открытого акционерного общества «Белтрансстрой» (далее ОАО «Белтрансстрой»). Согласно должностной инструкции в компетенцию главного инженера ОАО «Белтрансстрой» входит выполнение организационно-распорядительных и административно-хозяйственных функций, а также совершение юридически значимых действий. В их числе контроль за состоянием материальных отчетов работников филиала, эффективное использование производственных фондов, организация работ по обеспечению высокого качества строительно-монтажных работ и услуг, по выполнению их в соответствии с проектами и при строгом соблюдении строительных норм и правил, ГОСТов, технических условий, инструкций и других нормативных документов по производству и приемке работ, обеспечение эффективного использования основных фондов и оборотных средств, обеспечение контроля за работой субподрядных организаций в соответствии с действующими нормативными актами и заключенными договорами и др. В нарушение этих полномочий виновный, зная о том, что работы по разборке оснований под полы из бетона на гравий на объекте «Реконструкция имущественного комплекса по улице Даумана» выполняются исключительно силами подчиненных ему штатных работников В., Р., С., дал указание не осведомленным о преступном характере действий обвиняемого главному механику Л. и посредством него производителю работ Д. о подготовке и оформлении договора подряда между ОАО «Белтрансстрой», с одной стороны, и физическим лицом К, с другой стороны, на производство последним указанных выше работ, которые К. фактически не выполнял и не должен был выполнять. В дальнейшем организовал подписание акта выполненных работ к указанному договору Д. от имени К., а также подписание данного договора не осведомленным о преступном характере действий обвиняемым начальником ОАО «Белтрансстрой» Л. После этого передал договор и акт выполненных работ в бухгалтерию для производства расчета с подрядчиком, т.е. К., которому на его карт-счет была перечислена денежная сумма в размере 520 белорусских рублей, что эквивалентно 260 долларам США. Данная денежная сумма была обналичена и передана обвиняемому, который распорядился ею по своему усмотрению [19].

Человек также может являться объектом преступного посягательства при совершении хищения путем злоупотребления служебными полномочиями. В результате противоправных действий на потерпевшего оказывается опосредованное воздействие. Человеку может быть причинен ущерб имущественного (материального) характера. Речь идет о прямом (непосредственном) ущербе, возникновение которого не связано с иными обстоятельствами и целями противоправного поведения должностного лица.

При этом следует иметь в виду положение УК, согласно которому не подлежит уголовной ответственности лицо, совершившее хищение имущества физического лица путем злоупотребления служебными полномочиями в сумме, не превышающей двукратного размера базовой величины, установленного на день совершения деяния. Таким образом, законодатель разграничивает уголовно наказуемое хищение от мелкого хищения, ответственность за которое предусмотрена Кодексом Республики Беларусь об административных правонарушениях.

Подводя итог изложенному, можно сделать некоторые выводы.

Во-первых, в уголовном праве отсутствует единое понимание объекта преступления.

Во-вторых, существующие уголовно-правовые концепции неприемлемы для рассмотрения объекта посягательства как равноценного понятия криминалистики.

В-третьих, абстрактность общественных отношений, социальных благ и интересов исключает возможность отразить систему следов, представляющих интерес с позиции криминалистики и содержащих значимую информацию о совершенном преступлении и его элементах.

В-четвертых, в научной, нормативной и учебной литературе по уголовному праву Республики Беларусь придерживаются традиционной концепции общественных отношений как объекта посягательства при хищении путем злоупотребления служебными полномочиями.

В-пятых, объектами преступного посягательства при хищении путем злоупотребления служебными полномочиями в их криминалистическом понимании являются материальные элементы преступной структуры, в числе которых человек, государственные и общественные организации.

В-шестых, человеку, государственным и общественным организациям как элементам криминалистической структуры преступления в результате хищения путем злоупотребления служебными полномочиями причиняется материальный вред (ущерб). В ряде случаев он может достигать крупного либо особо крупного размера.

В-седьмых, развивающиеся интеграционные процессы в системе наук уголовно-правового цикла предполагают унификацию научных категорий, которыми оперируют эти науки. Реализация этого будет способствовать решению многих проблем теоретико-прикладного характера.

Список литературы

1 Перечень коррупционных преступлений // Генеральная прокуратура Республики Беларусь [Электронный ресурс]. — Режим доступа: http://www.prokuratura.gov.by (дата доступа 17.01.18).

2 Уголовный кодекс Республики Беларусь от 09.07.1999 г., № 275-З // Эталон – Беларусь Нац. центр правовой информ. Респ. Беларусь. — Минск, 2018.

3 Научно-практический комментарий к Уголовному кодексу Республики Беларусь / Н.Ф. Ахраменка [и др.]; под ред. А.В. Баркова, В.М. Хомича. — 2-е изд., с изм. и доп. — Минск: Гос. ин-т упр. и соц. технологий Белорус. гос.ун-та, 2010. — 1064 с.

4 Шаргородский М.Д. Актуальные вопросы советского уголовного права / М.Д. Шаргородский, Н.С. Алексеев // Учен. записки (Ленингр. гос. ун-т). Серия юрид. наук. — Л., 1954. — Вып. 5. — № 182. — С. 188–189.

5 Кригер Г.А. К вопросу о понятии объекта преступления в советском уголовном праве / Г.А. Кригер // Вестн. Моск. ун-та. — 1955. — № 1. — С. 111–118.

6 Пионтковский А.А. Учение о преступлении по советскому уголовному праву / А.А. Пионтковский. — М.: Юрид. лит., 1961. — 666 с.

7 Винокуров В.Н. Объект преступления: теория, законодательство, практика: моногр. / В.Н. Винокуров. — М.: Юрлитинформ, 2010. — 224 с.

8 Наумов А.В. Российское уголовное право: курс лекций: [в 2-х т.] / А.В. Наумов. — М.: Юрид. лит., 2004. — Т. 1. Общая часть. — 496 с.

9 Елисеев С.А. Преступления против собственности по уголовному законодательству России (вопросы теории) / С.А. Елисеев. — Томск, 1999. — С. 15–19.

10 Фесенко Е. Объект преступления с точки зрения ценностной теории / Е. Фесенко / Уголовное право. — 2003. — № 3. — С. 72.

11 Новоселов Г.П. Учение об объекте преступления. Методологические аспекты / Г.П. Новоселов. — М.: НОРМА, 2001. — 208 с.

12 Криминалистика: Краткая энциклопедия / Авт.-сост. Р.С.Белкин. — М.: Большая Рос. энцикл., 1993. — 111 с.

13 Криминалистика: учеб. пособие / А.В. Дулов [и др.]; под. ред. А.В. Дулова. — Минск: ИП «Экоперспектива», 1996. — 415 с.

14 Гучок А.Е. Криминалистическая структура преступления / А.Е. Гучок. — Минск: БГУ, 2007. — 151 с.

15 Грунтов И.О. К вопросу о понимании объекта преступления в уголовном праве / И.О. Грунтов // Труд. Профсоюзы. Общество. — 2017. — № 2(56). — С. 41–46.

16 Шумак Г.А. Экономическая криминалистика в системе криминалистической науки / Г.А. Шумак // Право и демократия: Межвуз. сб. науч. тр. Вып. 11. / отв. ред. В.Н. Бибило. — Минск, 2001. — С. 284–285.

17 Архив суда Московского района г. Минска. Уголовное дело № 1-337/17.

18 Ожегов С.И. Словарь русского языка: Ок. 57 000 слов / С.И. Ожегов; под ред. чл.-корр. АН СССР Н. Ю. Шведовой. — 20-е изд., стереотип. — М.: Рус. яз., 1988. — 750 с.

19 Архив суда Московского района г. Минска. Уголовное дело № 1-209/17.

А.М. Хлус

Қызметтік өкілеттіктерді асыра пайдалану жолымен жымқыру кезіндегі қылмыстық қолсұғушылық объектісінің криминалистикалық түсінігі

Мақалада криминалистикадағы және қылмыстық құқықтағы қызметтік өкілеттіктерді асыра пайдалану жолымен жымқыру кезіндегі қылмыстық қолсұғушылық объектісі түсінігінің мәселесі талданған. Беларусь Республикасының қылмыстық құқығы бойынша ғылыми, нормативтік және оқу әдебиеттерде қызметтік өкілеттіктерді теріс пайдалану жолымен жымқыру кезіндегі қолсұғушылықтың объектісі ретінде дәстүрлі тұжырымдама бойынша қоғамдық қатынастарды ұстанады. Қоғамдық қатынастар, әлеуметтік игіліктер және мүдделер абстракттілігі криминалистика тұрғысынан қызығушылық тудыратын және жасалған қылмыс туралы маңызды ақпаратты, оның элементтерін құрайтын іздер жүйесін көрсету мүмкіндігін шектейді. «Қылмыстық құқықтың нақтылығы туралы» ғылым бола тұра, криминалистика құқықбұзушылықтың нысанын қылмыс құрылымының материалдық элементі ретінде қарастырады. Қызметтік өкілеттіктерді асыра пайдалану жолымен жымқыру кезіндегі қылмыстық қолсұғушылықтың объектілері криминалистикалық түсінікте қылмыс құрылымының материалдық элементтері, оның ішінде адам, мемлекеттік және қоғамдық ұйымдар. Адамға, мемлекеттік және қоғамдық ұйымдарға қылмыстың криминалистикалық құрылымының элементтері ретінде қызметтік өкілеттіктерді теріс пайдалану жолымен жымқыру нәтижесінде материалдық зиян (зардап) келтіріледі. Көп жағдайларда ол ірі немесе аса ірі мөлшерде болуы мүмкін. Қылмыстық-құқықтық циклдағы ғылымдар жүйесіндегі интеграциялық үрдістердің тиімді түрде дамуы үшін осы ғылымдар пайдаланатын ғылыми категорияларды біріздендіру қажет.

Кілт сөздер: қылмыстық құқық, жымқыру, қызметтік өкілеттіктерді асыра пайдалану, қылмыстардың криминалистикалық құрылымы, қылмыстардың нысаны.

A.M. Khlus

Criminalistic understanding of the object of criminal affairs while pursuing through ability by official authorities

The article analyzes the problem of understanding the object of criminal encroachment during theft by abuse of official powers in criminalistics and criminal law. In the scientific, normative and educational literature on the criminal law of the Republic of Belarus, they adhere to the traditional concept of public relations as an object of encroachment when embezzling by abuse of official authority. The abstractness of social relations, social benefits and interests excludes the possibility to reflect the system of traces that are of interest from the point of view of criminology and contain meaningful information about the crime committed and its elements. Being a science «about the realities of criminal law», criminalistics considers the object of encroachment as a material element of the structure of the crime. Objects of criminal encroachment when embezzling by abuse of official powers in their criminalistic understanding are the material elements of the criminal structure, including man, state and public organizations. Person, state and public organizations as elements of the criminalistic structure of the crime, as a result of theft by abuse of official authority, material damage (damage) is caused. In some cases, it can reach a large or very large size. For the successful development of integration processes in the system of the sciences of the criminal law cycle, it is necessary to unify the scientific categories that these sciences operate on.

Keywords: criminal law, embezzlement, abuse of official authority, criminology, criminalistic structure of crime, the object of crime.

References

1 Perechen korruptsionnykh prestuplenii [The list of corruption crimes]. *Heneralnaia prokuratura Respubliki Belarus – General Prosecutor's Office of the Republic of Belarus.* Retrieved from http://www.prokuratura.gov.by [in Russian].

2 Uholovnyi kodeks Respubliki Belarus [The Criminal Code of the Republic of Belarus]. Minsk: Etalon – Belarus Nac. centr pravovoi inform. Resp. Belarus (2018) [in Russian].

3 Akhramenka, N.F., & et al. (2010). Nauchno-prakticheskii kommentarii k Uholovnomu kodeksu Respubliki Belarus [Scientific and practical commentary to the Criminal Code of the Republic of Belarus]. A.V. Barkov, V.M. Khomich (Ed.). Minsk: Hosudarstvennyi institut upravleniia i sotsialnykh tekhnolohii Belorusskoho hosudarstvennoho universiteta [in Russian].

4 Shargorodskij, M.D., & Alekseev, N.S. (1954). Aktualnye voprosy sovetskoho uholovnoho prava [Actual issues of Soviet criminal law]. *Uchenye zapiski (Leningradskii hosudarstvennyi universitet). Seriia yuridicheskikh nauk – Scholarly notes (Leningrad State University). Series Juridical sciences, No. 182,* Issue 5, 188, 189. Leningrad [in Russian].

5 Kriger, G.A. (1955). K voprosu o poniatii obekta prestupleniia v sovetskom uholovnom prave [On the issue of the concept of the object of crime in Soviet criminal law]. *Vestnik Moskovskoho universiteta – Bulletin of Moscow University, 1,* 111–118 [in Russian].

6 Piontkovskij, A.A. (1961). *Uchenie o prestuplenii po sovetskomu uholovnomu pravu [Teaching on the crime of Soviet criminal law]*. Moscow: Yuridicheskaia literatura [in Russian].

7 Vinokurov, V.N. (2010). *Obekt prestupleniia: teoriia, zakonodatelstvo, praktika [Object of the crime: theory, legislation, practice]*. Moscow: Yurlitinform [in Russian].

8 Naumov, A.V. (2004). *Rossiiskoe uholovnoe pravo [Russian criminal law]*. (Vol. 1-2, Vol. 2). Moscow: Yuridicheskaia literatura [in Russian].

9 Eliseev, S.A. (1999). *Prestupleniia protiv sobstvennosti po uholovnomu zakonodatelstvu Rossii (voprosy teorii) [Crime against property under the criminal legislation of Russia (theory issues)]*. Tomsk [in Russian].

10 Fesenko, E. (2003). Obekt prestupleniia s tochki zreniia tsennostnoi teorii [The object of the crime from the point of view of the value theory]. *Uholovnoe pravo – Criminal law, 3,* 72 [in Russian].

11 Novoselov, G.P. (2001). Uchenie ob obekte prestupleniia. Metodolohicheskie aspekty [Teaching about the object of crime. Methodological aspects]. Moscow: NORMA [in Russian].

12 Belkin, R.S. (1993). *Kriminalistika [Forensic science]*. Moscow: Bolshaia Rossiiskaia entsiklopediia [in Russian].

13 Dulov, A.V. (Eds.). (1996). *Kriminalistika [Forensic science]*. Minsk: IP «Ekoperspektiva» [in Russian].

14 Guchok, A.E. (2007). *Kriminalisticheskaia struktura prestupleniia [Criminalistic structure of the crime]*. Minsk: BHU [in Russian].

15 Gruntov, I.O. (2017). K voprosu o ponimanii obekta prestupleniia v uholovnom prave [On the issue of understanding the object of crime in the criminal law]. *Trud. Profsoiuzy. Obshchestvo, 2 (56),* 41–46 [in Russian].

16 Shumak, G.A. (2001). Ekonomicheskaia kriminalistika v sisteme kriminalisticheskoi nauki [Economic criminology in the system of criminal science]. Proceedings from Law and Democracy: *Mezhvuzovskii sbornik nauchnykh trudov – Interuniversity collection of scientific papers, Issue 11,* 284–285. Minsk [in Russian].

17 Arhiv suda Moskovskoho raiona h. Minska. Uholovnoe delo № 1-337/17 [Archives of the court of the Moscow district of Minsk. Criminal case No. 1-337 / 17] [in Russian].

18 Ozhegov, S.I. (1988). *Slovar russkoho yazyka [Dictionary of the Russian language]*. Moscow: Russkii yazyk [in Russian].

19 Arhiv suda Moskovskoho raiona h. Minska [Archives of the court of the Moscow district of Minsk]. *Uholovnoe delo – Criminal case,* 1-209/17 [in Russian].

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Б.Ж. Кыздарбекова

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

К вопросу о понятии и социально-правовом назначении режима исполнения меры пресечения в виде содержания под стражей

В статье предпринимается попытка углубить обоснование принципиально нового понимания режима как порядка и условий исполнения меры пресечения в виде содержания под стражей. Выявлены и рассмотрены основные подходы к определению понятия «режим исполнения меры пресечения в виде содержания под стражей» и социально-правовому его назначению в доктрине уголовно-исполнительного права. Обосновывается вывод о том, что режим, его требования должны соответствовать целям указанной меры пресечения. Ставится под сомнение наделение режима содержания под стражей воспитательным свойством. Автор проводит грань между понятиями «режим места содержания под стражей» и «режим исполнения меры пресечения в виде содержания под стражей». Последний распространяется исключительно на подозреваемых и обвиняемых, подвергнутых данной мере уголовно-процессуального принуждения, тогда как режим места содержания под стражей распространяется не только на указанных лиц, но и на все категории лиц, находящихся в этих учреждениях, не исключая сотрудников. В этой связи понятие режима места содержания под стражей шире понятия режима исполнения данной меры пресечения. На основании проведенного анализа сформулировано авторское определение понятия «режим исполнения меры пресечения в виде содержания под стражей», а также обоснована идея о необходимости включения данного понятия в действующий Закон РК «О порядке и условиях содержания лиц в специальных учреждениях, обеспечивающих временную изоляцию от общества»

Ключевые слова: содержание под стражей подозреваемых и обвиняемых, режим содержания под стражей, исполнение меры пресечения в виде содержания под стражей, порядок и условия содержания под стражей, следственные изоляторы, места содержания под стражей.

Одним из важных средств достижения целей меры пресечения в виде содержания под стражей является режим ее исполнения. Именно посредством последнего реализуется конституционный принцип презумпции невиновности, в соответствии с которым лица, подвергнутые мере пресечения в виде содержания под стражей, должны пребывать в условиях, отличных от условий отбывания уголовных наказаний, связанных с лишением свободы. Наряду с этим режим способствует обеспечению прав, законных интересов лиц, содержащихся под стражей, а также выполнению ими своих обязанностей.

Термин «режим» довольно часто встречается в действующем Законе РК «О порядке и условиях содержания лиц в специальных учреждениях, обеспечивающих временную изоляцию от общества», но понятие режима в нем не раскрывается. Полагаем, что данный пробел должен быть восполнен.

В юридической литературе существуют различные определения режима содержания под стражей. Однако прежде чем приступить к их рассмотрению, считаем необходимым обратиться к некоторым подходам ученых-юристов к дефиниции режима отбывания наказания в виде лишения свободы, поскольку последний имеет схожие черты с режимом содержания под стражей.

Практически все ученые-пенитенциаристы определяют режим исходя из общеизвестного значения этого слова. Режим — установленный порядок чего-нибудь; условия деятельности, работы, существования чего-нибудь; совокупность правил, мероприятий, норм для достижения какой-либо цели [1; 550]. Одни авторы в основу данной дефиниции кладут такое значение режима, как установленный порядок, и в этом смысле под режимом исполнения наказания в виде лишения свободы понимается: порядок исполнения наказания в исправительных учреждениях [2; 8]; порядок деятельности ИТУ [3; 115]; порядок содержания в ИУ [4]. Другие авторы, наряду с порядком, в раскрытии указанного понятия используют и такое его значение, как условия. При таком подходе под режимом понимают порядок и условия исполнения (отбывания) наказания в виде лишения свободы [5; 36]. Есть также авторы, которые при определении рассматриваемого понятия берут за основу такое его значение, как совокупность правил, норм, понимая под режимом совокупность правил поведения заключенных, устанавливаемых как законами или ведомственными актами, так и самими заключенными в порядке самодисциплины и самоорганизации [6; 131], совокупность установлений, определяющих объем ог-

раничений для осужденных и порядок их реализации [7; 27]. Представляется, что каждая из приведенных точек зрения не имеет каких-либо расхождений со значением термина «режим», и поэтому нет сомнений в их правильности. Вместе с тем, на наш взгляд, за основу режима целесообразно брать такое его значение, как порядок и условия исполнения (отбывания) наказания в виде лишения свободы. Такое толкование ближе к этимологическому значению этого слова, как порядок или образ жизни человека, группы людей. Заметим, что образ жизни человека подвергается изменениям как под воздействием режима отбывания наказания в виде лишения свободы, так и под воздействием режима исполнения меры пресечения в виде содержания под стражей.

В силу того, что специалисты в сфере уголовно-исполнительного права в понятие режима вкладывают различные значения этого слова, в литературе существуют довольно разноречивые определения данного явления. Следует отметить, что ряд ученых понятие режима толкуют двояко: в широком и узком смысле. «Пенитенциарный режим», в широком смысле этого слова, — писал С.В. Познышев, — охватывает всю систему мер, посредством которых пенитенциарные учреждения стремятся к достижению своих целей. Сюда относятся, во-первых, все способы размещения и подразделения заключенных для целей исправительно-трудового воздействия на них, или так называемые «пенитенциарные системы», а во-вторых, весь распорядок жизни, который устанавливается в пенитенциарных учреждениях, и все применяемые в них меры воздействия на заключенных» [8; 113, 114]. Нетрудно заметить, что широкое определение режима включает все стороны деятельности ИУ. Что касается режима в узком понимании, то это «один из основных методов исправительно-трудового воздействия, обеспечивающий осуществление исправления и перевоспитания, это регламентирование порядка содержания заключенных в исправительно-трудовых учреждениях» [9; 96]. В более конкретизированной форме понятие режима, в узком смысле слова определил Б.С. Утевский, который писал: «режим в узком смысле слова складывается из распорядка дня, из регулирования порядка передвижения в пределах места лишения свободы, из правил, устанавливающих формы общения лишенных свободы с внешним миром, из системы мер поощрения и мер дисциплинарного взыскания и т.п., то есть из всего того, что составляет совокупность внешних признаков лишения свободы, специфических для этой меры репрессии» [10; 169]. С иных позиций определял режим Е.Г. Ширвиндт, считая, что режим составляет совокупность правил поведения осужденных [6; 118]. Схожее определение содержится в работе К.А. Автухова, где режим рассматривается как установленная уголовно-исполнительным законодательством система правил поведения осужденных (режим отбывания) и мероприятий, осуществляемых администрацией органов и учреждений исполнения наказаний, направленных на достижение целей наказания (режим исполнения) [11; 147].

Заслуживает внимания определение режима лишения свободы, данное Ф.Р. Сундуровым. Под режимом лишения свободы он понимает «закрепленный законом порядок исполнения и отбывания данного наказания, выражающийся в деятельности администрации ИТУ, коллектива осужденных и правомерном поведении отдельных осужденных по достижении поставленных перед ними целей» [12; 30]. Трудно не согласиться с автором данной точки зрения в том, что режим представляет собой взаимосвязанную деятельность администрации указанного учреждения и осужденных по его отбыванию. Ф.Р. Сундуров исходит из той посылки, что реализация режима лишения свободы есть не что иное как разновидность правовой деятельности, которая может осуществляться в рамках конкретных правоотношений. Как правильно отмечает К.Ш. Садреев, режим лишения свободы не может регулировать поведение лишь одного субъекта правоотношения и одновременно быть безразличным к другому участнику [13; 19]. Такой подход к пониманию режима следует признать прогрессивным, поскольку направляет нас на осуществление поиска решения проблемы в укреплении режима исполнения наказания в виде лишения свободы и в сфере улучшения деятельности ИУ. Вне всяких сомнений, режим исполнения меры пресечения в виде содержания под стражей также представляет собой взаимосвязанную деятельность двух субъектов — администрации СИЗО и лиц, подвергнутых этой уголовно-процессуальной мере.

В работах, опубликованных в последние годы, режим определяется как правовое средство воздействия на лиц, отбывающих уголовное наказание, устанавливающий правила поведения для всех субъектов уголовно-исполнительных правоотношений [14; 55].

Для уяснения понятия режима исполнения меры пресечения в виде содержания под стражей необходимо проанализировать имеющиеся в литературе наиболее распространенные определения. Так, А.П. Евграфов под режимом в следственных изоляторах понимает принудительный порядок поведения арестованных при исполнении меры пресечения в виде содержания под стражей [15; 172].

В данном определении, по нашему мнению, можно отметить ряд недостатков. Во-первых, в нем не указываются источники, устанавливающие данный порядок. Во-вторых, не отражена связь режима с целями меры пресечения в виде содержания под стражей, в существовании которой не приходится сомневаться. Она состоит в том, что исследуемый режим, а точнее, его требования должны соответствовать целям меры пресечения в виде содержания под стражей. В случае отсутствия такого соответствия ограниченные режимом права лиц, содержащихся под стражей, будут признаны противоречащими не только целям указанной меры пресечения, но и конституционному принципу презумпции невиновности. В-третьих, крайне ошибочно под режимом понимать только принудительный порядок поведения подследственных заключенных. С нашей точки зрения, режим складывается из деятельности двух субъектов — администрации мест содержания под стражей, с одной стороны, и подозреваемых и обвиняемых — с другой.

Другие авторы под режимом в следственных изоляторах понимают установленный нормами уголовно-процессуального, исправительно-трудового (ныне уголовно-исполнительного) и административного права порядок содержания в этих учреждениях лиц, лишенных свободы [16; 27]. Данное определение, на наш взгляд, также не отличается полнотой. Так, нельзя согласиться с тем, что исполнение меры пресечения в виде содержания под стражей регулируется нормами уголовно-процессуального и уголовно-исполнительного права. Стоит отметить, что несмотря на внешнее сходство исполнения меры пресечения в виде содержания под стражей с наказаниями в виде ареста и лишения свободы, каждая из них имеет свои цели, юридическую природу и социально-правовое назначение. При этом характерно, что правоотношения при исполнении содержания под стражей возникают как уголовно-процессуальные, а в процессе своей реализации выходят за их пределы и принимают форму самостоятельных правоотношений. В этой связи правовую основу исполнения меры пресечения в виде содержания под стражей составляют Закон РК «О порядке и условиях содержания лиц в специальных учреждениях, обеспечивающих временную изоляцию от общества» и ведомственные нормативные правовые акты. Кроме того, нам представляется неправильным режим исполнения меры пресечения в виде содержания под стражей связывать исключительно с порядком содержания указанных лиц, упуская из виду администрацию.

В литературе под режимом исполнения меры пресечения в виде содержания под стражей понимают также: регламентированный законами и другими нормативными актами правопорядок, направленный на обеспечение целей и задач предварительного заключения [17; 32], урегулированный нормами уголовно-процессуального и исправительно-трудового права (ныне уголовно-исполнительного) порядок и условия содержания лиц, в отношении которых мерой пресечения избрано заключение под стражей [18; 27].

Из приведенных определений режима нам импонирует последнее. Однако оно, с учетом изложенных выше соображений, также не лишено недостатков.

Мы же предлагаем следующую дефиницию режима исполнения меры пресечения в виде содержания под стражей: режим — это урегулированные нормами Закона РК «О порядке и условиях содержания лиц в специальных учреждениях, обеспечивающих временную изоляцию от общества» и ведомственными нормативными правовыми актами порядок и условия исполнения меры пресечения в виде содержания под стражей, выражающиеся в соответствующем поведении подозреваемых и обвиняемых, деятельности администрации мест содержания под стражей в обеспечении целей уголовного судопроизводства. В части 1 ст. 14 Закона РК «О порядке и условиях содержания лиц в специальных учреждениях, обеспечивающих временную изоляцию от общества», на наш взгляд, должно быть закреплено, по аналогии с ч. 1 ст. 97 УИК РК, следующее определение режима: «Режимом содержания под стражей в учреждениях является установленные Законом РК «О порядке и условиях содержания лиц в специальных учреждениях, обеспечивающих временную изоляцию от общества» порядок исполнения меры пресечения в виде содержания по стражей, обеспечивающий охрану и изоляцию подозреваемых и обвиняемых, постоянный надзор за ними; реализация их прав и законных интересов; исполнение возложенных на них обязанностей, безопасность подозреваемых и обвиняемых и персонала; раздельное содержание определенных категорий подозреваемых и обвиняемых».

В литературе существовало мнение, согласно которому режим, установленный в следственных изоляторах, должен объективно обладать воспитательным свойством, ибо подавляющее большинство тех, кто находится под стражей в порядке меры пресечения, после осуждения отбывают срок лишения свободы [19; 185]. К данной точке зрения склонялся и Н.А. Стручков, считая при этом, что режим при предварительном заключении под стражу не только должен обладать каким-либо воспитатель-

ным воздействием, а уже им обладает. Он писал: «Нельзя сказать, что содержание под стражей в порядке меры пресечения не оказывает никакого исправительного воздействия. Когда то или иное лицо находится в месте лишения свободы во время рассмотрения уголовного дела и после суда, до вступления приговора в законную силу, на него оказывает влияние уже сам факт изоляции, поэтому время, проведенное под стражей в порядке меры пресечения, засчитывается в назначенный приговором суда срок наказания» [20; 197].

Вполне очевидно, что мнение Н.А. Стручкова основано как на имеющих место определенных гарантиях процессуального характера, так и на такой позиции, при которой к лицу, подвергнувшемуся мере пресечения в виде содержания под стражей, как правило, применяется наказание в виде лишения свободы, срок которого должен быть равен или превышать срок заключения под стражей. С данными соображениями можно было бы согласиться, если не учитывать при этом имеющиеся на практике факты вынесения оправдательных приговоров, назначения наказаний, не связанных с лишением свободы, в отношении лиц, к которым применялась мера пресечения в виде содержания под стражей.

Отрицая наличие в местах содержания под стражей воспитательного процесса в отношении подозреваемых и обвиняемых, трудно не заметить сходство предусмотренного в них режима с режимом в исправительных учреждениях и тюрьмах. Оно обусловлено, прежде всего, тем, что мера пресечения в виде содержания под стражей и наказание в виде ареста и лишения свободы являются мерами государственного принуждения, связанными с изоляцией от общества, влекущими за собой существенное ограничение прав и свобод граждан. Можно сказать, что по этой причине время содержания под стражей засчитывается судом в срок наказания.

Хотя режим исполнения указанной меры пресечения имеет свои цели, задачи, элементы, средства обеспечения, его содержание имеет много сходных черт с тюремным режимом [21; 131], обусловленных условиями изоляции. Поэтому вполне объяснимым представляется то, что до появления следственных изоляторов как специализированных учреждений по содержанию под стражей подозреваемых и обвиняемых задача по исполнению меры пресечения в виде содержания под стражей была возложена на тюрьмы.

В то же время режим мест содержания под стражей имеет существенные отличия от режима исправительных учреждений. К числу основных отличий указанных режимов следует отнести их направленность на обеспечение различных целей.

В определении режима отбывания наказания в местах лишения свободы, даваемом Б.Н. Брызгаловым и Н.Е. Макагоном, можно чётко уяснить отличие сравниваемых режимов. Они определяют его как «урегулированный нормами исправительно-трудового права порядок реализации уголовно-правовой кары — наказания в виде лишения свободы и привлечения осужденного к общественно-полезному труду, общеобразовательному и профессионально-техническому обучению» [21; 6]. Отсюда режим содержания под стражей не имеет и не может иметь направленности на реализацию уголовно-правовой кары, так как это противоречит природе меры пресечения в виде содержания под стражей. Кроме того, лицам, содержащимся под стражей, не вменяется обязанность трудиться и не ставится задача их общеобразовательного и профессионально-технического обучения.

Проводя разграничение между режимом мест содержания под стражей и режимом исполнения наказания в виде лишения свободы, нельзя не заметить, что в определенных случаях о первом можно говорить как о режиме отбывания наказания. К примеру, это происходит в случаях оставления осужденных в следственном изоляторе для выполнения работ по его хозяйственному обслуживанию (в соответствии с ч. 1 ст. 92 УИК РК), а также в связи с производством по делу о преступлении, совершенном другим лицом (ч.ч. 4, 5 ст. 92 УИК РК).

Однако здесь важно принять во внимание то, что речь идет о режиме места содержания под стражей (следственном изоляторе как учреждении, исполняющем уголовно-процессуальную меру принуждения, связанную с изоляцией от общества), а не о режиме исполнения данной меры пресечения. Последний распространяется исключительно на подследственных заключенных, тогда как режим места содержания под стражей распространяется не только на указанных лиц, но и на все категории лиц, содержащихся в них, не исключая сотрудников этого учреждения. В этой связи нам представляется, что первое понятие шире второго.

В литературе отмечается, что следственные изоляторы предназначены для содержания под стражей подозреваемых и обвиняемых [16; 8]. С таким пониманием предназначения (цели) следственных изоляторов мы не совсем согласны, оно представляется нам узким. Поскольку содержание

под стражей подозреваемых и обвиняемых в этих местах направлено на достижение целей указанной меры пресечения, то и предназначение следственных изоляторов состоит не в простом содержании под стражей названных выше лиц, а в содержании под стражей, обеспечивающем достижение указанных целей.

Исходя из того, что само содержание под стражей подозреваемых и обвиняемых реализуется посредством установленного режима, следует признать, что последний играет значительную роль в обеспечении достижения целей уголовного судопроизводства. Это означает, что целью режима является установление таких условий содержания, которые способствовали бы достижению целей меры пресечения в виде содержания под стражей.

Некоторые ученые-юристы считают, что изоляция лиц, заключенных под стражу, с тем чтобы исключить для них возможность скрыться от следствия и суда, воспрепятствовать установлению истины по уголовному делу, а также предупреждение совершения ими новых преступлений и обеспечение исполнения приговора являются задачами следственных изоляторов [22; 12, 13]. В данном случае, по нашему мнению, речь идет не о задачах следственных изоляторов, а об их целях. Применительно к рассматриваемому вопросу под целью понимается предмет стремления — то, что надо или желательно осуществить, а под задачами — то, что требует исполнения, разрешения (поставленные для достижения определенных целей) [1; 206]. Для достижения той или иной цели, в нашем понимании, необходимо выполнить те или иные задачи.

Несмотря на то, что они непосредственно не установлены в законодательстве, можно сказать, что они вытекают из смысла и содержания норм, регламентирующих режим места содержания под стражей. Так, к основным его задачам мы относим:1) обеспечение изоляции лиц, содержащихся под стражей, и постоянного надзора за ними; 2) обеспечение соблюдения прав и законных интересов лиц, содержащихся под стражей; 3) обеспечение точного и неуклонного выполнения лицами, содержащимися под стражей, и работниками мест содержания под стражей своих обязанностей; 4) обеспечение безопасности подозреваемых, обвиняемых и осужденных, а также персонала и граждан, находящихся на его территории; 5) обеспечение нормального функционирования места содержания под стражей как государственного учреждения, исполняющего меру пресечения в виде содержания под стражей.

Таким образом, под режимом исполнения меры пресечения в виде содержания под стражей понимаются урегулированные нормами Закона РК «О порядке и условиях содержания лиц в специальных учреждениях, обеспечивающих временную изоляцию от общества» и ведомственными нормативными правовыми актами порядок и условия исполнения указанной выше меры уголовно-процессуального принуждения, выражающиеся в соответствующем поведении подозреваемых и обвиняемых, деятельности администрации мест содержания под стражей в обеспечение целей уголовного судопроизводства.

Список литературы

1 Словарь русского языка / С.И. Ожегов; ред. Н.Ю. Шведова. — 20-е изд. — М.: Рус. яз., 1988. — 750 с.

2 Тер-Саакян А.Г. Режим — основа исправления осужденных к лишению свободы: автореф. дис. … канд. юрид. наук: 12.00.08 «Уголовное право и криминология; уголовно-исполнительное право» / А.Г. Тер-Саакян. — Ставрополь, 2002. — 25 с.

3 Беляев Н.А. Цели наказания и средства их достижения / Н.А. Беляев. — Л.: ЛГУ, 1963. — 186 с.

4 Хачикян А.М. Лишение свободы: криминологические и уголовно-исполнительные проблемы / А.М. Хачикян. — Ереван: Ереванский гос. ун-т, 2008. — 192с.; Советское исправительно-трудовое право / под ред. Ю.М. Ткачевского. — М.: Моск. ун-т, 1971. — 232 с.

5 Маслихин А.В. Исполнение наказаний, связанных с мерами исправительно-трудового воздействия: учеб. пособие / А.В. Маслихин, А.И. Васильев. — Рязань: РВШ МВД СССР, 1989. — 82 с.

6 Ширвиндт Е.Г. Советское исправительно-трудовое право / Е.Г. Ширвиндт, Б.С. Утевский. — М.: Госюриздат, 1957. — 244 с.

7 Марцев А.И. Некоторые вопросы исправительно-трудового права в связи с принятием нового законодательства / А.И. Марцев // Сибирские юридические записки. — Вып. 2. — Омск-Иркутск, 1971. — С. 21–30.

8 Познышев С.В. Основы пенитенциарной науки / С.В. Познышев. — М: Мосполиграф, 1923. — 843 с.

9 Советское исправительно-трудовое право / под общ. ред. Б.С. Утевского. — М.: Госюриздат, 1960. — 278 с.

10 Утевский Б.С. Советская исправительно-трудовая политика: учебник / Б.С. Утевский. — М.: Советское законодательство, 1934. — 256 с.

11 Автухов К.А. Анализ нормативного и доктринальных определений понятия «режим в учреждениях исполнения наказания» / К.А. Автухов // Проблемы законности. — 2013. — № 124. — С. 141–149.

12 Сундуров Ф.Р. Проблемы эффективности исполнения лишения свободы в отношении рецидивистов: автореф. дис. … д-ра юрид. наук: 12.00.08 «Уголовное право и криминология; уголовно-исполнительное право» / Ф.Р. Сундуров. — М., 1980. — 44 с.

13 Садреев К.Ш. Режим лишения свободы и средства его обеспечения: дис. … канд. юрид. наук: 12.00.08 «Уголовное право и криминология; уголовно-исполнительное право» / К.Ш. Садреев. — 1983. — 224 с.

14 Борсученко С.А. Режим исполнения (отбывания) наказаний и проблемы его законодательной регламентации / С.А. Борсученко // Мониторинг правоприменения. —2016. — № 1(18). — С. 54–58.

15 Евграфов А.П. Вопросы укрепления режима в следственных изоляторах / А.П. Евграфов // Актуальные проблемы укрепления режима отбывания наказания и профилактики правонарушений в исправительно-трудовых учреждениях. — Рязань, 1979. — С. 169–173.

16 Маслихин А.В. Следственный изолятор как место предварительного заключения: лекция / А.В. Маслихин. — Рязань: РВШ МВД СССР, 1976. — 52 с.

17 Комментарий к Положению о предварительном заключении под стражу / Белов Г.Л., Будыгин В.И., Гуляев А.П., Даньшина Л.И. и др. — М.: ВНИИ МВД СССР, 1979. — 88 с.

18 Следственный изолятор МВД СССР: учеб. пособие. — М: УУЗ МВД СССР, 1970. — 128 с.

19 Исправительно-трудовое право: учебник / под ред. В.С. Тикунова. — М.: Юрид. лит., 1966. — 328 с.

20 Стручков Н.А. Советская исправительно-трудовая политика и её роль в борьбе с преступностью / Н.А. Стручков. — Саратов: Сарат. ун-т, 1970. — 271 с.

21 Брызгалов В.Н. Режим в местах лишения свободы / В.Н. Брызгалов, Н.Е. Макагон. — Киев: КВШ МВД СССР, 1976. — 158 с.

22 Булатов Б.В. Правовое регулирование исполнения предварительного заключения под стражу: лекция / Б.В. Булатов, В.И. Горобцов, Ю.И. Шутов. — Омск: Омск. высш. шк. милиции МВД СССР, 1985. — 40 с.

Б.Ж. Қыздарбекова

Қамауда ұстау түріндегі бұлтартпау шарасын атқару тәртібінің түсінігі және әлеуметтік-құқықтық тағайындау сұрақтары

Мақалада күзетпен ұстау түріндегі бұлтартпау шараларын атқарудың тәртібі мен шарттары сияқты режимді жаңа негізде түсіну үшін терең негіздеуге ұмтылыс жасалды. «Күзетпен ұстау түріндегі бұлтартпау шараларын атқару режимі» және оның қылмыстық-атқару құқығы доктринасындағы әлеуметтік-құқықтық тағайындалуы түсініктерін анықтаудың негізгі тәсілдері анықталған және қарастырылған. Осы режимнің, нақтысында, оның талаптарының аталған бұлтартпау шарасының мақсаттарына сәйкес келуі тиіс деген тұжырымы негізделді. Күзетпен ұстау режимінің тәрбиелік мәніне күмән келтірілді. Автор күзетпен ұстау орны режимі және күзетпен ұстау түріндегі бұлтартпау шараларын атқару режимі ұғымдарының арасында ажыратуды жүргізеді. Соңғысы тек қылмыстық-процессуалдық мәжбүрлеудің аталған шарасына ұшыраған күдіктілер мен айыпталушыларға қолданылады, ал күзетпен ұстау орны режимі алдыңғы аталған тұлғалармен қоса, осы мекемедегі тұлғалардың барлық санаттарына, қызметкерлерге қолданылады. Осыған байланысты күзетпен ұстау орны режимінің ұғымы аталған бұлтартпау шарасын атқару режимінің ұғымынан кеңірек. Жүргізілген талдау негізінде «күзетпен ұстау түріндегі бұлтартпау шарасын атқару тәртібі» ұғымының авторлық анықтамасы құрылған және де «Адамдарды қоғамнан уақытша оқшаулауды қамтамасыз ететін арнаулы мекемелерде ұстау тәртібі мен шарттары туралы» Қазақстан Республикасының қолданыстағы Заңына аталған түсінікті енгізу қажеттілігі туралы идеясы негізделген.

Кілт сөздер: күдіктілер мен айыпталушыларды күзетпен ұстау, күзетпен ұстау режимі, күзетпен ұстау түріндегі бұлтартпау шараларын атқару, күзетпен ұстау тәртібі және шарты, тергеу изоляторы, күзетпен ұстау орындары.

B.Zh. Kyzdarbekova

On the issue of the concept and socio-legal appointment of the regime of execution of preventive measures in the form of detention

In the article, an attempt is made to deepen the rationale for a fundamentally new understanding of the regime as an order and conditions for the implementation of preventive measures in the form of detention. The main approaches to the definition of the concept of «the regime of execution of preventive measures in the form of detention in custody» and its socio-legal appointment in the doctrine of criminally-executive law were identified and examined. The author substantiates the conclusion that the regime, or rather its requirements, must

meet the goals of this preventive measure. The allocation of the educational regime to the detention regime is questioned. The author draws a line between the concepts of the regime of the place of detention and the regime of execution of the preventive measure in the form of detention. The latter applies exclusively to suspects and accused persons subject to this measure of criminal procedural coercion, while the regime of the place of detention extends not only to the said persons, but also to all categories of persons who are in these institutions, not excluding employees. In this regard, the concept of the regime of the place of detention is broader than the concept of the regime for the implementation of this preventive measure. Based on the analysis, the author's definition of the concept of «the regime of execution of preventive measures in the form of detention» is formulated, and the idea of the necessity of including this concept in the acting Law of the RK «On the order and conditions of detention of persons in special institutions that provide temporary isolation from society».

Keywords: detention of suspects and accused, the regime of detention, the implementation of preventive measures in the form of detention, the procedure and conditions of detention, remand centers, places of detention.

References

1 Ozhegov, S.I. (1988). Slovar russkoho yazyka [Dictionary of the Russian language]. N.Iu. Shvedova (Ed.). Moscow: Russkii yazyk [in Russian].

2 Ter-Saakyan, A.G. (1973). Rezhim — osnova ispravleniia osuzhdennykh k lisheniiu svobody [The regime is the basis for correcting prisoners sentenced to deprivation of liberty]. *Extended abstrack of candidate`s thesis.* Moscow [in Russian].

3 Belyaev, N.A. (1963). Tseli nakazaniia i sredstva ikh dostizheniia [The goals of punishment and the means to achieve them]. Leningrad: LHU [in Russian].

4 Hachikyan, A.M. (1971). Lishenie svobody: Kriminolohicheskie i uholovno-ispolnitelnye problemy [Criminological and criminally-executive problems]. Erevan: Erevanskii hosudarstvennyi universitet; Iu.M. Tkachevski (Eds.). (1971). Sovetskoe ispravitelno-trudovoe pravo – Soviet Correctional Labor Law. Moscow: Moskoskii universitet [in Russian].

5 Maslihin, A.V., & Vasil'ev, A.I. (1989). Ispolnenie nakazanii, sviazannykh s merami ispravitelno-trudovoho vozdeistviia [Execution of punishments related to the measures of corrective labor]. Ryazan: RVSH MVD SSSR [in Russian].

6 Shirvindt, E.G., & Utevskij, B.S. (1957). *Sovetskoe ispravitelno-trudovoe pravo [Soviet correctional labor law]*. Moscow: Hosiurizdat [in Russian].

7 Marcev, A.I. (1971). Nekotorye voprosy ispravitelno-trudovoho prava v sviazi s priniatiem novoho zakonodatelstva [Some issues of corrective labor law in connection with the adoption of new legislation]. *Sibirskie yuridicheskie zapiski – Siberian legal notes, 2,* 21–30 [in Russian].

8 Poznyshev, S.V. (1923). *Osnovy penitentsiarnoi nauki [Fundamentals of penitentiary science]*. Moscow: Mospolihraf [in Russian].

9 Utevskij, B.S. (Eds.). (1960). *Sovetskoe ispravitelno-trudovoe pravo [Soviet corrective labor policy]*. Moscow: Hosiurizdat [in Russian].

10 Utevskij, B.S. (1934). *Sovetskaia ispravitelno-trudovaia politika [Soviet corrective labor policy]*. Moscow: Sovetskoe zakonodatelstvo [in Russian].

11 Avtuhov, K.A. (2013). Analiz normativnoho i doktrinalnykh opredelenii poniatiia «rezhim v uchrezhdeniiakh ispolneniia nakazaniia» [Analysis of the normative and doctrinal definitions of the concept of «regime in penal institutions»]. *Problemy zakonnosti – Problems of legality, 124,* 141–149 [in Russian].

12 Sundurov, F.R. (1980). Problemy effektivnosti ispolneniia lisheniia svobody v otnoshenii retsidivistov [Problems of the effectiveness of execution of deprivation of liberty with respect to recidivists]. *Extended abstrack of candidate`s thesis.* Moscow [in Russian].

13 Sadreev, K.Sh. (1983). Rezhim lisheniia svobody i sredstva eho obespecheniia [The regime of deprivation of liberty and means of its provision]. *Extended abstrack of candidate`s thesis.* [in Russian].

14 Borsuchenko, S.A. (2016). Rezhim ispolneniia (otbyvaniia) nakazanii i problemy eho zakonodatelnoi rehlamentatsii [The regime of execution (serving) of punishments and the problems of its legislative regulation]. *Monitorinh pravoprimeneniia – Monitoring of law enforcement, 1(18),* 54–58 [in Russian].

15 Evgrafov, A.P. (1979). Voprosy ukrepleniia rezhima v sledstvennyh izoliatorakh [Issues of strengthening the regime in investigative isolators]. *Aktualnye problemy ukrepleniia rezhima otbyvaniia nakazaniia i profilaktiki pravonarushenii v ispravitelno-trudovykh uchrezhdeniiakh – Actual problems of strengthening the regime of serving punishment and preventing offenses in corrective labor institutions,* 169–173 [in Russian].

16 Maslihin, A.V. (1976). *Sledstvennyi izoliator kak mesto predvaritelnoho zakliucheniia [Detention facility as a place of pretrial detention]*. Ryazan: RVSH MVD SSSR [in Russian].

17 Belov, G.L., Budygin, V.I., Gulyaev, A.P., & Dan'shina, L.I. (1979). *Kommentarii k Polozheniiu o predvaritelnom zakliuchenii pod strazhu [Commentary to the Provision on preliminary detention in custody]*. Moscow: VNII MVD SSSR [in Russian].

18 Sledstvennyi izoliator MVD SSSR (1970) [Investigation isolator of the USSR Ministry of Internal Affairs]. Moscow: UUZ MVD SSSR [in Russian].

19 Tikunov, V.S. (1966). *Ispravitelno-trudovoe pravo [Correctional labor law]*. Moscow: Yuridicheskaia literatura [in Russian].

20 Struchkov, N.A. (1970). *Sovetskaia ispravitelno-trudovaia politika i ee rol v borbe s prestupnostiu [Soviet correctional labor policy and its role in the fight against crime]*. Saratov: Saratovskii universitet [in Russian].

21 Bryzgalov, V.N., & Makagon, N.E. (1976). *Rezhim v mestakh lisheniia svobody [The regime in places of deprivation of liberty]*. Kiev: KVSH MVD SSSR [in Russian].

22 Bulatov, B.V., Gorobcov, V.I., & Shutov, Yu.I. (1985). Pravovoe rehulirovanie ispolneniia predvaritelnoho zakliucheniia pod strazhu [Legal regulation of the execution of remand in custody]. Omsk: Omskaia vysshaia shkola militsii MVD SSSR [in Russian].

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M.M. Rakhimbekov[1], L.Ch. Sydykova[2]

[1]*B.Beisenov Karaganda Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan, Kazakhstan;*
[2]*B.N. Yeltsin Kyrgyz-Russian Slavic University, Bishkek, Kyrgyzstan*
(E-mail: rahimbekov.m@mail.ru)

Foreign experience in prevention of religious extremism and terrorism and its applicationin the Republic of Kazakhstan

In this article, the example of Great Britain and France analyzed the legal experience of foreign countries in the sphere of preventing religious extremism. A study of the religious situation in these countries showed that the main pan-European tendencies in the whole religious sphere are the processes of secularization and the involvement of religion (its distorted image) in world geopolitics to create a conflict-prone environment. For Kazakhstan, as a participant of globalization processes, this global trend is important in the aspect of building its own model of counteraction to emerging risks, as these tendencies are directly related to the problem of preventing religious extremism. Issues of building and implementing legal instruments of regulation in the religious sphere, which reduce the risks of propaganda in the society of the ideology of religious radicalism and terrorism, remain topical. Assessing the experience of developed countries of Western Europe in the field of countering religious extremism, the authors comes to the conclusion that some foreign tools for resolving extremist issues can significantly enrich the domestic system of preventing religious extremism. The article attempts to systematize the existing foreign experience in improving anti-extremist legislation and law enforcement. Based on the study of legislation and practical experience of the UK, a conclusion is drawn on the need for effective involvement of non-governmental organizations in this work. The emphasis is on improving the quality of their work. UK experience in the implementation of the «Preventing Violent Extremism» program shows that the emphasis in prevention activities exclusively in Muslim (in a broad sense) communities is counterproductive. On the example of France, the expediency of seizing identity documents from persons suspected of involvement in extremist (terrorist) activities was emphasized.

Keywords: religious extremism, Foreign experience, experience of Great Britain and France, prevention of extremism.

Before analyzing specific aspects of the foreign experience of preventing religious extremism and its implementation in Kazakhstan, we consider it expedient to first identify pan-European tendencies in the whole in the religious sphere, since these tendencies are directly related to the prevention of religious extremism. Taking as a basis the conducted social and political study of the main trends in the development of the religious situation in the world [1; 59-67], we can identify the following features.

First, the religious factor in world geopolitics is visibly increasing. Today, against the backdrop of the rejection of religious values in Europe, there has been a marked politicization of religion (not its worldview role, namely the religious factor). This occurs against the backdrop of secularization (the decline of faith) in the world, the growth of a number of radical religious movements, the establishment of «democracy» in the Islamic world, the growing interest of the media in religious extremism and terrorism [1; 29].

Secondly, the legal documents of the Parliamentary Assembly of the Council of Europe (PACE), having a great impact on the state of European legislation in the field of religious regulation, recommend:

– consider religion an element of civil society, not to recognize its sacredness. Religion is equated with philosophical and ideological currents, with other judgments and opinions;

– not to criminalize defamation of religions (insulting religious feelings of citizens), consider it a manifestation of freedom of speech;

– Do not toughen national legislation in the field of religion, even arguing it with threats to national security. Against this background, artificially intensified inter-civilization contradictions, in particular, provocations between representatives of different beliefs. So it was with caricatures of the Prophet and with a number of documentary films of anti-Islamic character, the burning of the Koran, periodically declared «crusades» [1; 64]. These factors of political nature, together with socio-economic and other factors, become the determinants of religious extremism and further exacerbate religious problems both at the global and regional levels. Russian researchers come to the same conclusions, pointing out that «the rapprochement of religion (not its spiritual component - MR) with politics is a moment that contributes to the emergence of religious extremism» [2; 148].

Despite the fact that Kazakhstan society is secular (not religious), at present we have practically the whole spectrum of not only world and traditional religions, but also new beliefs and cults, which often have nothing to do with religion. A serious problem is the suppression of the activities of extremist organizations and radical movements. As well as in foreign countries, in Kazakhstan the formation of a subculture of adherents of radical currents, was influenced by missionaries (migrant preachers). For the purposes of effective prevention of religious extremism in the Republic of Kazakhstan, it is necessary to reliably own the criminological indicators of extremist criminality not only in the country, but also to know the worldwide trends in this issue. The threat of religious extremism is of a transnational nature, therefore effective counteraction to its manifestations is impossible without an analysis of foreign regulatory legal acts that regulate this sphere.

United Kingdom. In the normative legal acts of Great Britain, the prohibition of discrimination of persons on religious grounds is regulated by the Law on the Maintenance of the Public Order of 1986 [3] and the Prevention of Terrorism Act of 2005 [4]. In accordance with this Law, in order to prevent the spread of extremist ideas, the struggle for «hearts and minds», the Preventing Violent Extremism program was adopted, which is part of broader strategies aimed at reducing radicalization and countering violent extremism. The first one is CONTEST (Home Of the-the-2003) based on the principle of «four» P – «warning, harassment, protection (protection) and training». In March 2009, CONTEST was revised, in the new program the emphasis was shifted to the stage of radiculization of citizens, on the study of the factors that lead to the commission of extremist crimes. The revised program increased the emphasis on preventive work with individuals and communities from risk groups, reducing and neutralizing the factors that lead people to extremist and terrorist organizations. The purpose of CONTEST 2 (Home Of-2009) is declared as «reducing risks to the UK and its interests abroad from international terrorism so that people can live freely and confidently». Among the tasks declared, such as:

– challenge the ideology of violent extremism and support the main voices, interrupt those who propagandize violent extremism, and support people living in communities in which they can work

– support persons who are vulnerable to recruitment or have already been recruited by violent extremists;

– to increase the resilience of communities to violent extremism

– consider the discontent that ideologists use

– develop intelligence information, analysis and information

– improve strategic communication [5; 82].

In accordance with the Preventing Violent Extremism (PVE) program, the UK government at the legislative level restricted the entry of foreigners into the country, for which law enforcement bodies have information on the latter's involvement in extremism or the propagation of illegal or socially dangerous acts. For three years (2006-2009), 230 people were not admitted to the UK on these grounds, of which 80 were recognized as religious extremists [6]. Since 2004, the UK National Coordinator Domestic Extremism (NCDE), the main purpose of which is to reduce and eliminate threats related to internal extremism in the UK. In order to counteract the radicalization of youth in 2006, a document was adopted aimed at combating the propaganda of violent extremism in colleges and universities in the United Kingdom. Since 2010, counter-propaganda for extremism in the Internet has been actively conducted. Thus, the UK Ministry of Internal Affairs has a special unit that maintains contacts with British Internet providers and monitors the published materials on the Internet. At the legislative level, it was proposed to oblige Internet providers to provide law enforcement information about the IP addresses of Internet users suspected of terrorist activities. According to experts, approximately 1000 extremist materials are removed every week by site moderators. In addition, a bill was submitted to the Parliament of Great Britain for consideration, according to which it was proposed to withdraw British passports for up to 30 days if there was a suspicion of an intention to travel abroad to participate in terrorist activities, and also to prohibit the entry into the territory of the United Kingdom of persons suspected of carrying out terrorist activities outside the country, deny any airlines flying to the United Kingdom in the event that they refused to provide special services to the passenger information [6].

In accordance to the PVE, the fight against violent extremism is conducted at both the national and the public level. The British police, which is the coordinator of the work on countering violent extremism, acting at the local level (*an analog of the local police service in Kazakhstan – M.R.*) carries out:

– the wide involvement of local communities and the population and the involvement of the police itself in the consolidation of the public;

– active opposition to the propaganda and dissemination of extremism in the universities and colleges of the country;

– struggle against the active activity of extremists on the Internet.

The key to successful work is the state and public support of the structures dealing with youth problems and promoting their integration into society, active social and pedagogical work and psychological support, the formation of a positive identity among youth and a sense of unity with British society. Thus, the British police have accumulated significant experience of effective interaction with various segments of society, including primarily local communities.

The public also plays an important role in preventing the creation of extremist groups operating in their communities. In the United Kingdom, the prevention of violent extremism (this wording is used) is carried out in close cooperation with civil society institutions (non-governmental organizations – further NGOs, local communities). The ratio is bilateral. State bodies support activities to combat violent extremism in local communities, and local communities support their efforts to interact with grass-roots communities. At the central level, national coordination is carried out in the Government with the participation of cabinet ministers. At the local level – through the Coordinators of the Prevent Strategy. More attention is paid to implementation on the ground, because the risks and threats in different regions are different. As stated in the program: «The solution to the problem of radicalization depends on a clear, active, intransigent position of political parties, public, religious associations and individuals» [4]. The police sites of individual counties in the UK contain reminders of how individual citizens – members of the local community – can help the police in eliminating the threats of terrorism and extremism. Entire pages of sites are devoted to a review of the strategy of the county police to prevent extremism in society. The police draw attention to those who conduct underground subversive and agitation work in communities, identify cases of preparation for extremist activity, analyze the facts reported by the population [6]. At the same time, the planning of preventive activities of public structures, the definition of targets, tasks and methods for their solution, the amount of funding is carried out at the level of public authorities (usually various ministries and agencies - to work with young people).The PVE program aims to prevent the plans of extremist organizations operating in the communities. On the websites of law enforcement agencies it is noted that the prevention of extremism threats is focused on preserving public security in specific communities, counties, cities and towns of the UK, and, consequently, is caused by the activity of many population groups that have influence at the local level.

In recent years, the problem of illegal migration has been declared «absolute priority». Law enforcement agencies do not always succeed in successfully maintaining law and order in greatly changed new conditions, in the face of increasing criminality of migrants, in conditions of active attempts to spread the ideology of extremism.

In this regard, as noted by foreign researchers (P. Thomas), the current PVE program is recognized as unsuccessful and not conducive to solving the problem. PVE provides as a target group with which it is necessary to carry out preventive work – in general the Muslim community. From the start, PVE has focused on Muslim communities, and particularly on young Muslims. This focus might appear self-evident given the serious Islamist threat faced, but it is argued here that this focus, and the way that it has been framed and operationalised, has been damagingly counterproductive. While the terrorist bombings and other plots mentioned above are clearly serious, they have involved very small numbers of individuals. P. Thomas correctly, in our opinion, notes that «the mono-cultural approach of PVE to Muslims as a risk group is in complete contradiction with the main political goal of the British government – community cohesion» [7; 451]. There is a marking of the entire Muslim community as susceptible to terrorist activities. As Y.Birt notes, «the mistake is not to attract Muslims as citizens of the United Kingdom in the fight against terrorism and violent extremism, but to evaluate them as» risk groups» [8; 54]. In his work, this author argues that an effective means of solving the problems of radicalization must be sought in a moderate and progressive British Islam [8; 55]. This monocultural focus was a means of monitoring and collecting information from the police and security services, thus antagonizing those same communities, bringing them closer together (moderates with radicals). The approach to Muslim communities in general as risk groups for Britain is all the more controversial, since the political direction of British society (as European) is associated with the rallying of the community in search of a common identity. So, in Great Britain (as well as in Kazakhstan) there is a tangible uncertainty in the number, and in the «quality» of the believers. This moment is one of the main ones characterizing the religious situation. The lack of reliable data on the number and «quality» of believers significantly complicates the work on preventing religious extremism.

The next problem is state funding in the framework of PVE NGOs, which implement programs of deradicalization. In connection with the frequent cases of the departure of British citizens to participate in hostilities on the side of the terrorist organization of the DAIS, in this country, serious attention is paid to the development of programs for the de-radicalization. For example, NGOs «FAST» are actively working in

schools and higher educational institutions, showing films and interviews with parents whose children went abroad and joined the AAA. However, as some authors [8] point out, money is often given to organizations that later become associated with extremist organizations. To this we can add that the extremist organization «Hizb-ut-Tahrir», banned in Kazakhstan, quite legally operates in the UK and has its headquarters there.

In this regard, for the Republic of Kazakhstan, the experience of the UK seems to be fruitful in such positions as:

1. Given the experience of the UK, we should not allow any part of the population to be stigmatized on a religious basis. As the President of the country N.Nazarbayev noted, «the fight against religious extremism should not turn into a struggle with religion». The main efforts of the state should be focused on such tasks as strengthening the secular principles of the development of the state, ensuring the rights of citizens to freedom of conscience, ensuring the rights of citizens to freedom of conscience and respect for the religious beliefs of citizens. At the same time, without interfering in the activities of religious associations, it is necessary to support the Spiritual Board of Muslims of Kazakhstan as the only legitimate representative of the bearers of Islam of the Hanafi trend, whose historical role in the development of culture and spiritual life of the people of Kazakhstan is recognized at the legislative level.

2. Extreme prevention activities in the UK have a wide scope - it includes both police services and local government bodies, public and religious organizations, informal youth organizations, etc. At the same time, the planning of their preventive activities, the definition of its targets, tasks and methods for their solution, the amount of funding is carried out at the level of state authorities (usually various ministries and agencies – to work with young people).

3. Inadequate control over the financing of NGOs (the direction of spending money) acts as a criminal factor that determines the commission of extremist crimes. In this regard, the improvement of the financial control over their activities acts as an instrument to prevent the risks of extremist activity on their part.

France. French law provides protection to members of religious groups, along with groups that are characterized by a common race, as well as ethnic origin. Criminal liability is provided for insulting religious feelings. French law allows you to condemn a person for «hate speech», regardless of intent and consequences. For example, in Canada this offense is provided for by common law, and accordingly it is necessary to provide evidence that it threatens public tranquility, so that a person is brought to justice for insulting religious feelings, and also to prove the intent of a person. Also in France, there are various non-governmental organizations, and their purpose is to combat racism. They, by the way, have the right to initiate not only civil, but also criminal cases, on the facts of racist statements. Most of these cases are initiated by anti-racist organizations. The possibility of collecting fines and damages in the practice of France is widely used. It should also be said that the French system provides a choice between a criminal case and a civil suit (easier to handle and prove). Sanctions imposed from the perpetrator of the law are also compensation to the victim, and also reduces the likelihood of such behavior in the future [9; 218].

In 2014, the Law «On Strengthening Measures to Combat Terrorism» (No. 2014-1453) was passed permitting the seizure of identity documents from persons suspected of involvement in terrorist and extremist activities in order to prevent travel abroad to combat zones in Syria and Iraq. At the same time, it should be pointed out that earlier it was allowed to expel an undesirable foreign citizen from the country (under the Law No. 81-973 of October 29, 1981, Law No. 86-1019 of September 9, 1986 «On the conditions for entry and stay of foreigners in France»), According to which the grounds for expelling an undesirable foreign citizen may be that «his stay creates a threat to public order». These laws allowed expelling unwanted foreigners from the French territory.

In 2008, France adopted a law on the ratification of the Council of Europe Convention on the Prevention of Terrorism (of 13 February 2008 No. 2008-134). In March 2011, the country adopted Law No. 2011-267 on the directions and program for ensuring national security. To toughen the fight against terrorism, the country's migration legislation was amended, in particular, in the Law of France of September 3, 1986, No. 86-1004 «On the Verification of Personality». The law regulated a special procedure for checking persons entering France. He eliminated unnecessary formalities, simplified the procedure for checking the entry of people into France, allowed to photograph people entering the territory and take fingerprints. This facilitated the detention of persons suspected of having explosive, poisonous and other substances [10; 59].

The Law on Strengthening Measures to Combat Terrorism introduced the possibility of declaring an administrative ban on leaving French nationals from the national territory. The ban is provided by the seizure of identification documents, as well as by the obligation to transport companies to refuse to provide services to persons who are intent on leaving the zones of hostilities. The decision is made by the Minister of the Inte-

rior in writing on the basis of available information on the intention of the person to go abroad to participate in the E terrorist activities. Violation of the prescribed prohibition is punishable by up to three years' imprisonment and a fine of 45 thousand euros. The person's refusal to timely pass the passport to the authorities and is certified shall be punished with imprisonment up to two years and a fine of 4.5 thousand euros. The term of imposed restrictions is 6 months, after which the authorities will consider the issue of whether to extend it.

In addition, there is an opposition to the dissemination of extremist materials on the Internet. According to the Ministry of Internal Affairs of France in 2015, five sites containing terrorist and extremist materials were blocked. When you try to open sites that were previously free access, now there is an automatic redirect to the page with the logo of the Ministry of Internal Affairs of France. On the screen appears a prohibitory sign in the form of a raised palm of red color, as well as the inscription: «You were redirected to this official site, since from your computer there was a connection to a page whose content provokes acts of terrorism or publicly permits their commission». Providers received notifications from the Central Service for Combating Crime related to information and communication technologies.

In the laws of France, counteraction to extremism is carried out through the consolidation of preventive measures aimed at preventing extremism. Effective in the legislation of France is the practice of using recompensive norms that facilitate the involvement of individuals involved in extremist activities. At the same time, laws severely punish those involved in extremist activities. All these provisions of the French legislation, in our opinion, can be useful for improving Russian legislation in the field of countering extremism. It was in those years in France that new bodies were created that coordinated with the special services and the Ministry of Internal Affairs to work to counter extremism. Another authority promoting the prevention of extremism in France was the Muslim Council, which was called upon to carry out activities to integrate French Muslims into the social, cultural and political life of French society. Thus, special organizations have been set up in France to coordinate activities to prevent extremism. These organizations collect information, help state bodies fight extremist crime, cooperate with the media, scientists, and issue methodological explanations for state employees. The results of the analysis obtained by them are used to formulate the state policy and the legal basis for planned measures to counter extremism [10; 60].

Thus, we come to the conclusion that:

1. Given the experience of the UK, we should not allow any part of the population to be stigmatized on a religious basis. As the President of the country N.Nazarbayev noted, «the fight against religious extremism should not turn into a struggle with religion». The main efforts of the state should be focused on such tasks as strengthening the secular principles of the development of the state, ensuring the rights of citizens to freedom of conscience, ensuring the rights of citizens to freedom of conscience and respect for the religious beliefs of citizens. At the same time, without interfering in the activities of religious associations, it is necessary to support the Spiritual Board of Muslims of Kazakhstan as the only legitimate representative of the bearers of Islam of the Hanafi trend, whose historical role in the development of culture and spiritual life of the people of Kazakhstan is recognized at the legislative level.

2. Extreme prevention activities in the UK have a wide scope - it includes both police services and local government bodies, public and religious organizations, informal youth organizations, etc. At the same time, the planning of their preventive activities, the definition of its targets, tasks and methods for their solution, the amount of funding is carried out at the level of state authorities (usually various ministries and agencies – to work with young people).

3. Inadequate control over the financing of NGOs (the direction of spending money) acts as a criminal factor that determines the commission of extremist crimes. In this regard, the improvement of the financial control over their activities acts as an instrument to prevent the risks of extremist activity on their part.

4. The French experience in the prevention of extremism can be actively used in the Republic of Kazakhstan.

At the same time, we are not talking about mechanical borrowing, but well thought-out, scientifically grounded application of effective foreign practice in domestic conditions and taking into account mistakes made by foreign colleagues in counteracting religious extremism.

References

1 Актуальные проблемы развития религиозной ситуации в Республике Казахстан / под общ. ред. З.К. Шаукеновой. — Алматы: ИФПР КН МОН РК, 2013. — 137 с.

2 Ахромеева Ю.В. Социокультурные основы религиозного экстремизма: дис. ... канд. филос. наук: 09.00.13 «Религиоведение, философская антропология и философия культуры» / Ю.В. Ахромеева. — Воронеж, 2009. — 178 с. [Электронный ресурс]. — Режим доступа: http://www.dissercat.com/content/sotsiokulturnye-osnovy-religioznogo-ekstremizma#ixzz4UlgkMuyL.

3 Racial and Religious Hatred Act 2006. [Электронный ресурс]. — Режим доступа: http://www.opsi.gov.uk/.

4 Preventing violent extremism pathfinder fund 2007/08. Case studies // Department for Communities and Local Government: London. — 2007 [Электронный ресурс]. — Режим доступа: http://www.tedcantle.co.uk/publications/022%20 Preventing%20violent%20 extremism%20pathfinder%20fund%20case%20studie.pdf;

5 HM Government, Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism, March 2009 [Электронный ресурс]. — Режим доступа: http://www.voltairenet.org/IMG/pdf/UK_Counterterrorism_Strategy.pdf.

6 «Prevent Violent Extremism» [Электронный ресурс]. — Режим доступа: http://www.surrey.police.uk/safety/prevent.asp (дата обращения: 22.10.2016).

7 Thomas P. Failed and Friendless: The UK's 'Preventing Violent Extremism' Programme / P.Thomas // The British journal of politics and international relations (BJPIR). — 2010. — Vol. 12. — P. 442–458.

8 Birt Y. Promoting virulent envy: Reconsidering the UK's terrorist prevention strategy / Y.Birt // Royal United Services Institute (RUSI) Journal. — 2009. — №154(4). — P. 52–58.

9 Шаева О.Н. Методы профилактики экстремизма в молодежной среде / О.Н. Шаева // Вестн. Моск. гос. лингвистического ун-та. — 2016. — № 2 (767). — С. 214–225.

10 Беджанова Т. Countering religious extremism in France: legal regulation, interaction of authorities / Т. Беджанова // Юрид. Вестн. Дагестанского гос. ун-та. — 2014. — № 3. — С. 57–60.

М.М. Рахымбеков, Л.Ч. Сыдыкова

Қазақстан Республикасында діни экстремизмді және терроризмді болдырмаудың шетелдік тәжірибесі және оны қолдану

Мақалада Ұлыбритания мен Францияның мысалында діни экстремизмнің алдын алу саласында шетелдердің құқықтық тәжірибесін талдау жүргізілді. Осы елдердегі діни ахуалды зерттеу бүкіл діни саладағы жалпы еуропалық үрдістердің дүниетанымдық үрдістер және дүниежүзілік геосаясатта дінді, (оның бұрмаланған имиджін) жанжалды жағдайды қалыптастыру үдерісі болып табылатынын көрсетті. Қазақстан үшін жаһандану үдерістерінің қатысушысы ретінде бұл жаһандық үрдіс қалыптасқан тәуекелдерге қарсы әрекет етудің өзіндік моделін құру тұрғысынан маңызды. Себебі бұл заңдылықтар діни экстремизмді алдын алу мәселесіне тікелей байланысты. Діни радикализм мен терроризм идеологиясының қоғамда насихаттау қауіпін азайтатын діни салада реттеудің құқықтық құралдарын құру және енгізу мәселелері өзекті болып қала береді. Діни экстремизмге қарсы әрекет ету саласындағы Батыс Еуропаның дамыған елдерінің тәжірибесін бағалай келе, авторлар экстремистік мәселелерді шешудің кейбір шетелдік құралдары діни экстремизмнің алдын алудың ішкі жүйесін айтарлықтай байытуы мүмкін деген қорытындыға келді. Олар экстремизмге қарсы заңнаманы және құқық қорғау органдарын жетілдірудегі қолданыстағы шетелдік тәжірибені жүйелеуге тырысты. Ұлыбританияның заңнамасын және практикалық тәжірибесін зерделеу негізінде осы жұмыста үкіметтік емес ұйымдарды тиімді тарту қажеттілігі туралы қорытынды жасалды. Өз жұмысының сапасын жақсартуға баса назар аударылды. «Экстремизмді болдырмау» бағдарламасының Ұлыбританиядағы тәжірибесі көрсеткендей, тек қана мұсылман (кең мағынада) қоғамдастықтарда алдын алу іс-әрекеттерде жемісті болып табылады. Франция мысалында экстремистік (террористік) қызметке қатысы бар деп күдіктенген адамдардың жеке басын куәландыратын құжаттарды алудың орындылығы ерекше атап өтілді.

Кілт сөздер: діни экстремизм, шетелдік тәжірибе, Ұлыбритания мен Францияның тәжірибесі, экстремизмді болдырмау.

М.М. Рахимбеков, Л.Ч. Сыдыкова

Зарубежный опыт предупреждения религиозного экстремизма и терроризма и его имплементация в Республике Казахстан

В настоящей статье проведен анализ правового опыта зарубежных стран в сфере предупреждения религиозного экстремизма на примере Великобритании и Франции. Исследование религиозной ситуации в указанных странах показало, что основными общеевропейскими тенденциями в целом в религиозной сфере являются процессы секуляризации и вовлечения религии (ее искаженного образа) в мировую геополитику для создания конфликтогенной среды. Для Казахстана, как участника глобализационных процессов, указанная общемировая тенденция имеет важное значение в аспекте выстраивания собственной модели противодействия возникающим рискам, так как эти тенденции

имеют непосредственное отношение и к проблеме предупреждения религиозного экстремизма. Актуальными остаются вопросы выстраивания и реализации правовых инструментов регулирования в религиозной сфере, снижающие риски пропаганды в обществе идеологии религиозного радикализма и терроризма. Оценивая опыт развитых стран Западной Европы в сфере противодействия религиозному экстремизму, авторы приходят к выводу, что некоторые зарубежные инструменты разрешения экстремистской проблематики могут существенно обогатить отечественную систему предупреждения религиозного экстремизма. В статье предпринята попытка систематизировать имеющийся зарубежный опыт в совершенствовании антиэкстремистского законодательства и правоприменения. На основе изучения законодательства и практического опыта Великобритании дается вывод о необходимости эффективного вовлечения в данную работу неправительственных организаций. Сделан акцент на повышение качества их работы. Опыт Великобритании по внедрению программы «Preventing Violent Extremism» показывает, что акцент в предупредительной деятельности исключительно в мусульманских (в широком смысле) общинах является контрпродуктивным. Учитывая пример Франции, авторы подчеркивают целесообразность изъятия документов, удостоверяющих личность, у лиц, подозреваемых в причастности к экстремистской (террористической) деятельности.

Ключевые слова: религиозный экстремизм, зарубежный опыт, опыт Великобритании и Франции, предупреждение экстремизма.

References

1 Shaukenova, Z.K. (Eds.). (2013). *Aktualnye problemy razvitiia relihioznoi situatsii v Respublike Kazakhstan [Actual problems of development of religious situation in the Republic of Kazakhstan]*. Almaty [in Russian].

2 Akhromeeva, Iu.V. (2009). Sotsiokulturnye osnovy relihioznoho ekstremizma [Religious extremism socio-cultur main]. *Candidate's thesis.* Voronezh. Retrieved from http://www.dissercat.com/content/sotsiokulturnye-osnovy-religioznogo-ekstremizma#ixzz4UlgkMuyL [in Russian].

3 Racial and Religious Hatred Act 2006. *opsi.gov.uk.* Retrieved from http://www.opsi.gov.uk/.

4 Preventing violent extremism pathfinder fund 2007/08. Case studies. [Department for Communities and Local Government: London, 2007]. *tedcantle.co.uk.* Retrieved from http://www.tedcantle.co.uk/publications/022%20Preventing%20violent%20 extremism%20pathfinder%20fund%20case%20studie.pdf.

5 HM Government, Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism, March 2009. *voltairenet.org.* Retrieved from http://www.voltairenet.org/IMG/pdf/UK_Counterterrorism_Strategy.pdf

6 Prevent Violent Extremism. *surrey.police.uk.* Retrieved from http://www.surrey.police.uk/safety/prevent.asp.

7 Thomas, P. (2010). Failed and Friendless: The UK's 'Preventing Violent Extremism' Programme. *The British journal of politics and international relations (BJPIR),* Vol. 12, 442–458.

8 Birt, Y. (2009). Promoting virulent envy: Reconsidering the UK's terrorist prevention strategy. *Royal United Services Institute (RUSI) Journal,* 54(4), 52–58.

9 Shaeva, O.N. (2016). Metody profilaktiki ekstremizma v molodezhnoi srede [Methods of prevention of extremism in the youth environment]. *Vestnik Moskovskoho hosudarstvennoho linhvisticheskoho universiteta – Journal of Moscow state linguistic University, 2* (767), 214–225 [in Russian].

10 Bedzhanova, T. (2014). Countering religious extremism in France: legal regulation, interaction of authorities. *Yuridicheskii Vestnik Dahestanskoho hosudarstvennoho universiteta – Journal of Dagestan State University, 3,* 57–60 [in Russian].

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L.K. Arenova[1], Ye.A. Nabiyeva[2]

[1]Ye.A. Buketov Karaganda State University, Kazakhstan;
[2]B. Beisenov Karaganda Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan, Kazakhstan
(E-mail: super.hamka@mail.ru)

Criminalistic characteristic of acts of terrorism and its importance in investigation

This article is dedicated to determination of consent of criminalistic characteristic of criminal acts, as well as to identification of criminalisticsally significant, evidentiary and orienting information in each single case that allows organizing their qualitative detection. Authors show that criminalistic characteristic of acts of terrorism is aimed to reflect, broadly, peculiarities of commitment of concerned socially-dangerous acts, and in more specific consideration – to define regular mutually conditioned connections between its elements with the aim of advancement of particular typical investigative leads as a basis for investigation forming according to a defined program. The act of terrorism must be considered from the perspective of its dominant elements: the identity of the criminal as part of the criminalistic characterization of an act of terrorism committed by self-incrimination (suicide bomber); the relationship of the method, the crime under investigation to the situation under which a socially dangerous act is committed. Cognition process during criminal investigation can be presented as an algorithm of consistent achievement of constantly forming tasks, emphasizing of which compiles investigation differentiation into certain stages, where its features and content are identified.

Keywords: criminalistic characteristic of criminal acts, identification of criminalisticsally significant, evidentiary and orienting information in each single case that allows organizing their qualitative detection, of criminalistic characteristic as a person.

Successful investigation of any kind of criminal activity is largely conditioned by an ability of a person conducting the investigation to determine both criminal and criminalistic matter of investigated case.

It should be noted that criminal classification should be the basis for creating a private methodology for crimes investigation related to acts of terrorism and, accordingly, its criminalistic characteristic of crimes as an element of this method, determine its content [1; 346]. Determination of the content of criminalistic characteristic of crimes, as well as the ability to identify criminalisticsally significant, evidentiary and orienting information in each single case allows organizing a qualitative detection on investigated case.

The history of criminalistics science shows that a dominant number of criminalistics scientists is thought of criminalistic characteristic as «a system of significant signs (features, peculiarities) of criminal acts of a certain type or category, which allows to draw conclusions on an optimal decision of disclosure and investigation of a criminal act» [2; 29]. Among these scientists can be identified such scientists as N.P. Yablokov, I.A. Vozgrin and others. R.S. Belkin held an opinion that «...criminalistic characteristic of a particular type of crime should include a characteristic of initial information, data systems on the manner of commitment and suppression of crime and typical consequences of its use, personality of a potential offender and potential motives and purposes of the criminal act, personality of a potential victim of crime, concerning some circumstances of crime commission (place, time, situation)...». Alongside with that in his understanding the criminalistics characteristic is «an abstract scientific concept, a result of scientific analysis of a certain type of crime acts (type or kind of crime), generalization of its typical features and peculiarities» [1]. Later, in his works, R.S. Belkin expressed the opinion that criminalistic characteristic had become outdated, turned into an illusion, a criminalistic phantom [3; 223].

Despite a wide range of various opinions, we consider that the criminalistic characteristic of terrorist acts as a certain type of crime has a right to existence, development and addition, giving the ability to investigator selectively use initial data concerning the crime presenting versions, choice of scientific recommendations, tactic techniques and combinations in the course of investigation of an act of terrorism Therefore, its framing is important and necessary in investigation of activities of terrorist nature organizations.

Describing the act of terrorism from the point of view of criminalistics, it should be noted that it is not possible to cover all the elements of the criminalistic characteristic within the framework of the presented article, therefore we consider in this paper only some of its elements: personality of offender as part of the criminalistic characteristic of the act of terrorism committed by self-destruction, (suicide bomber); relation of method, investigated crime in situation when socially dangerous act is committed. Other elements of criminalistic characteristic we will certainly consider later in the framework of individual works.

Herewith, according to the current Law of RK, terrorism – it is an illegal criminal act or a threat of commission in regard to private persons or organizations with the aim to violate public safety, frighten violations, to force on decisions making by state authorities of RK, foreign governments and international organizations, either aimed to terminate activity of state or public activists or for revenge due to such activity [4].

As previously noted, criminalistic characteristic of acts of terrorism should include a data system on the method of preparing, commission and suppression of a crime, and typical consequences of its commission, personality of potential criminal, potential motives and purposes of such crime, and other circumstances of crime commission, including place, time, situation and purpose. These elements constitute a system, i.e. they are interrelated with each other.

In the meantime, method and situation of crime committing as an element of criminalistic characteristic also has a psychological significance not only due to its informativeness, but also due to the fact that at initial stage of inspection, as a rule, the investigation has only information on method and situation of commission that allows through legal and psychodiagnostic methods as well, in particular psychological profiling, to identify features and possible characteristics of those responsible.

Proceeding to consideration of such an element of criminalistic characteristic as a method of crime commission, it should be noted that according to G.G. Zuikov by that method of crime commission is meant a system of actions for preparation, commission and suppression of a crime determined by the conditions of external environment and psychophysiological properties of a personality. It can be associated with selective use of appropriate tools or means and conditions of place and time. As a rule, actions for preparing, committing and suppressing of a crime are combined with a common criminal intent; in some cases, there may be an independent way of crime cover-up (if such cover-up is not a part of the overall intent) [1; 318].

In our understanding the method of committing of acts of terrorism has its own specifics – initially it is mostly a psychological influence on consciousness of masses, as a consequence, such actions are carefully planned and considered. For this purpose, subjects study the situation, nature of actions on the part of state authorities that carry out registration, territorial location based on the principle of population's mentality and human potential in general, selecting possibility of a suicidal-minded person who is most sensitive to new ideas, with weakened mental activity, infantilism and emotional instability.

Concerning the method of crime committing, we shall remember that we are talking about its three main stages: preparatory actions, actions, (inaction) aimed to commission of acts of terrorist and actions for covering-up a crime. Besides, at the preparatory stage, the methods of committing acts of terrorism can be conditionally divided into two main groups. The first group includes methods, influences on physical nature, i.e. objects of surrounding world, associated with deception of various types (abuse of trust, false promise, etc.) for acquisition of property, money and other items having material value. The analysis of studied materials of practical activity in this category of cases has showed that choice of an algorithm for committing a crime consisted of the following actions:

– plan development of crime commission (95 %); choosing of participants for crime commission (75 %) and defining of their functions (70 %); choosing of crime instrument (50 %); choosing of objects of the offense (36 %); clear supervision of an object of crime (36 %); crime instruments making (95,5 %); choosing of crime place (95 %);

– choosing of clothes, acquisition of money and food (10 %); making of hiding places (75 %); communication setup (92 %) (according to the materials of practical activity) [5].

The second group, the most significant in quantitative ratio, includes preparing methods for crimes commission that have the nature of psychological effect on a person's consciousness, and, in general, mental activity, formation of suicidal ideas of criminal nature. The issue concerning specifics of a criminal personal-

ity who is preparing or has committed an act of terrorism will be further considered by us. Using as a preparing method to crimes commission of such phenomena as a trance-like condition, hypnotic influence, often with the use of narcotic and psychotropic substances, as well as psychological technologies of influence and manipulation to conscious and unconscious part of a human mind, including neurolinguistic programming, destroys value-system and, as a result, destroys human's mind. In fact, such preparing can be called a preparation for creation of crime instrument for a terrorist act, which will be the personality of such terrorist-performer, including a suicide bomber.

The specifics of the method of acts of terrorism committing depend on a specific aim and is determined by it. The method of acts of terrorism committing is a kind of dynamic stereotype of human behavior. This provision is confirmed by the fact that when committing such acts of terrorism, the method of crime is repeated or its part is borrowed from previously used one in terrorist organizations of different types, which is connected with the possibility to exchange a criminal experience, analyzing made mistakes in other terrorist organizations.

Considering method of an act of terrorism committing, in our opinion it is necessary to consider its important component, what is the instrument of crime. In our opinion, the data on instruments of acts of terrorism committing in the criminalistic characteristic of the crime method are its obligatory element. According to the dictionary of legal terms, a crime instrument is any object which was used by a criminal while committing a criminal act, in particular, for causing injury to a victim or killing her [6].

Studies show that a set of tools for commission of crimes includes: approximately 75 % of firearms and explosives, about 20 % - psychotropic drugs and narcotic substances, 5 % of other specially produced weapons [5]. Thus, the instruments of act of terrorism are specific and differ from the data of criminalistic characteristic of crimes, committed for religious, political or other reasons. The instruments for crimes commission are different for crimes of a terrorist, religious and extremist nature, and also depend on nonconventional religious organization.

Choosing of an instrument for crime commission depends on personality of a crime committed, his mental abilities, physical strength, professional skills, belonging to a certain category of religious group, etc. For example, non-traditional religious confessions of pro-Islamist orientation, as a rule, use the same psychological impact and training skills of use of firearms and explosives, and eclectic cults, narcotics and other substances to achieve altered state of consciousness, etc. In this case, there is meant that while committing an act of terrorism an instrument of crime can be not only a material object, but also personality of a criminal, performer of terrorist act, who on one hand can be a subject of criminological characteristic, and on the other – its instrument. Thus, a suicide bomber, who committed an act of self-destruction being under influence of psychotropic or narcotic substances, or who has been subjected to ideological bombardment, here acts as an instrument of a terrorist act head. Along with taking into account lack of full identification of such a suicide bomber with personality of a criminal due to the fact that it may be a single terrorist. In more detailы, the issue of such instrument characteristic from the psychological point of view will be considered below in relation to such element of criminalistic characteristic as a person.

Together with instrument of crime, the method of a terrorist act committing may determine situation for commission of a socially dangerous act, its place and time. In this article, we offer not to define the situation as a separate element of the criminalistic characteristic, as most authors do it, but to consider it through interrelation with the method of crime. Thus, a crime event at all its stages takes place in actual real conditions of territorial location with appropriate material-physical situation, time, in current conditions of location, display of natural-climatic and socio-psychological factors and other displays of social activity of population which determines the way of act of terrorism commission. At the same time, the way of commission of the crime, in turn, determines situation where a terrorist act must be committed. However, we shall remember that in both cases commission of terrorist act will depend on aims and resources that has performer of a terrorist attack. So, specifying self-destruction as a method of committing a terrorist act, we point out the characteristic features of this method: a rapid effect and a significant danger zone, possibility of controlling explosion at a distance, fewness of traces after explosion, a wide range of criminal intents. Having these characteristics, the method of criminal action indicates the most «desirable» environment for terrorist act commission, characterized by presence of a mass gathering of people, whether it is a festive event, a concert or a public event. In turn, the situation can «provoke» a criminal to use a certain method of criminal activity, in this case the use of explosives or self-destruction. Investigations of these factors creating the situation of crimes should be aimed to determining of the nature and volume of information about this situation, its elements and links to the method of crime committing and personality of offender, since it has a great influence both on commission of crimes and investigating process of these socially dangerous acts.

In addition, analyzing the ways of an act of terrorism committing, we came to the conclusion that the subject of a criminal act takes measures to suppress his participation in the crime, while not hiding the fact of the crime itself. The main purpose of terrorist act is creating in masses of people a sense of fear and panic, achieved through a wide publicity, considered a socially dangerous act. Often, terrorist organizations take responsibility for committing terrorist attacks, informing population via Telegram channels, as well as various social networks. When committing an act of terrorism, in particular using a suicide belts, the main efforts of the subject of criminal activity (head of terrorist act) to suppress his actions, are aimed to a secret delivery and installation of a subject (in our case, a person who preparing to commit a terrorist act) of increased danger. For cover-up, they use hiding places, compact explosives, as well as possible corrupted contacts in interested structures that ensure unobstructed movement of a suicide bomber to the place of terrorism.

These aspects also recite relation of situation and instruments of a crime with the way of a criminal event. At the same time, the method of crime committing directly depends on psychological qualities of a terrorist, presence of dependencies and their quality, level, mental disorder, diseases anamnesis, including neurological, psychological and physiological traumas, i.e. personality of an offender. Thus, an important element of criminalistic characteristic, which determines the way of act of terrorism commission in our opinion, is the subject of a criminal activity.

In this case, we suggest to understand by the subject of criminalistic characteristic his personality, but not a typical victim of criminal offense. The personality of criminal terrorist as an element of criminalistic characteristic was not specifically investigated, and is the type of so-called religious-ideological criminal, as it has no clear mercenary or violent orientation, and motivation for his behavior is based on a certain idea, including an irrational one. This is a main distinguishing feature of personality of a religious-ideological criminal as a specific object of research requires an integrated approach involving criminal law, criminal procedure, criminalistic, religious, psychological and other knowledge.

An analysis based on practical activities makes it possible to distinguish the classification of persons involved into commission of acts of terrorism:

– fanatically-criminal adepts;

– psychologically fluid adepts;

– faith-unconscious adepts.

Individuals with destructive religious activity are characterized as fanatically-criminals and capable of violent acts, as a reaction to disagreement or doubt in issues of sermonized ideas, and they are 46 % of the total number of persons prosecuted for attempting to commit an act of terrorism. For this category of people it is typical religious, national intolerance, stable contacts between wrongful behavior in a fanatical form and commission of acts of a criminal nature, i.e. a persistent motivation for committing crimes [5].

The characteristic features of such criminals are actively stable criminal-fanatical behavior, which is expressed in counteraction to investigation process, intolerance and dislike towards a surrounding society, constitutional system and state authority, spiritual leaders and confessions, orientation to observance of their own nonconventional religious dogmas, with complete or partial disregard of accepted behavior norms in society. Based on the analysis of study of terrorist's personality, one can single out the following characteristic features of terrorist: lack of values system, moral degradation, in most cases legal nihilism, and distortion, cunning, craft, cruelty, versatility. As a rule, they commit well-orchestrated crimes, having a definite purpose and intent, for this purpose there are taken active measures to create appropriate conditions for eliminating possible difficulties for act of terrorism commission.

This category of criminals can be divided into two subgroups. The first one consists of adepts who carry out professionally criminal non-traditional religious activities, i.e. for them issues of religion and missionary work it is the way of crimes committing through manipulation of a human factor, and who staying in this criminal sphere for a long time. The second category includes adepts who accepting, however, are striving to receive a certain material-financial benefit in the process of criminal religious activity, consciously conceding destruction of a religious nature, who have a propensity for conventions and rituals, cult actions and traditions showing active interest in this destructive confession or cult [5].

Psychologically unstable adepts are 89 % of the total number of all terrorist criminals. For this category of adept-criminals there are no stable relations between commission of a crime and any form of religionism. Criminal behavior of this category of convicts is spontaneous and contradictory by its nature and differs in inconsistence that naturally affects their status among other adepts. Often, their behavior is associated with rejection or support of non-traditional religious-cultic customs and traditions, as well as demonstrative support of leaders of confessional or cult with a destructive focus or, on the contrary, representatives of state authority and law enforcement [5].

In conflict situations, such criminals also do not crucially adhere a certain line of behavior and it negatively affects the process of identifying, disclosure and investigation of acts of terrorism, due to the fact that their behavior is almost impossible to predict or simulate. Instability and unbalanced state of character appears not only in the environment of terrorist organization, but also in the performance of any other activity.

Faith-unconscious criminal-adepts are 5.3 % of all adepts who have committed terrorist acts. For this type of criminals is typical a lack of openness to personal criticism, irritability, unbalanced state, suspiciousness, inflated self-esteem, sharpness and instability in communication, rapid mental and emotional excitability, as well as inadequate responses [5].

Peculiar to people who joining terrorist organizations is that they come from different social strata and have different attitude in accordance with their upbringing, mentality and traditions accepted in family, nation, ethnos, etc. At some moment a person, not receiving desired one, not reaching a specific life goal, or undergoing tragedy of life situations, is prepared to stand against oppression and shock by accepting a religious idea or joining a religious destructive organization. Obviously, there are certain personality traits that distinguish a criminal - a terrorist. Psychological changes and deviations from the norm occur in a person who complies to a certain terrorist organization. This is due to rejection of the normative social group, denial of society and transformation of habitual way of life into a secret, confidential, closed one, so, his transition as a personal unit into a reference group.

According to the data, terrorist criminals (62.8 %) are characterized as aggressive paranoiacs, who tend to:

– personalism, egoism and egocentrism that lead to rejection of common rules and norms of life;

– inability to think systematically and consistently, exaggerating significance of expected result from a terrorist act;

– cruelty and unmotivated aggression towards others and indifference to fate of innocent people;

– weak social contacts, weak integration in society and blind faith in the current policy of terrorist organization members of which they are;

– disposition to narcissism, adventurism and love to strong sensations;

– systemic watch on scenes of violence and contemptuous attitude towards death [7; 31]. This is explained by the phenomenon that a person feels a need to reckon some people among his allies, and others – among his enemies, and this need is the result of his efforts to defend his sense of self-identity.

Thus, in our opinion, common personality trait of a terrorist, a religious extremist or a separatist is his irresistible need to join a criminal group of similar persons connected with problems of self-identification. Before becoming a terrorist, a religious extremist or a separatist, a person goes through apathy stages and other forms of social disadaptation.

From scientific and practical positions, an attempt to formulate a process of formation of a terrorist or a religious extremist was undertaken by E. Shaw. He concluded that terrorist is a person who, being a child, has problems with self-esteem, and identified four factors that lead a person to terrorism: early socialization; narcissistic disorders; conflict situations, especially with the police; personal relations with members of terrorist organizations» [7; 31].

For a terrorist, leaving of such organization is associated with the loss of his identity, refusal is almost impossible because of his low self-esteem, by reason that he is afraid of authoritarianism. In this case, each attack to a group he perceives as a personal one, so each successful terrorist action only increases group cohesion. This must be taken into account when fighting with terrorist, religious extremist and separatist organizations. For the most part, individuals belonging to terrorist and religious extremist organizations share its ideology without subjecting the ideology to criticism and, in accordance with it, have readiness for immediate criminal actions without thinking about public danger of their consequences.

In this regard, counteraction to terrorism and religious extremism should be carried out not only by force methods, but also by intellectual and psychological one.

To create a psychological profile (portrait) of a criminal - a terrorist, a religious extremist there requires a complete and exact knowledge of the terrorist act, namely, place, time, method, instruments, motive, etc. In this case, we see that having knowledge of the method, instruments and situation of the commission of the act, we can with a certain degree of probability designate a subject, i.e. a person who committed a socially dangerous act. At the same time, as it was noted earlier, not in all cases a person who committed a criminal event can be considered as a subject of a terrorist act, in some cases, a person acts as an instrument. Despite the duality of the subject of the criminalistic characteristic, it should be noted that having knowledge of the method, instrument and situation, we can also draw up a profile of the crime subject which in this case is the performer of the terrorist act.

In addition, it should be noted that a special place in drawing up the psychological profile of offender is taken by identification of criminal terrorist belonging to a religious confession, but his personal characteristics are quite different and form a terrorist activity. In this case, a personality of a terrorist who carried out a socially dangerous act through commission of a criminal suicide becomes important.

For example, committing a suicide by self-destruction or preparing an explosive device, planning an act of terrorism and motive for action due to religious, political, ideological reasons and etc.

Analysis of terrorists' personality allows us to conclude that this type of religious and ideological criminal has personal peculiarities that are of paramount motivational importance. Such peculiarities have a crystal-clear psychological phenomenon – aiming for death, which affects his psychological and mental health, transforming personality of a person, launching processes of personal degradation [5].

The basis of psychological knowledge of terrorism is the analysis of crime motives, as a subjective meaning of this behavior. In this regard, violent or selfish motives are only an external explanation and reason for commission of an act. The process of terrorism motivation and religious extremism is a deep intrapersonal conflict that goes into the sphere of unconscious processes, which promotes the launch of a psychological mechanism leading to implementation of actions aimed to self-destruction, which acts as a true motive. The need for dangerous situations, sense of risky and extreme situations creates the impression that a young criminal has a sense of his own importance, involvement in some secret, omnipotence. Occurring legal relations with law enforcement and other state authorities, including high rank, meets an inner need of a young person to feel a sense of self-importance and a sharp increase of self-esteem and self-respect level [7; 12].

It should be noted that motivation of terrorism has a specific psychological trait, namely, a conscious or unconscious need for suicide, so suicide bombers. The causes of criminal suicide of terrorists, religious extremists are a psychological phenomenon.

The analysis of criminal cases based on the facts of a terrorist act commission, allow us to note that terrorist suicide is formed in the course of:

– self-deception and rejection of surrounding reality perception, in accordance with which it is necessary to make life decisions and choice of, where the ideological aspects play a special role;

– fanaticism, which begins to predominate in irrational thinking;

– distortion of the reality of surrounding world, caused by psychophysiological causes (painful conditions and disorders of human body);

– prompt satisfaction of inflated needs for material and financial well-being [5].

A suicidal motive of a terrorist has a deep psychological cause - necrophilia, that is a steady attraction to death. In this sense, a psychological profile (portrait) of a terrorist must be based on this basic motive, where achievement of a public death is a basis of a life goal, after which such criminal begins to live already in the fear of other people, i.e. the terrorist act by self-destruction is a continuation of his life, but more comfortable for him [7; 18].

A suicidal type of criminal personality selects crimes of a terrorist and religious extremist orientation, in connection with a set of personal attitudes and qualities (significantly increased level of anxiety, including unrecognized, suppressed aggressiveness, impulsion- headedness, etc.) that dictates the line of his behavior in the search for an exciting subject, for him it is a death. An unsuccessful attempt of a suicide or a terrorist act by self-destruction strains the need for a criminal-terrorist to achieve death. This reveals the relationship of suicidal tendencies to formation of criminal's identity for commission of an act of terrorism, which indicates a sufficient addiction and multifaceted of motivation for the crime [7; 21].

We suppose that pathological fear and attraction to death distinguish a criminal person whose activity is aimed to committing socially dangerous acts of terrorist, religious-extremist orientation, from other types of personality of a criminal on a number of essential features, namely:

– demonstration of death, which may cause in human society the same jelly as the basic instinct of self-preservation and panic;

– as a kind of ideological type of criminals such a person shifts personal, subjective responsibility not to internal but to external causes related to social aspects and associated with interests of religion, politics, nation, ethnos, etc. This in turn, determines the nature of terrorism, religious extremism and separatism in general, for example, act of terrorism committed for religious reasons of prevalence of one religion over another, terrorism political or nationalistic, etc.

The result of our research is an establishing of strong relations between such elements of criminalistic characteristic as a method, instrument and situation. At the same time, this relation is determined by the

goals of terrorist act being committed and by the fact that the subject has any of these elements, which in turn makes it possible to single out the following probabilities of preparation for a terrorist act:

Probability A

A figurant is conditioned by a purpose of terrorist act, which assumes mass sacrifice. At the same time, he has such a resource as a probable performer-victim and is in a state of uncertainty as to likely algorithm of terrorist act committing and used instruments. In this situation, a dominant element in preparation of terrorist act is a person who acts as an instrument, i.e. a suicide bomber. Depending on the qualities of this individual, also taking into account his physical characteristics, the performer of a terrorist act selects a probable algorithm for crime commission. For example, having such an instrument (in this case a person ready to commit a terrorist act), as a woman, the performer of a terrorist act cannot choose crime algorithm which assumes the use of a weapon as a weapon, because it gives rise to special situation of terrorist act planning, where the chosen algorithm of crime depends on the situation, people gathering at one time or another.

Probability B

The performer of terrorist act has a number of items that can be used as an instrument of crime (jihad-mobile, ammunition of chemical, bacteriological, nuclear damage, etc.), but cannot find a suicide bomber who could have the skills to use these weapons. Here, as we can see, the main element in preparation of a terrorist act is availability of crime instrument in the form of specific items, i.e. the method of crime committing for which the ideal performer is selected.

Version C

The specific conditions of the situation of a crime in progress (place, time) suppose selection of such a set of performers and instruments, which can be realized by means of a unique algorithm for the use of these items by the given person in the given conditions. In this case, conditions of the situation are a dominant element of the criminalistic characteristic and are out our conclusion concerning the relation between the situation and the way of crime in progress.

At the same time, the main thing among these variants, in our conditions, is a probability associated with dominant situation of crime committing determined by the fact that a number of fanatical persons in our country does not allow to make easy choosing of «suicide bombers» as a consumable material and carry out terrorist acts commission which are not related with commission of criminal suicide. For states where the flame of a religious war has taken on the scale of internal component, there vice-versa are peculiar the cases when the main element of a terrorist act preparing is a weapon in the form of personality of a suicide bomber who largely presents at the place of terrorist act. As for probability associated with prevalence of the crime instrument, it is typical for cases with sufficient financing of terrorist activities for transparency of states' borders, surrounding this area. Besides, a combination of these factors can generate specific types of algorithms for terrorist acts preparing, which are characterized by an explosion from an absolute deficit in choosing of suicide bomber weapon to an absolute adequacy of such funds. In these conditions, the counterterrorism activity of security organizations of one or another country is of particular importance.

From the point of view of criminalistic angle, these conclusions are important as the conditions for identifying the situation which arising at the time of terrorist act commission, which determines the set of actions typical for each of these variants on the part of criminals, formation of material and ideal tracks and so on.

References

1 Белкин Р.С. Курс криминалистики: в 3-х т. Т. 3 / Р.С. Белкин. — М.: Юристъ, 1997. — 480 с.

2 Волынский А.Ф. Криминалистика / А.Ф. Волынский, В.П. Лавров. — М.: Юнити-Дана, 2008. — 397 с.

3 Белкин Р.С. Криминалистика: проблемы сегодняшнего дня. Злободневные вопросы российской криминалистики / Р.С. Белкин. — М.: Инфра-М-НОРМА, 2001. — 240 с.

4 Закон Республики Казахстан «О противодействии терроризму» от 13.07.99 года № 416 (с изм. и доп. от 08.04.2010 года №266-IV) [Электронный ресурс]. — Режим доступа: http://online.zakon.kz/Document/?doc_id=1013957.

5 По материалам практики КУИС Республики Казахстан по Карагандинской области.

6 Словарь юридических терминов. — М.: Изд-во «Библиотека словарей «Инфра-М», 2008. — 789 с.

7 Кубеев Е.К. Терроризм и экстремизм: правовые, криминалистические и психологические аспекты: монография / Е.К. Кубеев, Б.Г. Ганчевски, Р.М. Жамиева, Л.К. Аренова, А.С. Нурадинов, А. Божкараулы. — Караганда: Изд-во КарГУ, 2016. — 210 с.

Л.К. Әренова, Е.А. Нәбиева

Терроризм актілерін криминалистік сипаттау және оның тергеудегі маңызы

Мақала қылмыстың криминалистикалық сипаттамаларының мазмұнын анықтауға, сондай-ақ әр жағдайда жеке-дара сот-сараптамалық, маңызды, дәлелді және бағдарланған ақпаратты анықтауға арналған, бұл олардың сапалы ашылуына мүмкіндік туғызды. Авторлар терроризм актілерін криминалистикалық сипаттау кең ауқымда қарастырылып жатқан әлеуметтік қауіпті актілердің ерекшелігін және белгілі бір бағдарлама бойынша тергеуді қалыптастырудың негізі ретінде жеке модельдік тергеу нұсқаларын алға жылжыту мақсатында оның элементтері арасындағы табиғи, өзара байланысты анықтау үшін неғұрлым нақты қарауды көздейді. Әртүрлі қоғамдағы және мемлекеттердегі саяси, экономикалық, құқықтық және әлеуметтік салаларда түрлендіру орын алған геосаяси кеңістікті жаңарту, сондай-ақ жасөспірімдер мен жастар арасында жағымсыз әлеуметтік аспектілерін анықтау қажет. Әлемнің жағымсыз бағыттағы түрленуі ретінде радикалды діни экстремистік және лаңкестік идеяларды тарату, сондай-ақ өз-өзіне қолжұмсауға немесе басқа да деструктивті сипаттағы әрекеттерді үгіттеуге бағытталған виртуалды экстремистік топтар мен қауымдастықтардың пайда болуы қазіргі қазақ жастары үшін тікелей қауіп тудыруда. Қылмыстық істерді тергеу кезінде тану үдерісі үнемі пайда болған міндеттерге дәйекті жетудің алгоритмі ретінде ұсынылуы мүмкін, оны іріктеу оның ерекшеліктері мен мазмұны анықталған белгілі бір сатылардағы тергеуді саралау негізінде жатыр.

Кілт сөздер: сот-сараптамалық сипаттамалары, терроризм актілері, терроризм актілерін ашу және тергеу, қылмыстың сот-сараптамалық сипаттамаларының элементтері, терроризм актілерін жасау ерекшеліктері, жеке үлгідегі тергеу әрекеттері.

Л.К. Аренова, Е.А. Набиева

Криминалистическая характеристика актов терроризма и ее значение в расследовании

Статья посвящена определению содержания криминалистической характеристики преступлений, а также выявлению криминалистически значимой, доказательственной и ориентирующей информации в каждом отдельном случае, позволяющей организовать их качественное раскрытие. Авторы указывают, что криминалистическая характеристика актов терроризма призвана отражать в широком понимании особенности совершения рассматриваемых общественно опасных деяний и более конкретно — определять закономерные взаимообусловленные связи между ее элементами, с целью выдвижения частных типовых следственных версий как основы формирования расследования по определенной программе. Акт терроризма необходимо рассматривать с позиций доминирующих ее элементов: личность преступника в составе криминалистической характеристики акта терроризма, совершенного путем самоподрыва (террорист-смертник); взаимосвязь способа расследуемого преступления с обстановкой, при которой совершается общественно опасное деяние, орудия преступления, а также особенностей выявления и раскрытия в экстремальных условиях, которые имеют место быть при совершении преступлений террористической или экстремистской направленности. Процесс познания в ходе расследования по уголовным делам можно представить как алгоритм последовательного достижения постоянно формирующихся задач, выделение которых лежит в основе дифференциации расследования на определенные этапы, где вычленяются его особенности и содержание.

Ключевые слова: криминалистическая характеристика, акты терроризма, раскрытие и расследование актов терроризма, элементы криминалистической характеристики преступлений, особенности совершения актов терроризма, частные типовые следственные действия.

References

1 Belkin, R.S. (1997). *Kurs kriminalistiki [Course of criminalistics]*. (Vol. 1-3, Vol. 3). Moscow: Yurist [in Russian].

2 Volynskiy, A.F., & Lavrov V.P. (2008). *Kriminalistika [Criminalistics]*. Moscow: Uniti-Dana [in Russian].

3 Belkin, R.S. (2001). Kriminalistika: problemy sehodniashneho dnia. Zlobodnevnye voprosy rossiiskoi kriminalistiki [Criminalistics: current problems. Hot issues of Russian criminalistics]. Moscow: Infra-M-NORMA [in Russian].

4 Zakon Respubliki Kazakhstan «O protivodeistvii terrorizmu» ot 13.07.99 hoda № 416 [Law on counterterrorism policy of RK as of 13.07.99 with No. 416]. *online.zakon.kz.* Retrieved from http://online.zakon.kz/Document/?doc_id=1013957 [in Russian].

5 Po materialam praktiki KUIS Respubliki Kazakhstan po Karahandinskoi oblasti [According to materials of the Committee of Penal System of RK in the Karaganda region] [in Russian].

6 Slovar yuridicheskikh terminov (2008) [Dictionary of legal terms]. Moscow: Izdatelstvo «Biblioteka slovarei «Infra-M» [in Russian].

7 Kubeyev,Ye.K., Ganchevsky, B.G, Zhamieva, R.M., Arenova, L.K, Nuradinov, A.S., & Bozhkarauly, A. (2016). *Terrorizm i ekstremizm: pravovye, kriminalisticheskie i psikholohicheskie aspekty [Terrorism and extremism: legal, forensic and psychological aspects]*. Karaganda: Izdatelstvo KarHU [in Russian].

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V.E. Sukhoterin[1], A.A. Kim[2]

[1]Ye.A. Buketov Karaganda State University, Kazakhstan;
[2]The main transport prosecutor's office of the Prosecutor General's Office of the Republic of Kazakhstan, Kazakhstan
(E-mail: v_suhoterin&mail.ru)

Theoretical questions about the concept of the object of prosecutor's supervision

Based on the analysis of modern educational literature on prosecutors' supervision, the authors come to the conclusion that there is no unequivocal opinion on the question of some of the fundamental categories of the science of prosecutorial supervision. Among such categories it is possible to name concepts of object and a subject of public prosecutor's supervision. Some authors (O.S. Akhetova, M.H. Geldibaev, B.V. Korobeinikov, A.A. Ogorodnikov, M.P. Polyakov, A.V. Fedulov, V.B. Yastrebov) under the object of public prosecutor's supervision understand federal ministries, state committees, services and other federal executive bodies; representative (legislative) and executive bodies of the subjects of the Russian Federation; bodies of local self-government; military administration bodies; control bodies; officials of the above ministries, state committees, services and other bodies; government bodies and heads of commercial and non-commercial organizations. Others (A.P. Stukanov) argue that the subject of prosecutor's supervision is not the totality of these bodies and organizations, but the legality of their activities. Such disunity in the understanding of these important categories of the theory of prosecutorial oversight necessitated the presented research, which highlights different views on the disputed issues under consideration. The approaches to minimizing the contradictions on this problem have been determined.

Keywords: state activity, prosecutor's supervision, object of prosecutor's supervision, subject of prosecutor's supervision, subject of legal relations, supervisory bodies, subject of public prosecutor's supervision.

The highest supervision of prosecutor's office over exact and uniform application of law has a universal character in comparison with other state control bodies and civil society institutions. To improve prosecutorial supervision and increase its effectiveness it is necessary to develop its scientific basics in details. The fundamental problems of the theory of prosecutorial supervision were paid close attention by scholars of the Soviet period and by many authors in the post-Soviet period. However, authors have not come to a unanimous or consensus view regarding the most important categories of science of prosecutorial supervision. These «white» spots include the concept of the object and the scope of prosecutorial supervision.

One of the most notable monographs, in which a thorough analysis of various points of view on the scope and object of prosecutorial supervision was carried out for the first time, it is necessary to mention the work of V.V. Gavrilov, in the foreword to which the author states that «not all of the most important theoretical problems of this discipline are developed by science ... Among these gaps, it is possible to include to this day with full justification, the questions about the scope, object, function and the limits of the competence of prosecutor's supervision» [1; 4]. After publication of this work, quite a long time passed, during which one could hope for a solution to this problem. But many years later we again have to deal with different approaches in covering these concepts, which served as the basis for A.P. Stukanov for reiterating that «the different meaning put by researchers in such fundamental concepts of prosecutor's supervision as an object and scope often leads to contradictory and sometimes opposite conclusions, which is clearly not good not only for science but for practice» [2; 44].

Analysis of modern educational literature on prosecutor's supervision allows us to conclude that so far the approach of different authors to questions about the object and scope of prosecutor's supervision is ambiguous. To confirm this conclusion, for purposes of illustration, it is necessary to provide sufficiently voluminous extracts from educational and monographic sources containing various opinions about the objects of prosecutor's supervision.

In the opinion of B.V. Korobeynikov «the object of prosecutor's supervision should be understood as enterprises, institutions, organizations and other bodies, which are the subject to prosecutorial inspections on the implementation of laws ... Participants of prosecutorial-supervisory relations should be considered as the subject of prosecutors' supervision... One object of prosecutor's supervision may contain several objects and subjects of supervision. Thus, in ... the federal ministry can be the subject to the inspection on the implementation of laws in the accounting service, in control and other units (objects of supervision) and the legality of acts adopted by officials (subjects of supervision)» [3; 15].

Other authors, sharing this position, state: «Prosecutor's supervision branches are certain areas of prosecutor's supervision that have their scope of supervision, established supervisory objects, specific powers of the prosecutor in supervising» [4; 53, 54]. The above definition also allows to assume the presence of a multiplicity of objects of supervision within the framework of one branch, but that these authors understand under the object of supervision - we can learn from the following narrative of M.Kh. Geldibayev and A.A. Ogorodnikov: «The law imposes on the prosecutor's office supervision over the implementation of laws by a strictly defined circle of bodies and officials.

In accordance with the law, this circle includes federal ministries, state committees, services and other federal bodies of executive power; representative (legislative) and executive bodies of the subjects of the Russian Federation; bodies of local self-government; military administration bodies; bodies of control; officials of the above-mentioned ministries, state committees, services and other bodies; government bodies and heads of commercial and non-commercial organizations.

This list is exhaustive and not expandable.

Public and political organizations and movements are excluded from the system **of objects** (highlighted by us - S.V.) of public prosecutor's supervision, because in the conditions of society democratization, strengthening and development of relations, the other means of control must be applied to above mentioned public and political structures» [4; 64].

Similarly, the scope of public prosecutor's supervision is defined by I.V. Kushnir, according to which «the objects of prosecutor's supervision over the observance of human and citizen's rights and freedoms are defined in the Law on the Prosecutor's Office: federal ministries, state committees, services and other federal bodies of executive power; representative (legislative) and executive bodies of the subjects of the Russian Federation; bodies of local self-government; military administration bodies; bodies of control; officials of the above-mentioned ministries, state committees, services and other bodies; government bodies and heads of commercial and non-commercial organizations» [5].

It is not difficult to see that here the object of public prosecutor's supervision is also understood as government bodies and heads of commercial and non-commercial organizations. However, the exclusion of public and political organizations from the circle of «objects» of prosecutor's supervision causes suspicion, since in their statements and actions they can be in conflict with the current legislation (holding unauthorized meetings, processions, calls for committing offenses etc.).

Within the framework of this idea, M.P. Polyakov and A.V. Fedulov discuss: «The law on the prosecutor's office defines its objects, scope and powers of the prosecutor in relation to each of the prosecutor's supervision branches» [6; 17]. And further: «In accordance with the Law on the Prosecutor's Office, the objects of prosecutor's supervision for the observance and enforcement of laws include: 1) federal ministries, state committees, services and other federal executive bodies; 2) military authorities, their officials; 3) control bodies, their officials; 4) representative (legislative) and executive bodies of state power of the subjects of the Russian Federation; 5) local government bodies; 6) government bodies and heads of commercial and non-commercial organizations» [6; 81, 82].

The statement of the aforementioned authors that «among the **objects** (highlighted by us - S.V.) of prosecutor's supervision there are no citizens of the Russian Federation» [6; 83] causes concern. In contrast to this opinion, other authors, on the contrary, note: «From the content of Article 26 of the Law on the Prosecutor's Office, it follows that citizens are not included in the number of **subjects** (highlighted by us - S.V.)» [7; 172]. The question arises: if citizens, as bearers of duties fixed by law, grossly and clearly violated the requirements of the law in the form of a crime, do they fall into the sphere of prosecutor's supervision? The answer is obvious and it is certainly positive, because having established the fact of committing a crime by a citizen, the prosecutor's office has the right to investigate this crime in full. However, not including citizens in the number of objects (or subjects?) of the prosecutor's supervision, we are unable to logically substantiate the legality of investigating crimes by the prosecutor's office.

It should not be forgotten that the implementation of the norms of law can be carried out in various forms: permission, use, execution, application. Citizens by themselves can not and are not objects of prosecutor's supervision, because law-abiding citizens do not represent any interest for the prosecutor, except cases of infringement of their rights and legitimate interests on the part of officials of state bodies or other citizens (for example, instituting criminal proceedings for a crime against the rights and freedoms of man and citizen). Secondly, citizens do not carry out law enforcement activities, because it is entrusted to state bodies, their officials and persons exercising governing functions in commercial and non-commercial organizations. Thirdly, citizens who have crossed the line of prohibiting or prescribing norms of the law are also not subject

to prosecutor's supervision, since the prosecutor assesses only the legality of the citizen's actions in this particular case, and not all factors that together determine the legal status of the citizen as such. Fourthly, even if we agree with this opinion, with such an interpretation of the object, foreigners and stateless persons fall out of the field of prosecutor's supervision, who also must comply with the laws of the host state. Finally, if a citizen is viewed as an object of prosecutor's supervision, then inevitably the question arises: if a citizen as a bearer of duties established by law has grossly and clearly violated the requirements of the law in the form of a crime, do they fall into the sphere of prosecutor's supervision? The answer is obvious and it is certainly positive, because having established the fact of committing a crime by a citizen, the prosecutor's office has the right to investigate this crime in full. However, not including citizens in the number of objects (or subjects?) of the prosecutor's supervision, we are unable to logically prove the legality of investigating crimes by the prosecutor's office. Consequently, the subject of the offense, and the subject of prosecutor's supervision is the citizen himself, without becoming an object of supervision.

Among the statements that equated institutions and organizations, as well as citizens, to the objects of prosecutor's supervision, is the opinion of D.I. Aminov: «The limits of prosecutor's supervision over the execution of laws are determined by the competence of the prosecutor's office, **objects** (highlighted by us – S.V.) of prosecutor's supervision, the presence or lack of information about violations of the law.

The prosecutor's office does not supervise over the execution of laws by both chambers of the Federal Assembly of the Russian Federation, the judiciary, the Government of the Russian Federation and the President of the Russian Federation, this is not their competence ... The number of **objects** (highlighted by us – S.V.) of prosecutor's supervision over the execution of laws includes citizens of the Russian Federation and other individuals» [8; 102].

Disclosing the priorities for the implementation of the prosecutor's supervision over the observance of human and citizen's rights and freedoms, some authors note that «as the situation changes, priorities may change», ... but in any case there should be «the supervision over the observance of human and civil rights and freedoms at supervised facilities, including commercial and non-commercial organizations...» [7; 174]. In other words, in this case, the objects of prosecutorial supervision are the bodies and organizations enshrined in Article 21 and 26 of the Federal Law «On the Prosecutor's Office of the Russian Federation».

The above mentioned statements on the object of prosecutor's supervision are shared by V.B. Yastrebov, which on the pages of the textbook repeatedly, directly or indirectly, includes institutions and organizations and their officials to the objects of prosecutor's supervision. He notes that the Federal Law of February 10, 1999 «introduced an absolutely necessary, eliminating a serious obstacle in the work of prosecutors that had previously occurred in the article determining the scope of supervision over the execution of laws, according to which the number of **objects** (highlighted by us - S.V.) of prosecutor's supervision included governing bodies and management of commercial and non-commercial organizations» [9; 63].

Analyzing the peculiarities of the place and activity of the military prosecutor's office, the author further emphasizes: «The military prosecutor's offices are an integral part of the single prosecutorial system of the Russian Federation. They supervise over the legality in the Armed Forces of the Russian Federation, other troops and military formations created in accordance with federal laws. The military formations that arise on a different basis are known to be illegal and, naturally, they can not be the **object** of supervision (highlighted by us - S.V.) to the military prosecutor's office» [10; 130]. There is a doubtful conclusion: if the prosecutor himself discovers or prosecutor receives information about the organization and activities of illegal armed groups, prosecutor should not react in any way to such a violation of the law, because such formations are not object of supervision.

Commenting Article 21 of the Federal Law «On the Prosecutor's Office of the Russian Federation», which fixes the scope of supervision over the implementation of laws, V.B. Yastrebov points out that the prosecutor's office supervises over the execution of laws by a set of bodies, organizations and officials strictly defined by law. «As can be seen from the list presented in Article 21 of the Law, it includes federal branches of executive bodies (ministries, services, agencies, other federal executive bodies), legislative and executive bodies of state power of the subjects of the Russian Federation, local government bodies, military governing bodies, control bodies, their officials, government bodies and heads of commercial and non-commercial organizations that carry out activities in various spheres of society. It can be changed or supplemented only by the adoption of relevant laws. A substantiated and extremely necessary change in the list of **objects** (highlighted by us – S.V.) of prosecutor's supervision was provided by the Federal Law of February 10, 1999, which eliminated the mistake made in the edition of the Law «On the Prosecutor's Office of the Russian Federation» of 1995, which was expressed in non-inclusion of government bodies and heads of

commercial and non-commercial organizations in Article 21» [9; 142]. In another place, returning to the same issue, the author again emphasizes: «The circle of objects supervised by the prosecutor with full completeness is established by the law» On the Prosecutor's Office of the Russian Federation «and prosecutors do not have the right to go beyond this circle» [9; 148].

The author's idea that «the main criterion for assessing the activity of supervised objects by the prosecutor's office is the legitimacy of their actions and acts is very noteworthy… The prosecutor's field of view is only that part of the activity of the objects of supervision that is regulated by law is connected with the execution of laws» [9; 148].

Such a point of view, although with some interpretation, is expressed by Ahetova O.S., in the opinion of which «the object of prosecutor's supervision - enterprises, institutions, organizations and other legal entities in which prosecutor's inspection of the execution of laws are conducted» [10]. At the same time, it can be seen from the above provision that the author does not include individuals either on the list of objects of the prosecutor's supervision or among the subjects of supervision.

The authors of all the given points of view avoid a very important point: if enterprises, institutions, organizations and citizens are objects of prosecutor's supervision, then who will be the subject in this case?

Another position on the issue of the object of prosecutorial supervision is represented by A.P. Stukanov in the study of the relationship between the concepts of the object and the scope of prosecutor's supervision. His position, in our opinion, is more successful in comparison with the above statements, although it is quite controversial. He writes: «In our opinion, the object of prosecutor's supervision over the execution of laws by the administrative jurisdictions bodies is the legality in the activities of these bodies. The concept of the scope of supervision is close in its meaning to the concept of the object. It is advisable to use it to specify the object of prosecutor's supervision when it is necessary to concentrate the attention of the prosecutor on the actions and acts of the supervised bodies, the legality of which should be inspected. Thus, the scope of prosecutor's supervision over the execution of laws by the administrative jurisdiction bodies is observance of human and citizen rights and freedoms, the procedure for initiating proceedings on administrative violation established by law, administrative investigation and consideration of cases of this category, as well as the legality and validity of the resolutions» [2; 45].

It is not difficult to see that the approach of A.P. Stukanov radically differs from the others, if only because there is no attempt to list enterprises, institutions, organizations and their officials. But here, too, the author's position, in our opinion, needs to be clarified, since in determining the object of prosecutor's supervision it is necessary to proceed from the concept of an object universally accepted in philosophy. «An object is something that exists in reality (that is, independently of consciousness): a scope, phenomenon or process, to which the subject-practical and cognitive activity of the subject (observer) is directed ... The object puts certain boundaries and limits to the subject's activity» [11]. From the point of view of the modern Russian language, according to the dictionary of the Russian language of S.I. Ozhegov, the word «object» is used in the following meanings: 1) the phenomenon, the scope to which any activity is directed and 2) the enterprise, the institution, and also all that is the place of some activity [12; 377]. Probably, the authors, implying enterprises, institutions and organizations under the object of prosecutor's supervision, are based on the concept of the object in its second meaning.

Returning to the question about the object of prosecutorial supervision, it is necessary to remember that the prosecutorial supervision is a kind of cognitive activity, which consists of different levels of cognition. The first level of cognition is the contemplation, observation and it does not entail a detailed study and transformation, determination of the form, structure, content, relationships, etc. In this regard, there is unified object of prosecutor's supervision. This is a consequence from the formulation, which is enshrined in Art. 83 of the Constitution of the Republic of Kazakhstan, which establishes that the prosecutor's office shall exercise the highest supervision over exact and uniform application of law, the decrees of the President of the Republic of Kazakhstan and other regulatory legal acts on the territory of the republic. Summing up what has been said, the object of prosecutorial supervision is an exact and uniform application of law, the decrees of the President of the Republic of Kazakhstan and other regulatory legal acts.

The object of prosecutorial supervision is concretized in various branches of supervision, depending on the content of legal relations, it forms a generic object of the branch of prosecutorial supervision. Generic object of supervision answers two questions: first, the prosecutor's office oversees the exact and uniform application of *which* law, and, secondly, the prosecutor's office oversees the exact and uniform application of law by *which* subjects of the legal relationship. For example, in the branch of prosecutorial supervision over

the legality of investigation and inquiry, the unified object of the supervision does not change – it is the exact and uniform application of law, but a generic object allows to answer these questions.

Thus, in order to decrease the contradictions on the object of the prosecutor's supervision and to find an acceptable definition, we suggest that we understand under the object of public prosecutor's supervision the exact and uniform execution (by the Constitution of the Republic of Kazakhstan - application) of laws by state and non-state bodies and organizations, officials and citizens as subjects of legal relations and the bearers of rights and obligations. The scope of prosecutor's supervision is the legality of actions and acts of subjects of legal relations.

References

1 Гаврилов В.В. Сущность прокурорского надзора в СССР / В.В. Гаврилов; под ред. проф. В.И. Новоселова. — Саратов: Изд-во Саратовского ун-та, 1984. — 152 с.

2 Стуканов А.П. Прокурорский надзор за исполнением законов органами административной юрисдикции Российской Федерации / А.П. Стуканов. — СПб.: Юридический центр «Пресс», 2000. — 225 с.

3 Прокурорский надзор: учебник / Ю.Е. Винокуров и др.; под общ. ред. Ю.Е. Винокурова. — 7-е изд., перераб. и доп. — М.: Юрайт-Издат, 2007. — 459 с.

4 Гельдибаев М.Х. Прокурорский надзор / М.Х. Гельдибаев, А.А. Огородников. — СПб.: Питер, 2002. — 240 с.

5 Кушнир И.В. Прокурорский надзор [Электронный ресурс] / И.В. Кушнир. — Режим доступа: http://be5.biz/pravo/paos/index.htm.

6 Поляков М.П. Прокурорский надзор: Краткий курс лекций / М.П. Поляков, А.В. Федулов. — М.: Юрайт-Издат, 2004. — 204 с.

7 Бессарабов В.Г. Защита российской прокуратурой прав и свобод человека и гражданина / В.Г. Бессарабов, К.А. Кашаев. — М.: Издат. дом «Городец», 2007. — 463 с.

8 Адельханян Р.А. Прокурорский надзор: учеб. пособие для студентов вузов, обучающихся по специальности «Юриспруденция» / Р.А. Адельханян, Д.И. Аминов, В.И. Гладких; под ред. Р.А. Адельханяна. — М.: ЮНИТИ-ДАНА, 2011. — 215 с.

9 Ястребов В.Б. Учебник прокурорского надзора. — 2-е изд., перераб. и доп. — М.: Издат. дом «Городец», 2005. — 395 с.

10 Ахетова О.С. Прокуратура и прокурорский надзор [Электронный ресурс] / О.С. Ахетова. — Режим доступа: http://www.litres.ru/olesya-ahetova/.

11 Новая философская энциклопедия. — 2-е изд., испр. и доп. — М.: Мысль, 2010. — Т. 1-4; Философский словарь / под ред. И.Т. Фролова. — 4-е изд. — М.: Политиздат, 1981.

12 Ожегов С.И. Словарь русского языка: Ок. 57 000 слов / С.И. Ожегов; под ред. Н.Ю. Шведовой. — 16-е изд., испр. — М.: Рус. яз., 1984. — 797 с.

В.Е. Сухотерин, А.А. Ким

Прокурорлық қадағалаудың нысанының ұғымы жайлы теориялық сұрақтар

Прокурорлық қадағалау туралы заманауи оқу әдебиеттерін талдау негізінде авторлар прокурорлық қадағалау ғылымының кейбір іргелі ұғымдарына қатысты мәселелері бойынша біржақты пікір жоқ екендігі жайлы қорытынды жасады. Осындай ұғымдардың арасында прокурорлық қадағалаудың нысаны мен пәні жайлы ұғымдарды айтуға болады. Бірқатар авторлар (О.С. Ахетова, М.Х. Гельдибаев, Б.В. Коробейников, А.А. Огородников, М.П. Поляков, А.В. Федулов, В.Б. Ястребов) прокурорлық қадағалау нысаны ретінде федералды министрліктерді, мемлекеттік комитеттерді және атқарушы биліктің өзге де қызметтері мен органдарын түсінеді; Ресей Федерациясы субъектілерінің өкілді (заңшығарушылық) және атқарушы органдарын; жергілікті өзін-өзі басқару органдарын; әскери-басқару органдарын; бақылау органдарын; жоғарыда аталған министрліктердің, мемлекеттік комитеттердің, қызметтердің және басқа да органдардың лауазымды тұлғаларын; мемлекеттік органдар мен коммерциялық және коммерциялық емес ұйымдардың басшыларын түсінеді. Басқа авторлар (А.П. Стуканов және тағы басқалар) прокурорлық қадағалау пәні деп бұл органдардың және ұйымдардың жиынтығы емес, олардың қызметінің заңдылығы деп түсінуді ұсынады. Прокурорлық қадағалау теориясының осы маңызды ұғымдарын түсінудегі мұндай келіспеушілік, қарастырылып отырған даулы мәселелер бойынша әртүрлі көзқарастарды көрсететін зерттеулерді қажет етеді. Осы мәселеге қатысты қайшылықтарды барынша азайтудың көзқарастары анықталды.

Кілт сөздер: мемлекеттік қызмет, прокурорлық қадағалау, прокурорлық қадағалау нысаны, прокурорлық қадағалау пәні, құқықтық қатынастардың субъектісі, қадағалау органдары, прокурорлық қадағалау субъектісі.

В.Е. Сухотерин, А.А. Ким

Теоретические вопросы о понятии объекта прокурорского надзора

На основе анализа современной учебной литературы по прокурорскому надзору авторы приходят к выводу о том, что по вопросу о некоторых фундаментальных категориях науки прокурорского надзора нет однозначного мнения. Среди таких категорий можно назвать понятия объекта и предмета прокурорского надзора. Одни авторы (О.С. Ахетова, М.Х. Гельдибаев, Б.В. Коробейников, А.А. Огородников, М.П. Поляков, А.В. Федулов, В.Б. Ястребов) под объектом прокурорского надзора понимают федеральные министерства, государственные комитеты, службы и иные федеральные органы исполнительной власти; представительные (законодательные) и исполнительные органы субъектов Российской Федерации; органы местного самоуправления; органы военного управления; органы контроля; должностные лица перечисленных выше министерств, государственных комитетов, служб и иных органов; органы управления и руководители коммерческих и некоммерческих организаций. Другие (А.П. Стуканов) утверждают, что предметом прокурорского надзора является не совокупность указанных органов и организаций, а законность их деятельности. Такая разобщенность в понимании данных важнейших категорий теории прокурорского надзора обусловила необходимость представленного исследования, в котором освещаются различные взгляды на рассматриваемые спорные вопросы. Определены подходы к минимизации противоречий по данной проблеме.

Ключевые слова: государственная деятельность, прокурорский надзор, объект прокурорского надзора, предмет прокурорского надзора, субъект правоотношений, надзорные органы, субъект прокурорского надзора.

References

1 Gavrilov, V.V. (1984). *Sushchnost prokurorskoho nadzora v SSSR [The essence of prosecutorial supervision in the USSR]*. V.I. Novoselova (Ed.). Saratov: Izdatelstvo Saratovskoho universiteta [in Russian].

2 Stukanov, A.P. (2000). *Prokurorskii nadzor za ispolneniem zakonov orhanami administrativnoi yurisdiktsii Rossiiskoi Federatsii [Prosecutor's supervision of the execution of laws by the administrative jurisdiction of the Russian Federation]*. Saint Petersburg: Yuridicheskii tsentr «Press» [in Russian].

3 Vinokurov, Ju.E., & et al. (2007). *Prokurorskii nadzor [Prosecutor's supervision]*. Ju.E. Vinokurov (Ed.). (7d ed.). Moscow: Yurait-Izdat [in Russian].

4 Geldibayev, M.Kh., & Ogorodnikov, A.A. (2002). *Prokurorskii nadzor [Prosecutor supervision]*. Saint Petersburg: Piter [in Russian].

5 Kushnir, I.V. Prokurorskii nadzor [Prosecutor supervision]. *be5.biz.* Retrieved from http://be5.biz/pravo/paos/index.htm [in Russian].

6 Polyakov, M.P., & Fedulov, A.V. (2004). *Prokurorskii nadzor [Prosecutor's supervision]*. Moscow: Yurait-Izdat [in Russian].

7 Bessarabov, V.G., & Kashaev, K.A. (2007). *Zashchita rossiiskoi prokuraturoi prav i svobod cheloveka i hrazhdanina [Protection of human rights and freedoms by the Russian Prosecutor's Office]*. Moscow: Izdatelskii Dom «Horodets» [in Russian].

8 Adel'hanjan, R.A., Aminov, D.I., & Gladkikh, V.I. (2011). *Prokurorskii nadzor [Prosecutor's supervision]*. R.A. Adel'hanjan (Eds.). Moscow: JuNITI-DANA [in Russian].

9 Jastrebov, V.B. (2005). *Uchebnik prokurorskoho nadzora [The textbook of public prosecutor's supervision]*. (2d ed.). Moscow: Izdatelskii dom «Horodets» [in Russian].

10 Ahetova, O.S. Prokuratura i prokurorskii nadzor [Prosecutor's office and prosecutor's supervision]. *litres.ru.* Retrieved from http://www.litres.ru/olesya-ahetova/ prokuratura-i-prokurorskiy-nadzor/chitat-onlayn/ [in Russian].

11 Novaia filosofskaia entsiklopediia [New philosophical encyclopedia]. (2010). (2d ed.). Moscow: Mysl [in Russian].

12 Ozhegov, S.I. (1984). *Slovar russkoho yazyka [Dictionary of Russian]*. N.Ju. Shvedovoj (Ed.). (16d ed.). Moscow: Russkii yazyk [in Russian].

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Хорами Ния Анвар Бахман

Бакинский государственный университет, Азербайджан
(E-mail: hlus.home@mail.ru)

Формирование понятий относительно правового статуса кредитных организаций как участников гражданско-правовых отношений в Исламской Республике Иран

В статье анализируется правовой статус кредитных организаций в гражданско-правовых отношениях в Исламской Республике Иран. Указываются особенности универсальных предприятий (ширкат), кредитных организаций в Исламе. Опора на исламские принципы заставила иранские банки выбрать особый путь развития. В первую очередь строгому запрету подверглось использование процентной ставки в традиционном ее понимании. Вместо этого банки были вынуждены принимать участие в проектах своих заемщиков, деля с ними не только прибыль, но и риски. В результате финансовые институты Ирана в значительной степени потеряли заинтересованность в развитии сферы кредитования и оказались незащищенными перед системными экономическими колебаниями. Государственный контроль, практическое отсутствие конкуренции и закрытость для внешнего мира привели к стагнации банковской системы Ирана и ослаблению ее роли в развитии экономики. Автор приходит к выводу, что развитие экономики Исламской Республики Иран возможно в случае создания условий для приватизации в экономической и банковской сфере и исполнения ст. 44 Конституции по приватизации. Автором рассмотрены отрицательные и положительные стороны проведенной в Иране реформы банковской системы по исламизации банковского дела. В заключение автором сформулированы характерные черты модели исламских банков в Исламской Республике Иран в современный период.

Ключевые слова: беспроцентный банкинг, Иран, частные банки, Конституция, реформы, государственные предприятия, исламское право.

Ислам наряду со своей специфической философией имеет также особую экономическую систему и доктрину. Эта доктрина разъясняет основные цели и намерения, выдвинутые Исламом в экономической сфере, которая в основном состоит в улучшении материального благосостояния человека [1; 25]. В исламской экономической и финансовой системах представлены особенности универсальных предприятий (ширкат), способных внести свой вклад в достижение этих целей [2]. Создание универсальных предприятий, в том числе кредитных организаций, в Исламе не зависит от определенной позиции и условий, имеет возможность реализоваться в определенной форме при любых условиях. Являясь одной из форм проявления универсальных предприятий, исламские банки принимают активное участие в достижении целей и задач, поставленных исламской экономикой.

После исламской революции в Иране в 1979 г. параллельно со структурным реформированием банковской системы были предприняты шаги по исламизации банковского дела. Статус кредитных организаций стал определяться как с правовой, так и с религиозной точки зрения, что привело к путанице.

Является ли банк в финансовой системе Исламской Республики Иран государственной организацией, подлежащей управлению государством? Или же это негосударственная организация, которая может быть создана как государством, так и частным лицом? Исследование банкинга в религиозном

(«фикх» (исламское юридическое право) и юридическом аспектах для определения его правового статуса как государственной или негосударственной организации в Исламской Республике Иран основывается на понятии особенностей Закона «О беспроцентной банковской деятельности», Конституции Исламской Республики Иран и других законов страны [3–6; 38]. Данная нормативно-правовая база предопределяет существенную специфику банковской системы Ирана и ее отличие от общепринятых стандартов.

Что такое банк в финансовой системе Исламской Республики Иран?

В Законе «О беспроцентной банковской деятельности» не дано особого определения банка. Но, обратив внимание на задачи банковской системы и догмы банкинга, данные в этом документе, можно сформировать представление о специфике банков в Исламской Республике Иран.

Согласно статье 3 Закона «О беспроцентной банковской деятельности» для формирования источника банки могут принимать депозиты. Такие депозиты подразделяются на две общие категории:

1) беспроцентные депозиты, которые, в свою очередь, делятся на текущие и сберегательные;

2) срочные инвестиционные депозиты.

С этой точки зрения понятие «банк» подразумевает депозитные банки, т.е. финансовые организации, получающие депозиты от своих клиентов.

С другой стороны, поскольку в исламской экономической системе беспроцентные займы являются основным методом финансирования предпринимательской деятельности, согласно этому же закону банки обязаны отдавать часть своего источника заявителям в виде беспроцентного займа. Благодаря этой особенности они становятся своего рода организацией «безвозмездной помощи».

В Исламе человек во время своей жизни является лишь поверенным Аллаха по распоряжению материальными ресурсами. Он просто доверенное лицо и пользователь богатства на срок своей жизни. Это в полной мере распространяется и на банки. Согласно Закону «О беспроцентной банковской деятельности» в отношении срочных инвестиционных вложений банки в мусульманских договорах представляются как поверенные. Принятие полномочий банком связано с его претендованием на финансовые средства. Поэтому в срочных инвестиционных депозитах банк обладает не только депозитами, но и становится поверенным вкладчиков в рамках мусульманских договоров. Кроме того, согласно ст.ст. 7-17 указанного закона банк, финансируя коммерческие торговые операции, включается в категорию «операционные банки». Операционные банки участвуют в промышленных и коммерческих предприятиях.

Банк как негосударственная организация

Особенности банков, описанные в Законе «О беспроцентной банковской деятельности», выявляют некоторые противоречивые моменты. Банк, с одной стороны, является организацией, формирующейся слиянием различных универсальных организаций и понятий, а с другой — негосударственной организацией, т.е. его задачи могут не входить в сферу ответственности государства с точки зрения Ислама. Это такая организация, которая может быть создана физическим и юридическим лицом, единолично или в коллективной форме, как в государственном, так и в частном секторе. Но, анализируя Конституцию Ирана, мы приходим к другим выводам.

Банк в Конституции Исламской Республики Иран

Конституция Исламской Республики Иран как высший закон страны формируется из двух частей.

1. Законы, опирающиеся на Ислам. Такие законы не связаны с какой-либо политической позицией, имеют религиозную основу и представляют собой строгое и неукоснительное соблюдение правил и законов шариата. Примером этому могут служить разделы III, IV, V Конституции Исламской Республики Иран.

2. Законы, опирающиеся на своеобразную позицию Ирана на современном этапе. Например, в Конституции страны закреплена свобода печати, свобода собраний и демонстраций, но с условием того, что данные права будут использованы без нарушений норм Ислама. Эти законы создаются с учетом общественной, политической, экономической и культурной сфер и позиции Ирана на международной арене.

В соответствии со ст. 4 Конституции экономическая система Исламской Республики Иран подразделяется на 3 части — государственную, корпоративную и частную, где банкинг указывается в категории, принадлежащей государству. Несмотря на то, что по Закону «О беспроцентной банковской деятельности» и по критериям исламского законодательства банк может управляться и государственным, и корпоративным, и частным сектором, Конституция передает его во власть государственного сектора [4].

В связи с путаницей в определении правового статуса кредитных организаций частные банки поставлены в условия, не позволяющие им успешно конкурировать с госсектором в этой сфере. К главным особенностям следует отнести жесткий контроль за деятельностью банков со стороны государства, запрет на создание частных банков и на один из основополагающих принципов банковского кредитования — платность. Правительство, связанное Конституцией и законом о ведении банковских операций на основе исламских правил, не имеет возможности проводить эффективную финансовую политику.

Но стали появляться признаки, свидетельствующие о возможности реформирования финансовой системы страны в ближайшей перспективе. Если ситуация изменится и произойдут изменения в соответствующих материалах данного закона, появится возможность изменить закон на основании положений ст. 177 Конституции Исламской Республики Иран. К наиболее заметным шагам, предпринятым иранским руководством в банковской и финансовой сферах, следует отнести принятие III Программы социально-экономического и культурного развития Ирана. Основой нормативно-правовой базы осуществляемых изменений является Закон о третьем пятилетнем плане Исламской Республики Иран, которым предусмотрено ослабление монополии государства в банковской сфере. Из-за сильного сопротивления консерваторов, сохраняющих свое влияние во всех ветвях власти, реализация правительственных планов реформ продвигается медленно.

Негосударственные (частные) банки

В статье 98 Закона о III Программе социально-экономического и культурного развития Исламский консультативный совет разрешает частному сектору через физических и юридических лиц открывать банки в стране. С целью повышения конкуренции, экономичности и инвестиционных вложений на финансовом рынке, экономического развития страны и предотвращения ущерба и убытков для населения, с учетом ст. 44 Конституции, в стандартных рамках, в указанных ниже областях и среде физическим и юридическим лицам страны разрешается открывать частные банки. Статья 44 Конституции Исламской Республики Иран гласит: «Экономическая система Исламской Республики Иран основана на трех секторах — государственном, кооперативном и частном. При регулярном и правильном планировании Государственный сектор включает в себя всю крупную промышленность, основные отрасли промышленности, внешнюю торговлю, крупные горнорудные предприятия, банковское дело, страхование, обеспечение электроэнергией, плотины и крупные водопроводы, радио и телевидение, почту, телеграф и телефон, гражданскую авиацию, судоходство, дороги, в частности железные, и т.п. Все это в виде общественной собственности находится в ведении государства. Кооперативный сектор включает в себя кооперативные производственные и распределительные фирмы и учреждения, которые согласно исламским нормам создаются в городе и в деревне. Частный сектор охватывает ту часть земледелия, животноводства, промышленности, торговли и сферы услуг, которые дополняют экономическую деятельность государственного и кооперативного секторов.

В этих секторах экономики собственность, при условии непротиворечия другим статьям этой главы и законам ислама, а также способствования развитию экономики страны и ненанесения ущерба обществу, находится под покровительством закона Исламской Республики. Закон определяет правила, сферу и условия функционирования этих трех секторов».

То есть покровительство закона государственному, кооперативному и частному секторам зависит от четырех условий:

1) должен соответствовать другим статьям главы IV Конституции, гласящей об экономических и финансовых средствах;

2) не должен выходить за рамки ограничений, установленных исламскими законами;

3) должен содействовать экономическому развитию страны;

4) не должен наносить ущерба обществу [7].

При нынешней ситуации Исламский консультативный совет оценивает предотвращение открытия частных банков как преграду экономическому развитию страны и причинение ущерба обществу. Насколько это выгодно с экономической точки зрения — решать экономистам. Но с юридической точки зрения, анализируя ст. 44 Конституции Исламской Республики Иран, не так сложно понять, насколько деятельность государственных банков ограничена и насколько есть потребность в создании новой правовой базы для деятельности частных банков.

С одной стороны, Совет разрешает деятельность частных банков, но с другой — ст. 44 Конституции и Закон «О банковских операциях без риба (ростовщического процента)» никто не отменял. При нынешних условиях, когда частные банки должны иметь возможность действовать самостоя-

тельно, в соответствии со своими уставами и независимо от Центрального банка Исламской Республики Иран, развитие частного банкинга вызывает сомнения [8].

Возможности и вызовы

После устранения юридических преград, стоящих перед частными банками, и утверждения Закона о III Программе и в религиозных законах не осталось каких-либо преград для них. Таким образом, была создана возможность для деятельности частного сектора в сфере банкинга и занятия им важного места в развитии национальной экономики. Но, несмотря на это, все еще имеются некоторые вопросы.

В первую очередь, при нынешнем положении экономики страны и возникновении ряда трудностей в промышленной и сельскохозяйственной сферах, из-за направления большей части капитала в торговлю, частные банки, желающие увеличить свои доходы, помогут улучшению ситуации в стране или сделают ее еще более критической и будут преследовать свою выгоду.

Можно ли верить тому, что при таких недостатках, как повышение процентных ставок на национальном уровне по причине неправильного исполнения Закона «О беспроцентной банковской деятельности» государственными банками, частные банки будут исполнять этот закон успешнее государственных и не повысят процентные ставки?

Помогут ли исправлению трудной и запутанной ситуации проводимые в экономике такие локальные реформы, как создание частных банков или еще более ухудшат ситуацию? Не было бы лучше, прежде чем проводить реформы, составить полезный путеводитель для деятельности банков.

Список литературы

1 Абу Хамид аль-Газали / цит. по: Ислам: проблемы идеологии, права, политики и экономики: сб. ст. под ред. А.И. Ионовой. — М.: Наука, 1985. — 138 с.

2 Аль-Мардави, аль-Инсаф (Бейрут, 1400 г. х.), 5:423 [Электронный ресурс]. — Режим доступа: http://www.islam.ru/content/economica/30937.

3 Закон «О банковской деятельности на основе исламских принципов, запрещающих ростовщичество в любых формах» Исламской Республики Иран, 1983 г. (принят в 1984 г.) [Электронный ресурс]. — Режим доступа: http://www.dissercat.com/content/ekonomicheskie-mekhanizmy-obespecheniya-ustoichivogo-razvitiya-promyshlennosti-islamskoi-res.

4 Конституция Иранской Исламской Республики от 15 ноября 1979 года [Электронный ресурс]. — Режим доступа: http://www.cis-emo.net/sites/default/files/imagesimce/constitution_of_iran.pdf.

5 Закон «О национализации банков» Исламской Республики Иран, 1980 г. [Электронный ресурс]. — Режим доступа: http://www.investiran.com.ua/index.php/islamskie-finansy/bankovskaya-sistema-irana/53-iranskie-banki-osobennosti-sozdaniya-i-funktsionirovaniya.

6 Али-заде А.А. Фикх: Исламский энциклопедический словарь / А.А. Али-заде. — М.: Ансар, 2007. — 400 с.

7 Abbas Musəviyan. Faizsiz bankçılıq, nəzəriyyədən praktikaya. 2006 [Электронный ресурс]. — Режим доступа: http://banker.az/faizsiz-bankciliq-anlayisi/.

8 Hasan Shobhani. Concern and Perspective in Islamic Economic. — Tehran, 2001. — 237 p.

Хорами Ния Анвар Бахман

Иран Ислам Республикасында азаматтық-құқықтық қатынастардың қатысушысы ретінде несие ұйымдарының құқықтық мәртебесіне қатысты ұғымның қалыптасуы

Мақалада Иран Ислам Республикасындағы азаматтық құқықтық-қатыстарындағы несие ұйымдарының құқықтық мәртебесіне талдау жүргізілген. Сондай-ақ Исламдағы әмбебап кәсіпорындар (ширкат), несие ұйымдарының ерекшеліктері көрсетілді. Ислам қағидаларына негіздеу ирандық банктерді дамудың ерекше жолын таңдауға мәжбіүр етті. Бірінші кезекте дәстүрлі ұғымдағы пайыздық мөлшерлемелерді қолдануға қатаң тыйым салынды. Оның орнына банктер өз қарыз алушыларының жобаларына қатыса отырып, тек пайданы бөлісіп қана коймай, тәуекелге де бел буып қатысуға мәжбүр болды. Нәтижесінде, Иранның қаржылық институттары несиелендіру саласын дамыту мүддесін едәуір жоғалтты, соның нәтижесінде жүйелі түрде болып тұратын экономикалық тұрақсыздық жағдайларында қорғалусыз қалды. Мемлекеттік бақылаудың жүргізілуі, бәскелестіктің іс жүзінде болмауы және сыртқы әлемге жабық болуы Иран банк жүйесінің тоқырауына және экономиканы дамытуда оның рөлінің әлсіреуіне әкелді. Автор экономикалық және банктік салада

жекешелендіру үшін жағдай жасалғанда және жекешелендіру туралы Конституцияның 44-бабы орындалған жағдайда ғана Иран Ислам Республикасының экономикасының дамуы мүмкін болады деген қорытындыға келді. Автормен Иранда жүргізілген банк ісін исламдау бойынша банктік жүйені реформалаудың оң және теріс жақтары қарастырылған. Жұмыстың қорытындысында автормен Иран Ислам Республикасындағы қазіргі кезеңдегі ислам банктерінің үлгілерінің сипаттаушы белгілері айқындалған.

Кілт сөздер: пайызсыз банкинг, Иран, жеке банктер, конституция, реформа, мемлекеттік кәсіпорындар, ислам құқығы.

Khorami Nia Anvar Bahman

Formation of concepts about legal status of credit organizations as participants of civil legal relations in the Islamic Republic of Iran

The legal status of credit organizations in civil legal relations in the Islamic Republic of Iran is analyzed in the article. The peculiarities of universal companies (shirkat), credit organizations in Islam are also indicated. The reliance on Islamic principles forced the Iranian banks to choose a special path of development. First, the strict prohibition to use the interest rate in the traditional sense. Instead, banks were forced to take part in the projects of their borrowers, sharing with them not only the profits, but also the risks. As a result, Iran's financial institutions largely lost interest in developing the credit sector and were unprotected against systemic economic fluctuations. State control, practical lack of competition and closeness to the outside world led to the stagnation of the Iranian banking system and the weakening of its role in the development of the economy of the Islamic State of Iran. The development of the economy of the Islamic Republic of Iran is possible in the case of creating the necessary conditions for privatization in the economic and banking sphere and the implementation of Article 44 of the Constitution on privatization. The positive aspects of banking system reform about Islamization of banking carried out in Iran are considered by author. The author formulates characteristics of the models of Islamic banks in the Islamic Republic of Iran during the modern period in the conclusion of the work.

Keywords: interest-free banking, Iran, private banks, Constitution, reforms, State enterprises, Islamic law.

References

1 Abu Khamid al-Gazali. (1985). Tsit. po: Islam: problemy ideolohii, prava, politiki i ekonomiki [Islam: problems of ideology, law, politics and economy]. A.I. Ionova (Ed.). Moscow: Nauka [in Russian].

2 Al-Mardavi. (1400 h). al-Insaf [al-Insaf] Beirut. *islam.ru.* Retrieved from http://www.islam.ru/content/economica/30937.

3 Zakon «O bankovskoi deiatelnosti na osnove islamskikh printsipov, zapreshchaiushchikh rostovshchichestvo v liubykh formakh» Islamskoi Respubliki Iran, 1983 h. (priniat v 1984 h.) [The Law «On Banking Activities Based on Islamic Principles Banning Usury in Any Forms» of the Islamic Republic of Iran, 1983 (adopted in 1984)]. *dissercat.com.* Retrieved from http://www.dissercat.com/content/ekonomicheskie-mekhanizmy-obespecheniya-ustoichivogo-razvitiya-promyshlennosti-islamskoi-res.

4 Konstitutsiia Iranskoi Islamskoi Respubliki ot 15 noiabria 1979 h. [Constitution of the Islamic Republic of Iran of 15 November 1979]. *cis-emo.net*. Retrieved from http://www.cis-emo.net/sites/default/files/imagesimce/constitution_of_iran.pdf [in Russian].

5 Zakon «O natsionalizatsii bankov» Islamskoi Respubliki Iran, 1980 h. [The Law on the Nationalization of Banks of the Islamic Republic of Iran, 1980]. *investiran.com.* Retrieved from http://www.investiran.com.ua/index.php/islamskie-finansy/bankovskaya-sistema-irana/53-iranskie-banki-osobennosti-sozdaniya-i-funktsionirovaniya [in Russian].

6 Ali-zade, A.A. (2007). *Fikkh: Islamskii entsiklopedicheskii slovar [Fiqh: Islamic encyclopedic dictionary]*. Moscow: Ansar [in Russian].

7 Abbas, Musəviyan. (2006). Fikkh: Islamskii entsiklopedicheskii slovar [Interest-free banking, from theory to practice]. *banker.az.* Retrieved from http://banker.az/faizsiz-bankciliq-anlayisi/ [in Azerbaijan].

8 Hasan, Shobhani. (2001). Concern and Perspective in Islamic Economic /Hasan Shobhani. Tehran.

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А. Арыстан, А. Бекен

Қазақстан Республикасы Заңнама институты, Астана, Қазақстан
(E-mail: assel.arystan@gmail.com)

Қазақстандағы титулдық сақтандыруды құқықтық реттеу

Қазақстан жылжымайтын мүлік нарығының серпінді дамуына байланысты мәмілелер қауіпсіздігі, жылжымайтын мүлікке қатысты мәмілелер тарихы мен тәуекелдерді сақтандыру мәселелері өзекті сипатқа ие бола бастауда. Титулдық сақтандыру жылжымайтын мүлікпен байланысты мәмілелер қатысушыларының құқықтарын қорғауды қамтамасыз етуге мүмкіндік беретін тиімді құрал болып табылады. Мақала Қазақстандағы титулдық сақтандыруды құқықтық реттеу ерекшеліктеріне арналған. Авторлармен адал алушылардың мүліктік мүдделерін қорғаудың әлемдік практикада қолданылып жүрген құралдарына талдау жүргізілген, бұл талдаудың негізінде титулдық сақтандырудың жылжымайтын мүлік айналымын тіркеу жүйесі үлгісімен тығыз байланыста екендігі айқындалған. Бұдан басқа, шетелдік заңнама мен тәжірибеге жүргізілген салыстырмалы талдау Қазақстандағы жеткіліксіз деңгейдегі құқықтық реттеу, титулдық сақтандырудың барлық мүмкіндіктерін оны жылжымайтын мүлік нарығындағы адал алушыларды қорғауды қамтамасыз ету мақсатында қолданатын елдерге қарағанда, барынша пайдалануға кедергі келтіретіндігін көрсетті. Сонымен қатар мақалада титулдық сақтандырудың негізгі элементтері жан-жақты қарастырылған. Жұмыстың мақсаты титулдық сақтандырудың Қазақстанда дамуына кедергі келтіретін себептерін анықтау болып табылады. Осы мақсатқа қолжеткізу үшін титулдық сақтандырудың жылжымайтын мүліктің адал алушылары мүдделерін қорғау жүйесіндегі орнын, сондай-ақ титулдық сақтандыруды өзге сақтандыру түрлерінен ерекшелейтін айрықша белгілерін анықтау бойынша міндеттер алға қойылды. Қолжеткізілген нәтижелер негізінде қорытындылар мен ұсыныстар әзірленді.

Кілт сөздер: титулдық сақтандыру, меншік құқығы, адал алушы, ерікті сақтандыру, меншік құқықтарын қорғау, титулдық сақтандыру шарты, жылжымайтын мүлік.

Кіріспе

Жылжымайтын мүлік нарығы жоғары қауіпті қызмет аясы ретінде сипатталады. Нарықтың бұл сегменті әлеуметтік-экономикалық маңызға ие. Бір жағынан, жылжымайтын мүлік инвестициялық қызмет объектісі болса, екінші жағынан, оның әлеуметтік маңыздылығы жоғары, әсіресе тұрғын үй мәселелері қозғалғанда.

ҚР Әділет министрлігінің статистикалық мәліметтеріне сәйкес, 2016 жылы меншік құқығының өтуі туралы 2 млн астам мәміле тіркелген [1]. ҚР Ұлттық экономика министрлігінің анықтамалық мәліметтеріне сәйкес, 2016 жылғы кезең ішінде жылжымайтын мүлікпен байланысты операцияларда айтарлықтай инвестициялар өсімі анықталған, ал құрылыс жұмыстарының көлемі тұрғын үй құрылысының өсуі негізінде 7,9 %-ға артқан [2].

Жоғарыда келтірілген мәліметтер қазақстандық жылжымайтын мүлік нарығының серпінді түрде даму үстінде екенін дәлелдейді. Осы орайда мәмілелер қауіпсіздігі, жылжымайтын мүлік нысандары тарихының құқықтық аспектілері, сондай-ақ тәуекелдерді сақтандыру мәселелерінің өздеріне назар аударту негізді.

Титулдық сақтандыру адал алушылар мүдделерін қорғау кепілдігі ретінде

Әрбір мемлекет адал алушылар мүдделерін қорғауда өз әдістерін әзірлейді. Шетелдік тәжірибеде жылжымайтын мүліктің адал алушыларының мүліктік мүдделерін қорғауды қамтамасыз ететін мынадай құралдары қолданылады [3; 24-38]:

1) риэлторлық қызмет субъектілерінің жауапкершілігін сақтандыру;
2) мәмілелерді нотариаттық куәландыру;
3) мәмілелерді мемлекеттік тіркеу;
4) мәмілелерді заңды сүйемелдеу;
5) титулдық сақтандыру.

Жоғарыда келтірілген құралдардың бірін таңдаудағы шешуші мәселе жылжымайтын мүлікке меншік құқығын жоғалту жағдайында адал алушыға зардаптың орнын толтыру тәртібінде жатыр.

Осылайша, Францияда, Бельгияда жылжымайтын мүлікке қатысты мәміленің заңға сәйкестігін қамтамасыз ету нотариатқа жүктеледі. Нотариус мәмілені заңсыз деп тану салдары үшін мүліктік

жауапкершілік көтереді, яғни құқықты жоғалтқаны үшін шамалас өтемақының орны нотариус есебінен толтырылады. Осы орайда нотариустың кәсіби жауапкершілігін ұжымдық сақтандыру зор маңызға ие болуда.

Германияда, Швецияда, Ұлыбританияда, Австралияда, Канада мен Батыс Еуропаның басқа да елдерінде жылжымайтын мүлікке құқықтарды тіркеу кең таралған. Осы елдердегі мемлекеттік тіркеу жүйесі жылжымайтын мүлік сатып алушысының мүдделерін қорғауға кепілдік береді. Бұл ретте соның негізінде жылжымайтын мүлік сатып алынған кейінгі мәміле жарамсыз болған жағдайда, мемлекет зардап шеккен тарапқа залалдың орнын толтырады [4; 14, 15].

АҚШ-та жылжымайтын мүлік айналымын мемлекеттік тіркеу жүйесі құқықтарды қорғауға кепілдік бермейді. Осыған байланысты ғылыми әдебиетте оны субъективті заттай құқықтарды тіркеу жүйесі ретінде емес, мәмілелерді тіркеу жүйесі ретінде саралайды. Тіркеуші орган жылжымайтын мүлік объектілеріне құқық орнатушы құжаттарды есепке алады *(мәмілелерді тіркеуді жүзеге асырады)*, алайда құқық иеленушілердің алдында заңсыз мәмілені тіркегені үшін жауапкершілік көтермейді. АҚШ-та титулдық сақтандыру жылжымайтын мүліктің адал алушысы мүдделерін қорғау тетігінің ажырамас бөлігі болып табылады және жылжымайтын мүлікпен байланысты мәміле қатысушыларына залалдың орны сақтандыру компанияларымен толтырылады. Осыған байланысты бұл мемлекетте титулдық сақтандыру туралы арнайы заң қолданылады, оған сәйкес титулдық сақтандыру міндетті сипатқа ие [5; 93]. Осылайша, жылжымайтын мүлікті өтемін төлеп мәжбүрлеп иеліктен шығару туралы мәмілелердің 90–95 % титулдық сақтандырумен сүйемелденеді [4, 3]. Титулдық сақтандыру адал алушыны құқықтың ықтимал құқықтық дефектілерінен (алдыңғы иеленушілер құқықтарын бұзу, ескерілмеген мұрагерлер, алдыңғы мәмілелер заңсыздығы, жылжымайтын мүлікке құқықтарды мемлекеттік тіркеушінің қателіктері, соттың қолайсыз шешімі және т.б.) қорғайды [5; 12].

Латын Америкасы, Азия, Африка, Шығыс Еуропа, ТМД сияқты өзге аймақтарда мемлекеттік тіркеу не мүлдем жоқ, не осы екі үлгінің бірімен дамуда.

Шетел тәжірибесіне жүргізілген талдау нәтижесінде мынадай қорытындыға келуге болады. Титулдық сақтандыру жылжымайтын мүліктің адал алушыларының мүліктік мүдделерін қорғаудың негізгі кепілі ретінде тек АҚШ құқығына ғана тән. Өзге мемлекеттерде адал алушылардың мүдделерін қорғау жүйесі мәмілелерді нотариаттық куәландыру немесе мемлекеттік тіркеу сияқты басқа құқықтық құралдар негізінде даму үстінде.

Қазақстанда тіркеу жүйесі, басқа да ТМД елдеріндегідей, құқықтарды тіркеу жүйесі мен мәмілелерді тіркеу жүйелерінің араласуы сипатында. ҚР Азаматтық кодексінің жалпы бөлімінде (бұдан әрі – *ҚР АК*) жылжымайтын мүлікке құқықты тіркеу түсінігі мен мәмілелерді тіркеу түсінігі (ҚР АК 118, 155-б.) қолданылады [6]. «Жылжымайтын мүлікке құқықтарды мемлекеттік тіркеу туралы» ҚР Заңның 20-бабында тіркеуші органдардың мәміле заңдылығын қолданыстағы заңнамаға сәйкестігін тексеру бойынша міндеті көзделгеніне қарамастан, мемлекеттік тіркеудің өзі тіркелген құқықтардың қорғалуына кепілдік бермейді.

Қазақстанда қалыптасқан жылжымайтын мүлік айналымын тіркеудің аралас жүйесінде біртұтастық жоқ. Бастау алатын қағидаттарын ескерместен екі түрлі тіркеу жүйесінің жекелеген элементтерін алу екі жүйеге де ортақ маңызды бір элементтің — жылжымайтын мүліктің меншік иесінің құқықтарына берілетін кепілдіктердің түсіп қалуына әкеп соқты.

Жылжымайтын мүлік айналымында тұрақтылық пен нақтылықты қалыптастыру үшін жылжымайтын мүлікке қатысты мәмілелер қатысушылары құқықтарының кепілдіктері жүйесін құру қажет. Оған екі түрлі әдіспен қолжеткізуге болады. Бірінші әдіс құқықтарды тіркеу жүйесіне өтуден тұрады: бірыңғай мемлекеттік тізілімде тіркелген меншік құқығын жоғалтқаны үшін мемлекеттік өтемақы енгізу және жылжымайтын мүлікке қатысты мәмілелерді кәсіби сүйемелдеумен айналысатын тұлғалардың (нотариустардың, риэлторлардың, мемлекеттік тіркеушілердің және т.б.) азаматтық-құқықтық жауапкершілігін міндетті сақтандыруды дамыту. Екінші әдіс титулдық сақтандырудың міндетті нысанын дамытуды көздейтін мәмілелерді тіркеу жүйесіне өту болып табылады.

Титулдық сақтандару сақтандырудың дербес түрі ретінде

Қазақстанда титулдық сақтандыру әлі де қызу даму жолына түсе қойған жоқ. Осыған ұқсас жағдай ТМД басқа да елдерінде орын алып отыр. Жалпы, бұл жағдайды титулдық сақтандырудың ерікті сақтандыру түріне жататындығымен де түсіндіруге болады, сондықтан оның дамуы ерікті

сақтандыру нарығының ағымдағы жай-күйіне тікелей тәуелді. Демек, титулдық сақтандырудың дамуына сақтандыру нарығының жалпылама проблемалары әсер етеді [7]. Осылайша, Қазақстанда ерікті сақтандыру түрлеріне қатысты ұсынылатын көрсетілетін қызметтердің шектеулілігін, сақтандыру өнімдері бағасының салыстырмалы түрде жоғары екендігін (статистика жоқтығына орай) немесе оларға сұраныстың жоқтығын, нарықтағы жекелеген сақтандыру ұйымдарының жеткілікті түрде белсенділік танытпауларын және ықтимал сақтанушылардың сақтандыруға деген қызығушылығының аздығын атап өткен жөн [7]. Сақтандыру нарығында қалыптасқан тәжірибені ескере отырып, сақтандыру саласының кейінгі дамуын, бір жағынан, ерікті сақтандыру түрлері жөніндегі заңнаманы кешенді жетілдірумен, екінші жағынан, ерікті сақтандыру нарығының инфрақұрылымын дамытумен байланыстыру қажет.

Ерікті сақтандыру нарығы Қазақстанда банктердің кросс-сатулары және міндетті сақтандыру бойынша агенттік жүйе есебінен даму үстінде. Айта кеткен жөн, Қазақстанда титулдық сақтандыру сонымен қоса банктер қызметінің арқасында көбінесе ипотека нарығында дамуда. Барлық банктер дерлік өздерінің ипотекалық кредиттеу бағдарламаларында сақтандырудың үш түрін көздейді: мүлікті сақтандыру, заемшы өмірін жазатайым оқиғадан сақтандыру және титулдық сақтандыру. Қол қойылған сақтандыру шарттары бойынша пайда алушы банк болып табылады. Ол сақтандыру жағдайы орын алған жағдайда сақтандыру төлемін алады [8]. Осылайша, ипотекалық кредиттеудегі титулдық сақтандыру меншік құқығын қорғауды емес, кредитордың кепіл құқығын (талап ету құқығын) қорғауды көздейді.

Мұндағы назар аударарлық жағдай, ипотекалық кредиттеу кезіндегі сақтандыру объектісі кепіл құқығын жоғалтумен байланысты кредитордың мүліктік мүдделері болып табылады. Сақтандырудың мұндай түрі кезінде сақтандыру сомасы, пайда алушы және шарт мерзімі жайлы талаптар өзге қағидаларға сәйкес анықталады. Ипотекалық тәуекелдер титулдық тәуекелдерден ерекшеленеді, олар кредитордың меншік құқығын қорғауды емес, кепіл құқығын (талап ету құқығын) қорғауды көздейді.

Қазақстандағы титулдық сақтандыруды заңнамалық анықтаудың титулдық сақтандыру объектісіне меншік құқығымен қатар кепіл құқығын қосуға мүмкіндік бермейтіндігін («Сақтандыру қызметі туралы» заңның 7-бабының 17-тармағы) атап өткен жөн. Бұдан басқа, сақтандыру түрлері «Сақтандыру қызметі туралы» (бұдан әрі – *Заң*) заңмен бекітіледі, олардың тізімі түпкілікті болып табылады. Осылайша, ипотекалық тәуекелдермен байланысты жағдайларды сақтандыру кезінде титулдық сақтандыруды қолдану заңнаманы бұзушылық болып саналады, себебі заңға сәйкес титулдық сақтандыру объектісі кепіл құқығы емес, меншік құқығы болып табылады. Сақтандыру қызметінде қалыптасқан іскери практика титулдық сақтандыру мәні мен мақсаттарын кәсіби деңгейде түсінбеушілікті қуаттай түсуде.

Орын алған проблема шешімін АҚШ-тың оң тәжірибесінен табуға болады. Мұнда титулдық сақтандырудың екі түрлі полисі қолданылады: меншік иесіне арналған полис пен кредиторға арналған полис. Меншік иесіне арналған полис сақтанушыға оның меншік құқығының қандайда бір кемістіктер мен ауыртпалықтардан тәуелсіз екендігіне кепілдік береді. Ол сондай-ақ сақтанушының жерге деген рұқсатының, меншікті сату құқығының және таза титулды жаңа иеленушіге табыстау құқығының бар екендігіне кепілдік береді. Бұл ретте мұндай полис бойынша лимит әдетте үйдің оны сатып алу сәтіндегі нарықтық бағасына тең. Кредитор полисі кредиторды берілген несие сомасы шегінде қорғайды және банктер мен өзге де кредиттік мекемелер үшін арнайы шығарылады. Кредитор полисі бойынша өтеу кредиторда шығындардың пайда болу тәуекелін қамтиды. Кредитор полисі әдетте кепіл сомасына беріледі [5; 91–101].

Қазақстанда жоғарыда келтірілген практиканы кірістіру үшін титулдық тәуекелдерді сақтандыруды құқықтық реттеудегі кейбір әдістерді қайта қарастырған жөн. Анағұрлым нақтырақ бұл мәселе жұмыстың алдағы бөлігінде қарастырылатын болады.

Осылайша, Қазақстандағы титулдық сақтандырудың қолжетімділігі мен тиімділігін арттыруға ерікті сақтандырудың толыққанды инфрақұрылымын дамыту, сондай-ақ титулдық сақтандыруды құқықтық реттеуді кейінгі жетілдіру өз септігін тигізуі тиіс.

Титулдық сақтандырудың негізгі элементтері

Титулдық сақтандыру мүліктік сақтандырудың өзге түрлерінен айтарлықтай ерекшеліктерге ие, алайда сақтандырудың бұл түрінің негізгі элементтері – сақтандыру объектісі мен нысанасы, сақтандыру жағдайы, шарт тараптары мен мерзімі әлі де жеткілікті деңгейде пысықталмаған және тиянақты зерттеуді талап етеді.

1 Титулдық сақтандырудың объектісі мен нысанасы

«Титулдық сақтандыру» термині АҚШ құқығынан алынған, мұндағы «титул» түсінігі меншік құқығына және сипаттамасы жағынан континенталдық жалға беру құқығымен ұқсас өзге де шектеулі заттық құқықтарға тарайды [9]. Осыған байланысты шет елдерде титулдық сақтандыру объектісі субъективті заттай құқық ретінде анықталады, бұл ретте ол меншік құқығы мен өзге де шектеулі заттай құқықтарды қамтиды. Кейбір зерттеушілер шетелдік тәжірибеге негізделе отырып, титулдық сақтандыруды жалға беру қатынастарына немесе кепіл қатынастарына қолдану мүмкіндігін атап өтеді [4; 10]. Бұл ретте заттай құқықтарды саралау шетелде Қазақстанға қарағанда өзгеше екендігіне баса назар аударған жөн. Қазақстанда титулдық сақтандыру объектісін субъективті заттай құқық ретінде белгілегеннің өзінде де жалға беру құқығы заттай-құқықтық мәні отандық құқықтық ғылымда пікірталас тудырып жүрген кепіл құқығы сияқты сақтандыруды құқықтық реттеуге еш жатпайды.

Бұдан басқа, Заңның 7-бабының 7-тармағына сәйкес титулдық сақтандыру мүлікке меншік құқығы тоқтатылған жағдайда сақтанушының мүліктік мүдделерін қорғау бойынша қатынастар ретінде анықталады. Демек, титулдық сақтандыру Қазақстанда шектеулі түрде қолданылуы мүмкін және меншік құқығын сақтандыруды ғана білдіреді, яғни азаматтық заңнамамен көзделген заттай құқықтардың басқа түрлеріне тарамайды. Іс жүзінде түсінілуін жеңілдету мақсатында «титулдық сақтандыру» атауын «меншік құқығын сақтандыру» деп өзгертуге де болатын еді. Қазақстандық заттай құқықтар жүйесі қазіргі таңда қалыптасу сатысында (ҚР АК 195-б.). Алайда Қазақстандағы заттық-құқықтық қатынастардың серпінді түрде дамып күрделене түсуіне байланысты титулдық сақтандыру да дами түсіп, мүмкін, меншік құқығына қатысты ғана емес, өзге заттай құқықтарға да қатысты өз қолданысын табар. Біздің ойымызша, келешекте титулдық сақтандыруды қолайлы үрдіс жағдайында мынадай қатынастарға қолдануға болады [5; 54]:

1) мемлекеттен сатып алу нәтижесінде бастапқы нарықта меншік құқығын алу кезінде;

2) жылжымайтын мүлікті сатып алуды (салуды) кредиттеу немесе жылжымайтын мүлікті кепілге алу арқылы;

3) жаңа құрылыс нәтижесінде жылжымайтын мүлікке меншік құқығын иелену кезінде;

4) қайталама нарықта иеліктен шығаруға қатысты мәмілелерді жүзеге асыру кезінде;

5) құқық мирасқорлық тәртібінде меншік құқығын иелену кезінде.

Бүгінгі күні титулдық сақтандыру объектісінің тек меншік құқығын заңнамалық бекітуі титулдық сақтандырудың барлық мүмкіндіктерін барынша пайдалануға кедергі келтіреді. Шетелдік тәжірибеге жүгінер болсақ, титулдық сақтандыру объектісі ретінде шектеулі заттай құқықтарды жоғалтумен байланысты мүліктік мүдделер (мәселен, кепіл құқығы) бола алады.

Шет елдерде титулдық сақтандырудың мүлікпен байланысты болған мәмілелердің заңды тарихы туралы мәліметтер негізінде жүзеге асырылуымен байланысты болуына орай титулдық сақтандыру нысанасы жылжымайтын мүлік болып табылады. Жылжымайтын мүлікпен байланысты мәмілелер мемлекеттік есепке алынуға жатады, сондықтан алдыңғы мәмілелер туралы ақпаратты қалпына келтіру ауқымды ұйымдастырушылық шығындарды қажет етпейді. Жылжымалы мүлікке қатысты титулдық сақтандыру алдыңғы мәмілелер бойынша толық ақпарат алу мүмкіндігінің болмауына байланысты белгілі бір қиындық туғызады. Жоғарыда келтірілгеннің негізінде титулдық сақтандырудың нысанасы ретінде жылжымайтын мүлікті түсіну қажет деп санаймыз.

2 Сақтандыру жағдайы

ҚР АК 249-бабына сәйкес меншік құқығы меншік иесі өз мүлкін басқа адамдарға берген, меншік иесі меншік құқығынан бастартқан, мүлік қираған немесе жойылған және заңнамалық актілерде көзделген өзге де реттерде тоқтатылады.

Сақтандыру ықтималдық сипатқа ие, сол себепті титулдық сақтандыруды құқық иеленушінің еркінен тыс мүлікке меншік құқығын жоғалту негіздерімен шектеу қажет. Бұдан басқа, мүлікті сақтандыруға қарағанда титулдық сақтандыру алдағы оқиғалардан емес, жағымсыз себеп-салдары келешекке әсер етуі мүмкін өтіп кеткен оқиғалардан қорғайды.

Біздің ойымызша, қазақстандық заңнама бойынша титулдық сақтандыру сақтандыру жағдайының басталуы байланыстырылатын өзге де титулдық тәуекелдерді де ескеруі қажет. Титулдық тәуекелдер заңды тәуекелдер болып табылады. Заң әдебиетінде мүлікті жоғалтудың заңды тәуекелдеріне мыналарды: 1) виндикациялық тәуекелдерді; 2) реституциялық тәуекелдерді; 3) ипотекалық тәуекелдерді; 4) мүлікті алушы білмеген және білуге тиіс болмаған пайдалану

ауыртпалықтары мен шектеулерінің тәуекелдерін; 5) меншік құқығын ұсынудың арнайы реттелетін тәртібінің тәуекелдерін қамтиды [4; 9]. Алайда отандық тәжірибеде сақтандыру жағдайына екі оқиғаны жатқызады: мүлікті сатып алу туралы ақысы төленетін мәмілені сот тәртібінде жарамсыз деп тану және мүлікті басқа біреудің заңсыз иеленуінен талап етіп алдыру (сақтандыру жағдайының ықтималдылық пен кездейсоқтық қағидаттарына сәйкес тек адал алушыға қатысты) [5; 48, 49]. Біздің ойымызша, сақтандыру жағдайының орын алуы байланыстырылатын өзге титулдық тәуекелдерді де титулдық сақтандыру ескеруі қажет.

3 Титулдық сақтандыру шартының тараптары

Титулдық сақтандыру шартына сәйкес сақтанушы (пайда алушы) ретінде адал алушы болады [4; 8]. Титулдық сақтандыру шартының ерекшелігі сол жалпы ереже бойынша мүлікке деген құқықтары мен міндеттерінің өтуіне байланысты сақтанушыны ауыстыру мүмкін еместігі (ҚР АК 836-б.), себебі титулдық сақтандыру мерзімі нақты адамның меншік құқығы мерзімімен шектеулі.

Титулдық сақтандыру шартына сәйкес сақтандырушы — бұл сақтандыру ұйымы ретінде тіркелген және сақтандыру қызметін жүзеге асыру құқығына лицензиясы бар заңды тұлға не өзара сақтандыру туралы Қазақстан Республикасының заңнамалық актісіне сәйкес өзара сақтандыру қоғамы (ҚР АК 804-б.).

Қазақстанда титулдық сақтандыруды жүзеге асыру үшін арнайы талаптар көзделмеген. Канада мен АҚШ-та, керісінше, мүліктік сақтандыруды лицензиялау талаптарынан өзгеше титулдық сақтандыруды лицензиялау талаптары қарастырылған [3]. Бұдан басқа, АҚШ-та титулдық сақтандыруды жүзеге асыруға лицензия алу үшін сақтандыру ұйымы жылжымайтын мүлікке құқықтардың тарихы туралы ақпаратты алу және талдау тетіктері регламенттелген құжат ұсынуға міндетті. Бұл құжат сақтандыру ұйымының төлемқабілеттілігін растайтын маңызды талап болып табылады [5; 78].

Ұлыбритания мен АҚШ-та титулдық сақтандыруды титулдық сақтандыру саласында мамандандырылған компаниялар жүзеге асырады. АҚШ-та титулдық сақтандыру қатысушылары бірдей сақтандыру талаптарын ұстанатын топтарға біріктірілген. Бір жағынан, күрделі тәуекелді есептеуді мамандандырылған сақтандырушы оңай іске асырады, екінші жағынан, сақтандыру портфелінің жеткіліксіз теңгерімсіздігі банкроттық тәуекелін арттыра түседі (80–90-жж. Ұлыбританияда 3 профильдік компания банкроттыққа ұшырады) [5; 104].

Қазақстанда кәсіпкерліктің жеке секторындағы титулдық сақтандырушылар туралы әңгіме өрбіту әлі ерте. Титулдық сақтандырушы функцияларын мемлекеттік сақтандыру компания нысанында мемлекет өзіне ала алады, алайда бұл ретте іс жүзінде Торренс тіркеу жүйесіне (құқықты тіркеу жүйесіне) өту орын алады. Мұндай жағдайда оңтайлы шешім – бұл мемлекеттік сақтандыру арқылы титулдық сақтандыруды дамыту бойынша күрделі де шиеленіскен тетіктерді қалыптастыру емес, Торренс жүйесіне толық өту болмақ.

4 Титулдық сақтандыру шартының мерзімі

Шарт мерзімі сақтандыру шартының елеулі талаптарының бірі болып табылады. Себебі ол сақтандырушы өзіне алатын тәуекел дәрежесіне әсер етеді.

Қазақстандық және ресейлік тәжірибеде титулдық сақтандыру шарты бір жылдық және үш жылдық мерзімге жасалады. Аталмыш мерзімдер азаматтық заңнамамен бекітілген талап қою мерзімдерімен түсіндіріледі. Мұндай әдіс сақтандырушылардың титулдық сақтандырудың айрықша белгілерін ескермейтіндіктерін куәландырады.

Біріншіден, меншік құқығын сақтандыру – бұл мәміленің «заңды тазалығын» сақтандыру. Мүлікті сақтандыруға қарағанда титулдық сақтандыру болашақта болатын емес, жағымсыз себеп-салдары келешекте әсер етуі мүмкін өтіп кеткен оқиғалардан сақтандырады [5; 3, 4]. Сақтандырушы сақтандыру шартын жасасар бұрын алдынала тексеріс кезінде осындай сақтандыру жағдайының орын алу ықтималдығына әсер ететін жағдаяттарды анықтай алады.

Екіншіден, титулдық тәуекелдер мүлікті сатып алу туралы мәміле жасалғаннан кейінгі алғаш үш жылда ең жоғарғы шыңына жетеді, ал кейін олар басқа сақтандыру түрлеріндегідей көтерілмейді, керісінше, төмендейді. Бұл жалпы талап қою мерзімімен байланысты (ҚР АК 187-б. 1-т.).

Үшіншіден, титулдық сақтандыру мерзімсіз сипатқа ие меншік құқығын қорғаудың кепілі болып табылады [4; 17].

Осылайша, сақтандыру жағдайына әкеп соғуы мүмкін мән-жайлардың басым бөлігі жылжымайтын мүлікті сатып алғаннан кейінгі алғаш үш жылдың ішінде орын алып жатады, себебі азаматтық заңнамаға сәйкес орнатылған талап қоюдың жалпы мерзімі үш жылды құрайды. Үш жылдық мерзімнің өтіп кетуі сақтандыру жағдайының ықтималдығын барынша төмендетеді. Демек, титулдық тәуекелдер жылжымайтын мүлікті сатып алу туралы мәміле жасалған кезден бастап алғаш үш жылда өте жоғары болады да, кейін олар, өзге сақтандыру түрлеріндегідей, арта түспей, керісінше, төмендей бастайды.

Жоғарыда келтірілгеннің негізінде біз титулдық сақтандыру шартының мерзімсіздігі туралы ережені қарастыруды не талап қоюдың жалпы мерзімі өткеннен кейін сақтандыру жағдайының орын алу ықтималдығының азаюын ескеретін негіздемелік сақтандыру тарифін есептеудің міндетті әдістемесін бекітуді ұсынамыз.

Қорытынды

Жоғарыда келтірілгеннің негізінде Қазақстандағы титулдық сақтандыруды құқықтық реттеуді жетілдіру үшін мынадай қорытындылар мен ұсыныстар жасауға болады:

1. Титулдық сақтандыру объектісі қатарына меншік құқығымен бірге кепіл құқығын да жатқызған жөн. Меншік құқығы мен кепіл құқықтарын титулдық сақтандыру үшін арнайы сақтандыру қағидаларын әзірлеу қажет.

2. Титулдық сақтандыру шарттары бойынша сақтандыру жағдайының басталу негіздерінің тізбесін заңнамалық тұрғыда кеңейту қажет. Титулдық сақтандыруды меншік құқығын жоғалту жағдайларына қатысты ғана емес, меншік құқығына қатысты ол туралы сақтанушы білмеген және білуге тиіс болмаған мүлік бағасын азайтатын пайда болған шектеулер мен салынған ауыртпалықтарға да тарату қажет.

3. Жылжымайтын мүлікке титулдық сақтандырудың мерзімсіздігі туралы міндетті ережені көздеу ұсынылады, алайда, сонымен қатар, жылжымайтын мүлікке деген сақтанушының құқықтары мен міндеттерінің басқа адамға өтуі кезінде сақтанушыны ауыстыруға тыйым салуды да көздеу қажет (ҚР АК 836-б.). Жылжымайтын мүлікке деген құқықтар мен міндеттердің сақтанушыдан басқа адамға өтуі титулдық сақтандыру шартының тоқтатылуының негізі болып табылады.

Әдебиетер тізімі

1 2016 ж. мен 2017 ж. I-тоқсаны аралығындағы тіркелген құқықтар саны жөніндегі статистикалық мәліметтер [Электронды ресурс] // ҚР ӘМ ресми сайты. — Қолжетімділік тәртібі: http://www.adilet.gov.kz/ru/articles/statisticheskie-dannye-o-kolichestve-zaregistrirovannyh-prav-za-period-2016-goda-i-za-1.

2 Қазақстан Республикасының әлеуметтік-экономикалық дамуының 2016 жылғы негізгі қорытындылары туралы анықтама [Электронды ресурс] // ҚР ҰЭМ ресми сайты. — Қолжетімділік тәртібі: http://economy.gov.kz/ru/pages/itogi-ser-za-2016-god.

3 Ус В.В. Титульное страхование – действенный механизм защиты прав участников рынка недвижимости / В.В. Ус // Имущественные отношения. — 2010. — № 4. — С. 24–38.

4 Петров Н.В. Гражданско-правовое регулирование титульного страхования: автореф. дис. ... канд. юрид. наук: 12.00.03 – «Гражданское право; предпринимательское право» / Н.В. Петров. — Волгоград, 2011. — 32 с.

5 Купреишвили Б.Ю. Титульное страхование в условиях реформирования экономики: дис. ... канд. экон. наук: 08.00.10 – «Финансы, денежное обращение и кредит» / Б.Ю. Купреишвили. — М., 2006. — 145 с.

6 Ильясова К.М. Регистрация прав на недвижимость по законодательству Республики Казахстан: основные концептуальные положения [Электронды ресурс] / К.М. Ильясова. [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/?doc_id=30178795.

7 Қазақстан Республикасы Үкіметінің 2014 жылғы 27 тамыздағы № 954 Қаулысы «Қазақстан Республикасының қаржы секторын дамытудың 2030 жылға дейінгі тұжырымдамасын бекіту туралы» [Электронды ресурс] // «Әділет» Қазақстан Республикасының нормативтік-құқықтық актілерінің ақпараттық-құқықтық жүйесі. — Қолжетімділік тәртібі: http://adilet.zan.kz/rus/docs/P1400000954.

8 Страхование недвижимости: лишние хлопоты или необходимость? [Электронды ресурс] // Қазақстанның жылжымайтын мүлік туралы порталы «Kn.kz». — Қолжетімділік тәртібі: https://www.kn.kz/article/6986/.

9 Гречко Д.П. Tenancy at sufferance в системе правоотношений владения недвижимостью: опыт США / Д.П. Гречко // Вестн. РУДН. Сер. Юридические науки. — 2011. — № 2. — С. 69, 70.

А. Арыстан, А. Бекен

Правовое регулирование титульного страхования в Казахстане

В связи с динамичным развитием казахстанского рынка недвижимости актуальными вопросами становятся безопасность сделок, история сделок с недвижимостью и страхование рисков. Титульное страхование является эффективным инструментом, позволяющим обеспечить защиту прав участников сделок с недвижимым имуществом. Статья посвящена особенностям правового регулирования титульного страхования в Казахстане. Авторами проведен анализ существующих в мировой практике инструментов защиты имущественных интересов добросовестных приобретателей, на основании которого выявлено, что титульное страхование находится в тесной взаимосвязи с моделью системы регистрации оборота недвижимого имущества. Кроме того, сравнительный анализ законодательства и практики зарубежных стран показал, что недостаточное правовое регулирование в Казахстане препятствует использованию всех возможностей титульного страхования по сравнению с теми странами, где титульное страхование используется в целях обеспечения защиты добросовестных приобретателей на рынке недвижимости. В статье также подробно рассмотрены основные элементы титульного страхования. Целью работы является выявление причин, препятствующих развитию титульного страхования в Казахстане. Для достижения цели были поставлены задачи по определению места титульного страхования в системе защиты интересов добросовестных приобретателей недвижимого имущества, а также особенностей титульного страхования, отличающих его от других видов страхования. На основании полученных результатов сформулированы выводы и предложения.

Ключевые слова: титульное страхование, право собственности, добросовестный приобретатель, добровольное страхование, защита права собственности, договор титульного страхования, недвижимое имущество.

A. Arystan, A. Beken

Legal regulation of title insurance in Kazakhstan

Due to dynamic development of Kazakh real estate market, the issues of safety of transactions, history of real estate transactions and risk insurance became relevant. Title insurance is an efficient tool which provides protection of rights of parties to real estate transaction. This article is concerned with aspects of legal regulation of title insurance in Kazakhstan. The authors analyzed existing tools used in the world practice for protection of property interest of good-faith buyers. The results of analysis showed that title insurance is closely linked to the model of registering the immovable property turnover. Moreover the comparative analysis of foreign countries' legislation and practice revealed that insufficient legal regulation in Kazakhstan limits the possibilities of title insurance compared to the countries where the title insurance is used in order to ensure the protection of good-faith buyers at real estate market. Also article considers in detail the main elements of title insurance. The purpose of the paper is to identify the causes that prevent development of title insurance in Kazakhstan. In order to achieve the purpose, the following objectives were set: To determine the place of title insurance in the system of protection of good-faith buyer's interests, and To determine the aspects of title insurance distinguishing it from other types of insurance. Conclusions and proposals were made based on the results obtained.

Keywords: title insurance, ownership, good-faith buyer, protection of ownership, title insurance agreement, real estate.

References

1 2016 zh. men 2017 zh. I-toksany aralyhyndahy tirkelhen kukyktar sany zhonindehi statistikalyk malimetter [Statistics data on number of registered rights for 2016 and for 1st quarter of 2017]. KR UEM resmi saity – Official site of the Ministry of Communications of the RK. *adilet.gov.kz.* Retrieved from http://www.adilet.gov.kz/ru/articles/statisticheskie-dannye-o-kolichestve-zaregistrirovannyh-prav-za-period-2016-goda-i-za-1 [in Kazakh].

2 Kazakstan Respublikasynyn aleumettik-ekonomikalyk damuynyn 2016 zhylhy nehizhi korytyndylary turaly anyktama [Information on results of social and economic development of Kazakhstan for 2016]. *economy.gov.kz.* Retrieved from http://economy.gov.kz/ru/pages/itogi-ser-za-2016-god [in Kazakh].

3 Us, V.V. (2010). Titulnoe strakhovanie – deistvennyi mekhanizm zachshity prav uchastnikov rynka nedvizhimosti [Title insurance is viable mechanism for protection of rights of participants at real estate market]. *Imushchestvennye otnosheniia – Property relations, 4,* 24–38 [in Russian].

4 Petrov, N.V. (2011). Hrazhdansko-pravovoe rehulirovanie titulnoho strakhovaniia [Legal regulation of title insurance]. *Extended abstract of candidate's thesis.* Volgograd [in Russian].

5 Kupreishvili, B.Ju. (2006). Titulnoe strakhovanie v usloviiakh reformirovaniia ekonomiki [Title insurance under the conditions of reformation of economy]. *Extended abstract of candidate's thesis.* Moscow [in Russian].

6 Ilyasova, K.M. Rehistratsiia prav na nedvizhimost po zakonodatelstvu Respubliki Kazakhstan: osnovnye kontseptualnye polozheniia [Registration of rights to real estate in accordance with legislation of the Republic of Kazakhstan: main conceptual provisions]. *online.zakon.kz*. Retrieved from http://online.zakon.kz/Document/?doc_id=30178795 [in Russian].

7 Kazakstan Respublikasy Ukimetinin 2014 zhylhy 27 tamyzdahy № 954 Kaulysy «Kazakstan Respublikasynyn karzhy sektoryn damytudyn 2030 zhylha deiinhi tuzhyrymdamasyn bekitu turaly» [Resolution of the Government of the Republic of Kazakhstan dated August 29, № 954 «On approval of Concept of financial sector development in the Republic of Kazakhstan until 2030»]. «Adilet» Kazakstan Respublikasynyk normativtik-kukytyk aktilerinin akparattyk-kukyktyk zhuiesi – «Adilet» information system of regulatory legal acts of the Republic of Kazakhstan. Retrieved from http://adilet.zan.kz/rus/docs/P1400000954 [in Kazakh].

8 Strakhovanie nedvizhimosti: lishnie khlopoty ili neobkhodimost? [Real estate insurance: Unnecessary worries or the Need?]. *www.kn.kz.* Retrieved from https://www.kn.kz/article/6986/ [in Russian].

9 Grechko, D.P. (2011). Tenancy at sufferance v sisteme pravootnoshenii vladeniia nedvizhimostiu: opyt SShA [Tenancy at sufferance in system of relations regarding tenancy: USA experience]. *Vestnik RUDN. Seriia Yuridicheskie nauki – Bulletin of the PFUR. A series of Juridical sciences, 2,* 69–70 [in Russian].

ӘОЖ 347.1

Ж.С. Сейтаева, Т.Ғ. Маханов

Қазақстан Республикасының Бас прокуратурасы жанындағы
Құқық қорғау органдары академиясы, Астана, Қазақстан
(E-mail: seitaeva-zhanara@mail.ru)

Қазақстан Республикасының азаматтық құқығындағы диспозитивтілік: қағида, әдіс және азаматтық құқық нормасын сипаттайтын санат ретінде

Мақалада Қазақстан Республикасының азаматтық құқығындағы диспозитивтілік қағидасының ерекшеліктері және құқық ғылымындағы алатын орны қарастырылды. Цивилисттер диспозитивтілік қағидасын өздігімен талқылағанымен, бірақ оның нормативтік-құқықтық нақты түсінігі жоқ, тек біздер бұл түсінікті азаматтық заңнаманың түрлі баптарының мағынасынан жиып алатынымызды қорытындылай кеткеніміз жөн. Бұл, өз алдына, құқыққолдану субъектілерінің аталған қағиданы түсіндіру қиындығына әкеліп соқтырады. Қазақстан Республикасының азаматтық заңнамасындағы диспозитивтілік қағидасын нақты және айқынды жазу қажет. Шынымен де, азаматтық заңнаманың негізгі бастаулары мазмұнына, диспозитивтік қағидасының түсінікті мағынасына байланысты көптеген азаматтық істердің шешімі табылады. Қазақстан Республикасының азаматтық құқығындағы нормаларды сипаттайтын әдіс, қағида және санат ретіндегі диспозитивтіліктің жалпы сипаттамасын – өз бастамасы бойынша азаматтық құқықтар мен міндеттерді иемдену мен жүзеге асыруда, азаматтық құқықтық қатынас субъектілерінің іштей әзірленген, құштарлық бағытын айтамыз. Қорытынды ретінде диспозитивтілік түсінігін қағида, әдіс және азаматтық құқық нормасын сипаттайтын санат ретіндегі заңнамалық қырлары анықталды және оның азаматтық-құқықтық қатынас шеңберіндегі аса маңыздылығы ашып көрсетеді. Яғни, диспозитивтілік азаматтық құқықтың қағидасы ретінде – оның құрылымын ұйымдастырады, азаматтық-құқықтық реттеу әдісінің белгісі ретінде – оның әрекетін қамтамасыз етеді, ал құқық нормасын сипаттайтын санат ретінде – азаматтық құқықтық қатынас субъектілерінің қандайда бір әрекетін жүзеге асырудың баламасын жасайды.

Кілт сөздер: цивилистика, құқық қағидасы, құқықтық норма, құққытық санат, әдіс, азаматтық құқық, азаматтық-құқықтық қатынас, азаматтық құқықтық қатынас субъектісі, диспозитивтілік қағидасы, императивтік норма.

Диспозитивтілік – құқықтану ғылымының әртүрлі саласында қолданатын маңызды құқықтық санат болып табылады. XX ғасырдың соңынан бастап диспозитивтілік (лат. *dispono* – еркінде болу, орналастыру) ұғымына ерекше көңіл бөліне бастады, себебі демократиялық мемлекетте тұлғаның құқықтық мәртебесін жетілдіру проблемасына назар аудару көбейіп жатты.

Дәстүрлі түрде диспозитивтілік мәселесі тек қана азаматтық іс жүргізу (азаматтық сот ісін жүргізу) саласында қарастырылады. Сонымен бірге кеңестік кезеңде қоғамдық қатынасты реттеудің әдісі ретінде жекелеген диспозитивтілік мәселелері В.Ф. Яковлев, О.А. Красавчиков, В.М. Семеновтың еңбектерінде қарастырылған [1; 323]. Алайда бүгінгі күні диспозитивтіліктің салааралық сипатының бары ақиқат. Бұл орайда Қазақстан Республикасының қылмыстық процесіндегі диспозитивтілік ұғымын қарастырған біздің әріптесіміз А.Е. Мүсілімовтің жұмысы үлкен назар аударады [2; 12].

Сонымен, азаматтық құқықтағы диспозитивтілік дегеніміз не екен? Жалпы мағынада диспозитивтілік қимылды таңдаудың еркіндігі болып табылады.

О.Ю. Глухованың пікірінше, жалпытеориялық контекстіде диспозитивтілік институты материалдық құқық нормасында бекітілген субъективтік құқықты жүзеге асырудың (иемдену, іске асыру, басқару) заңи еркіндігі (мүмкіндігі) бар, процессуалдық құқық нормасында бекітілген қорғау құралдарымен басқаратын құқықтық нормалар жиынтығы болып табылады [3; 10].

Р.Б. Брюхованың ойынша, диспозитивтілік кең мағынада (жалпы, бастапқы) субъективтік азаматтық құқықты және заңи міндеттерді алу, мәміле жасасқанда заңның диспозитивті нормасымен белгіленген ережелерден шегіну жолымен қоса алғанда, субъективтік азаматтық құқық құрылымын айқындау еркіндігін сипаттайды.

Ал диспозитивтілік қысқа мағынада (жеке, туынды) субъективтік азаматтық құқықты жүзеге асыру мен бұзылған құқықтарды қорғау нысаны (тәртібі) мен әдісін қолдану, сонымен қатар азаматтық-құқықтық жауаптылыққа тартудың көлемі мен нысанын таңдау еркіндігі болып саналады [4; 15].

Диспозитивтілік заманауи құқықтық әдебиетте екіжақты мәртебеге ие, яғни, бір жағынан, құқық қағидасы ретінде, ал, екінші жағынан, азаматтық құқықтық және процессуалдық реттеу әдісінің белгісі ретінде қарастырылады.

Біздің ойымызша, азаматтық құқық нормаларын сипаттайтын категория ретіндегі сарапталып отырған диспозитивтілік түсінігінің үшінші мәртебесін де ұмытуға болмайды. Олай болса, белгіленген жоспарға сай диспозитивтілік ұғымын қарастыралық.

Азаматтық құқық қағидасы ретіндегі диспозитивтілік

Азаматтық құқық қағидасы мәселелерінің тарихы терең. Қазақстанның заманауи заң ғылымында әлі де көңіл аударылып келеді.

Құқық қағидасы ретіндегі диспозитивтіліктің нақты қасиеттерінің қатарына іргелік, тұрақтылық, әмбебаптылық, салааралық қасиет және көрсету нысанының алуантүрлілігі жатады. Азаматтық құқықтағы диспозитивтіліктің нормативтік негізі ретінде азаматтық құқықтың барлық нормалары болып табылады, себебі олардың барлығы да құқық шегін белгілейді.

Қазақстан Республикасының Президентінің 2009 жылдың 24 тамыздағы № 858 бұйрығымен бекітілген Қазақстан Республикасының 2010–2020 жылдар аралығындағы құқықтық саясат тұжырымдамасы ұлттық құқықты дамытудың негізгі бағыттарын айқындайды. Өзінің материалдық және процессуалдық құқығына өз дегенінше иелік етуші тұлғалардың іске қатысуға мүмкіндігін көрсететін диспозитивтілік қағидасын қолдану аясын кеңейту қарастырылады. Бұл орайда жария мүдделерін қарастыратын азаматтық-құқықтық қатынастарға диспозитивтілік қағидасын қолдануға болмайтынын ескерген жөн [5].

Сонымен, құқықтық реформалау бойынша іс-қимылдар стратегиясын анықтайтын негізгі құжатта диспозитивтілік қағидасын қолдану аясын кеңейту бекітілген, бірақ қолданыстағы Қазақстан Республикасы Азаматтық кодексінде (бұдан әрі – ҚР АК) аталған қағида нормативті бекітілмеген. ҚР АК 2-бабында азаматтық заңнаманың негізгі бастаулары бекітілген, сонымен бірге оның 2-тармағында диспозитивтілік қағидасын ашатын ережелер орын алған, яғни азаматтар мен заңды тұлғалар өздерінің азаматтық құқықтарына өз еркімен және өз мүддесін көздей отырып ие болады және оларды жүзеге асырады, сондай-ақ егер заңнамалық актілерде өзгеше белгіленбесе, құқықтарынан бастартады. Олар шарт негізінде өздерінің құқықтары мен міндеттерін анықтауда және оның заңнамаға қайшы келмейтін кез келген талаптарын белгілеуде ерікті [6].

Цивилистикада диспозитивтілік қағидасының мазмұнын «тыйым салынбағанның барлығына рұқсат» пікірімен теңестіреді. Қазақстан Республикасы азаматтық заңнамасы нормаларын талдай отырып, диспозитивтілік қағидасының бұдан әрі орын алуы ҚР АК 8-бабында «Азаматтық құқықты жүзеге асыру» бекітілгендігі жөнінде тоқтамға келеміз. Яғни, азаматтар мен заңды тұлғалар өздеріне берілген азаматтық құқықтарды, соның ішінде өздерін қорғау құқығын өз қалауынша пайдаланады. Азаматтар мен заңды тұлғаларға тиесілі құқықтардың жүзеге асырылмауы, заңнамалық актілерде көзделген жағдайларды қоспағанда, бұл құқықтардың тоқтатылуына әкеп соқпайды (ҚР АК 8-б. 1- және 2-т.).

Алайда аталған қағиданың орындалуы өзге азаматтық құқық субъектілерінің мүдделерін бұзбауы тиіс. ҚР АК 8-б. 3-тармағына сәйкес, азаматтық құқықтарды жүзеге асыру басқа құқық субъектілерінің құқықтарын және заңдармен қорғалатын мүдделерін бұзбауға, айналадағы ортаға зиян келтірмеуге тиіс [6]. Сондықтан азаматтық-құқықтық қағидасы диспозитивтілікті «бірінің бостандығы басталған жерден екіншісінің бостандығы аяқталады» деп аталатын белгілі фәлсафалық тұжырымға қосуымыз керек. Сондықтан да цивилисттер диспозитивтілік қағидасын өздігімен талқылағанымен, бірақ оның нормативтік-құқықтық нақты түсінігі жоқ, тек біздер бұл түсінікті азаматтық заңнаманың түрлі баптарының мағынасынан жиып алатынымызды қорытындылай кеткеніміз жөн. Бұл, өз алдына, құқыққолдану субъектілерінің аталған қағиданы түсіндіру қиындығына әкеліп соқтырады.

Осыған байланысты Қазақстан Республикасының азаматтық заңнамасындағы диспозитивтілік қағидасын нақты және айқынды жазу қажет. Шынымен де, азаматтық заңнаманың негізгі бастаулары мазмұнына, диспозитивтік қағидасының түсінікті мағынасына байланысты көптеген азаматтық істердің шешімі табылады.

Азаматтық құқық әдісі ретіндегі диспозитивтілік

Жеке құқық ретіндегі азаматтық құқық үшін, диспозитивтік әдіс – құқықтық қатынасқа қатысушыларының теңдік әдісі тән екені бәрімізге белгілі. Аталған әдістің аса маңызды белгілері:

– азаматтық қатынас қатысушыларының теңдігі;

– ерік автономиясы;

– азаматтық құқық қатынастарына қатысушылардың мүліктік дербестігі;
– бұзылған азаматтық құқықтарды қорғау;
– азаматтық жауаптылық.

Тізімделген әрбір диспозитивтік әдістер азаматтық-құқықтық нормаларда іске асырылады. Аталған белгілерді мысалдармен қарастырып көрелік.

Азаматтық қатынас қатысушыларының теңдігі

Жеке тұлғалар, заңды тұлғалар, әкімшілік-аумақтық бөліністер мен мемлекет – Қазақстан Республикасының азаматтық құқық субъектілері – меншіктенушілер, яғни олар өздеріне тиесілі барлық мүлікті өз қалауынша иеленуге, пайдалануға және иелік етуге тең құқылы болып табылады. ҚР АК 188-бабының 1-бөлігіне сәйкес талдау арқылы аталған қорытындыны жасауға болады, яғни меншік құқығы дегеніміз – субъектінің заң құжаттары арқылы танылатын және қорғалатын өзіне тиесілі мүлікті өз қалауынша иелену, пайдалану және оған билік ету құқығы [6].

Ерік автономиясы дегеніміз дербес және еркін түрде өзінің еркісін қалыптастырып, көрсете білетін тұлғалардың мүмкіндігі мен қабілеті болып табылады. Мысалы, ҚР АК 7-б. азаматтық құқықтар мен міндеттердің пайда болу негіздері тізімделген, сондай-ақ аталған баптағы тізімделген сегіз бөліктің ішіндегі келісім субъектілер өздерінің ерік білдіруіндегі тең және дербес бастамалы еріктік акті екенін белгілегеніміз жөн.

Азаматтық құқық қатынастарына қатысушылардың мүліктік дербестігі дегеніміз мүліктік қатынас субъектілері оқшау мүлік иегерлері ретінде кіреді. Сонымен, меншігіндегі мүлікті құқықтану, заң құжаттарында тыйым салынбаған кез келген мәміле жасасып, міндеттемелерге қатысу құқықтары азаматтың құқыққа қабілетінің негізгі мазмұнына кіреді (ҚР АК 14-б.). Заңды тұлғаның мүліктік дербестігі ҚР АК 33-бабында көзделген, сондай-ақ оның негізгі белгілері, яғни меншік, шаруашылық жүргізу немесе жедел басқару құқығындағы оқшау мүлкі бар және сол мүлікпен өз міндеттемелері бойынша жауап беретін, өз атынан мүліктік және мүліктік емес жеке құқықтар мен міндеттерге ие болып, оларды жүзеге асыра алатын, сотта талапкер және жауапкер бола алатын ұйым заңды тұлға деп танылады [6].

Бұзылған азаматтық құқықтарды қорғау

Азаматтық құқықтық қатынас қатысушылары бұзылған құқықтарын қорғауға тең құқылы. Осы орайда ҚР АК 9-б. 1-б. сәйкес, бұзылған құқықты қорғаудың негізгі әдісі сот арқылы қорғау (сот, арбитраж не аралық соттармен). Алайда заң актілерінде арнайы көзделген жағдайларға сәйкес, өзін-өзі қорғауды жүзеге асыруға жол беріледі (құқықтары бұзылған тұлғаның тікелей нақты немесе заңи әрекеті) (ҚР АК 9-б. 3-б.).

Азаматтық жауаптылық шығын мен зардапты толықтай орнын толтырғу қағидасына жауап беру қажет. ҚР АК 9-б. 4-б. сәйкес, құқығы бұзылған адам, егер заң құжаттарында немесе шартта өзгеше көзделмесе, өзіне келтірілген залалдың толық өтелуін талап ете алады [6]. Сондықтан құқықбұзушы тұлғаға емес (әкімшілік құқықтағы) және қылмыскер тұлғасына емес (қылмыстық құқықтағы), яғни оның мүлігіне, ықпал етеді. Жеке мүліктік емес құқықтарды қорғау да осындай талаптарға жауап береді. Мысалға, ҚР АК 952-б. 1-б. моральдік зиян ақшалай нысанда өтеледі [7].

Қазақстан Республикасының азаматтық құқығындағы диспозитивтік нормалар. Заң әдебиеттерінде диспозитивтік нормалар тек азаматтық құқыққа ғана тән екендігі жөнінде пікірлер қалыптасқан. Бірақ қолданыстағы заңнамаға талдау жұмыстары көрсеткендей, диспозитивтік сипаттағы құқықтық нормалар әрбір құқық саласында кездеседі. Азаматтық құқықта императивтік нормалар да кездеседі, мысалы, ҚР АК 178-б. 1-б. талап қоюдың жалпы мерзімі үш жыл болып белгіленетіндігі көрсетілген, сонымен қатар ҚР АК 168-бабының 1-бөлігінде сенімхат үш жылдан аспайтын мерзімге берілуі мүмкін [6] екендігі жазылған.

Императивтікке қарағанда, диспозитивтік нормалар құқықтық қатынас қатысушылары келісіміне (шартына) сәйкес мінез-құлық ережелерінде көзделген өзгерістерге жол бере алады. Мысалы, ҚР АК 359-б. 1-б. сай, борышқор кінәлі болған кезде, егер заңдарда немесе шартта өзгеше көзделмесе, міндеттемені орындамағаны және (немесе) тиісті дәрежеде орындамағаны үшін жауап береді [6].

Негізінен, диспозитивтік норма түсінігі ҚР АК 382-б. орын тапқан. Аталған баптың бірінші бөлігі мазмұнынан, яғни диспозитивтік норма дегеніміз егер тараптардың келісімімен өзгеше белгіленбесе, заңнамаға сәйкес жүзеге асырылатын норма болып табылатыны шығады.

Диспозитивтілік норманың классикалық мысалы ҚР АК 285-бабында көзделген, яғни екі немесе бірнеше әрекеттің бірін жасауға міндетті борышқорға, егер заңдардан немесе міндеттеменің шарттарынан өзгеше туындамаса, таңдау құқығы берілетіні, баламалы міндеттемені орындау болып табылады [6].

Сонымен қатар императивтік және диспозитивтік нормалардың сандық арақатынасын қарастыратын болсақ, С.И. Климкиннің пікірінше, азаматтық құқықтың аса демократияшыл ішкі саласы – шарт құқығы, шарт бостандығы қағидасы толық шамада орындалуы қажет болса, ал 90 % императивтік нормалардан тұрады [8].

Сонымен, Қазақстан Республикасының азаматтық құқығындағы нормаларды сипаттайтын әдіс, қағида және санат ретіндегі диспозитивтіліктің жалпы сипаттамасын – өз бастамасы бойынша азаматтық құқықтар мен міндеттерді иемдену мен жүзеге асыруда, азаматтық құқықтық қатынас субъектілерінің іштей әзірленген, құштарлық бағытын айтамыз.

Бұл орайда диспозитивтілік азаматтық құқықтың қағидасы ретінде – оның құрылымын ұйымдастырады, азаматтық-құқықтық реттеу әдісінің белгісі ретінде – оның әрекетін қамтамасыз етеді, ал құқық нормасын сипаттайтын санат ретінде – азаматтық құқықтық қатынас субъектілерінің қандайда бір әрекетін жүзеге асырудың баламасын жасайды.

Диспозитивтіліктің біртұтас азаматтық-құқықтық санаты құрамында дербес элемент ретінде, азаматтық құқықтық қатынас субъектілерінің мүдде, ерік, бастама және дербес қарауын бөліп қарастыруға болады. Бұл орайда азаматтық құқықты иемдену мен жүзеге асыру жөніндегі мақсаттылық қызметті жүзеге асырудың ниеті мен мінез-құлық нұсқасын таңдауды біле-тұра ниеті ерік болады; мүдде болса, қандай да бір игілікке ұмтылу, сондай-ақ қандай да бір игілік бойынша өзіндік қатынасы; диспозитивтілік элементі ретіндегі бастама, бұл – өзінің мінез-құлқын анықтаудағы субъектінің бостандығы, қандай болмасын әрекеттегі нақты басшылық етуші рөлі; дербес қарауы болса, заңмен тыйым салынбаған кез келген әдіспен субъектіге тиесілі құқықты жүзеге асыру, сондай-ақ аталған құқықты жүзеге асырмау мүмкіндігі болып табылады.

Әдебиеттер тізімі

1 Яковлев В.Ф. Гражданско-правовой метод регулирования общественных отношений / В.Ф. Яковлев. — Свердловск, 1972. — С. 85; Красавчиков О.А. Диспозитивность в гражданско-правовом регулировании / О.А. Красавчиков // Советское государство и право. — 1970. — № 1. — С. 41–49; Советский гражданский процесс: учебник / отв. ред. К.И. Комиссаров, В.М. Семенов. — М.: Юрид. лит., 1978. — 432 с.

2 Мусилимов А.Е. Диспозитивность в уголовном процессе Республики Казахстан: автореф. дис. ... канд. юрид. наук: 12.00.09 – «Уголовный процесс, криминалистика» / А.Е. Мусилимов. — Караганда, 2004. — 30 с.

3 Глухова О.Ю. Институт диспозитивности в праве: автореф. дис. ... канд. юрид. наук: 12.00.01 – «Теория и история права и государства» / О.Ю. Глухова. — Тамбов. 2009. — 25 с.

4 Брюхов Р.Б. Диспозитивность в гражданском праве России: автореф. дис. ... канд. юрид. наук: 12.00.03 – «Гражданское право, предпринимательское право, семейное право, международное частное право» / Р.Б. Брюхов. — Екатеринбург, 2006. — 29 с.

5 «Қазақстан Республикасының 2010 жылдан 2020 жылға дейінгі кезеңге арналған құқықтық саясат тұжырымдамасы туралы» Қазақстан Республикасы Президентінің 2009 жылғы 24 тамыздағы № 858 Жарлығы [Электронды ресурс]. — Қолжетімділік тәртібі: http://adilet.zan.kz/rus/docs/U090000858_

6 Қазақстан Республикасының Азаматтық кодексі. 1994 жылғы 27 желтоқсандағы № 268-XIII Қазақстан Республикасының Кодексі [Электронды ресурс]. — Қолжетімділік тәртібі: http://adilet.zan.kz/kaz/docs/K940001000_.

7 Қазақстан Республикасының Азаматтық кодексі (ерекше бөлім). 1999 жылғы 1 шілдедегі № 409 Қазақстан Республикасының Кодексі [Электронды ресурс]. — Қолжетімділік тәртібі: http://adilet.zan.kz/kaz/docs/K990000409_.

8 Климкин С.И. Гражданское право и цифры [Электронды ресурс]. — Режим доступа: http:// m.zakon.kz/4629322.

Ж.С. Сейтаева, Т.Г. Маханов

Диспозитивность в гражданском праве Республики Казахстан: как принцип, как метод и как категория, характеризующая нормы гражданского права

В статье рассмотрены особенности принципа диспозитивности в гражданском праве Республики Казахстан и его роль в юридической науке. Несмотря на то, что цивилисты достаточно часто оперируют таким понятием, как принцип диспозитивности, авторы отмечают, что само понятие не имеет четкой нормативно-правовой формулировки, а собирается из смысла различных статей гражданского законо-

дательства. Это, в свою очередь, приводит к затруднению уяснения указанного принципа субъектами правоприменения. Необходима более четкая и определенная прописанность принципа диспозитивности в гражданском законодательстве Республики Казахстан, так как от содержания основных начал гражданского законодательства, наличия в нем внятной формулировки принципа диспозитивности зависит решение многих цивильных дел. Общей характеристикой диспозитивности в гражданском праве как метода, как принципа и категории, характеризующей нормы гражданского права, можно назвать внутренне выработанную, заинтересованную направленность субъектов гражданских правоотношений по своей инициативе приобретать и осуществлять гражданские права и обязанности. В итоге авторы раскрывают понятие диспозитивности как принципа, метода и категории, характеризующей нормы гражданского права, а также отмечают ее особую значимость в сфере гражданско-правовых отношений. При этом диспозитивность как принцип гражданского права организует его структуру, как черта метода гражданско-правового регулирования обеспечивает его действие, а как категория, характеризующая норму права, создает альтернативу осуществления субъектом гражданского правоотношения того или иного действия.

Ключевые слова: цивилистика, принцип права, правовая норма, правовая категория, метод, гражданское право, гражданско-правовые отношения, субъект гражданского правоотношения, принцип диспозитивности, императивная норма.

Zh.S. Seitaeva, T.G. Makhanov

Dispositiveness in civil law of the Republic of Kazakhstan: as a principle, as a method and as a category characterizing the norms of civil law

The article considers the features of the principle of disposability in the civil law of the Republic of Kazakhstan and its role in the legal science. It is stated that despite the fact that civilians often operate with such a concept as the principle of disposability, the very concept does not have a clear normative legal formulation, we collect this concept from the meaning of various articles of civil legislation. This, in turn, leads to the difficulty of clarifying this principle by the subjects of law enforcement. In this regard, it is necessary to have a more precise and definite prescriptiveness of the principle of disposability in the civil legislation of the Republic of Kazakhstan. After all, the content of the main principles of civil legislation, the presence in it of a clear formulation of the principle of disposability, depends on the decision of many civil cases. A common characteristic of disposability in civil law as a method, as a principle and category, characterizing the norms of civil law can be called the internally developed, interested direction of subjects of civil legal relations on their own initiative to acquire and exercise civil rights and obligations. As a result, the authors disclose the notion of disposability as a principle, method and category that characterizes the norms of civil law, and also note its special significance in the sphere of civil law relations. At the same time, disposability as a principle of civil law -organizes its structure as a feature of the civil law regulation method - ensures its operation, but as a category characterizing the rule of law - creates an alternative to the implementation of a civil legal relationship of an action.

Keywords: civil law, the principle of law, the legal norm, the legal category, method, civil law, civil relations, the subject of civil legal relationship, the principle of disposability, the imperative norm.

References

1 Iakovlev, V.F. (1972). *Hrazhdansko-pravovoi metod rehulirovaniia obshchestvennykh otnoshenii [Civil-law method of regulation of public relations]*. Sverdlovsk [in Russian]; Krasavchikov, O.A. (1970). Dispozitivnost v hrazhdansko-pravovom rehulirovanii [Dispositiveness in civil law regulation]. *Sovetskoe hosudarstvo i pravo – Soviet state and law, 1,* 41–49 [in Russian]; Komissarov, K.I., & Semenov, V.M. (Eds.). (1978). *Sovetskii hrazhdanskii protsess [Soviet civil procedural law]*. Moscow: Yuridicheskaia literatura [in Russian].

2 Musilimov, A.E. (2004). Dispozitivnost v uholovnom protsesse Respubliki Kazakhstan [Dispositiveness in criminal process of the Republic of Kazakhstan]. *Extended abstract of candidate's thesis.* Karaganda [in Russian].

3 Glukhova, O.Yu. (2009). Institut dispozitivnosti v prave [Institute of dispositive in law]. *Extended abstract of candidate's thesis.* Tambov [in Russian].

4 Briukhov, R.B. (2006). Dispozitivnost v hrazhdanskom prave Rossii [Dispositiveness in the Civil Law of Russia]. *Extended abstract of candidate's thesis.* Ekaterinburg [in Russian].

5 «Kazakstan Respublikasynyn 2010 zhyldan 2020 zhylha deiinhi kezenhe arnalhan kukyktyk saiasat tuzhyrymdamasy turaly» Kazakstan Respublikasy Prezidentinin 2009 zhylhy 24 tamyzdahy №858 Zharlyhy [«On Conception of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020» The Decree of the President of the Republic of Kazakhstan dated 24 August 2009 No. 858]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/rus/docs/U090000858_ [in Kazakh].

6 Kazakstan Respublikasynyn Azamattyk kodeksi (Zhalpy bolim) 1994 zhyl 27 zheltoksan № 268-XIII [Civil code of the Republic of Kazakhstan (The general part) of December 27, 1994 No. 268-XIII, 1994, 27 December]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/kaz/docs/K940001000 [in Kazakh].

7 Kazakstan Respublikasynyn Azamattyk kodeksi (Erekshe bolim) 1999 zhyl 1 shilde № 409 [Civil code of the Republic of Kazakhstan (The special part) of July 1, 1999 No. 409, 1999, 1 July]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/kaz/docs/K990000409_. [in Kazakh].

8 Klimkin, S.I. Hrazhdanskoe pravo i tsifry [Civil law and figures]. *m.zakon.kz.* Retrieved from http://m.zakon.kz/4629322. [in Russian].

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A.A. Nukusheva

«Bolashak» Academy, Kazakhstan
(E-mail: akuka007@mail.ru)

To the question of objects of inherited relation in the Republic of Kazakhstan

Inheritance law belongs to one of the most demanded in the practical respect sub-sectors of civil law and is known to all modern legal systems. The study of current problems of inheritance law in the Republic of Kazakhstan is of particular value, since inheritance preserves the inextricable link between generations and indirectly contributes to the stabilization and development of civil turnover. With the transition of Kazakhstan to the market economy, privatization, establishment of entrepreneurial activity freedom and other reforms, the range of objects of private property rights of individuals has broadened significantly which leads to an increase in the interest in Kazakhstani society in applying its forces and labor to generate income from generation to generation. The object of the hereditary legal relationship is inheritance (hereditary property, «hereditary mass»), passing to the heirs. Based on the analysis of the national legislation of the Republic of Kazakhstan the CIS countries and other countries different approaches to determining inheritance have been identified. When writing the article there were analyzed various points of different periods scholars' view - pre-revolutionary, Soviet and modern which are set out in textbooks, monographs, scientific articles, doctoral and candidate dissertations concerning such a concept as «inheritance», «hereditary property», «hereditary weight». It was concluded that unfortunately in our national legal doctrine there is obviously not enough work of the appropriate kind devoted to this problem, therefore, scientific research on this topic is relevant nowadays.

Keywords: inheritance law, objects of inheritance relationship, inheritance property, inheritance mass, inheritance, composition of inheritance.

Recognition of private property, entrepreneurial activity, transition to the market economy by modern Kazakhstan led to radical changes in all spheres of society and every citizen. Article 26 of the Republic of Kazakhstan Constitution recognizes the right of private property and the inadmissibility of its deprivation other than by a court decision for every person residing in the territory of the Republic of Kazakhstan regardless of his citizenship. Also it guarantees the right of inheritance [1]. Recognition for every person and citizen of the right to freely dispose of their labor and creativity, the right to engage in entrepreneurial and other economic activities entailed an increase in the sources of income. With the transition of Kazakhstan to the market economy, privatization, establishment of freedom of entrepreneurial activity and other reforms, the range of objects of private property rights of individuals has broadened significantly, which leads to an increase in the interest in Kazakhstani society in applying its forces and labor to generate income, from generation to generation.

The object of the hereditary legal relationship is inheritance (hereditary property, «hereditary mass»), passing to the heirs. If we turn to the legal definition of inheritance, contained in the civil codes of different countries, then we can distinguish three positions in the definition of inheritance:

1. Rights and duties. For example, according to Art. 1218 of the Civil Code (hereinafter referred to as CC) of Ukraine, the inheritance includes all rights and obligations that belonged to the testator at the time of opening the inheritance and did not cease due to his\her death [2], and according to 1113 Civil Code of Uzbekistan, the inheritance includes all rights and obligations, they belong to the testator at the time of the discovery of the inheritance, the existence of which does not cease with his\her death [3].

2. Property, property rights and obligations - Art. 1040 Civil Code of the Republic of Kazakhstan [4]; Art. 1112 Civil Code of the Russian Federation [5]; Art. 1328 Civil Code of Georgia [6]; Art. 1922 German civil code [7]; Art. 625 of the Civil Code of Quebec [8]; Art. 1 of the Law on the Succession of Israel [9]. For example, according to Art. 1112 of the Civil Code of Russian Federation, the inheritance includes belonging to the testator on the day of opening the inheritance, other property, including property rights and obligations [5].

3. The aggregate of movable and immovable property, as well as the transferred rights and duties, can be traced in art.382 of the Latvian Civil Code. «The inheritance is the totality, which includes all movable and immovable property as well as the rights and obligations to be transferred to others belonging to the deceased or declared deceased at the time of his\her actual or allegedly legal death.

In this case the deceased or declared dead is called the testator» [10]. Similarly, this position can be traced in Art. 724 of the Civil Code of France [11].

In the doctrine also there was no common understanding of the inheritance. D.I. Meyer, by inheritance, understood the aggregate of legal relations that passed to the heir [12; 409]. A similar position was occupied by G.F. Shershenevich who believed that all the relations of the former subject, which together make up the notion of property, are transferred to a new person not as a single entity but as something integral, single. Inheritance is a general continuity. It is simultaneously a transition of the whole complex and not just the sum of legal relations [13; 467]. However, legal relationship as a legal link between two entities with rights and (or) duties can not be transferred. It may cease or change with the participation of some entities, continuing to exist with the participation of other entities.

K.P. Pobedonostsev under the inheritance recognized property with all rights and duties, «some unity in which the cash and debts (activa and passiva) merge into one legal entity (universum jus), passing not to a random invader but to known predetermined persons - heirs» [14; 484].

The Civil Code of KazSSR did not contain the legal notion of inheritance although the content of many norms dealt with property. There was also no formal definition of property. According to V.I. Serebrovsky property of a citizen is a collection of his\her real values that belong to him\her, including various material objects (things); may also include rights of claim. But property can not include debts and property can not consist of only debts [15; 55].

The Civil Code of the Republic of Kazakhstan directly establishes that the inheritance includes the property belonging to the testator as well as rights and duties the existence of which does not cease with his\her death. The inheritance may also include the rights necessary for registration of the property rights of the testator which were not registered during his\her life including the right to register them (Article 1040 of the Civil Code of the Republic of Kazakhstan) [4].

Paragraph 2 of the Art. 115 under the general concept of property combines property benefits and rights which include: things, money, including foreign currency, financial instruments, works, services, objectified results of creative intellectual activity, trade names, trademarks and other means of individualizing products, property rights and other property. The legal regime of things or property rights (claims) applies accordingly to money and rights (claims) under a monetary obligation (the rights of a demand for payment of money) [16].

The contributions of spouses, acquired during the marriage, are their common joint property. When allocating the share of the testator to the common joint property contributions made to the surviving spouse should be considered [17].

Nevertheless in the literature on the concept of «inheritance» and at the present time there is no unity: some authors under the inheritance understand rights and obligations while others proceed from its legal definition.

It should be agreed with V.I. Sinaiskiy, who believed that our civil laws had adopted a view of inheritance mainly as a way of acquiring property. The concept of inheritance like the inheritance itselfis not exhausted by the notion of the acquisition of property [18; 547].

Any citizen is a subject of corporeal and obligatory legal relations and consequently the possessor of real and obligatory subjective rights and legal obligations. The fundamental proprietary right is the right of ownership which allows the owner at his discretion to own, use and dispose of his property. In case of death of the owner, the deceased's property right passes to his heirs, therefore the Civil Code considers inheritance as one of the grounds for acquiring property rights (clause 2 of the Article 235 of the Civil Code) [16]. Authors who understand the inheritance as a set of rights and obligations rightly proceed from the fact that the law calls inheritance the basis for the emergence of property rights rather than property, things. However, inheritance has always been aimed at ensuring the transfer to the heirs of not only property rights but also various things like objects of material world, money, securities, property rights belonging to the potential testator, considering that the deceased person is eliminated not only from the legal but also from the legal, economic and social relations. Therefore, heirs replace the deceased and in public property relations, exercising dominance over inherited property, ensure the preservation of the inheritance from the moment of opening the inheritance. It is important for them that all things, material goods belonging to a possible testator on the right of ownership, whatever they are, they should be transferred to them as a single whole. Everyone therefore works, acquires, and stores his\her property in order to satisfy not only his\her needs but also to leave them behind to his loved ones. Therefore, the inheritance includes not only the right of ownership of a particular property but also the property itself. There can be no other because «Property» without the right to

it «loses any meaning, the basis of its existence» [19; 9]. But the right of ownership without an object of property - property, also loses «any meaning and basis of its existence». Therefore, the inheritance includes not only the right of ownership but also the property that belonged to the citizen before his death.

We are impressed by the definition made by K.M. Ilyasova and E.B. Babyikova who under inheritance or hereditary property, proposes to understand the property belonging to the testator as well as rights and duties, the existence of which does not cease with his\her death and on the conditions of universal legal succession pass to his\her heirs [20; 300].

Currently, the list of objects of civil rights is much broader than the composition of the inheritance. Objects of civil rights include things, including cash and documentary securities, other property, including non-cash funds, uncertificated securities, property rights; results of works and services; protected results of intellectual activity and equated to them means of individualization (intellectual property); intangible goods (Article 115 of the Civil Code of the Republic of Kazakhstan) [16]. But the inheritance also includes most of the obligatory rights and obligations and some personal rights of the authors of intellectual property. All these objects, except intangible benefits, are part of the inheritance. Paragraph 3 of the Art. 115 Civil Code of the Republic of Kazakhstan

The personal non-property benefits and rights include: life, health, personal dignity, honor, good name, business reputation, privacy, personal and family secrets, the right to a name, the right to authorship, the right to inviolability of the work and other intangible benefits and rights [16].

Inheritance should guarantee the stability of not only property but also legal relationships to which a possible testator was a participant and therefore there must be a succession of rights and obligations. Pre-revolutionary civilians used the term «succession» [18; 546, 14; 238, 21; 484, 13; 471], in the Soviet literature both this terms and «succession» were recognized [15; 64], in the Civil Code of the RK it is a question of «succession» (Article 344, Article 1038) [16; 4]. As B.B Cherepakhin noted the term «succession» can be interpreted in two senses: a) continuity only in rights; b) the continuity provided by the norms of law by which one can understand the transition from one person to another not only of rights but also of duties [22; 310].

The grounds for the creditor's change in the obligation under Art. 344 CC RK are: 1) as a result of universal succession in the rights of the creditor; 2) by a court decision on the transfer of creditor's rights to another person when the possibility of such transfer is provided for by legislative acts; 3) due to the performance of the obligation by its guarantor, guarantor or pledger who is not a debtor under this obligation; 4) upon subrogation to the insurer of the rights of the creditor to the debtor responsible for the occurrence of the insured event; 5) in other cases provided for by legislative acts [16]. The current version of the Civil Code of the Republic of Kazakhstan also provides for the transfer of debt (Article 348 of the Civil Code of the Republic of Kazakhstan) [16]. The above provisions of the law confirm the provision that in the composition of the inheritance besides the things, money, other property the corresponding rights and duties are included except for the rights inherent in the person of the testator. In particular, the rights and duties inherent in the person of the testator are not the part of the inheritance: 1) the rights of membership in organizations that are legal entities unless otherwise stipulated by legislative acts or the contract; 2) the right to compensation for harm caused to life or health; 3) rights and obligations arising from maintenance obligations; 4) rights to pension payments, benefits and other payments on the basis of labor legislation of the Republic of Kazakhstan and laws of the Republic of Kazakhstan in the field of social security; 5) personal non-property rights that are not related to property rights except for cases established by legislative acts (clause 2, article 1040 of the Civil Code of the Republic of Kazakhstan) [4].

At present on the right of private property citizens can own any movable and immovable property in unlimited quantity, money, securities, rights and duties that satisfy not only the needs of the owner and his\her family members but used in entrepreneurial activities. In the event of the death of the owner all the things, money, securities and other property that belong to him are included in the inheritance, regardless of the place of his location.

In the literature the opinion was expressed that the heirs can not claim the sharing of the joint property of the spouses [23; 3] and therefore the share of the deceased person should not be included in the inheritance in the joint property of the spouses. The fallacy of such an opinion is obvious since it does not correspond to the current family and civil legislation.

In the Russian literature an opinion is expressed on the need to include unauthorized buildings in the composition of the inheritance [24]. With this opinion one can be disagreed because the general rule on the transfer of ownership is contained in paragraph 2 of Art. 235 of the Civil Code of the Republic of Kazakh-

stan [16]. To determine the fate of unauthorized construction art. 244 CC which contains the concept of unauthorized construction and unequivocally determines that a person does not acquire ownership rights to it, therefore, he\she does not have the right to dispose of it [16]. Only after the legalization of the unauthorized construction can be a part of the inheritance. If the unauthorized construction cannot be legalized then the inheritance may include only those materials (things) from which it is erected.

A potential testator can be a participant of both a shared and shared joint property. In the first case the share of the inheritance belongs to the right of common shared ownership (Article 235 of the Civil Code of the Republic of Kazakhstan) [16] and in the second case, its share is established which is included in the inheritance but the inheritance is opened to the share of the deceased participant in the general property and if it is impossible to divide the property in kind - in relation to the value of the share (clause 1, Article 1041 of the Civil Code of the Republic of Kazakhstan) [4]. A participant in common joint property also has the right to bequeath his\her share in common property which will be determined after his\her death (clause 2, article 1041 of the Civil Code of the Republic of Kazakhstan) [4]. Since the majority of adult citizens are married the share of the deceased spouse which belongs to him\her in the right of marital property is most often part of the inheritance.

Because according to Art. 1040 Civil Code of the Republic of Kazakhstan in the composition of the inheritance also includes the rights of existence of which does not cease with his\her death, respectively, according to Art. 195 Civil Code of the Republic of Kazakhstan for Property Rights, along with the right to property include: 1) the right of land use; 2) the right of economic management; 3) the right of operational management; 3-1) the right of limited targeted use of foreign real estate (servitude); 4) other proprietary rights (for example: easement, the right to use subsoil, the right to temporarily use the land plot that is privately owned, pledge) provided for by the Civil Code of the Republic of Kazakhstan or other legislative acts [4; 16].

In addition to real rights the inheritance includes mandatory property rights that meet certain requirements. First, they belonged to a potential testator at the time of the opening of the inheritance. Secondly, they are not connected with his personality, and therefore can be alienated. Thirdly, their passage is not prohibited by law.

The quality of alienability is shared by most property rights and obligations of a mandatory nature. These are all rights and obligations of purchase and sale and barter, permanent rents with the participation of an individual. The inheritance includes the obligation of the donor to donate some thing to transfer the right of claim or to release from the obligation, unless otherwise provided by the gift contract. But the right of the donee is not included in the composition of the inheritance to whom the gift is promised (paragraph 3 of Article 506 of the Civil Code) [4].

As related to the person the rights of the recipient of life annuity or life-long maintenance with dependents cannot be included in the composition of the inheritance (Article 530 of the Civil Code of the Republic of Kazakhstan) [4].

The inheritance includes the rights and obligations of the landlord and employer. The rights and obligations of the landlord - a citizen who is an employer of immovable propertyю. His\her rights and obligations under the contract for the hiring of this property pass to the heir, unless legislative acts or the agreement provides otherwise. The lender has no right to refuse such heir in entering into the contract for the remaining term of its operation except for cases when the conclusion of the contract was due to the personal qualities of the employer (Article 559 of the Civil Code of the Republic of Kazakhstan) [4]. At the same time the new owner becomes a renter on the terms of a previously concluded hiring contract.

The death of the borrowing citizen terminates the contract of gratuitous use of property (loan agreement) (Article 615 of the Civil Code of the Republic of Kazakhstan), the heirs of the loan recipient are obliged to return to the lender that thing that was the subject of the loan agreement. The death of the lender does not stop this obligation, his\her rights and duties are part of the inheritance (Article 614 of the Civil Code of the Republic of Kazakhstan) [4].

The death of a contractor citizen terminates the contractor's obligation as related to his personality and generates the duty of his heirs to transfer the result of the work to the customer (if work on the order was carried out) documentation and materials transferred by the customer to the contractor. The rights and obligations of the deceased customer are included in the inheritance. If the citizen was the executor of services then his death gives rise to the same legal consequences.

Some peculiarities are inherent in the transfer of the insured amount under a personal insurance contract in case of death of the insured person. So, in case of death of the insured person who is not an insured the

contract is subject to termination but if the death of the insured person is the insurance event stipulated in the insurance contract this contract is executed on the terms provided for by it. In the case of the death of the insured person who is not the insured in relation to which the property insurance contract was concluded the rights and obligations of the insured with the consent of the insured pass to the heirs of that property and those property rights of the insured that were the object of insurance. However, if the policyholder does not agree to replace the deceased insured person or the heirs of the insured person do not agree to accept his rights and obligations arising from the insurance contract this agreement is subject to termination (clause 8, article 815 of the Civil Code of the Republic of Kazakhstan) [4].

The death of the principal or the agent terminates the contract of assignment (Article 852 of the Civil Code of the Republic of Kazakhstan) [4]. In the event of the death of the principal, his\her heirs are required to notify the attorney about the termination of the contract, pay the remuneration due to the attorney and incur expenses incurred while executing the assignment. If an attorney dies then his\her heirs must return the power of attorney to the trustee and also transfer the trustee's property.

Some peculiarities are also inherent in the commission's contract in the case of the death of the commission agent the contract terminates (clause 2, Article 879 of the Civil Code of the Republic of Kazakhstan), in the event of the death of the citizen's committent, the commission agent is obliged to continue the execution of the assignment given to him\her until the heirs or representatives of the committent proper instructions will be received (clause 2, article 879 of the Civil Code of the Republic of Kazakhstan) [4].

The contract of trust management of property, along with the general grounds for the termination of obligations is terminated by the death of a citizen - the trustee and the liquidation of a legal person - the trustee and in the event of the death of the physical person-founder the trusted property enters the hereditary mass (paragraphs 1, 4, article 891 The Civil Code of the Republic of Kazakhstan).

There are special rules for transaction of rights and duties under a comprehensive entrepreneurial license contract. So, in the case of the death of a licenser-citizen his\her rights and obligations under a comprehensive entrepreneurial license contract pass to the heir, provided that the heir is registered or within six months from the date of opening the inheritance is registered in as an entrepreneur, otherwise the contract is terminated. Management of the licensed complex in the period prior to the acceptance by the heir of the relevant rights and obligations or prior to the registration of the heir as an entrepreneur is carried out by a trustee appointed by a notary in accordance with the established procedure. In case of death of the licensee the heir enters into the contract in the part of rights and obligations relating to the transferred exclusive right (Article 909 of the Civil Code of the Republic of Kazakhstan).

The possessor could own property and personal non-property rights if he was the author of the result of intellectual activity (Article 963 of the Civil Code of the Republic of Kazakhstan) [4].

Exclusive rights to the object of intellectual property pass in the order of universal succession by inheritance (Article 965 of the Civil Code of the Republic of Kazakhstan). According to the Art. 964 of the Civil Code of the Republic of Kazakhstan the exclusive right to the result of intellectual creative activity or a means of individualization is recognized the property right of their owner to use the object of intellectual property in any way at their discretion [4].

In the Russian literature there is an opinion that it is expedient to include the obligation to pay alimony to the estate and accordingly the recovery on maintenance obligations can be turned over to the inheritance both for the purpose of paying off the debts that have arisen and to ensure payment of current payments [25; 411] .

We believe that the obligation to pay alimony cannot be part of the inheritance not only because it is expressly prohibited under Art. 3, Art. 1040 Civil Code of the Republic of Kazakhstan but also because the recipient of alimony always inherits the obligatory share (item 1 of Article 1069 of the Civil Code of the Republic of Kazakhstan) [4].

All that an heir entitled to such a share receives from the inheritance under the will and (or) by law including the value of the property consisting of items of ordinary household furnishings and use and the value of the established in favor of such heir of the testamentary refusal (clause 2, article 1069 of the Civil Code of the Republic of Kazakhstan) [4].

According to the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family» (hereafter MF of the RK) the right to receive alimony is:

1. Disabled adult children in need of assistance of able-bodied parents (clause 1 of article 143 of the MF of the RK).

2. To demand the provision of alimony in court from a former spouse who has the necessary means to do so:

a) the former spouse during pregnancy and until reaching the total child of three years of age (clause 148 of the MF of the RK);

b) a needy former spouse who cares for the common disabled child before reaching the age of eighteen years and also if the disabled child is identified as an eighteen-year-old disabled person under the I-II disability category (clause 2, article 148 of the MF of the RK) ;

c) a disabled former needy spouse who became disabled before the dissolution of marriage (marriage) (clause 3, article 148 of the RK CBS).

3. Minor brothers and sisters in need of help from their able-bodied relatives of adult brothers and sisters who have the means necessary for this (Article 151 of the MF of the RK).

4. Minors needing help grandchildren from their grandparents who have the necessary means (Article 152 of the MF of the RK).

5. The disabled grandfather and grandmother in need of help from their able-bodied adult grandchildren who possess the necessary means (Article 153 of the MF of the RK).

6. Disabled persons in need who actually raised and kept underage children from their able-bodied pupils who reached the age of majority (Article 154 of the MF of the RK).

7. Disabled and stepmother who are unable to work, who need help, who brought up and kept their stepchildren or stepdaughters from able-bodied stepchildren or stepdaughters who have the necessary means (Article 155 of the MF of the RK) [26].

A person has a complex of personal non-property rights that individualize his personality (in name, personal image, honor, dignity, business reputation, place of residence); (for life, health, sexual inviolability), as well as the right to inviolability of personal life (privacy of a secret, the secret of correspondence, negotiations, medical and other secrets) (Article 115 of the Civil Code of the Republic of Kazakhstan) [16] . These rights are inalienable and non-transferable and therefore do not inherit. Personal non-property rights and other non-material goods belonging to the testator may be carried out and protected by heirs (art. 1040, art. 1040 of the Civil Code of the Republic of Kazakhstan) [4].

The inheritance may include the rights or obligations of certain organizational legal relations. For example, it is the duty of the assignee to enter into the main contract if the possible testator after concluding a preliminary contract for the sale of some property or a contract of shared construction of a residential or non-residential premises, has died without having had the time to conclude a basic contract.

In the literature, the question of including in the inheritance of debts was discussed. Under current legislation, the inheritance includes duties (clause 1, article 1040 of the Civil Code of the Republic of Kazakhstan) [4]. Duties are very different, including on the payment of all kinds of monetary funds applied to the defendant in connection with non-performance or improper performance of duties. In accordance with the Art. 1081 of the Civil Code of the RK heirs are responsible for the debts of the testator [4].

Thus, the object of the hereditary legal relationship is inheritance (hereditary property, hereditary mass). The inheritance includes any property (movable, immovable) that belonged to a possible testator on the day of his death, property rights and obligations, with the exception of those connected with the person.

Referenses

1 Конституция Республики Казахстан. Принята на Республиканском референдуме 30 августа 1995 года [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/?doc_id=1005029#pos=1;-117.

2 Гражданский кодекс Украины [Электронный ресурс]. — Режим доступа: http://kievgrad.info/page/1/628.

3 Гражданский кодекс Узбекистана [Электронный ресурс]. — Режим доступа: http://fmc.uz/legisl.php?id=k_grajd_66.

4 Гражданский кодекс Республики Казахстан (Особенная часть) от 1 июля 1999 года № 409-I [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/?doc_id=1013880.

5 Гражданский кодекс Российской Федерации (ч. 3) от 26 ноября 2001 года № 146-ФЗ [Электронный ресурс]. — Режим доступа: http://www.consultant.ru/document/cons_doc_LAW_34154/.

6 Гражданский кодекс Грузии [Электронный ресурс]. — Режим доступа: https://matsne.gov.ge/ru/document/download/31702/75/ru/pdf.

7 Германское право. Часть I. Гражданское уложение: пер. с нем. / Серия: Современное зарубежное и международное частное право. — М.: Междунар. центр финансово-экономического развития, 1996. — 552 с.

8 Гражданский кодекс Квебека / Исследовательский центр частного права; Юридический факультет университета Макгилл; Институт сравнительного правоведения; Канадское агентство международного развития / Науч. ред. О.М. Козырь, А.А. Маковская; пер. с англ. и фр. Г.Е. Авилова и др. Автор введения Д.Е.К. Брайерли. — М.: Статут, 1999. — 472 с.

9 Гражданское законодательство Израиля / Сост. М.С. Хейфец. — СПб.: Юрид. центр «Пресс», 2003.

10 Гражданский закон Латвийской Республики [Электронный ресурс]. — Режим доступа: https://www.lid.lv/images/PDF /microsoft_word__satciv.pdf.

11 Французский гражданский кодекс / науч. ред. Д.Г. Лавров. — СПб.: Юрид. центр «Пресс», 2004. — 1101 с.

12 Мейер Д.И. Русское гражданское право / Д.И. Мейер. — 3-е, изд., испр. — М.: Статут, 2003. — 831 с.

13 Шершеневич Г.Ф. Учебник русского гражданского права (по изданию 1907 г.) / Г.Ф. Шершеневич; Вступ. ст. Е.А. Суханова. — М.: Фирма «СПАРК», 1995. — 556 с.

14 Победоносцев К.П. Курс гражданского права: в 3-х т. / К.П. Победоносцев; под ред. и с биограф. очерком В.А.Томсинова. — Т. 1. — М.: Зерцало, 2013. — 768 с. (сер. «Русское юридическое наследие»).

15 Серебровский В.И. Избранные труды по наследственному и страховому праву / В.И. Серебровский. — 2-е изд., испр. — М.: Статут: ЗАО «Консультант Плюс», 2003. — 557 с.

16 Гражданский кодекс Республики Казахстан (Общая часть). Введен в действие Постановлением Верховного Совета РК от 27 декабря 1994 года № 269-XII [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/?doc_id=1006061.

17 Нормативное постановление Верховного суда Республики Казахстан от 29 июня 2009 года № 5 «О некоторых вопросах применения судами законодательства о наследовании» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/?doc_id=30425715.

18 Синайский В.И. Русское гражданское право / В.И. Синайский. — М.: Статут, 2002. — 638 с.

19 Алексеев С.С. Право собственности. Проблемы теории: монография. — 3-е изд., перераб. и доп. — М.: Норма; Инфра-М, 2010. — 240 с.

20 Ильясова К.М. Раздел IX. Наследственное право / К.М. Ильясова, Э.Б. Бабыкова // Гражданское право. — Т. III: учебник для вузов (акад. курс) / отв. ред. М.К. Сулейменов, Ю.Г. Басин. — Алматы, 2004. — 522 с.

21 Никитюк П.С. Проблемы советского наследственного права: автореф. дис. ... д-ра юрид. наук / П.С. Никитюк. — М., 1975.

22 Черепахин Б.Б. Труды по гражданскому праву / Б.Б. Черепахин. — М.: Статут, 2001. — 479 с.

23 Акатова О. Плакала собственность, когда считали доли / О. Акатова // Адвокат. — 1998. — № 4.

24 Рождественский С.Н. О возможности включения в наследственную массу «самовольных построек» [Электронный ресурс] / С.Н. Рождественский. — Режим доступа: https://www.lawmix.ru/comm/3665.

25 Левушкин А.Н. Теоретическая модель построения системы семейного законодательства Российской Федерации и других стран - участников Содружества Независимых Государств: дис. ... д-ра юрид. наук: 12.00.03 «Гражданское право; предпринимательское право; семейное право; международное частное право» / А.Н. Левушкин. — М., 2013. — 462 с.

26 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.

А.Ә. Нүкішева

Қазақстан Республикасында мұрагерлік құқықтық қатынастың объектілері мәселесі туралы

Мұрагерлік құқық қазіргі құқық жүйелеріне белгілі азаматтық құқықтың тәжірибелік тұрғыдан үлкен сұранысқа ие саласына жатады. Қазақстан Республикасындағы мұрагерлік құқықтың өзекті мәселелерін зерттеу ерекше маңызға ие болуда. Себебі мұрагерлік ұрпақтардың арасындағы үзілмейтін байланысты сақтап, азаматтық айналымның тұрақтануы мен дамуына жанама әсер етеді. Қазақстанның нарықтық экономика мен жекешелендіруге өтуіне, кәсіпкерлік қызмет еркіндігінің белгіленуіне және өзге де реформаларға байланысты жеке тұлғалардың жеке меншік құқығы нысандары едәуір көбейді. Бұл қазақстандық қоғамда ұрпақтан ұрпаққа беруге болатын мүлікті алуға, табысты табуға бағытталған еңбек пен күшті жұмсауға қызығушылықты арттыруда. Мұрагерлік құқықтық қатынастың объектісі болып мұрагерлерге өтетін мұра (мұрагерлік мүлік, «мұрагерлік масса») табылады. Қазақстан Республикасы мен ТМД елдерінің, басқа елдердің ұлттық заңнамасына жүргізілген талдаудың негізінде мұраны анықтауға қатысты түрлі тұжырымдар анықталған. Мақаланы жазу барысында түрлі кезеңдердің, яғни революцияға дейінгі, кеңес және қазіргі заман ғалымдарының оқулықтарда, монографияларда, ғылыми мақалаларда, докторлық және кандидаттық диссертацияларда «мұра», «мұрагерлік мүлік», «мұрагерлік масса» ұғымдарына қатысты түрлі көзқарастарына талдау жасалып, зерттелді. Біздің ұлттық құқықтық доктринада аталған мәселеге арналған тиісті жұмыстардың аз екендігі жөнінде қорытынды жасалды. Осы себептен осы тақырыпқа арналған зерттеулер өзекті болып табылады.

Кілт сөздер: мұрагерлік құқық, мұрагерлік құқықтық қатынастың объектілері, мұрагерлік мүлік, мұрагерлік масса, мұра, мұраның құрамы, мұрагерлік.

А.А. Нукушева

К вопросу об объектах наследственного правоотношения в Республике Казахстан

Наследственное право относится к одним из наиболее востребованных в практическом отношении подотраслей гражданского права и известно всем современным правовым системам. Исследование актуальных проблем наследственного права в Республике Казахстан приобретает особую ценность, поскольку наследование сохраняет неразрывную связь между поколениями и опосредованно способствует стабилизации и развитию гражданского оборота. С переходом Казахстана к рыночной экономике, приватизации, с установлением свободы предпринимательской деятельности и иных реформ существенно расширился круг объектов права частной собственности физических лиц, что ведет к возрастанию в казахстанском обществе заинтересованности в приложении своих сил и труда для получения доходов, приобретения имущества, которое можно передавать от поколения к поколению. Объектом наследственного правоотношения является наследство (наследственное имущество, «наследственная масса»), переходящее к наследникам. На основе анализа национального законодательства Республики Казахстан, стран СНГ и других стран выявлены различные подходы определения наследства. При написании статьи были исследованы и проанализированы точки зрения учёных разного периода — дореволюционного, советского и современного, которые изложены в учебниках, монографиях, научных статьях, докторских и кандидатских диссертациях относительно таких понятий, как «наследство», «наследственное имущество», «наследственная масса». Был сделан вывод, что, к сожалению, в нашей национальной правовой доктрине явно недостаточно работ соответствующего вида, посвящённых этой проблеме, поэтому научные исследования по этой теме актуальны.

Ключевые слова: наследственное право, объекты наследственного правоотношения, наследственное имущество, наследственная масса, наследство, состав наследства.

Referenses

1 Konstitutsiia Respubliki Kazakhstan. Priniata na Respublikanskom referendume 30 avhusta 1995 hoda [Constitution of the Republic of Kazakhstan adopted in a referendum of 30, Augast 1995]. *online.zakon.kz.* Retrieved from http //https://online.zakon.kz/document/?doc_id=1005029#pos=1;-117 [in Russian].

2 Hrazhdanskii kodeks Ukrainy [Civil Code of Ukraine]. *kievgrad.info*. Retrieved from http://kievgrad.info/page/1/628 [in Russain].

3 Hrazhdanskii kodeks Uzbekistana [Civil Code of Uzbekistan]. *fmc.uz.* Retrieved from http://fmc.uz/legisl.php?id=k_grajd_66 [in Russain].

4 Hrazhdanskii kodeks Respubliki Kazakhstan (Osobennaia chast) ot 1 iiulia 1999 hoda № 409-I [Civil Code of the Republic of Kazakhstan (Special Part)] of July 1, 1999 No. 409-I]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/?doc_id=1013880 [in Russian].

5 Hrazhdanskii kodeks Rossiiskoi Federatsii (chast 3) ot 26 noiabria 2001 hoda № 146-ФЗ [Civil Code of Russian Federation (part 3) № 146-ФЗ of November 26, 2001]. *consultant.ru.* Retrieved from http://www.consultant.ru/document/cons_doc_LAW_34154/ [in Russian].

6 Hrazhdanskii kodeks Hruzii [Civil Code of Georgia]. *matsne.gov.ge*. Retrieved from https://matsne.gov.ge /ru/document/download/31702/75/ru/pdf [in Russian].

7 Hermanskoe pravo (1996). Chast I. Grazhdanskoe ulozhenie. Seria: Sovremennoe zarubezhnoe i mezhdunarodnoe chastnoe pravo [German law. Civil Code: Contemporary foreign and international private law]. (Part I). Moscow: Mezhdunarodnyi tsentr finansovo-ekonomicheskoho razvitiia [in Russian].

8 Kozyr, O.M., & Makovskaia, A.A. (Eds.). (1999). Hrazhdanskii kodeks Kvebeka [Civil Code of Quebec]. Issledovatelskii tsentr chastnoho prava; Yuridicheskii fakultet universiteta Makhiil; Institut sravnitelnoho pravovedeniia; Kanadskoe ahenstvo nauchnoho razvitiia [Private Law Research Center; Faculty of Law, McGill University]. (G.E. Avilov et.al, Trans). Moscow: Statut [in Russian].

9 Heifec, M.S. (Eds.). (2003). *Hrazhdanskoe zakonodatelstvo Izrailia [Civil law of Israel]*. Saint-Petersburg: Yuridicheskii Tsenter «Press» [in Russian].

10 Hrazhdanskii zakon Latviiskoi Respubliki [Civil Law of the Republic of Latvia]. *lid.lv.* Retireved from https://www.lid.lv/images/PDF/microsoft_word__satciv.pdf [in Russian].

11 Lavrov, D.G. (Eds.). (2004). *Frantsuzskii Hrazhdanskii kodeks [French Civil Code]*. Saint-Petersburg: Yuridicheskii Tsenter «Press» [in Russian].

12 Meyer, D.I. (2003). *Russkoe hrazhdanskoe pravo [Russian Civil Law]*. (3d ed.). Moscow: Statut [in Russian].

13 Suhanov, E.A., & Shershenevich, G.F. (1995). *Uchebnik russkoho hrazhdanskoho prava (po izdaniiu 1907 h.) [Textbook on Russian Civil Law (published in 1907)]*. Moscow: Firma «SPARK» [in Russian].

14 Pobedonostsev, K.P. (2013). *Kurs hrazhdanskoho prava [Course of Civil Law in three volumes]*. V.A. Tomsinov (Ed.). (Vol. 1-3; Vol. 1). Moscow: Zertsalo [in Russian].

15 Serebrovskiy, V.I. (2003). *Izbrannye trudy po nasledstvennomu i strakhovomu pravu [Selected Works on Hereditary and Insurance Law]*. V.I. Serebrovskiy (Ed.). Moscow: Statut: ZAO «Konsultant Plius» [in Russian].

16 Hrazhdanskii kodeks Respubliki Kazakhstan (Obshchaia chast). Vveden v deistvie Postanovleniem Verkhovnoho Soveta RK ot 27 dekabria 1994 hoda No. 269-XII [Civil Code of the Republic of Kazakhstan (General part) issued on 27 December, 1994 by the proclamation of Supreme Council of the Republic of Kazakhstan]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/?doc_id=1006061 [in Russian].

17 Normativnoe postanovlenie Verkhovnoho Suda Respubliki Kazakhstan ot 29 iiunia 2009 hoda No. 5 «O nekotorykh voprosakh primeneniia sudami zakonodatelstva o nasledovanii» [Normative Resolution of the Supreme Court of the Republic of Kazakhstan of June 29, 2009 No. 5 «On some of the issues of implementation of hereditary law by courts»]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/Document/?doc_id=30425715 [in Russian].

18 Sinayskiy, V.I. (2002). *Russkoe hrazhdanskoe pravo [Russian Civil Law]*. Moscow: Statut [in Russian].

19 Alekseev, S.S. (2010). *Pravo sobstvennosti. Problemy teorii [Property rights. Problems of theory]*. (3d ed.). Moscow: Norma; Infra-M [in Russian].

20 Iyasova K.M., & Babykova E.B. (2004). Razdel IX. Nasledstvennoe pravo. Hrazhdanskoe pravo [Section IX. The hereditary law. Civil Law]. (Vol. III). Almaty [in Russian].

21 Nikityuk, P.S. (1975). Problemy sovetskoho nasledstvennoho prava [Problems of Soviet inheritance law]. *Extended abstract of Doctor's thesis.* Moscow [in Russian].

22 Cherepahin, B.B. (2001). *Trudy po hrazhdanskomu pravu [Works on Civil Law]*. Moscow: Statut [in Russian].

23 Akatova, O. (1998). Plakala sobstvennost, kohda schitali doli [How the property wept when parts were counted]. *Advokat–Lawyer, 4* [in Russian].

24 Rozhdestvenskiy, S.N. O vozmozhnosti vkliucheniia v nasledstvennuiu massu «samovolnyikh postroek» [On the possibility of including «unauthorized buildings» in the hereditary mass]. *lawmix.ru.* Retrieved from https://www.lawmix.ru/comm/3665 [in Russian].

25 Levushkin, A.N. (2013). Teoreticheskaia model postroeniia sistemy semeinoho zakonodatelstva Rossiiskoi Federatsii i druhikh stran - uchastnikov Sodruzhestva Nezavisimykh Hosudarstv [Theoretical model of the construction of the family law system of the Russian Federation and other countries members of the Commonwealth of Independent States]. *Doctor's thesis.* Moscow [in Russian].

26 Kodeks Respubliki Kazakhstan ot 26 dekabria 2011 hoda No. 518-IV «O brake (supruzhestve) i seme» [Code of the Republic of Kazakhstan of December 26, 2011 No. 518-IV «On Marriage (Marital) and Family»]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/?doc_id=31102748 [in Russian].

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R.A. Tokatov, Zh.T. Myrzaliyeva

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

Cryptocurrency and digital future in market relations

The article is devoted to cryptocurrency, which is one of the most important and practical problems today. According to researches of the authors in order to be in an equal position among the world's economic monopoly tendencies in tendency of the complex world globalization in the modern world cryptocurrency relation as an alternative method being as one of the most unique ways to overcome financial dependence is considering. Payment by the cryptocurrency today is the trend. The number of supporters of the new currency system increases with each passing day. Naturally, the demand for is forming in capitalist society. However, since there is no single cryptocurrency control mechanism, it is difficult to have confidence. It is not provided and the individual control of cryptocurrency by separate countries. According to some experts cryptocurrency may be a great driver to assign huge amounts of cash. If each state will be able to present the declaration to control legally or improve other ways of regulation, the cryptocurrency can replace the current financial system. And then the demand for it will increase. In comparison with Eastern Europe, cryptocurrency turnover in the Republic of Kazakhstan officially not forbidden, therefore the association requires the adoption of the law and it is the most urgent question in this sphere. Authors in order to resolve these problems exploring the world practice in relations of cryptocurrency, suggesting the contribution that it will be introduced in the domestic market, submit their views.

Keywords: cryptocurrency, market relation, stock exchange, competition, bitcoin, issue, currency, electronic money, Gold fund, demand, digital transaction.

J. Connally, secretary of the US Treasury Department in 1971, said: «The dollar is our currency, but it's a problem for you». It is said that nowadays it is the headache of all the states. The crisis is becoming more and more expensive. The global community, which understands that the crisis is not overlooked, until it does not escape from the currency that has been dominated over the past 70 years. In the beginning of the last century, the priority was in the British pound sterling. Because of the two world wars, the pound stroke was lost, and America's «green paper» began to dominate. Currently, two-thirds of the world's reserve (65 %) is in dollars. The largest stock market, NYSE (capital of $ 16 trillion), belongs to the US NASDAQ. The dollar is quite rooted in the world economy. Central banks of other states hold 50 % of American bonds. Many countries have saved the capital with dollar assets. Most of them are in debt to America. These two are the dominating factors of the dollar: the strong US economy and a priority in the world stock exchanges. That is why it is difficult to kill the «green paper» today and tomorrow. The world community cannot do it. Even in the aging days, the dollar-bound reserves are in danger, shocking the entire economic system. All the countries of the world where they know about it, they have no choice but to move slowly. The dollar can only be «forced to regret». As the decision of that from time to time the question of introduction the alternative currency which can endure American economic sanctions is raised. However, the edge of a common solution is unimaginable. Valeri Polkhovsky, an expert on Forex Club, explains: «there is no national currency which can become a world currency. Whether it's a European Union, Japan or any other country, when it comes to functioning as a world currency, the first question will be who the issuer of this money is. That is, who will make and print this money? Someone should work hard for it, produce internal products, export them, should work hard to earn this money and why should the other print out from air, and get it? In this case, of course, the issuer country won't have problems as solvency. Now, when the dollar dominates, there is no any other currency which goes forward. Therefore, to create such situation, it is necessary to have a central institute, independent of any country. This organization should conduct the general monetary policy on a global scale. That would be fair. The only way which won't be failure. Therefore, every time when we speak about dollars replacement the problem will always be in it».

It is clear that the establishment of a global organization, believing it to be fair, is groundless. Everyone is keenly interested in it, but political games will, obviously, do harm. In this regard, there is only one way we have mentioned above.The need of second stronghold on the international arena which could resist the magnate US and «force it to regret». According to the law, only strong can fight back strong. The first currency to remember is the euro, which can be called the world currency. The euro is initially the second reserve currency. 45 % of total oil sales, 65 % of Iran's oil exports are calculated in euros.However, this does

not make much difference. Because the eurozone economy is weaker than the United States and there are no financial resources available. The share of the world's reserves is only 15-20 %. Moreover, the membership of the EU member states is different, and their competitiveness is not equal. Consequently, weak economically developed countries, which are in structure of Europe, are experiencing a socioeconomic crisis and stagnant in today's difficult times. Thus, the union which collapses from within raises doubts. The second currency that international experts often talk about is yuan. Even Chinese currency has the potential to fade in euro. According to Standard Bank, 40 % of Chinese-African trades are now traded in yuan. Gold and foreign exchange reserves are also significant. Our expert Valery Polkhovsky has also welcomed China's potential. «The economy of the country, which is the issuer of the currency, that is the producer, must be large. Nowadays, such countries are relatively small and have a considerable amount of money. Therefore, it is difficult for the existing system to change in the nearest future. Only the Chinese currency will have an impact on the global money. It's likely to be a rival to the euro and dollar by 20-30 years». These are two of the first things that a politician and an expert can speak about. Besides, some of the specialists speak about Japanese yen and Russian rubles. Iran, which has reduced its sales to $ 15 per barrel, has signed an agreement with Japan to sell oil in yens. Bearing in mind that in the oil market Iran is the largest producer of oil and Japan is the largest consumer, for the US dollar, which for decades dominated in the oil market, it was a big threat. It is also known that Japan has canceled the dollar in its dealings with Brazil. However, the owner of the cheapest currency in the world financial market doesn't have a power to threaten. And Russia has reduced to put in assets in US dollars and invested in gold more. This means that a long-term dedollarization plan has been developed. But despite the fact that Russia's gold and foreign exchange reserves are substantial, the share of raw materials in exports dominates. The only oil makes 25 % of all export. That is why now the dollar economic space to Russia is advantageous. Even if the Russian ruble would be competitive, the economic development of the CIS, which is considered as the main partner in the economy, does not allow this. We've listed the currencies that are visually seen and handpicked and can be competitive with America's «green paper» above. Recently it is often discussed that electronic money bitcoin can bypass all above called currencies Its general name is a cryptocurrency. The focus of attention is the emission center, that is, the absence of publisher. Everyone can do it. Any state may be equally emitted if it satisfies conditions and meets the requirements of the Bitcoin system. Cost of goods and services is calculated by means of bitcoin and paid electronically. Only the equivalent cost was set. Now, its scope is growing. So, Berlin and the University of Cyprus declared their willingness to take Bitcoin for their tuition. Because it is also possible to exchange it for paper money. This is the cryptocurrency exchange that goes on a global trading platform like Forex, Libertex for seven days a week. Other currencies will only be valid for up to five business days. Now the volume of investments in bitcoin is growing in the financial market. Because the ways of its preservation and increase are effective. However, the bitcoin system has a great deal of risk because of its incompleteness. No guarantee. Any country which has passed the system's requirements may withdraw funds at its own discretion. Legalization of illegally obtained funds is also possible due to the absence of a cryptocurrency series. However, international financial institutions are convinced that bitcoin will soon be promoted in the field of electronic commerce. Obviously, in the information century where modern digital technologies develop quickly all the issues convenient for people are top priority. Electronic commerce, cashless purchases are rising every year. From that point of view, it is likely that the only currency to displace the dollar would be this cryptocurrency, which is called the Internet currency. But it is all about timing [1].

There are a lot of cryptocurrency types, such as bitcoin. Bitcoin is a digital currency. Works only on the Internet. Currency emission using the programm which indicates mathematical algorithms, goes among the millions of computers around the world. You can buy any goods from the Internet using Bitcoin. The main difference is that there is no organization or bank in the world which controls Bitcoin. The problem is that it is not a bank-controlled financial operation ... whether it can be fraud? However, the cryptocurrency is becoming a trend of our time. So, who are the miners with the farm? What is the farm? - you are questioned. Yes, the time when we say «farm», we imagine animals already passed. Besides tenge, the world currencies, such as dollars and euros, may be displaced. In the future, it is not a fantasy if the cryptocurrency will replace all of these. Cryptocurrency - electronic money. There are several types of cryptocurrency. The most popular is bitcoin. You do not have to go to work every day to earn the bitcoin. By making some certain transactions you can earn money sitting at home. The main tool of bitcoin is mining. The tool to check the transactions of consumers in the system. And those who carry out this service are called miners or internet miners. One of them is Adilbek Shungulov. He is not a specialist of IT or a wunderkind, but a simple student. He is a future surgeon. At the beginning, he was engaged in the purchase and sale of shares in the stock exchange. He no-

ticed the big changes of the bitcoin rather than the stock market, then he made a farm and now he earns about 150 thousand tenge per month [2].

The development of new digital technologies has an impact on any brunch of industry. Electronic payment is a normal process and the time of electronic money comes. What does the cryptocurrency mean? And what about bitcoin? Where and how could we use it?

The European currency has its own currency- the euro, the dollar in America, the yuan in China, and the tenge in Kazakhstan, and now Internet has its own currency. It is called the Cryptocurrency Bitcoin. In real life, we have to use the currency of the place wherever we go. And nobody requires the Internet users to make payments with Bitkoin. Cryptocurrency is a free choice of free people.

The popularity of the cryptocurrency in the world has reached Kazakhstan as well. People began to show interest in it. Many people did not go into the circumstances of the case, but turned their money into a cryptocurrency.

As the State Revenues Committee of the Ministry of Finance of the Republic of Kazakhstan reported 2 billion tenge has been deposited into the One Coin pseudocryptocurrency pyramid in Astana (since 2015). Investigators found that several people in Kazakhstan were acting on behalf of a foreign company One Coin and deceived the citizens to sell the same cryptocurrency.

How did they do it? According to the materials of the State Revenues Committee, they advertise that the cryptocurrency is unique, and its rate is rising rapidly, people can have a lot of profit in the future and pay for goods and services with it, a multi-level bonus system for attracting new depositors, and falsifying that the cryptocurrency is going on the world's stock exchanges in 2018. Thus, people were made to buy trader packages from 140 to 118,000 euros. Cryptocurrency is a digital currency. Its emission and calculation is based on various cryptographic techniques. And its functionality is decentralized in the computer network.

Cryptocurrency is a fast and reliable system of payments and money transfers based on new technologies and non government-control.

At present, we can often see concepts such as cryptocurrency, bitcoin in any social network and information portals. Recently, the information that it is permitted to pay a penalty for violations of traffic regulations by Bitcoin, it is possible to pay off with bitcoins in the household appliances and electronics shop Technodom and the Prot House sports shop in Astana was bought for bitcoin by a student was spread. How truthful is this information? What is the cryptocurrency? And why the popularity of the cryptocurrency increased?

It is possible to say that 2017 is a year of cryptocurrency. At the beginning of January, the generalized market capitalization exceeded $ 18 billion. Over the past 12 months, it has grown 613 billion, or 3300 percent. This is the best result in the history of currencies, even though the recent exchange rate has gone down.

Cryptocurrency is an electronic digital currency, the origin and tracking of this currency is based on a cryptographic method. Cryptographic methods include systematic hashing of open key systems based on digital signature. The word «crypto» means «secret» or «hidden» in Greek. The basis of this system is the blockchain technology based on the acyclic graph and the consensus registry. The acyclic graph — an orgraf in which there are no directed cycles, but there can be «parallel» ways leaving one knot and different ways coming to final knot. Encrypted for security. Generally speaking, this term came after Forbes magazine's 2011 «Cryptocurrency» article. The first one to become the founder of the cryptocurrency was a mathematician Satosho Nakamoto in 2009. Satosho Natomoto's real name is still unknown, nobody has seen him yet. In general, Satosho Nakomoto in Japanese means «inside a clear-thinking system». Opening an individual or a group based on this name has been accomplished, but all failed. On October 31, 2008, Nakotomo published an article titled «Bitcoin: A Peer-to-Peer Electronic Cash System». His profile shows that he is 37 years old and lives in Japan. At present, there are about 3000 types of cryptocurrency. The most popular among them are bitcoin .

Bitcoin means «coin» in English. Cryptographic methods are used to count the operations of the same name unit and to give the protocol with the same name as Bitcoin a peer-to-peer network payment system, to maintain and protect the system.

All transaction information is publicly available. Minor bitcoin was named «Satoshi» in honor of the founder of 10^{-8} bitcoin. Bitcoin can be used as a payment instrument, buy goods, pay for telephony or hosting, and more. Although it's an Open Source-based but anonymous, in order to store, to receive, and to send Bitcoins, famouse as a reliable payment system, it needs a wallet with ID (address) , as well as a required balance and a password . Only the recipient's ID will be requested for the transfer. The identifier is a complex set of numbers and letters. For example:19noTg4T9TeFpT4ZTASvQxf7a1LYLSJa38.

When it comes to the systematic work of Bitcion, it is made by miners.Miners are a centralised peer-to-peer bank. They keep the system operating and verify transactions. The other person will not be financed if there is no miner. Nowadays miners receive bitcoins for the transactions they make on their computers. When bitcoins are over, transaction fees will be charged. At the time, Bitcoin produced a small set of computers. But now there are big firms dealing with it [3; 12]. The first transaction made with bitcoin was a US citizen bought pizza for 100 bitcoins. With the current bitcoin price, it has become the world's most expensive pizza. Originally, the cost of bitcoin was 0.4 cents, which is now several times higher than any other world currency. A few months ago, the cost of a bitcoin was $ 20,000, and now it costs only $ 8,753. Bitcoin's price is quite variable. However, this is not a big deal. Why is bitcoin so appreciated? According to Kazakh economists, there is no unreasonable offer. That is why the price of bitcoin is so high as there is demand. Currently, some of Kazakhstani people are familiar with this currency. However, this currency has positive and negative opinion in our country. In addition, the advantages of the cryptocurrency are that the developers say that currency protection is very high, that cyberattacks and hacker attacks are impossible, as well as state independence and devaluation have nothing to do with it. For this reason, there are positive trends. At present, some of the companies working with bitcoin have begun to form in our country. But they do not conceal their suffering as a result of this bitcoin exchange rate. According to the negative opinion, this is a questionable matter, which means giving money to the air.

One of the issues that needs to be addressed to the creditor investors is that the cryptocurrency is not limited to bitcoin. We should cover other types of cryptocurrency. Among the largest cryptocurrencies there is Ripple. The capitalization is about 10 billion US dollars. The enthusiasts' special attention is focused on the speed of work and the growth of partner companies. In just a few seconds, it's capable of 1500 operations. This speed is 75 times higher than bitcoin. In November, Ripple's American Express and Banco Santander created an international online payment line called American Express. In January, MoneyGram International has concluded an agreement to increase the transaction speed and avoid any malfeasance. The financier believes that this cryptocurrency can be overwhelming.

The next type is based on the Qtum, the Ethereum virtual machine. Based on the good sides of the two popular crytocurrencies mentioned earlier. Many developers of this crytocurrency believe that many companies will give their offers. Last month, Qtum has come to an agreement with two major Chinese companies. China has over 200 million active users. This mining can extend anytime.

Stellar comes to terms with the clever agreements in the world of cryptocurrency. These intelligent agreements are the basis for the formation of systematic conditions. In October, IBM signed a contract. The Pacific Ocean banks were astonished with its technolodies.

Neo is just as clever as the other cryptocurrency. Its specificity is also de-centralized.

High speed, NANO with an architectural specificity. It can provide 7,000 transactions per second. It only takes 20 seconds to make a payment.

If you want to pay special attention to cryptocurrency, then it is IOTA. This was the cryptocurrency offered by Data Marketplase last year. This blockchain system allows us to see the remaining amount. In other words, it is free for all users.

Subsequently, the cryptocurrency Monero has been rapidly developing. First of all, this cryptocurrency ensures security and confidentiality of transactions. The demand for this cryptocurrency is not only from the side of investors, but also the authorities.

One more cryptocurrency that can compete on a speed basis is NEM. It can handle up to 4000 transactions per second. The basis is made by the intellectual blockchain. It can adapt to different sectors of the economy. Recently, it has come to an agreement with Malaysia and contributes to the economy.

In general, cryptocurrency is not allowed in Kazakhstan and is not forbidden too. There is no law that regulates the cryptocurrency, there are no legislative acts. Nonetheless, the blockchain and the cryptocurrency association exist. The Association requires the adoption of the law. Nowadays, the countries of the Eurasian Union gradually use the cryptocurrency. At the same time, the funds of Kazakhstani people provide foreign companies. But, according to Akishev Daniyar Talgatovich, the Chairman of the National Bank of the Republic of Kazakhstan, the state is now conducting a study on financial pyramids, the turn will also reach cryptocurrency.

Regarding the use of the cryptocurrency in the world. It's no secret that America is a leader in any market. Because in the United States the world's largest stock exchanges are located, where significant financial events take place there, namely the US dollar is the main currency formed around the world. Undoubtedly, the United States has a great impact on the entire financial world, including the cryptocurrency

industry. Cryptocurrency is fixed by law in the USA, it can be freely converted to any fiat currency as US dollars and euro. Cryptocurrency brocker's boards operate legally. It should be noted that the American stock exchanges were first to send Bitcoin to the market in 2017. At the moment the American cryptocurrency exchange is the largest in the world. But the US does not want to say that the cryptocurrency industry is stable. In the US, there are a lot of supporters and opponents of the cryptocurrency. US government officials, financial monitors and major market players also expressed their mistrust to the cryptocurrency. There are many debates. Generally, the US cryptocurrency has a direct impact on the global cryptocurrency industry.

The use of cryptocurrency in Europe. While the cryptocurrency is fully using in the United States and Japan, Europe is only an observer. The main idea of the cryptocurrency exchange was originally formed in Netherlands in 1980. In 2010, the European Union recognized the existence of a virtual cash flow. However, different countries have begun to form it differently. For example, Eastern Europe has banned the cryptocurrency and this status has survived up to this day. In Switzerland, cryptocurrency equals foreign currency. In Bulgaria, it was accepted as financial assets and was taxed, and any retail stores, drugstores in the country accept bitcoin. Only Germany recognized it legally, and the fiat currency was included as the money. The amount of electronic money annually conquers Europe. At present, the European Union and the United States are keen to create a new type of exchange of cryptocurrency to euro and dollar. Although it is not officially announced, but there is a information that the EU has intention to create an electronic anonym of euro. In short, Europe recognizes the cryptocurrency at the state level [4; 149].

The use of the cryptocurrency in Japan. In Japan, the cryptocurrency is legally recognized. Bitcoin holders are protected by law and are not limited to circulation. In 2013 it was the basis of the investment. The Japanese Finance Minister gave an interview to the media that the cryptocurrency has not yet demonstrated its stability.

The use of the cryptocurrency in Russia. In January 2018 a revised legislative act «About digital financial assets» was adopted. The concepts related to the cryptocurrency have received legal definitions. The right to cryptocurrency is entered into the Digital Transactions Register. Cryptocurrency can be legally converted into any currency and financial assets. Individuals can use no less than 50000 rubles of the cryptocurrency. Cryptocurrency issue process is under state control. According to President Vladimir Putin, the introduction of new digital technologies is a good solution to finance and banking.

Recommended cryptocurrency exchange. EXMO - the best bitcoin exchange in Russia. Payment systems like Advcash, Payeer, Yandex, Qiwi are accepted. That is why many customers want to work here. It operates with the following cryptocurrency exchange lines: Bitcoin, BCH, Ethereum, DogeCoin, DASH.

BINANCE - the largest Chinese Bitcoin exchange located in Hong Kong. It holds the leading position in the world in terms of volume. It works with many virtual currencies.

KUCOIN was founded in 2017 and is currently a leading cryptocurrency exchange in Asia.

LIVECOIN - in this exchange market there is a possibility to translate the cryptocurrency into Russian. It serves 60 different virtual money.

YOUBIT - serves 280 different virtual money. It offers advantageous service through MasterCard and VISA.

BITMEX - is a popular stock exchange with bitcoin and some virtual money.

C-CEX - is one of the oldest and most popular stock exchanges. Includes 196 virtual money.

SPECTROCOIN - offers 25 types of currency to release and to implement. The best of the currency exchange market. Only BitCoin and DASH are used.

POLONIEX - is an American exchange of international rankings. It is on the 8th place in size. It performs only in English [5; 212].

Recently, Astana has opened a new stock exchange instead of the Expo International Exhibition. It will be launched in January 2018. It is also reported that this stock exchange may be dealing with a cryptocurrency.

Last week, the well-known financial publisher Forbes announced the most successful people in the cryptocurrency exchange:

1. Chris Larsen's fortune is estimated in $ 7.8-8 billion. Larsen has 5.2 billion in a cryptocurrency XRPs . He made great money from Ripple.

2. Joseph Lavin's fortune is estimated in $ 1-5 billion. He is the founder of Consensys and Ethereum platforms.

3. The CEO of Binance, Changping Zhao's fortune is estimated in $1.1 billion to 2 billion US dollars.

4. Brothers Cameron and Tyler Winklevoss' fortune is estimated to be 0.9-1.1 billion US dollars. They have succeeded by successfully investing on bitcoin for 6 years.

5. Inheritor of the bank Matthew Mellon 0.9-1.0 billion US dollars.

6. General Director of stock exchange Coinbase Brian Armstrong is 0.9-1.0 billion US dollars.

7. Matthew Roszak possesses 0.9-1.0 billion US dollars. He has expanded through investment, ICO, bitcoin.

8. The investor of the system Ethereum Anthony Diiorio is 0.75-1.0 billion US dollars.

9. Brock Pierce is 0.7-1.0 billion US dollars. He is the cryptocurrency investor.

10. Michael Novograts is 0.7-1.0 billion US dollars. He has come to the fortune by investing and selling the cryptocurrency [6].

The President of the Republic of Kazakhstan Nursultan Nazarbayev offered the world a common cryptocurrency. «Because of the transformation of the world financial architecture, there was a need to speak about this. It's the time to take seriously the question of introducing the international payment system. It will save the world from currency wars, speculation, commerce conflicts, volatility in the market. Currency must be a simple, with open emission mechanism that should be convenient for consumers. Due to digitalization and development of blockchain technology it should be in the form of a cryptocurrency». «Today it is necessary to transform the world financial architecture. It's time to look seriously at the issue of introducing an international payment unit. It enables the world to cope with currency wars, frauds, eradicate trade relations, and reduce fluctuations in the market. The currency should be simple, user-friendly. It would also be possible to create a computing unit in the form of a crypto-currency, taking into account technology development, digitalization. This currency should work for users all over the world», the President of Kazakhstan said. The head of state suggested to create G-Global so that not only G20 countries could participate, but also more states had such possibility. According to the President, the global currency can be introduced through the creation of a pool of central banks, for example by creating a special committee under the UN. «All countries should have an equal and fair representation. We shouldn't just have to tell it but solve it», said N.A. Nazarbayev at the Astana Economic Forum [7].

«The advantage of digital transactions is that it is faster than banking transactions and does not need a broker», says Magdalena Isbrandt, managing director of Bit Trust Services, the world's first bitcoin bank. According to her, in this case the commission will not be at all or at a very low level. Information about all transactions is registered in a single open register. However, it is difficult to control the transactions made in the electronic currency system. This is because there is no need for personal data to make transactions through the world's most popular cryptocurrency bitcoin. Cryptocurrency trading stock exchanges say that there is no inflation in the cryptocurrency. The reason is that its value does not depend on the gold fund, which is just like ordinary money. However, according to information provided by stock exchanges, «bitcoin is more reliable than gold, since it is produced only up to 21 million coins». In addition, the system in the cryptocurrency exchange is not a public body and not controlled by any centralized organization. There is no limit to a network user, he could send to any person and in any extent he would like. According to experts, the system of cryptocurrency is now the most reliable system. It is called «blockchain». This innovation has been triggered by this cryptocurrency. But its capabilities are not limited to electronic money. Today many countries and large corporations are studying it. Although the head of state offered to introduce a global virtual currency, it do not have legal status in our country. The National Bank is still exploring this topic. To this end, the financial regulator has a working group that analyzes financial technologies, such as cryptocurrency and currency surrogates. But at the beginning of the year the National Bank has warned about the activities of companies operating in cryptocurrency in the country: «The National Bank is now announcing that in Kazakhstan, there are operating such organizations that use the cryptocurrency and provide investment services to the population. These organizations offer Kazakhstani people to invest in cash for the purpose of buying a cryptocurrency, and to participate in their programs through the Internet in cashless mode». In short, there are elements of financial pyramids in the business of companies that want to profit from the cryptocurrency.

When we started writing this article, we completely opposed the cryptocurrency. We noticed that the opinion of many people was negative. Research has shown that the global market has moved to a new level. It is possible to notice that the world market makers start to practice it. Now, we believe that digital technology can be viewed as a new initiative for the cryptocurrency. In the Republic of Kazakhstan it is necessary to implement the law on the cryptocurrency and to keep the cryptocurrency under state control and, as the President says, to create a common cryptocurrency. Nevertheless, time will necessarily indicate which opinion is right.

References

1 Күнтуғанқызы А. Криптовалюта долларды ығыстыра ала ма. inform.kz белсенді сілтемені пайдаланыңыз [Электронный ресурс] / А. Күнтуғанқызы. — Режим доступа: https://www.inform.kz/kz/kriptovalyuta-dollardy-ygystyra-ala-ma_a3023197.

2 Шүнгүлов Ә. «Ауадан ақша жасау». Виртуалды ақша. Bitcoin [Электронный ресурс] / Ә. Шүнгүлов. — Режим доступа: http://www.astanatv.kz/news/show/id/60101.html.

3 Филиппов Е. Криптовалюта от А до Я / Е. Филиппов. — М.: Олимп-Бизнес, 2017. — 47 с.

4 Поппер Н. Цифровое золото / Н. Поппер. — М.: Диалектика, 2016. — 263 с.

5 Антонопулос А. Овладение биткоином: пер. с англ. / А. Антонопулос. — М.: ООО «И.Д. Вильямс», 2016. — 340 с.

6 Рейтинг самых богатых людей в мире криптовалют [Электронный ресурс]. — Режим доступа: https://forbes.kz/news.

7 ҚР Президенті Нұрсұлтан Назарбаев Х Астана экономикалық форумының жалпы отырысында әлемдік бірыңғай валюта әзірлеуді ұсынды [Электронный ресурс]. — Режим доступа: https://www.inform.kz/kz/nazarbaev-alemdik-biryngay-valyuta-azirleudi-usyndy_a3036824.

Р.А. Тоқатов, Ж.Т. Мырзалиева

Нарықтық қатынастардағы криптовалюта және цифрлық болашақ

Мақала қазіргі таңдағы аса маңызды әрі тәжірибелік алаңдатушылық туғызып отырған мәселелердің бірі — криптовалютаға арналған. Авторлардың зерттеулеріне сүйенетін болсақ, қазіргі таңдағы күрделі әлемдік жаһандану үрдісіне әлемдік экономикалық алпауыттар арасында нарықтық қатынастарда терезесі тең дәрежеде түсу үшін қаржылық тәуелділіктен шығу жолдарының бірегейі ретінде қарастырылып отырған жолдардың баламасы ретінде криптовалюта қатынастарын қарастыруда. Қазіргі таңда криптовалютамен төлем жасау трендке айналды. Күн өткен сайын жаңа валюта жүйесін қолдаушылар саны да артуда. Әрине, капиталистік қоғамда сұранысқа ұсыныс қалыптасады. Бірақ криптовалютаның бір орталықтан басқарылатын тетігі болмағандықтан, оған сенім арту да қиын. Криптовалютаның әр елде жеке бақылауы да жоқ. Кейбір сарапшы-мамандардың айтуынша, криптовалюта қомақты қаржыны жымқырғысы келетіндер үшін үлкен драйверге айналып кетуі де мүмкін. Егер әр мемлекет заң жүзінде бақылау жасауға декларация ұсына алса немесе өзгеде реттеу тәсілдерін жетілдірсе, криптовалюта бүгінгі қаржы жүйесін алмастырады. Оған сұраныс та бірден артады. Осы мәселелерді шешу мақсатында авторлар криптавалюта қатынастарының әлемдік тәжірибесін зерттей отырып, отандық нарыққа тигізер үлесін шыңдап өзіндік пікірлерін ұсынған.

Кілт сөздер: криптовалюта, нарықтық қатынас, қор биржасы, бәсекелестік, биткоин, эмиссия, валюта, электронды ақша, алтын қор, сұраныс, цифрлық транзакция.

Р.А. Тоқатов, Ж.Т. Мырзалиева

Криптовалюта и цифровое будущее в рыночных отношениях

Статья посвящена одной из наиболее важных и практических проблем на сегодняшний день — криптовалюте. Согласно исследованиям, чтобы быть равным по положению среди мировых экономических монополистов в тенденции сложной мировой глобализации в современном мире, криптовалютное отношение рассматривается авторами как один из уникальных способов преодоления финансовой зависимости. Оплата криптовалютой на сегодняшний день является трендом. И с каждым днем увеличивается число сторонников системы новой валюты. Разумеется, в капиталистическом обществе формируется спрос на запрос. Однако, так как у криптовалюты нет единого управляющего механизма, трудно ей оказать доверие. Не обеспечен и индивидуальный контроль криптовалюты отдельными странами. По словам некоторых экспертов, криптовалюта может являться большим драйвером для присваивания огромной суммы денежных средств. Если каждое государство сможет представить декларацию на контролирование на законном основании или найдет другие способы регулирования, то криптовалюта может заменить нынешнюю финансовую систему. И тогда спрос на неё увеличится. По сравнению с Восточной Европой оборот криптовалюты в Республике Казахстан официально не запрещен, в связи с чем требуется принятие закона, что является самым актуальным в этой сфере. Авторы в целях решения проблем, исследуя мировую практику в отношении криптовалюты, предполагая вклад, который она будет вносить в отечественный рынок, представили свое мнение.

Ключевые слова: криптовалюта, рыночное отношение, фондовая биржа, конкуренция, биткоин, эмиссия, валюта, электронные деньги, Золотой фонд, спрос, цифровая транзакция.

References

1 Kyntugankyzy, A. Kriptovaliuta dollardy yhystyra ala ma [Does the cryptocurrency be able to displace the dollar]. *inform.kz.* Retrieved from http:// https://www.inform.kz/kz/kriptovalyuta-dollardy-ygystyra-ala-ma_a3023197 [in Kazakh].

2 Shungulov, A. «Auadan aksha zhasau». Virtualdy aksha. Bitcoin [«Making money from the air». Virtual money. Bitcoin] *astanatv.kz.* Retrieved from http:// www.astanatv. kz/news/show/id/60101.html/id/60101.html [in Kazakh].

3 Filippov, E. (2017). *Kriptovaliuta ot A do Ya [Cryptocurrency from A to Ya]*. Moscow: Olimp-Biznes [in Russian].

4 Popper, N. (2016). *Tsifrovoe zoloto [Digital gold]*. Moscow: Dialectica [in Russian].

5 Antonopulos, A. (2016). *Ovladenie bitkoinom [Mastering bitcoin]*. Moscow: OOO «I.D.Viliams» [in Russian].

6 Reitinh samykh bohatykh liudei v mire kriptovaliut [The rating of the richest people in the world of cryptocurrencies]. *forbes.kz.* Retrieved from https://forbes.kz/news [in Russian].

7 KR Prezidenti Nursultan Nazarbayev X Astana ekonomikalyk forumynyn zhalpy otyrysynda alemdik birynhai valiuta azirleudi usyndy [At the plenary session of the X Astana Economic Forum, President of Kazakhstan Nursultan Nazarbayev proposed to develop a single global currency]. *inform.kz.* Retrieved from https://www.inform.kz/kz/nazarbaev-alemdik-biryngay-valyuta-azirleudi-usyndy_a3036824 [in Kazakh].

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A.S. Kizdarbekova, I.V. Zalimbayeva

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

The place of surrogate agreement in civil law contracts system

This article is devoted to the problems of legal regulation of surrogate agreement. The relevance of the research due to the fact that at present time in the Republic of Kazakhstan surrogate agreement is not enough regulated legal construction that, in turn, affects the legal practice. The legal essence of surrogate agreement, its law nature is considered in this article. The study of several models of surrogate agreement and their elements, including the scope of the contract, subject structure and other terms that pass on the essential characteristics of the contract is carried out by authors on the basis of the analysis of different points of view of top-level scientists in the sphere of contract and family law, with a purpose to finding of an optimum construction. Taking into account the law enforcement practice, the theoretical features of surrogate agreement construction, as well as different points of view, characterizing the contemporary level of exploration of this issue, the authors draw conclusion about the independent place of surrogate agreement construction in civil law contracts system. Having a superficial similarity with the group of obligations on rendering of services surrogate agreement significantly stands out from this group of special requirements for subject composition and terms of its execution, which proves that the legal nature of these contracts is different.

Keywords: surrogacy, assisted reproductive technologies, surrogate agreement, legal nature of surrogate agreement, the essential terms of surrogate agreement, subject structure of surrogate agreement, compensated rendering of services, the legal nature of the contract.

Development of medicine in the sphere of reproductive technologies gives hope to those people who are desperate to have children of their own. But, as is often the case, the development of science advances the moral and legal adaptation of society to its new achievements. Legal support of surrogacy, as well as other programs based on reproductive technologies of today - one of the most difficult issues in modern legal practice, organize and develop the general trends of development which today is almost impossible.

Let return to the statistics. According to the Ministry of Health of the Republic of Kazakhstan data today infertile couples are in the order of 12-15 per cent of the total population, or 30-35 percent among couples. On this basis, about 7000 pairs per year require the use of assisted reproductive technologies. This number can be increased several times since as the national mentality often prevents to speak openly on the subject and apply to health services. In terms of the World Health Organization this scale should automatically output the problem at the state level, given that this fact affects the overall demographic situation across the country [1].

It should be noted that partly the creation of necessary conditions conducive to the procreation and education of children, increasing the role of family relationships, prestige of motherhood and fatherhood helps to solve this problem. In our country this problem is tried to solve at the legislative level, making the rules governing the process of assisted of reproductive technologies. In particular, the Code of the Republic of Kazakhstan «On people's health and health care system», which laid the legal basis for surrogacy was adopted September 18, 2009 [2], the Rules of assisted reproductive methods and technologies approved 30 October 2009 by the order of acting Minister of Health of the Republic of Kazakhstan № 627 [3], the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family», which contains a chapter 9. «Surrogacy and use of assisted reproductive techniques and technologies» enacted January 7, 2012» [4].

All this contributes to the popularity of surrogate agreement among married couples in the Republic of Kazakhstan. However, despite the fact that the legislation on surrogacy in Kazakhstan gradually formed, in legal doctrine there is still no common understanding of the legal nature of the construction of surrogate agreement that dictates the need for a separate scientific researches on these issues, and confirms its relevance.

The concept of assisted reproductive technologies is formulated in Article 1 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family», according to which the assisted reproductive methods and technologies are complex medical procedures for diagnosis, treatment and rehabilitation, aimed at correcting the reproductive activity of citizens [4]. Surrogacy is related to these methods.

Surrogacy is a bearing and birth of the child (children), including cases of premature birth, according to the contract between the surrogate mother and the spouses with the payment of remuneration. In turn, the

agreement of surrogacy - a notarized written agreement between persons of Marriage (Matrimony) and who wish to have a child and a mother, which gave its consent to the bearing and birth of a child through the use of assisted reproductive methods and technologies [4].

Despite the fact that at the legislative level definition of surrogacy contract is fixed, in theory there is no unanimity in the understanding of its essence, what is more, the scientists propose different constructions in support of the fact of its existence in the legal reality. For example, some authors believe that the agreement on surrogacy should not be considered as a civil contract and, accordingly, it is unacceptable to use the civil legislation on contracts. Other authors believe that this agreement in accordance with Art. 157 of the Civil Code of the Republic of Kazakhstan should be classified as void transactions, as violating the foundations of morality and law [5].

Analyzing the data points of view, we can say the following.

In accordance with sub-section 1 of Article 100 of the Code of the Republic of Kazakhstan «On people's health and health care» surrogate motherhood is a bearing and birth of the child (children), including cases of premature birth, according to the contract between the surrogate mother and the spouses with the payment of compensation [2]. Based on this, we can draw the following conclusions: the parties to the agreement are the surrogate mother, on the one hand, the couple - on the other, this contract is commutative.

According to sub-section 1of article 54 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family» surrogate agreement shall be in writing in compliance with the requirements of the civil legislation of the Republic of Kazakhstan and shall be subject to mandatory notarial certification [4]. Therefore, given the fact that the contract of surrogacy is not directly named in the Civil Code of the Republic of Kazakhstan, it is related to a system of unnamed civil legal contracts, the conclusion and the implementation of which is governed by the general rules of civil legislation despite the fact that the institution of surrogate motherhood is not an institution of civil law.

The legal nature of the legal entity or a civil legal contract is to identify the necessary conditions for its conclusion, the basis of which is determined by its origin and then, to what kind of legal phenomena it belongs.

Range of views of scientists is very different. From denial of surrogate agreement as the existing legal phenomenon to reckoning it to various types of civil contracts. Most recent ones inclined to think that this agreement is similar to the contract of compensated rendering of services, and therefore, it should be subject to the regulations of the compensated rendering of services.

For example, according to E.S. Mitryakova, surrogate agreement has a nature similar to those of civil-legal agreements, as lease, service contract, contract of sale [6; 72]. E.V. Stebleva considers that the agreement of surrogacy has family-legal nature altogether, because on the basis of signed parties surrogate contract surrogate mother agrees to bear and give birth genetically stranger to her child for genetic parents (parent), provided that the child's conception occurs through procedures of in vitro fertilization and embryo implantation obtained using gametes of genetic parents and genetic parents (parent) agrees to provide s surrogate mother with necessary conditions for pregnancy and childbirth [7; 9].

Ye.A. Batler points out that in order to understand the species of a surrogate agreement it is necessary for a start to determine what serves as its subject: the rendering of services or performance of work? Therefore, in order to qualify the legal nature of the agreement it is necessary to define its subject, which includes what the aim relationship; subject composition and the resulting rights and obligations.

According to Art. 683 of the Republic of Kazakhstan Civil Code on the compensated rendering of services agreement performer undertakes, by the Customer to provide services (to perform certain actions or carry out certain activities), and the customer agrees to pay for such services [8]. If we imagine that a married couple acting as a customer, and the surrogate mother in the role of the performer, who for hatching reward for a couple a child, at first glance, based only on the determination of the contract, it is possible to agree with the fact that the contract of surrogacy follows from the nature of compensated rendering of services agreement.

However, the need for more detailed analysis of the surrogate agreement and compensated rendering of services agreement is appropriate. As far as they are identical, or still different contractual structure in their nature.

As mentioned above, an essential condition for conclusion of any kind of contract is its subject. In this regard, it appears that the identification of the legal nature of surrogate agreement is not possible without defining its subject matter. On this occasion, there are several points of view. According to a first one, subject of the contract are the actions that should be made on this contract [9; 78]. It is the opinion of the majori-

ty of researchers, considering as a subject of surrogate agreement, the actions in the form of services of a surrogate mother as a commitment to the development of the newborn human embryo into a child.

For example, Borisova T.E. writes that the surrogate mother grows implanted her embryo. She gives him the internal environment of her womb. Her body, lifestyle and actions since the conclusion of surrogate agreement are targeted at creating favorable conditions, the normal uterine development and subsequent prosperous childbearing [10; 65]. From this comes out is that the process itself is important, that is service. Similarly Mitryakova E.S. considers, according to which the provision of paid services of a surrogate mother for bearing and birth of genetically alien to her child for further transmission to customers serves as the subject of surrogate agreement [6; 78]. On this basis, she believed that an agreement of surrogacy follows from the compensated rendering of services and has a similar nature. And in view of this circumstance, E.S. Mitryakova offers to legislator «to take into account the undeniable similarities surrogacy agreement with a compensated rendering of services agreement and include it in the list of contracts, which are covered by chapter 33 of the Civil Code of the Republic of Kazakhstan» [6; 86].

And this, despite the fact that sometimes the surrogate agreement, by its legal nature, is gratuitous, although it should be noted that in most cases it is compensated in nature and, accordingly, has the features of a service agreement.

The second view identifies the subject of the agreement with the object of the legal relationship which arises from it. The grounds for the existence of such differences in the approaches to the definition of the contract subject are given by the law itself. The subject of the contract is identified with a particular object in the Civil Code of the Republic of Kazakhstan. For example, the things (goods) are as the subject of the contract of sale. In addition, some necessary actions on this property are included into the subject of the contract as a transaction in addition to specifying the subject of future legal - obligations. For example, Zhuravleva S.P. wrote in his works that, in view of the theory of contract law exactly the object of the contract is regarded as a «powerless» means, thing which transferred under the contract. Thus, in view of the current conventional practice, the embryo is subject of contract, for which actions are performed by implantation, nurturing, birth and transmission to potential parents being directly subject of the contract. In addition to services provided by a surrogate mother to potential parents, in some cases, the subject is also included services of the institution on the medical support of the contract. It seems that the position of «subject - object» of the contract is the optimal contract in the framework of the theory of contract law [11; 10].

In our opinion, it is necessary to agree with the authors, who believe that the subject of surrogate agreement should include only the obligations of the parties under the nurturing of the child and payment of «compensation», but not the embryo as an object for which implantation and development activities are made. Such arguments may sound unfamiliar from the moral point of view active in the community, because the person cannot be the object of relationships, but only as subject. As well as the surrogate mother cannot act as the object, for example, lending herself to hold a fertilized ovum.

Compensated rendering of services agreement in the same way as any other contract, has its own subject. And here it is possible to trace some resemblance to the surrogate agreement, as process - providing a variety of services for a fee is important in the compensated rendering of services agreement.

It should be noted that the surrogate agreement and the compensated rendering of services agreement are focused solely on the process of actions, not to the final outcome materialized, in contrast, for example, by works contract, where the result must be guaranteed the material object. Exactly it is upon consumption. The contract of surrogacy, as well as in the compensated rendering of services agreement has no such guarantee. This is confirmed by Art. 55 and 57 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family», according to which the surrogacy contract should contain: Data of spouses (customers) and surrogate mother; order and terms of payment of material costs for the maintenance of a surrogate mother; rights, duties and responsibilities of the parties in case of default of contract terms; the amount and procedure of compensation; other conditions, including force majeure circumstances [4].

And among the surrogate mother's duties such duties are as: to introduce to customers the medical report about her physical, mental and reproductive health; to observe by a doctor regularly and strictly follow his recommendations and destinations; to inform the people concluded the agreement with her on the course of pregnancy at the intervals specified in the contract of surrogate motherhood; to convey a child born to persons who have concluded with her the contract of surrogacy [4].

Of course, signing a contract of surrogacy, the result is expected, but the essence of the agreement is that the surrogate mother exactly is nurturing the child. And the contract will be valid, even if the result did not meet the expectations of participants of legal relations. The same happens with the compensated render-

ing of services agreement. Regardless of the result achievement agreement will be entitled to its legal existence. For example, getting a massage course does not guarantee the fact cure for a particular disease, but is an independent medical service, on the occasion of the implementation of which is the paid services.

Surrogate agreement is usually made between the surrogate mother and the child's biological parents. Simultaneously with the agreement of surrogacy spouses (customers) conclude an agreement with the medical organization applying assisted reproductive methods and technologies, which will provide the relevant services. That is in fact there are two independent contracts: between the couple and the surrogate mother - a contract of surrogate motherhood; between spouses and medical organization - the compensated rendering of services agreement, as in accordance with sub section 2 art.683 of the Civil Code of the Republic of Kazakhstan medical services are covered by the rules of compensated rendering of services agreement [8], and the use of assisted reproductive methods and technologies - is a group of methods and medical procedures.

Surrogate agreement is consensual agreement, as the rights and obligations arise for the parties from the moment of date of the Surrogate agreement and not from the moment of delivery of the thing date or the other action. Compensated rendering of services agreement has similar nature. The rights and obligations of the parties also arise from the moment they reach an agreement in this contract.

Both agreements are reciprocal, as carry certain rights and obligations for all parties of these relations.

Compensated rendering of services agreement is a bilateral; on the one hand, it is the customer, on the other - a performer. Surrogate agreement is also bilateral. However, along with this agreement, it is necessary to conclude a new treaty, without of which the contract of surrogacy cannot be executed because it is impossible to bear a child by a surrogate mother without transfer of the fertilized embryo into the uterine cavity of a surrogate mother. And these actions are carried out within the framework of a compensated rendering of services agreement concluded by the spouses with the medical organization. It turns out that these contracts are related. The need to conclude additional contracts for the performance of classical contract of compensated rendering of services available. This also manifests a certain difference between the two analyzed agreements.

Surrogate agreement may be concluded for a fee or free of charge. This follows from the list of those material costs which the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family» refers to the category of the duties of the spouses. Among them, the material costs: for the maintenance of a surrogate mother; associated with the passage of medical examination by surrogate mother; related to the application of assisted reproductive techniques and technologies; on medicine services of a surrogate mother during pregnancy, childbirth, and for fifty-six days after birth, and in case of complications related to pregnancy and childbirth, to pay the expenses for seventy days after birth [4]. In this list there is no obligation of the spouses to pay the fee a surrogate mother.

In turn, the compensated rendering of services agreement by itself implies retribution, which is reflected in its name, that is, in this agreement provision of services by service provider to service taker is performed for a fee.

However, some authors believe that the process of bearing a child - this is the service for a concrete fee. For example, A.A. Pestrikova argues that in the contract between the prospective parents and surrogate mother - the subject of the contract is to provide a kind of service for which the surrogate mother receives compensation [12; 78].

In our opinion, it is difficult to imagine that the surrogate mother, nurturing, and is giving birth to a child, thus, has render a service or performs a specific job. Services and works, as objects of civil rights, always have a value of the estate. To estimate life and the birth of a child or to calculate the exact or approximate cost of surrogate mother's actions is not possible, either legally or morally. Payment for medicine service, nutrition and other conditions, which are set by the parties in the contract - do not make an agreement for compensation, as these costs should be considered as necessary costs, like, for example, costs of materials, forming part of the work required under the contract. Thus, monetary compensation may occur as gratitude, that's why it is the prerogative of the parties, which may appear as an additional condition in the contract, and not as a well established rules prescribed in legislation level.

Not less important is the form of the conclusion of analyzed contracts. Compensated rendering of services agreement often consists in simple writing form. At the same time, oral form of its conclusion is acceptable, for example, the services of a stylist or barber, which in turn provides for compensated rendering of services agreement. The legislator strictly spelled out the shape of its sentence for surrogate agreement. Thus, according to Article 54 of the Code of Republic of Kazakhstan «On Marriage (Matrimony) and Family» surrogate agreement shall be in writing in compliance with the requirements of the civil legislation of the

Republic of Kazakhstan and shall be subject to mandatory notarization [4]. On this basis, it is possible to formulate a conclusion that the surrogate agreement is always in writing only, which clearly regulates the rights, duties and responsibilities of the parties. In addition, the contract shall be subject to mandatory notarization. This is connected to the fact that the notarization procedure allows the identification of the actual will of the parties (by checking the identity and authority of the persons signing the deal, they clarify the content of the transaction and of the consequences of the transaction), check the legality of the transaction and undeniably, protection of rights abuses interests of the parties. Except as noted, a notarized form of contract is another important guarantee of the rights and legitimate interests of not only the parties of contract under consideration, but also the legitimate rights and interests of the future child and the interests of society and the state, which significantly affected in connection with the conclusion and implementation of the surrogate agreement.

For non-compliance with the agreement of surrogacy written form and notarization entails the fact of its invalidity in connection with the defect will, which does not happen with the compensated rendering of services agreement.

It is necessary to pay attention to the subject composition of the analyzed agreements. Thus, the subjects of a service agreement are - the Service Provider (contractor) and service taker (customer). The Civil Code of the Republic of Kazakhstan does not contain any restrictions regarding the subject composition of compensated rendering of services agreement, so it is necessary to focus on the general rules of citizens and legal entities participation in public circulation. For example, a customer of audit services or executor of the contract for the provision of telephone services can only be a legal person. Medical, educational activities subject to licensing, therefore, the executor of the contract for the provision of these types of services is the person who has the license to engage in private practice. From this it is possible to conclude that the service provider is always the person entitled to the production of paid services, i.e. business activity, the customer can also be any subject of civil law.

Thus, the legislator doesn't have clear restrictions to the subject composition for the compensated rendering of services agreement, but only general rules are used.

In turn, such restrictions are in surrogate agreement. The parties in the contract of surrogacy are customers (potential parents) and the surrogate mother. And, based on the requirements of the law to the parties of contract, it can be concluded that not everyone can be a participant. For example, a woman who wants to become a surrogate mother must be between the ages of twenty and thirty-five years old, have a satisfactory physical, mental and reproductive health, confirmed by the conclusion of the medical organization, as well as having their own healthy child [4]. As we can see, not every woman can become a surrogate mother, and the only one that meets the age and medical requirements. In addition, men are excluded from this group of subjects. Customers under the contract of surrogacy can only be spouses. According to sub section 26 of Article 1 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family» marriage is an equal union between a man and a woman, entered into with the free and full consent of the parties in accordance with the law of the Republic of Kazakhstan, with the intent of creating a family, generating property and moral rights and duties between the spouses [4]. On this basis, it is possible to formulate a conclusion that surrogate agreement sets strict requirements for the subject composition.

Thus, the existence of certain requirements to the subject composition of the contract of surrogacy allows it to be distinguished from a compensated rendering of services agreement.

Another condition, which allows to distinguish an agreement of surrogacy from the compensated rendering of services agreement, is that surrogate mother can and should perform the service personally in the contract of surrogacy, that is, without the transfer of her rights to third parties, which is not the compensated rendering of services agreement where third parties can be held for the performance of services or works under the contract.

In addition, the compensated rendering of services agreement by its legal nature, is public. This means that the agreement does not limit the scope of, and binding manner should apply to all, which is not the surrogate agreement, which is not public, but rather has the personal character for participants of these relations.

Thus, analyzing the contracts, we are seeing some differences. The assignment of surrogate motherhood agreement to the compensated rendering of services agreement only under the terms of its retribution in the form of remuneration, in our opinion, it is not accurate, because the surrogate agreement can be signed, and at no charge.

Based on the above, we can conclude that the similarity is between the analyzed agreements, but this is not enough to recognize the agreement of surrogacy as a kind of compensated rendering of services agree-

ment. In addition, in our opinion, the contract of surrogacy has individual features that do not allow us to attribute it to any type of contracts, and thereby give good legal basis to allocate it as an independent form of a civil contract.

References

1 Бесплодие в Республике Казахстан Всемирная организация здравоохранения считает государственной проблемой. – [Электронный ресурс]. — Режим доступа: https://tengrinews.kz/kazakhstan_news/besplodie-kazahstane-voz-schitaet-gosudarstvennoy-problemoy-330705/.

2 Кодекс Республики Казахстан от 18 сентября 2009 года № 193-IV «О здоровье народа и системе здравоохранения». – [Электронный ресурс]. — Режим доступа: http://online.zakon.kz/Document/?doc_id=30479065.

3 Приказ и.о. Министра здравоохранения Республики Казахстан от 30 октября 2009 года № 627 «Об утверждении Правил проведения вспомогательных репродуктивных методов и технологий» [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/V090005919_.

4 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.

5 Договор суррогатного материнства: актуальные вопросы теории, законодательства и практики [Электронный ресурс]. — Режим доступа: http://www.blog.servitutis.ru/?p=653.

6 Митрякова Е.С. Правовое регулирование суррогатного материнства в России: дис. … канд. юрид. наук: 12.00.03 «Гражданское право; предпринимательское право; семейное право; международное частное право» / Е.С. Митрякова. — Тюмень, 2006. — 175 с.

7 Стеблева Е.В. Проблемы реализации прав участников отношений суррогатного материнства: автореф. дис. … канд. юрид. наук: 12.00.03 «Гражданское право; предпринимательское право; семейное право; международное частное право» / Е.В. Стеблева. — М., 2012. — 18 с.

8 Гражданский кодекс Республики Казахстан от 1июля 1999 года № 409-I (Особенная часть) (с изм. и доп. по состоянию на 01.01.2018 г.) [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/?doc_id=1013880.

9 Витрянский В.В. Существенные условия договора в отечественной цивилистике и правоприменительной практике / В.В. Витрянский // Вестн. Высшего арбитражного суда РФ. — 2002. — № 6. — 79 с.

10 Борисова Т.Е. Суррогатное материнство в Российской Федерации: проблемы теории и практики: монография / Т.Е.Борисова. — М.: Проспект, 2012. — 144 с.

11 Журавлева С.П. Правовое регулирование договора о суррогатном материнстве в Российской Федерации: автореф. дис. ... канд. юрид. наук: 12.00.03 «Гражданское право; предпринимательское право; семейное право; международное частное право» / С.П. Журавлева. — М., 2011. — 27 с.

12 Пестрикова А.А. Обязательства суррогатного материнства: дис. ... канд. юрид. наук: 12.00.03 «Гражданское право; предпринимательское право; семейное право; международное частное право» / А.А. Пестрикова. — Самара, 2007. — 202 с.

А.С. Қыздарбекова, И.В. Залимбаева

Азаматтық-құқықтық келісімшарттар жүйесіндегі суррогат ана болу келісімшартының орны

Мақала суррогат ана болу туралы келісімшартты құқықтық реттеу мәселесіне арналған. Зерттеудің өзектілігі қазіргі уақытта Қазақстан Республикасында суррогат ана болу туралы келісімшарт жеткілікті құқықтық тұрғыда реттелмеген, бұл өз кезегінде құқық қолдану тәжірибесіне әсер етуде. Авторлар суррогат ана болу туралы келісімшарттың құқықтық мәні, оның заңды табиғатын зерттеді. Шарттық және отбасы құқығы жүйесіндегі жетекші ғалымдардың әртүрлі көзқарастарын талдау негізінде суррогат ана болу туралы келісімшартының бірнеше моделін, оның элементтерін, пәнін, субъективтік құрылымын және аталмыш келісімшарттың маңызды сипаттама беретін басқада талаптарына оңтайлы құрылым іздеу мақсатында зерттеу жүргізілді. Суррогат ана болу туралы келісімшартын, ерекше теориялық құрылымын, құқық қолдану тәжірибесін назарға ала отырып, сонымен қатар аталған мәселені қарастырудағы қазіргі деңгейін анықтайтын әртүрлі көзқарастарды, азаматтық-құқықтық келісімшарттар жүйесіндегі суррогат ана болу дербес келісім ретінде қорытынды қалыптастырды. Өтеумелі қызмет көрсету бойынша міндеттемелер тобына үстемдік ете отырып, суррогат ана болу туралы келісімшарт осы топтың субъективтік құрылымы мен оның орындалу мерзіміне ерекше талаптармен ерекшеленеді, бұл осы келісімшарттардың құқықтық табиғаты әртүрлі екендігін дәлелдейді.

Кілт сөздер: суррогат ана, қосымша репродуктивті технологиялар, суррогат ана болу туралы келісімшарты, суррогат ана болу туралы келісімшартының заңдық табиғаты, суррогат ана келісімшартының маңызды шарттары, суррогат ана келісімшартының субъективтік құрамы, өтеумелі қызмет көрсету, келісімшарттың құқықтық табиғаты.

А.С. Киздарбекова, И.В. Залимбаева

Место договора суррогатного материнства в системе гражданско-правовых договоров

Статья посвящена проблемам правового регулирования договора суррогатного материнства. Актуальность исследования обусловлена тем, что в настоящее время в Республике Казахстан договор суррогатного материнства является недостаточно урегулированной юридической конструкцией, что, в свою очередь, сказывается на правоприменительной практике. Рассматриваются юридическая сущность договора суррогатного материнства, его правовая природа. На основе анализа различных точек зрения ведущих ученых в сфере договорного и семейного права, с целью поиска оптимальной конструкции авторами проводится исследование нескольких моделей договора суррогатного материнства и их элементов, среди которых предмет договора, субъектный состав и другие условия, передающие сущностные характеристики данного договора. Принимая во внимание правоприменительную практику, теоретические особенности конструкции договора суррогатного материнства, а также различные точки зрения, характеризующие современную степень разработанности данного вопроса, в статье формулируется вывод о самостоятельном месте договорной конструкции суррогатного материнства в гражданско-правовой системе договоров. Имея поверхностное сходство с группой обязательств по возмездному оказанию услуг, договор суррогатного материнства существенно выделяется из данной группы особыми требованиями к субъектному составу и условиями исполнения. Доказывается, что правовая природа данных договоров различна.

Ключевые слова: суррогатное материнство, вспомогательные репродуктивные технологии, договор суррогатного материнства, юридическая природа договора суррогатного материнства, существенные условия договора суррогатного материнства, субъектный состав договора суррогатного материнства, возмездное оказание услуг, правовая природа договора.

References

1 Besplodie v Respublike Kazakhstan Vsemirnaia orhanizatsiia zdravookhraneniia schitaet hosudarstvennoi problemoi [Infertility in the Republic of Kazakhstan, the World Health Organization considers the problem of the state]. *tengrinews.kz.* Retrieved from https://tengrinews.kz/kazakhstan_news/besplodie-kazahstane-voz-schitaet-gosudarstvennoy-problemoy-330705/ [in Russian].

2 Kodeks Respubliki Kazakhstan ot 18 sentiabria 2009 hoda № 193-IV «O zdorove naroda i sisteme zdravookhraneniia» [Code of the Republic of Kazakhstan dated September 18, 2009 № 193-IV «On people's health and health care system»]. *online.zakon.kz.* Retrieved from http://online.zakon.kz/Document/?doc_id=30479065 [in Russian].

3 Prikaz i.o. Ministra zdravookhraneniia Respubliki Kazakhstan ot 30 oktiabria 2009 hoda № 627 «Ob utverzhdenii Pravil provedeniia vspomohatelnykh reproduktivnykh metodov i tekhnolohii» [Order of acting Kazakhstan Health Minister on October 30, 2009 № 627 «On Approval of the Rules of assisted reproductive methods and technologies»]. *adilet.zan.kz.* Retrieved from http://adilet.zan.kz/rus/docs/V090005919 [in Russian].

4 Kodeks Respubliki Kazakhstan ot 26 dekabria 2011 hoda № 518-IV. «O brake (supruzhestve) i seme» [Code of the Republic of Kazakhstan dated December 26, 2011 № 518 -IV «On marriage (matrimony) and family»]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/?doc_id=31102748 [in Russian].

5 Dohovor surrohatnoho materinstva: aktualnye voprosy teorii, zakonodatelstva i praktiki [Surrogate agreement contemporary questions of the theory, legislation and practice]. *blog.servitutis.ru.* Retrieved from http://www.blog.servitutis.ru/?p=653 [in Russian].

6 Mitryakova, E.S. (2006). Pravovoe rehulirovanie surrohatnoho materinstva v Rossii [Legal regulation of surrogate motherhood in Russia]. *Candidate s thesis'.* Tyumen [in Russian].

7 Stebleva, E.V. (2012). Problemy realizatsii prav uchastnikov otnoshenii surrohatnoho materinstva [Problems of realization of the surrogacy relations participants rights]. *Candidate s thesis'.* Moscow [in Russian].

8 Hrazhdanskii kodeks Respubliki Kazakhstan ot 1 iiulia 1999 hoda № 409-I (Osobennaia chast) [The Civil Code of the Republic of Kazakhstan from July 1, 1999 No. 409-I (Special Part)]. *online.zakon.kz.* Retrieved from https://online.zakon.kz/document/?doc_id=1013880 [in Russian].

9 Vitrianskii, V.V. (2002). Sushchestvennye usloviia dohovora v otechestvennoi tsivilistike i pravoprimenitelnoi praktike [Significant terms of the contract in the domestic civil law and legal practice]. *Vestnik Vyssheho arbitrazhnoho suda Rossiiskoi Federatsii – Bulletin of the Supreme Arbitration Court of the Russian Federation, 6,* 79 [in Russian].

10 Borisova, T.E. (2012). *Surrohatnoe materinstvo v Rossiiskoi Federatsii [Surrogacy in the Russian Federation: problems of theory and practice]*. Moscow: Prospekt [in Russian].

11 Zhuravleva, S.P. (2011). Pravovoe rehulirovanie dohovora o surrohatnom materinstve v Rossiiskoi Federatsii [Legal regulation of the surrogate agreement in the Russian Federation]. *Extended abstract of candidates thesis*. Moscow [in Russian].

12 Pestrikova, A.A. (2007). Obiazatelstva surrohatnoho materinstva [Surrogacy obligations]. *Candidate s thesis'.* Samara [in Russian].

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A.K. Rahimberlina, R.B. Zhagalov

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

Actual problems of legal protection of children in the Republic of Kazakhstan

The article deals with the most urgent issues of state policy in the field of prevention and rehabilitation of child neglect and homelessness. The authors offer recommendations on the protection of children & apposes rights and analyze the work of the scientific and organizational center on the psychosocial needs of children and families. Moreover, the article deals with the legal protection of children left without parental care in the Republic of Kazakhstan, its forms and tasks. Kazakhstan joined the UN Convention on the Rights of the Child and follows its recommendations. The authors outline the main problems of legal protection of children in Kazakhstan and ways to solve them. Also, the lack of specialists in the regional departments for the protection of children's rights does not allow, in particular, to properly track the fate of a disadvantaged child, to reveal the reasons for a situation and to protect his rights in court. Researchers are recommended to cover all sectors of society, and especially non-governmental organizations, which play an important role in the social stabilization of Kazakhstani society to solve these issues. The cooperation of the «third sector» with the state is based on the principles of equal partnership. All this allows to monitor the observance of the rights of the child, to identify problems in establishing feedback with a wide audience, including with the media and other structures of the society working with children, including state and non-governmental organizations.

Keywords: legal protection of children, Kazakhstan, UN Convention on the Rights of the Child, state, organizations, non-governmental organizations, specialists, prevention, rehabilitation, society, social, minors.

At all times in the social structure of society an important role belonged to the family as a sustainable small groups of people, the social need for which is due to its needs. Performing a variety of social functions the family plays a leading role in social development while providing a number of important social functions. Its strong socio -economic and ethical principles that are directly associated with the healthy development of the economy and social sphere of society, depends on what generation it will be «delivered».

The leading role in shaping the identity of minors belongs to the family. Modern family has come under pressure from external factors due to which educational family environment has become more favorable. Often the breakdown of the family is one of the causes of neglect adolescents. As a result, children of divorce get in an atmosphere of tension, conflict, and avoiding family communication.

The level of civilization of a society is largely measured by its attitude to the children tackle the problems of childhood. The situation in the world of childhood is alarming and dangerous, both for children and for the future of society. Some serious problems occurring in the socio -economic and political life of the society in many ways extends the range of social, economic, psychosocial and other factors that are actively challenging child neglect, homelessness and social orphan hood.

One of the main strategies of the national policy of our republic is the legal protection of children. According to the Law of the Republic of Kazakhstan «On the Rights of the Child in the Republic of Kazakhstan», «a child is a person under the age of eighteen (majority)» [1]. The legal protection of children is understood as the system of normative legal acts establishing the legal status of minors as participants in public legal relations (rights, duties, guarantees of observance of rights and obligations) and fixing the bases for organizing the activity of the system of bodies dealing with minors and protecting their rights and legitimate interests. The task of each state is to strive to create a caring and compassionate society, only then it will be strong and prosperous when it takes care of children, about their future. We often hear the expression «Children are the future of the country». Indeed, in 10, 15, 20 years they will represent the most dynamic sector of our society. Kazakhstan, among the first countries in the post-Soviet space, having joined the UN Convention on the Rights of the Child, adopted on November 20, 1989, ratified in 1994 this document and its two optional protocols. The implementation of the rights of children is also promoted by international instruments ratified by our country concerning the participation of children in armed conflicts, as well as trafficking in children, child prostitution and child pornography. According to the statistical agency in 2017, 935 adults were deprived of parental rights. More than 2 thousand parents were brought to administrative responsibility. 50 criminal cases were opened on the facts of cruel treatment of children. Very complex children grow up among alcoholics, drug addicts, people for whom the commission of crimes is «commonplace».

A special problem is street children. These phenomena are the main reasons for including the child in the system of protection of rights, and families - the main «suppliers» of the contingent of institutions for orphans and children left without parental care. The forms of legal protection of children in our country are guardianship and trusteeship. Guardianship is a legal form of protecting the rights and interests of children under the age of fourteen. Guardianship is a legal form of protecting the rights and interests of children between the ages of fourteen and eighteen. In the Republic of Kazakhstan today there are 40 legal acts regulating the rights of children. In the years 2003-2006. in order to fully comply with the principles and provisions of the UN Convention on the Rights of the Child and the creation of legal conditions for the prevention of its social ills, Kazakhstan adopted laws on the prevention of juvenile delinquency and the prevention of child neglect and homelessness. The Law «On the Rights of the Child in the Republic of Kazakhstan» regulates relations arising in connection with the realization of the fundamental rights and interests of the child, guaranteed by the Constitution. To a certain extent, the state sectoral programs in the fields of education, health, poverty reduction, emigration policy, demographic development, and rehabilitation of disabled people have been directed to the implementation of the national policy regarding the observance of the legitimate rights and interests of children. According to the recommendations of the United Nations under the Ministry of Education and Science in 2002, the Committee for the Protection of the Rights of Children was established, and in the regions, including in the Karaganda region, the departments for the protection of children's rights.

The main tasks of the Department for the Protection of Children's Rights.

1. Ensuring the implementation of the Constitution of the Republic of Kazakhstan, the United Nations Convention on the Rights of the Child, the laws of the Republic of Kazakhstan on the rights of the child in the Republic of Kazakhstan, the Code of the Republic of Kazakhstan on marriage and family, on education and other legislative and regulatory protection of the rights and legitimate interests of children.

2. Coordination at the local level of interdepartmental cooperation and control over the implementation of a set of measures related to the realization of the rights of all categories of the child population, in accordance with the legislation of the Republic of Kazakhstan and the Convention on the Rights of the Child.

3. Assistance to local executive bodies in the implementation of regional programs to protect the rights and legitimate interests of children, spiritual and moral education.

4. Prevention and prevention of «social» orphan hood, child abuse and exploitation, assistance to children in difficult life situations, assistance in creating conditions for improving the quality of life of children.

5. Creation of conditions for successful self-realization of children, support and stimulation of children's social initiatives and children's public organizations aimed at the successful integration of children into society on the basis of moral and spiritual values.

6. Monitoring the implementation of the provisions of the Convention on the Rights of the Child, programs of moral and spiritual education, analysis and forecast of social well-being and spiritual growth of children, development of recommendations for improving the quality of life and raising children in the region.

7. Raising public awareness of the rights of the child and ways to implement them [2].

Sociological survey conducted in 2017 by Department for the Protection of Children's Rights in Almaty, showed that more than 80 % of children do not trust teachers, psychologists, at best they will share with a friend. More often - they will look for a way out for themselves. None of the respondents knew that they have the right to protection under the Code of the Republic of Kazakhstan «On Marriage (Marital) and Family» [3; 114]. It seems that the results reflect a common problem for the entire social space of Kazakhstan in the absence of children's awareness of their legitimate rights and interests. The lack of specialists in the regional departments for the protection of children's rights does not allow, in particular, to properly track the fate of a disadvantaged child, to reveal the reasons for a situation, to protect his rights in court. The inclusion in the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and the Family» of a separate chapter on the rights of the child allows us to overcome the traditional approach to children as passive objects of parental care. To solve these problems, it is necessary to involve all sectors of society, especially non-governmental organizations, which play an important role in the social stabilization of Kazakhstani society. The cooperation of the «third sector» with the state is based on the principles of equal partnership. All this allows to monitor the observance of the rights of the child, to identify problems in establishing feedback with a wide audience, including with the media and other structures of the society working with children, including state and non-governmental.

Noteworthy is the fact that among the homeless and neglected children in recent years has increased the number of former residents of children's homes and boarding schools. The most frequent cause of neglect of

former boarding is maltreatment by caregivers and teachers. Because of this, the question remains about the necessity of laying the legal foundations of behavior in the education of minors and the prevention of crime, social reintegration of juvenile offenders, and child protection before the law, preventing the infringement of their rights, freedoms and legitimate interests.

Lack of experience, stable moral values, physiological characteristics of juvenile promote their involvement in the commission of crime and anti-social activities. Feature of juvenile crime is crime- resistant orientation, as expressed in the commission of a crime and two more times. Much more often than adults, juveniles commit crimes in the group (about half), which is associated with a typical age group in the general nature of the conduct. Therefore, the most characteristic of the commission of their crimes with their peers conducting free time together. These groups are now committed about 80 % of the total number of juvenile crimes [4]. Even minor criminal groups, united relatively lengthy criminal activity with a hierarchical and other characteristics of an organized criminal group, usually converted from recreational groups peers.

About a quarter of crimes committed by juveniles with adult offenders. Holds a special latency infringing behavior in children, adolescents and young adults. Robbery, participation in the robbery, thefts committed by groups of young, premeditated, particularly violent crimes against the person did not receive adequate assessment and the persons who committed them usually go unpunished.

According to scientists, the problem lies primarily in the limited arsenal of means and measures to re-exposure, now known low efficiency. Obviously, the weakness of the earlier preventive direction prevention of juvenile crime has played a role in the magnitude of the violations of the criminal law by persons under the age of criminal responsibility.

The study by experts of the criminal cases shows that the vast majority of juvenile offenders, brought up in dysfunctional families. Caught in a difficult situation and feeling indifferent to his fate, minors are trying to solve their problems, often criminal and violent ways. However, many crimes are committed openly, with displays of unwarranted aggression and cynicism. Currently, violent crimes committed by juveniles, almost fits the crime adults characterized recently cruelty, inhuman treatment to the victims [5].

The variety of causes of orphan hood not only in the literal sense of the word, but also a social orphan hood, their close relationship with the problems of national scale explains the existence of different measures in content rights of orphans. Some of them are designed to prevent such a thing as an orphan in all its manifestations. They are called measures of protection. Others are designed to protect already infringed the rights of the child.

There are certain criminogenic determinants of juvenile delinquency, for instance, set of causes of crime and the conditions conducive to it. They are caused by the social environment that affects the formation of the person and the conditions of the specific situation that determines the transformation of the possibility of committing a crime in reality. Juvenile crime does not exist by itself, but is an indicator of the social situation in the country, a region, a response to the unjustified cruelty of adults towards children.

In order to prevent juvenile delinquency society needs rehabilitation measures of social orphans. One of the main causes of child abandonment is the parents' alcoholism and as a consequence - the ill- treatment of children in the family, the neglect of their needs and interests. Unemployment and parental alcoholism, unemployment teenagers their propensity to commit crimes generate numerous unauthorized withdrawals from home, neglect and crimes. In recent years, more and more children and teenagers become targets of abduction and resale to brothels (sex clubs, strip shows, brothels and similar institutions). Dissemination of criminal activity, pimping, prostitution contributes to such criminal acts as involvement in this activity minors.

To this end, the study of the problems of child abandonment requires a comprehensive study. There are the number of homeless and neglected children from families replenished (complete and incomplete) in which the parents because of various reasons are not engaged in the education of his children and did not take care of it.

On the problem of child abandonment typical for the Kazakh society requires a comprehensive and adequate approach to the definition of the strategic prospects for solutions to the problem. Analysis of the problems of orphanage is impossible without a clear delineation of its species. In the science and practice are two types of orphanage - a complete orphan, when for one reason or another the child 's biological parents are absent. And social orphanage, where the number of homeless and neglected children from families replenished (complete or incomplete), in which the parents because of various reasons are not engaged in the education of his children and do not care about him. Under the influence of the new market, socio -political and legal relations of an entirely new kind of abandonment - it's hidden. It is believed that the greatest concern is the social orphanage, which is a consequence and elimination of non-participation in the performance of their duties in relation to children (distortion of parental behavior) [2].

Social orphans - a special socio-demographic group of children from birth to age 18 who have lost parental care by socio-economic, moral, psychological, medical reasons (orphans with living parents). The definition of «social» refers to the fact that, ultimately, it is society that is guilty in the absence of adequate material, financial and general social conditions for the implementation of each family, each parent of duty, are in short supply them with a sense of responsibility, love, compassion and mercy.

The study of problems in the functioning of government and non-governmental institutions for the protection of children from other countries, their interactions have led to the realization of the possibility of similar structures in Kazakhstan. So, it could be a Committee for the Protection of the rights and interests of children within the Ministry of Justice of the Republic. This Committee was entitled to act as a focal point for the other concerned agencies in the field of children's rights, the annual revision in the direction of improving the minimum standards, norms and standards of life indicators of children for the social and legal review of the arrangements of the authorities to protect the rights and interests of children and families in general.

The growth of juvenile crime, the weakening of educational functions of the family, the collapse of traditional moral norms, accompanied by the attendant phenomena such as alcohol and drugs, as well as the growth of youth gangs are forcing local governments of many countries to take unpopular measures aimed at solving the problems of the younger generation. One of these measures - the introduction of restrictions on minors stay in public places at night, so-called curfews.

From this perspective, we can recognize that, despite the economic and social difficulties and limitations, both in Kazakhstan and all over the world have been put forward and supported by valuable initiative. Thanks to these initiatives, young people are coming to realize the need for the community to review and redesign their priorities in transforming today's conditions. One of the main objectives of youth policy is the development and distribution of educational technologies and structures that enhance the competence of the individual. Thus, the younger generation is prepared to clash with the increasingly complex and dynamic economic and cultural contradictions, thus reducing the risk of involving young people at risk and criminal activity.

The main problem in the prevention of delinquency in Kazakhstan is a departmental dissociation: the courts, the police, education, social services, juvenile committee, and others are trying to solve the problem of prevention of child neglect and juvenile crime within its jurisdiction. Meanwhile, the activities of these institutions to prevent child neglect and juvenile delinquency currently requires a clear, concerted action.

The main «suppliers» social orphans are the «crisis of the family», the problems which seem to be necessary to deal not occasionally, but constantly. After all, family - one of the major institutions of society. It is well known that the stability of family relations, health, parents dependent full physical and mental development of children. Accordingly, the level of socio -economic and socio-political development, public health, reproductive health of women, men, children - the components that characterize the health of the family and the nation. Much of the modern families today are not in full, and at times hard to play the role of a full-fledged social institution capable of ensuring inculcation of elementary norms and attitudes. All this combined effect on the causes of social orphanhood, the level and form of prevention.

Urgency of the problem of child abandonment in the current environment is evident and is an impetus for the development of theoretical and applied these issues contributing to promotion of legislative activity in the right direction, developing approaches to the implementation of public policies for children. Our government has laid the legal provisions in the laws of the Republic of Kazakhstan «On the Rights of the Child in the Republic of Kazakhstan», «Children's Villages and young people's homes», «Marriage and Family», «On State Social order», «On the social, medical and educational support for children with disabilities» and other normative acts to address the problems of orphans and children left without parental care.

However, the analysis of legal practice shows that there is a need and improvement, and adjustments of adopted legislations [1]. The main reason for the ineffectiveness of individual provisions of laws, as seems to be a lack of proper monitoring of compliance with the rules and declarative, often do not meet budget parameters.

It appears that for the prevention of child abandonment need government protection of children. Efforts should not be reduced to a one-time charitable actions. It should be a special service for children's rights, tips territorial levels on children and families, scientific and organizational center of psychosocial needs of children and families. Serious bid for the implementation of the state policy of family and child development should reach a qualitatively new state programs and concepts, design options which began to appear in Kazakhstan.

References

1 Доклад Уполномоченного по правам человека [Электронный ресурс]. — Режим доступа: http: // www.ombudsman.kz.

2 Международный пакт об экономическом, социальном и культурном праве [Электронный ресурс]. — Режим доступа: http://www.ohchr.org.

3 Джейембаев Р.К. Ювенальная юстиция как образовательный процесс / Р.К. Джейембаев // Бюллетень Казначейства. Серия законов. — 2007. — № 3. — С. 113–116.

4 Агентство Республики Казахстан по статистике [Электронный ресурс]. — Режим доступа: http://stat.kz.

5 Постановление Правительства Республики Казахстан от 11 июня 2001 года N 789 «Об утверждении типового положения о комиссии по делам несовершеннолетних и защите их прав» (с внесенными изм. и доп. постановлением Правительства РК от 15.01.2010 г.) [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/P010000789.

А.К. Рахимберлина, Р.Б. Жағалов

Қазақстан Республикасында балаларды құқықтық қорғаудың өзекті мәселелері

Мақалада балалардың қадағалаусыз және панасыздығын болдырмау және оңалту саласындағы мемлекеттік саясаттың ең өзекті мәселелері қарастырылды. Авторлар балалардың құқықтарын қорғау бойынша ұсыныстар жасайды және балалар мен отбасылардың психологиялық-әлеуметтік мұқтаждықтары бойынша ғылыми және ұйымдастырушылық орталығының жұмысын талдайды. Бұдан басқа Қазақстан Республикасында ата-анасының қамқорлығынсыз қалған балаларды құқықтық қорғау, оның нысандары мен міндеттері зерттелді. Қазақстан БҰҰ-ның «Бала құқықтары туралы» конвенциясына қосылды және оның ұсыныстарына сүйенеді. Авторлар Қазақстандағы балаларды құқықтық қорғаудың негізгі мәселелерін және оларды шешу жолдарын атап өтті. Сондай-ақ балалардың құқықтарын қорғау жөніндегі облыстық департаменттердегі мамандардың жетіспеушілігі, атап айтқанда, әлеуметтік жағдайы төмен балалардың тағдырын дұрыс қадағалауға, жағдайдың себептерін анықтауға, сотта оның құқықтарын қорғауға мүмкіндік бермейді. Осы мәселелерді шешу үшін авторлар қоғамның, әсіресе үкіметтік емес ұйымдардың, қазақстандық қоғамды әлеуметтік тұрақтандыруда маңызды рөл атқаратын барлық секторларын қамтуды ұсынды. «Үшінші сектордың» мемлекетпен ынтымақтастығы тең серіктестік қағидаттарына негізделген. Мұның бәрі балалардың құқықтарын сақтауға мониторинг жүргізуге, кең аудиториямен, оның ішінде бұқаралық ақпарат құралдарымен және балалармен жұмыс істейтін қоғамның басқа құрылымдарымен, соның ішінде мемлекеттік және үкіметтік емес ұйымдармен кері байланыс орнату мәселелерін анықтауға мүмкіндік береді.

Кілт сөздер: балаларды құқықтық қорғау, Қазақстан, БҰҰ-ның «Бала құқықтары туралы» конвенциясы, мемлекет, ұйымдар, үкіметтік емес ұйымдар, мамандар, алдын алу, оңалту, қоғам, әлеуметтік, кәмелетке толмағандар.

А.К. Рахимберлина, Р.Б. Жагалов

Актуальные проблемы правовой защиты детей в Республике Казахстан

В статье рассматриваются наиболее актуальные вопросы государственной политики в области профилактики и реабилитации безнадзорности и бездомности детей. Авторами предложены рекомендации по защите прав детей и анализируются работы научно-организационного центра по психосоциальным потребностям детей и семей. Более того, в статье рассматривается правовая защита детей, оставленных без попечения родителей, в Республике Казахстан, ее формы и задачи. Казахстан присоединился к Конвенции ООН о правах ребенка и следует ее рекомендациям. Авторы выделяют основные проблемы правовой защиты детей в Казахстане и пути их решения. Нехватка специалистов в областных департаментах по защите прав детей не позволяет, в частности, на должном уровне отследить судьбу неблагополучного ребенка, вскрыть причины той или иной ситуации, защитить его права в суде. Для решения этих проблем авторы предлагают охватить все секторы общества, особенно неправительственные организации, которые играют важную роль в социальной стабилизации казахстанского общества. Сотрудничество «третьего сектора» с государством строится на принципах равноправного партнерства. Все это позволяет вести мониторинг соблюдения прав ребенка, выявлять проблемы в налаживании обратной связи с широкой аудиторией, в том числе со средствами массовой информации и иными структурами общества, работающими с детьми, включая государственные и негосударственные организации.

Ключевые слова: правовая защита детей, Казахстан, Конвенция ООН о правах ребенка, государство, организации, негосударственные организации, специалисты, профилактика, реабилитация, общество, социальные, несовершеннолетние.

References

1 Doklad Upolnomochennoho po pravam cheloveka [Report of Commissioner on Human Rights]. *ombudsman.kz.* Retrieved from http:// www.ombudsman.kz [in Russian].

2 Mezhdunarodnyi pakt ob ekonomicheskom, sotsialnom i kulturnom prave [International Covenant on Economic, Social and Cultural Right]. *ohchr.org*. Retrieved from http://www.ohchr.org [in Russian].

3 Dzheiembaev, R.K. (2007). Yuvenalnaia yustitsiia kak obrazovatelnyi protsess [Juvenile justice as an educational process]. *Biulleten Kaznacheistva. Seriia zakonov – Bulletin Treasury. Law Series, 3,* 113116 [in Russian].

4 *Ahentstvo Respubliki Kazakhstan po statistike [Agency of the Republic of Kazakhstan on Statistics]. stat.kz.* Retrieved from http://stat.kz [in Russian].

5 Postanovlenie Pravitelstva Respubliki Kazakhstan ot 11 iiunia 2001 hoda N 789 «Ob utverzhdenii tipovoho polozheniia o komissii po delam nesovershennoletnikh i zashchite ikh prav» [Decree No. 789 of the Government of the Republic of Kazakhstan of June 11, 2001 On the approval of the model clause on the commission for the affairs of minors and the protection of their rights»]. *adilet.zan.kz/ru.* Retrieved from : http://adilet.zan.kz/rus/docs/P010000789/ [in Russian].

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L.R. Aliyeva

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

Legal nature of special proceeding as type of civil proceeding

The task to examine the major issues of special proceeding institute as type of civil proceeding is set in the present article. Modern civil turnover includes the need to establish the existence of legal facts, determining the legal regime of the different private law relations and the establishment of the legal status of their participants in order to implement the rights of these subjects in the sphere of private law. These issues are resolved by the courts of general jurisdiction in a particular order. Civil legislation provides for protection of the legitimate interests of the participants of civil relations, which has not yet been broken, and not contested, but which also needs to be protected from the government because of the uncertainty of specific legal facts, the legal status of citizens, and so on. The special proceeding is existing to protect such interests. The special proceeding is the third type of civil proceeding, which protects the personal rights and interests in cases where such rights and interests are violated, in the event of the need to establish rights which are the basis for the implementation of these rights. In the course of special proceeding eliminate of legal uncertainties and inaccuracies in respect of the circumstances, actions or events, carrying out of the control for the legality of the activities of notaries and RACS, thus preventing legal conflicts may be.

Keywords: special proceeding, a type of civil proceeding, civil procedure, civil cases, civil legal relations, civil procedural code, civil procedural legislation, protection of rights and interests, judgments, legal facts, evidentiary facts.

The structure of several forms of civil proceedings - contentious (claim), and the special procedure of civil process, which was caused by the need to create special procedural rules in civil procedural law for a very long time was fixing.

Construction of several civil justice forms the majority of modern researchers associated with the tradition of Roman law, which allocated the disputed claim proceeding and indisputable (voluntary), and that in their opinion, was reproduced current civil procedural legislation of modern states.

As the legislative practice evidenced, such civil process construction acquired axiomatic nature and there is no doubt. However, statements and examples indicating another approach to constructing structures of civil process were at various times [1; 225].

Thus, when Charter of civil court proceedings 1864 was developing, as the proceeding of criticism on Code of laws 1857 found, that one of the significant shortcomings of the legislation existing at that time is to conduct of various legal proceedings. As you know, the Code of laws provided for a common order of judicial procedure, and four main features and sixteen special ones. According to the department of laws and civil affairs of the State Council such legislative decision caused the slowness of legal proceedings, the development of formalism.

Austrian Charter of Civil Procedure, 1895, also included the differentiation of civil procedure. Section II of this statute, called «Proceeding in the first instance courts», containing chapter V «Specific proceedings», which included the features of consideration of separate categories of cases: the proceeding on bill claims, proceeding on claims arising from the contract of property rental, proceeding in the arbitration court, proceeding on the claims for damages caused by ranks of the judiciary. In addition, in particular the proceeding included the writ proceedings [2; 155].

P.P. Zavorotko, G.J. Stephan believe that «the Soviet civil procedural law has also been characterized by the idea of fixing the various forms of civil proceedings» [3; 55].

The first Soviet regulations about civil proceedings distinguished two types of civil proceedings: claim and protective, which is sometimes called undisputed or ex parte.

Acting Civil Procedural Codes of the RSFSR do not provide a definition of special proceeding, although secured list of special proceeding cases. Special proceeding designed as indisputable. The attempt to determine the nature of a special proceeding was made in the time instruction of People's Commissariat of Justice of the Ukraine from January 4, 1924 (circular number 4). The special proceeding in this document was opposed to the claim one by two characteristics: a) the establishment of the right in the claim proceeding and the finding of fact in an uncontested one; b) the possibility of objections, the call of parties in claim pro-

ceedings and proceedings without the defendant in a special proceeding. There are no other sources, which in one or another way fixed the legal reasons [4].

Despite the isolation of special proceeding in the civil procedure, as a relatively independent, common rules governing the procedure of their consideration for all the cases of special proceeding have not been formulated in the Code of Civil Procedure of the USSR and a list of special proceeding cases and their corresponding rules of consideration was assigned. In accordance with the CPC of the RSFSR of 1995 and 1997 the cases of special proceeding these cases were:

a) about property remaining after the dead;

b) about the arbitration records and judgments;

c) about the deposit;

d) about issue orders for the acts;

d) about divorces, claims about the content and the establishment of children's names;

e) about establishment of circumstances from the existence of which depends on the occurrence of public rights of citizens;

g) about exemption from military service on religious grounds;

h) about the complaints to the actions of notaries.

Later the Code of Civil Procedure of the RSFSR in the version of 1995 also provided for special proceeding. According to it, the cases of special proceeding concluded the case: about issue of injunctions; for permission to appeal indisputably penalties on current accounts and deposits with credit institutions; on establishing the circumstances that determine the appearance of the public rights of citizens; the renewal of rights to lost bearer securities; exemption from military service on religious grounds; complaints on the actions of notaries. In addition, according to the Code of Civil Procedure special proceeding cases concluded cases of divorce [5; 567].

As we can see, civil procedural legislation, enshrined the presence of protective (special proceeding), did not determine the criteria of these plants, their difference of action proceedings in a civil proceeding. The legislator only gave the list of cases referred to the special proceeding.

It was noted in the literature, that consolidation in the legislation of the two forms of civil proceedings has certain reasons, which are reduced to the fact that the nature of the special proceeding is determined by the absence of a dispute over a civil right in this proceeding. In contrast to the claim of cases the special proceeding cases resolved in a more simplified order, it does not apply some institutions of claim proceedings (settlement agreement, the rejection of a claim, third parties and others.).

The special proceeding is characterized as ex parte, unilateral proceeding with absentee disputing parties with opposing legal interests.

The essence of the special proceeding can be understood and disclosed only as a result of the analysis of the substantive legal and procedural nature of the cases referred to the special proceeding. And the nature of the proceeding purposes and ways in which the justice is carried out in special proceeding. Exactly these circumstances finally that ultimately causes the features of procedural order of consideration of special proceeding cases [6; 341].

Thus, the subject of judicial protection in the special proceeding cases is a legitimate interest of the applicant, mediated by the subjective right. The legitimate interest of social needs is understood in the jurisprudence, as social necessities taken under its protection by law by not granting them the carrier of subjective substantive rights, and providing to them (or others) the right to resort to judicial or other legal forms of protection [7; 270].

In this case, the protection of a legitimate interest in a special proceeding is needed for the applicant not exactly the most protection, or for the carrying out and acquisition of a subjective right in the future. Thus, the citizen must establish in court order the fact of its dependent on the deceased in order to ensure that this judgment on his application would the basis for the recognition of his legal heirs.

The special proceeding - is an independent type of civil proceedings in a specially within the jurisdiction of the court categories of civil cases, characterized by the absence of a dispute about the right and the use of special tools and methods of protection, in which the Court, by establishing of legal facts (actions, events, conditions) shall protect the interests protected by law citizens and organizations.

Legal regulation is possible only on the basis of not questionable legal facts. Implementation of the subjective right to a pension may be the case if you have installed the age of the person concerned, his seniority, disability, etc. For inheritance you need to know the facts of kinship certain extent, dependent, etc.

The special proceeding order established legal and evidentiary facts, and sometimes the conclusion of the legal status of a citizen or other legal issues resolve (on the basis of established facts, for example, a citizen recognized as missing or incompetent, or the issue of the transfer of property to state ownership addressed, and so on. For example, the fact of birth of a person is a legal fact, caused legal effect, but the fact of birth registration – evidentiary one.

There are two main procedures for establishing (ascertaining) of the unknown facts:

1) administrative (including notary);

2) court.

Obvious facts - birth, marriage registration, etc., ie, facts which are made directly in the face of the relevant body or confirmed by official documents may be certified in the administrative order. For example, the notary certifies the following facts:

a) finding of citizen as alive;

b) being of citizen in a certain place;

c) identity of the citizen with the person depicted in the photo which is presented by this citizen;

d) the presentation time to notary documents.

The facts are not clear, ie, either not subject to official registration or non-confirmed by official documents due to their loss, shall be certified by the courts, as they require examination of evidence supporting the relevant fact. If in the claim proceedings establishing of the relevant legal fact is necessary for the protection of subjective right, in special proceeding the applicant's interest is limited to a statement of fact. The question of fact arising from the subjective right decides later, outside the special proceeding [8; 144].

Due to the fact that the division on the life circumstances of legal significance and legally indifferent highly conditional and legally relevant facts is installed in the cases of special proceeding shall be determined specifically for each case. For determining of the legally relevant of fact it should be clarified the purpose of this fact, that the consequences of which the applicant would like to advance. Therefore, the fact is recognized as legal, if it has law-value to achieve the pursued goal by the applicant.

In addition, special proceeding can be set relatively large circle of evidentiary facts that is such, from the existence of which we can conclude on the presence (or absence) of the desired (legal) facts. So, the fact of birth of a person is a legal fact, attracted legal effect, and the fact of this birth registration - evidentiary fact. Therefore, the essence of special proceeding is to protect the legal interests through the establishment of legal or evidentiary facts [9; 199].

The court established the presence or absence of the following facts of different nature in special proceeding order:

– actions - for example, the facts of registration of adoption (adrogation), marriage and divorce, inheritance acceptance, notary acts or refusal in their carrying out, and so on.;

– events - such as the deaths at a certain time and under certain circumstances, birth, accident, etc.;

– status – for example, a facts of person finding dependent, family relationship, the actual marital relationship, disability citizen, the citizen is missing, etc. [10; 229].

However, the concept and essence of the special proceedings, as well as the category of cases that are attributable to a special proceeding, in the science of civil procedural law are debatable. The theoretical problems of special proceeding are questions about the legal nature of the special proceedings, the subject of judicial activity and the list of special proceeding cases.

Exploring the question of the legal nature and scope of a special proceeding cilil procedural scientists have come to different conclusions [11; 223].

The main emphasis may be placed on the indisputable nature of the cases, which relate to a special proceeding. The main attention is drawn to the purpose of the procedural court activities directed at protecting the legitimate interests of citizens and organizations. The emphasis is on the subject of special proceedings, consisting in the establishment of the legal fact or condition, as well as overseeing the legality of the actions of the notary and racs.

Also, in a special proceeding legal and evidentiary facts established, and sometimes the conclusion of the legal status of a citizen or resolve other legal issues (on the basis of established facts, for example, a citizen recognized as missing or incompetent, or the issue of the transfer of property to state ownership addressed, and so on).

Chapter 31, Section 4 expressed the general terms of the special proceeding, the considered cases in this type of proceeding.

Cases of special proceeding are considered by the courts under the general rules of civil procedure with the exceptions and additions set out the civil procedural legislation [12]. General principles of civil procedure - legality, optionality, spontaneity, etc. are applied in special proceeding. Cases of special proceedings go through the same stages of civil procedure, which makes claim proceedings. The same rules of evidence, court record, judgments are all over on matters of special proceeding, etc.

The absence of the right dispute determines the specific features of the procedural forms of special proceeding. There are no parties (plaintiff and defendant). A person filing a case of special proceeding, called the applicant.

Related parties (citizens, organizations, financial bodies, social security bodies, etc.) are involved to participate in the cases of special proceeding. Third parties do not participate in the cases of special proceeding.

Failure to settle the dispute of the right in a special proceeding and the lack of action is due to non-use of typical claim institutions: the recognition and rejection of a claim, settlement agreement, maintenance of the claim, counterclaim, etc.

The list of cases considered in a special proceeding order defined by procedural law. These include cases.

Cases considered by the court in special proceeding order, includes cases:

1) about establishing the facts having legal significance;

2) on the applications for adoption (adrogation) of the child;

3) about the recognition of the citizen as missing and declaring the citizen dead;

4) about the limitation of legal capacity of citizen, deprivation of legal capacity, about restriction or deprivation of a minor under the age of fourteen to eighteen years old right to dispose of their income;

5) about proclaiming of minor fully capable (emancipation);

6) about the direction of minors into special educational organizations for children with deviant behavior or organizations with a special regime of detention;

7) about the forced hospitalization of citizen into a psychiatric hospital;

8) about the direction of the citizen to involuntary treatment of tuberculosis, alcoholism, drug addiction, drug abuse;

9) about the restructuring of financial institutions and organizations within the banking conglomerate as a parent organization and non-financial institutions;

10) about introducing, premature termination and extension time control grain-enterprise or organization of the cotton;

11) about the rehabilitation and bankruptcy;

12) about recognition of movable thing as ownerless and recognition of communal ownership of real property;

13) about the establishment of civil registration irregularities;

14) on complaints against notary acts or refusal from committing them;

15) about the restoration of the rights of the lost bearer securities and order securities (procedure to declare lost documents void);

16) on statements of recognition of organization carrying out extremist or terrorist activities on the territory of the Republic of Kazakhstan and (or) another state, extremist or terrorist, including the establishment of the changes it its name, as well as the recognition of information materials imported, published, produced and (or) distributed on the territory of the Republic of Kazakhstan, extremist or terrorist;

17) on statements of recognizing online casino, product of foreign media, distributed on the territory of the Republic of Kazakhstan, containing information contradicting the laws of the Republic of Kazakhstan, unlawful;

18) on statements of expulsion of a foreigner or a stateless person from the Republic of Kazakhstan for violation of the Republic of Kazakhstan legislation.

Also, the law may provide for the consideration and other cases in a special proceeding [12].

This group of cases considered by judge singly. In respect of certain categories of cases of special proceeding law clearly defines range of stakeholders, according to which proceedings may be instituted.

The composition of the persons involved into special proceeding is different from that participating in the claim proceeding. As there is no dispute about the law in cases of special proceedings, then there are no parties (plaintiffs and defendants), and third parties. Only the applicants and interested parties participate.

The prosecutor in the examination and resolution of certain cases of special proceeding required to participate in the force of law.

Summarizing, we can conclude that the special proceeding is one of the types of civil proceedings. The name itself indicates the presence of specific features that characterize a special proceeding.

Special proceeding - is an independent type of civil proceedings on a specially within the jurisdiction of the court categories of civil cases, characterized by the absence of a dispute about the law and the use of special means and methods of protection, in which the Court, by establishing legal facts (actions, events, conditions) shall protect the interests of citizens and organizations protected by law. Legal regulation is possible only on the basis of not questionable legal facts.

Yu.S. Chervonyi notes that «Special proceeding - type of civil proceedings, in order of which civil cases, which is confirmed by the presence or absence legal facts that affect the occurrence, change or termination of personal or property rights of citizens, or confirmed by the presence or the absence of an undisputed right, and defines the legal status of the citizen are considered» [13; 278].

Special proceeding is a type of civil proceedings, different from the claim one by the absence of dispute about the law and, as a consequence, the absence of the contending parties with opposing legal interests. Special proceeding is characterized as ex parte otherwise, one-sided proceeding.

Civil cases are considered in a special proceeding, which is required by the courts confirm the presence or absence of legal facts or circumstances from which depends on the occurrence, change or termination of personal or property rights of citizens. For example, a citizen may apply to the court with statement on the establishment of ancestral relations, as the establishment of this fact is necessary to join the right of inheritance or get the pension for loss of breadwinner.

Such civil cases for which it is necessary to confirm the presence or absence of indisputable right (such as the finding of possession and use of real estate, the cases of the restoration of the rights of the lost securities to bearer or order securities, on restoration of forfeited proceeding) may be considered within the special proceedings. At the considering of these categories of civil cases the court should resolve not only questions of fact, but also of law. In these cases, the protection of right cannot be realized in the claim proceeding, since there is no dispute about the right and the person concerned is no requirement to anybody. The cases in which the court determines the legal status of a citizen: in some cases, the citizen is recognized as incapable or partially capable; in others - is declared dead or declared missing are considered in special proceeding.

Referenses

1 Гражданский процесс: учебник / под ред. проф. В.В. Комарова. — Харьков: ООО «Одиссей», 2001. — 704 с.

2 Гражданский процесс: учебник для вузов / под ред. проф. М.К. Треушникова. — 2-е изд. испр. и доп. — М.: Спарк; Юридическое бюро «Городец», 1998. — 544 с.

3 Заворотько П.П. Неисковое производство в советском гражданском процессе / П.П. Заворотько, Г.Й. Штефан. — Киев: Вид-во Київ. ун-ту, 1969. — 101 с.

4 Порогов А. История развития особого производства / А. Порогов // Правоведение. — 1999. — № 12. — С. 45–51.

5 Гражданский процессуальный кодекс: науч.-практ. комментарий / под ред. В.В. Комарова. — Харьков: Одиссей, 2001. — 816 с.

6 Гражданский процесс: учебник. — 3-е изд., перераб. и доп. / под ред. В.А. Мусина, Н.А. Чечиной, Д.М. Чечота. — М.: ПБОЮЛ Гриженко, 2001. — 544 с.

7 Гражданский процесс России / под ред. М.А. Викут. — М.: Юристъ, 2005. — 480 с.

8 Казанцев В.И. Гражданский процесс: учеб. пособие для студ. учреждений сред. проф. образования / В.И. Казанцев, С.Я. Казанцев. — М.: Академия, 2003. — 240 с.

9 Гражданский процесс России: учебник / под ред. д-ра юрид. наку, проф. М.А. Викут. — М.: ЮРИСТЪ, 2014. — 734 с.

10 Гражданский процесс / под ред. В.В. Яркова. — 6-е изд., перераб. и доп. — М.: Волтерс Клувер, 2006. — 703 с.

11 Баймолдина З.Х. Гражданское процессуальное право Республики Казахстан: учебник: в 2-х т. Т.2: Особенная часть (темы 16-30) / З.Ч. Баймолдина. — Алматы: КазГЮА, 2001. — 468 с.

12 Кодекс Республики Казахстан от 31 октября 2015 года № 377-V «Гражданский процессуальный кодекс Республики Казахстан» (с изм. и доп. по состоянию на 12.12.2017 г.) [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/?doc_id=34329053.

13 Гражданский процесс / отв. ред. Ю.С. Червоный. — Харьков: Одиссей, 2003. — 352 с.

Л.Р. Алиева

Азаматтық сот өндірісінің түрі ретіндегі ерекше іс жүргізудің құқықтық табиғаты

Автор ерекше іс жүргізудің азаматтық сот өндірісінің түрі ретіндегі негізгі мәселелері қарастырды. Заманауи азаматтық айналым заңды деректердің пайда болудың бекітілу қажеттілігін, түрлі жеке-құқықтық қатынастардың құқықтық режимін анықтауды, сондай-ақ осы субъектілердің жеке құқық саласындағы құқықтарын жүзеге асыру мақсатында олардың құқықтық мәртебесін анықтауды талап етеді. Бұл мәселелерді жалпы юрисдикция соттары арнайы тәртіппен шешеді. Азаматтық заңнама азаматтық қатынастардың қатысушыларының әлі ешкім бұзбаған және даулы емес, бірақ нақты заңды фактілердің белгісіздігіне, азаматтардың құқықтық мәртебесіне және тағы басқаға байланысты мемлекеттен қорғауға мұқтаж заңды мүдделерін қорғауын көздейді. Мұндай мүдделерді қорғау үшін ерекше іс жүргізу қажет. Ерекше іс жүргізу субъективті құқықтарды және мүдделерді қорғайтын, олар бұзылған, құқықтарды бекіту қажеттілігі пайда болған жағдайларда азаматтық іс жүргізудің үшінші түрі болып табылады. Ерекше іс жүргізу барысында бірқатар мән-жайларға, іс-әрекеттерге немесе оқиғаларға қатысты құқықтық белгісіздіктер мен дәлсіздіктерді жоюға нотариус және азаматтық хал актілерін тіркеу органдарының қызметінің заңдылығын бақылауға, сәйкесінше, құқықтық даулардың алдын алуын жүзеге асыруы міүмкіндіктері бар.

Кілт сөздер: ерекше іс жүргізу, азаматтық сот өндірісінің түрі, азаматтық іс жүргізу, азаматтық істер, азаматтық қатынастар, азаматтық іс жіргізу кодексі, азаматтық іс жүргізу заңнамасы, құқықтар мен мүдделерді қорғау, сот шешімдері, заңды деректер, дәлелдеу факті.

Л.Р. Алиева

Юридическая природа особого производства как вида гражданского судопроизводства

Автор ставится задача рассмотреть основные вопросы особого производства как вида гражданского судопроизводства. Современный гражданский оборот предусматривает необходимость установления наличия юридических фактов, определения правового режима различных частноправовых отношений, а также установления правового статуса их участников с целью реализации прав данных субъектов в частноправовой сфере. Данные вопросы решаются судами общей юрисдикции в особом порядке. Гражданским законодательством предусмотрена защита законных интересов участников гражданских отношений, которые еще никем не нарушены и не оспариваются, но которые также нуждаются в защите со стороны государства ввиду неопределенности конкретных юридических фактов, правового статуса граждан и т. п. Именно для защиты таких интересов и существует особое судопроизводство. Особым производством является третий вид гражданского судопроизводства, который защищает субъективные права и интересы в случаях, когда данные права и интересы нарушаются, при возникновении необходимости в установлении прав, служащих основанием для осуществления субъективных прав. В ходе особого производства возможно устранение правовых неопределенностей и неточностей в отношении круга обстоятельств, действий или событий, осуществление контроля за правомерностью деятельности органов нотариата и РАГС, тем самым предотвращение правовых конфликтов.

Ключевые слова: особое производство, вид гражданского судопроизводства, гражданский процесс, гражданские дела, гражданские правоотношения, гражданский процессуальный кодекс, гражданское процессуальное законодательство, защита прав и интересов, судебные решения, юридические факты, доказательственные факты.

Referenses

1 Komarov, V.V. (Eds.). (2001). *Hrazhdanskii protsess [The civil process]*. Kharkov: Odissei [in Russian].

2 Treushnikov, M.K. (Eds.). (1998). *Hrazhdanskii protsess [The civil process]*. (2d ed.). Moscow: Spark [in Russian].

3 Zavorotko, P.P., & Shtefan G.J. (1969). *Neiskovoe proizvodstvo v sovetskom hrazhdanskom protsesse [Ex parte proceeding in the Soviet civil process]*. Kiev: Kiev Universitu [in Russian].

4 Porogov, A. (1999). Istoriia razvitiia osoboho proizvodstva [History of the development of special proceeding]. *Pravovedenie – Legal Technology, 12,* 45–51 [in Russian].

5 Komarov, V.V. (Eds.). (2001). *Hrazhdanskii protsessualnyi kodeks: nauchno-prakticheskii kommentarii [Civil Procedural Code. Scientific-practical commentary]*. Kharkov: Odissei [in Russian].

6 Musina, V.A., Chechina, N.A., & Chechot, D.M. (Eds.). (2001). *Hrazhdanskii protsess [The civil process]*. Moscow: PBOYuL Hrizhenko [in Russian].

7 Vikut, M.A. (Eds.). (2005). *Hrazhdanskii protsess Rossii [Civil process of Russia]*. Moscow: Yurist [in Russian].

8 Kazancev, V.I., & Kazancev, S.Ya. (2003). *Hrazhdanskii protsess [The civil process]*. Moscow: Academiia [in Russian].

9 Vikut, M.A. (Eds.). (2014). *Hrazhdanskii protsess Rossii [Civil process of Russia]*. Moscow: Yurist [in Russian].

10 Yarkov, V.V. (Eds.). (2006). *Hrazhdanskii protsess [The civil process]*. Moscow: Volters Kluver [in Russian].

11 Baimoldina, Z.H. (2001). *Hrazhdanskoe protsessualnoe pravo Respubliki Kazakhstan [Civil Procedural Law of the Republic of Kazakhstan]*. Almaty: KazHYuA [in Russian].

12 Kodeks Respubliki Kazakhstan ot 31 oktiabria 2015 hoda № 377-V «Hrazhdanskii protsessualnyi kodeks Respubliki Kazhakhstan [Civil Procedural Code of the Republic of Kazakhstan dated October 31, 2015 № 377-V]. *online.zakon.kz*. Retrieved from https://online.zakon.kz/Dosument/ dos_id = 34329053 [in Russian].

13 Chervonyi, Yu.S. (Eds.). (2003). *Hrazhdanskii protsess [The civil process]*. Kharkov: Odissei [in Russian].

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E.V. Yespergenova

B. Beisenov Karaganda Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan, Kazakhstan
(E-mail: yevgeniyayes@mail.ru)

Some issues of improving the criminal law standards regulated by Article 320 of the Penal Code of the Republic of Kazakhstan «Failure to assist sick person»

The purpose of this work is to develop scientific-based proposals to improve criminal legislation and practice of its application. Based on the results of the research the author offers recommendations for improving the current criminal legislation and legal precedents in issues of crossing for failure to assist sick person, in particular, the author's position on the concept, type and amount of the assistance provided is proposed. In addition, considering the analysis of the existing points of view of academic lawyers, a number of conclusions were drawn related to the definition of the concepts «sick person» and «patient», on the basis of which the author proposed his own vision of this concept. The conclusions, results, provisions reflected in the work are based on the analysis of the legal literature, the materials of law enforcement practice and the survey of the relevant circle of respondents and can be used in further scientific research, when developing proposals for legislation, in the teaching process while teaching the criminal law course.

Keywords: criminal legislation, penal code, criminal law standards, medical offenses, responsibility of medical workers, failure to assist, professional duties, sick person.

The rendering of assistance to the sick person is substantive, because the life of the sick person, as well as the possibility of his recovery depends on the timely and proper provision of medical care.

Helping a sick person is the professional duty of medical professionals. Since ancient times one of the founders of medicine Hippocrates has been formulated standards of behavior of the doctor (Oath of Hippocrates). According to Hippocrates, the doctor is the only profession that must begin with an oath to society because a person who has chosen this profession, who has studied for many years to help a person suffering from personality, naturally must make a promise to be worthy of the chosen case. In works that have survived to this day it is noted that «medicine is truly the noblest of all arts. But because of the ignorance of those who are engaged in it, and those who with frivolous condescension judge them, it is now far below all arts» [1].

Graduates of higher education organizations who have been trained in medical specialties and are currently taking the oath of a doctor of the Republic of Kazakhstan, who swear to provide medical care to everyone who needs it, regardless of age, gender, nationality, religion, social status and citizenship [2].

It is necessary to recognize that today the issues of medical deontology (the totality of ethical norms for the performance of one's professional duties by a medical worker) really are great importance for society. The ethical responsibilities of health workers are considered both internationally in the International Code of Medical Ethics and at the national level in the Code of Honor for Medical and Pharmaceutical Workers [2].

However, medical workers who solemnly promised to provide medical assistance do not always have it, so they are held liable in accordance with the legislation of the Republic of Kazakhstan. The cases of bringing persons to criminal responsibility for failure to assist sick person, as shown by the analysis of statistical

data in practice although they are relatively rare, do exist. So, in 2014 5 such offenses were registered, in 2015 - 5, in 2016 - 0, in 2017 – 2 [3].

According to Article 320 of the Penal Code of the Republic of Kazakhstan victim is a person in need of medical assistance but because of his physical incapacity or because of the lack of special medical knowledge he cannot provide medical assistance to himself.

As the analysis of legal literature shows some academic lawyers propose to legislatively fix the concept of a sick person because in their opinion a sick person can be not only a person suffering from any disease, regardless of its severity, but also a person who is not suffering from the disease but needing medical care, for example, a woman in childbirth [4; 86]. In medical practice the concepts of «sick person» and «patient» as a rule are interchangeable. In addition, there is a problem in determining the status of «patient» and the concept of «sick person». All this in turn creates difficulties in law enforcement practice. In connection with the indicated problem it should be noted that according to subpar. 87 pt. 1 Art. 1 of the Code of the Republic of Kazakhstan «On public health and health care system» the term «a patient» is defined as - an individual, who is (was) the consumer of health services [2]. At the same time, the concept of «sick person» is not legally fixed. According to the explanatory dictionary S.I. Ozhegov is a sick person it is struck by some kind of disease [5; 107]. The patient is a biological status that characterizes the deviation from the norm in the state of the organism [6]. Thus, the concept of «patient» is broader than that of the sick person because the status of the patient is acquired by any person who has applied to a medical institution, not necessarily for the purpose of treatment (for example, for prevention or medical examination). An analysis of legal literature shows that some authors suggest that the notion of a «sick person» should be legally fixed in a note to the criminal law stipulating responsibility for failure to assist sick person in the following wording: sick person - an individual who is in any painful condition who needs immediate medical attention, regardless of whether he applied for medical help or not [7; 345].

In our opinion, the legislative consolidation of the notion of «sick person» in a note to the article providing responsibility for failure to assist sick person will lead to excessive cluttering of the criminal legislation which can hardly be considered expedient. Moreover, the analysis of the Penal Code of the Republic of Kazakhstan shows that in some chapters, in particular, chapter 8 of the Penal Code of the Republic of Kazakhstan «Criminal infraction in the scope of economic activity» is dominated by a large amount of terms inherent in the sphere of economics, however, notes to each article of Chapter 8 PC RK explaining these concepts the legislator did not provide, thus did not overload the criminal legislation which is, in our opinion, justified.

At the same time, it must be recognized that the lack of appropriate explanations of the term «sick person» negatively affects law enforcement practice. In this regard we consider it expedient to define and consolidate the notion of «sick person» in the sectoral legislation in particular in the Code of the Republic of Kazakhstan «On public health and health care system» of September 18, 2009 which we believe will promote uniformity and effectiveness of criminal legislation evaluation of the deed.

Ya.A. Myts in addition to the legislative definition and consolidation of the concept of the sick person suggests in the dispositions of the rule providing responsibility for the act under analysis to expand the list of victims providing a sick person other than the sick person who needs medical assistance. The author proposes to refer to other persons: a woman in childbirth who also has the right for medical care under the law and this right is ensured by assigning an appropriate duty to provide necessary assistance to obstetricians and gynecologists; some categories of persons whose professional activity is associated with significant overloads for the organism (athletes performing in the professional ring, military, persons performing work in difficult working conditions, etc.). The doctor is obliged to conduct a medical examination with respect to them on the conclusion of which the life and health of that persons depends. Not revealing a discrepancy between the psychophysiological indicators of such persons, the state of their health by the established special rules to standards can lead to a lethal outcome [4].

In our opinion, the opinion of Ya.A. Myts should be accepted because indeed the concept of «sick person» does not encompass all possible states of the human body. For example, a woman in childbirth, in fact, is not a sick person but she needs timely, qualified medical care. I would like to note that in medical practice a person is considered a sick person when his state of health is examined and a final diagnosis is made. Until the time person is not examined and diagnosed by medical staff, it is not legally possible to consider him as a sick person (except when signs of a crisis health situation on the face). In practice there are cases when a person who seeks medical help has no signs of illness, there is no evidence that he is not a sick person, there are no medical records and he claims that he is sick. In such cases the above person in our opinion should also be

categorized as other persons in need of medical assistance. Recognize a sick such a person without a confirmatory diagnosis is not possible but medical personnel are obliged to examine and provide medical assistance.

In medical practice there are also cases when a person at the time of seeking medical help is healthy but his state of health is at the borderline in the transition to a morbid state. This category of people, in our opinion, should also be categorized as other persons in need of medical care because the state of his health may worsen in a short time and lead to unfavorable consequences. Thus, the medical worker is obliged to examine the patient's body and identify the prerequisites for the disease.

On the basis of the foregoing we consider advisable as victims in the title and disposition of Art. 320 of the Penal Code of Kazakhstan entrench along with sick persons other persons in need of medical assistance.

An additional argument in favor of the stated position is the results of a survey of members of a law enforcement agency who was asked: «Do you consider it appropriate to expand the circle of victims by including in the disposition Art. 320 of the Penal Code of the Republic of Kazakhstan «Failure to assist sick person» of other persons in need of medical assistance?», 81 % answered positively.

It should be noted that the legislator did not specifically indicate what kind of assistance the sick person did not have from the person obliged to provide it. However, as shown by the analysis of legal literature most scientists suggest that it is about medical care which follows from the very interpretation of the idiom «failure to assist sick person». At the same time some authors believe that this norm says not only about medical assistance but also about other necessary assistance. For example, F.Yu. Berdichevsky believes that the crime in question can be the failure to assist such assistance, such as the refusal of the pharmacy worker to provide a phone for calling an ambulance, the driver's refusal to transport the ambulance [8; 74].

I.F. Ogarkov believes that the inactivity of the relatives of the sick person and cohabiting conjoints for the organizational and material support of the victim should also be regarded as a failure to assist to the sick person [9; 68]. In turn according to I.V. Ivshyn the driver of the vehicle who refused without excuse to transport the sick person in need of emergency care is liable to criminal liability in the event of socially dangerous consequences [10; 129].

In connection with the foregoing I would like to focus on the following points: firstly, the legislator fixing the responsibility for the act in question in Chapter 12 of the Penal Code of the Republic of Kazakhstan «Medical Criminal Infractions», we believe, implied that this infraction is committed in the sphere of medical care. Secondly, it should be noted that in the sanction of the article under consideration one of the types of punishment provides for the deprivation of the right to occupy certain positions or engage in certain activities. And, finally, thirdly, inaction of persons who do not have medical education expressed in the failure to assist sick person, in our opinion, should lead to criminal liability under Article 119 of the Penal Code of the Republic of Kazakhstan «Leaving in danger» subject to appropriate conditions. In this regard we believe that there is no doubt about the fact that the composition of the criminal infraction provided for in Article 320 of the Penal Code of the Republic of Kazakhstan takes place solely in cases when it is a question of failure to assist medical assistance sick person. Moreover, in accordance with the Order of the Ministry of Health of the Republic of Kazakhstan of July 3, 2017, No. 450 «On Approval of the Rules for the Provision of Emergency Medical Assistance in the Republic of Kazakhstan» the drivers of ambulance (ambulance) should provide the necessary medical assistance because in law as one of the requirements for drivers are indicated that they must have first aid skills [11].

Thus, if it is a question of drivers of sanitary vehicles they will be prosecuted under Article 320 of the Penal Code of the Republic of Kazakhstan only if they did not receive the first medical aid which is rightly addressed in the works of such authors as I.I. Gorelik, T.V. Kirpichenko, N.G. Alexandrov. Moreover, they expressed a proposal on the expediency in the disposition of a norm providing for responsibility for failure to assist sick person pointing out the failure to assist medical assistance sick person. In our opinion, the authors' proposal is justified and acceptable for the Kazakh legislation as this clarification will help to avoid misunderstandings of the Penal Code of Kazakhstan and resolve problems in law enforcement practice. At the same time the content of the criminal law norm must correspond to its name, in this connection we believe that it is necessary to supplement both the disposition and the title of the article with an indication of medical assistance. In addition the principle of maximum specification of the norm to date meets the requirements of paragraph 2.8 of the Concept of the Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020.

It should be noted that as a result of our survey the overwhelming majority of **members of a law enforcement agency** to the question: «Do you consider it appropriate to add the word «medical» after the word

«failure» to Part 1 of article 320 of the Penal Code of the Republic of Kazakhstan? (86 % of respondents) responded positively.

According to Art. 38 of the Code «On public health and health care system» the main types of medical care are: pre-medical care, qualified medical care, specialized medical care, high-tech medical services, medical and social assistance [2].

At the same time medical assistance can be provided in the following forms: outpatient care, primary health care, consultative diagnostic care, inpatient care, hospital substitute treatment, emergency medical care, sanitary aviation, medical relief during emergencies, traditional medicine, folk medicine (healing) [2].

In turn failure to assist sick person means that there is no action on the part of medical personnel to provide the necessary assistance to the sick person. Failure to assist medical care can be expressed in a variety of forms. Thus I.I. Gorelik highlights some of them:

1) non-attendance of the medical worker to the sick person on a call, an invitation or his own initiative (the last case is possible if the medical worker knows that the patient needs his services but for some reason he or the relatives of the patient can not invite, for example, the absence of a telephone or remoteness of the patient and his relatives from the medical institution);

2) failure to assist sick person in a medical institution;

3) refuse to take a sick person to a medical institution where he was taken or appeared himself;

4) do not call a specialist by a medical professional who came to the patient but was not competent because of narrow specialization, lack of knowledge or for some other reason;

5) a medical worker without a preliminary examination prior to the diagnosis indicates that the patient does not need help [12; 35, 36].

As a condition for bringing a person to criminal liability under Article 320 of the Penal Code of Kazakhstan in the disposition of the analyzed article the legislator indicated the absence of valid reasons for failure to assist sick person. In legal literature for valid reasons the authors as a rule include force majeure circumstances that justify the omission of the medical worker: the lack of the possibility to render medical assistance in connection with the state of extreme necessity, force majeure, illness of the medical worker himself, lack of necessary medicines or tools, lack of transport for travel to the location of the patient, etc. This list is not exhaustive and the validity of the reasons for not providing assistance in each case is decided at the discretion of the court taking into account all the circumstances of the case.

Analysis of law enforcement practice shows that as valid reasons in the materials of criminal cases as a rule there are the following: a medical worker could not get to the premises from which the call was made for help because the door was locked and unlocked there was no one; lack of medicines, necessary devices and devices to help the sick person; the medical worker was not competent in providing the necessary assistance because he had another specialization; the medical worker had on his hands a medical document signed by the patient about the refusal to provide medical assistance and hospitalization.

In the light of the foregoing it should be noted that the medical worker on vacation is also obliged to provide assistance to the sick person if necessary. However, in the event that the medical worker does not possess the necessary knowledge or for other reasons cannot provide the necessary assistance, he must call another medical officer with the necessary knowledge or take the sick person to a medical institution.

In addition I would like to note that in Art. 91 of the Code of the Republic of Kazakhstan «On public health and health care system» states that every citizen has the right to be treated with dignity in the process of diagnosis, treatment and care, respectful attitude to his cultural and personal values, as well as relief of suffering to the extent permitted by this the existing level of medical technology [2], while it should be noted regardless of the severity of the disease. In cases when a medical worker knows that a person is hopelessly ill he must still provide the necessary assistance, fight to the end for the patient's life and use all available medical achievements thereby alleviating the sufferings of the sick person and prolonging the life span because for the sick person the medical worker is the last hope and he sees the strength and confidence in the cure in him. Thus, a medical worker in the event of failure to assist sick person that would allow him to prolong his life is, in our opinion, liable to criminal liability under Article 320 of the Penal Code of the Republic of Kazakhstan «Failure to assist sick person». The criminal liability for failure to assist sick person, as noted above, is provided only in cases where due to the omission of the medical worker the sick person is injured or died.

According to Part 1 of Art. 320 of the Penal Code of the Republic of Kazakhstan as a socially dangerous consequence of failure to assist sick person the legislator has foreseen - infliction of average gravity

harm to health of sick person by negligence; on Part 2 of the article under consideration - the death of sick person or infliction of grievous harm to his (her) health by negligence.

At the same time it should be noted that according to the analysis of legal literature some scholars believe that from the socially dangerous consequences of failure to assist sick person provided as an obligatory sign of the objective side of the crime it is necessary to refuse and establish the moment of the end of the crime proceeding from the fact of inactivity itself [4]. In their opinion a crime committed in the form of inaction cannot have a material composition because inaction as such does not entail consequences in the form of any changes in the material world. The consequences listed in the dispositions are not the result of the omission of the medical worker but are a consequence of the development of the internal processes of the victim's body conditioned by internal causes [4].

This point of view, in our opinion, has no valid reasons because according to the tendency of legislative practice in the criminal law sphere crimes connected with violation of special rules or norms should always lead to consequences otherwise it may be an administrative or disciplinary offense. That is if we divide this point of view, the line between the disciplinary offense on the part of the medical worker and the criminal offense is erased. Thus, in our opinion, the fact of failure to assist sick person in the category of criminally punishable acts should not be erected.

At the same time it is necessary to recognize that cases of failure to assist sick person which was infliction easy harm to health fall out of the legislator's view because as the analysis of the Code on Administrative Infractions shows such acts are not an administratively punishable offense. At the same time the degree of public danger of such acts is higher than the disciplinary act. In this regard we consider it advisable to provide for the provision in the Code on Administrative Infractions of the Republic of Kazakhstan for the failure to assist sick person as well as to other persons needing medical assistance without valid reasons by a person obliged to provide it in accordance with the law of the Republic of Kazakhstan or under a special rule if it is entailed infliction of light gravity harm to health of sick person by negligence or other person in need of medical assistance.

We believe that the given suggestion will serve to improve the legislation and law enforcement practice as a result of which the offense under consideration will receive an appropriate legal assessment and the punishment will be consistent with the principle of justice.

References

1 Крелин Ю. Гиппократа клятва [Электронный ресурс] / Ю. Крелин // Энциклопедия Кругосвет. Универсальная научно-популярная онлайн-энциклопедия. — Режим доступа: http://www.krugosvet.ru/.

2 Кодекс Республики Казахстан «О здоровье народа и системе здравоохранения» от 18 сентября 2009 года № 193-IV [Электронный ресурс] // Информационно-правовая система нормативных правовых актов Республики Казахстан «Адилет». — Режим доступа: http://adilet.zan.kz/rus/docs/K090000193.

3 Официальный сайт Комитета по правовой статистике и специальным учетам Генеральной прокуратуры РК. Информационный сервис «Правовая статистика». Статистические отчеты [Электронный ресурс]. — Режим доступа: http://pravstat.prokuror.kz/rus - загл. с экрана.

4 Мыц Я.А. Оставление в опасности в уголовном праве России: дис. … канд. юрид. наук: 12.00.08 «Государственное образовательное учреждение высшего профессионального образования» «Ульяновский государственный университет» / Я.А. Мыц. — Ульяновск, 2006. — 208 с.

5 Ожегов С.И. Толковый словарь русского языка / С.И. Ожегов. — М.: Мир и образование; Оникс, 2011. — 736 с.

6 Отличие понятий «пациент» и «больной» [Электронный ресурс]. — Режим доступа: http://www.e-reading.club/chapter.php/69038/36/Zaiiceva_-_Medicina %2C_kotoraya_vas_razoryaet.html.

7 Блинов А.Г. Учение об уголовно-правовой охране прав и свобод пациента: дис. … д-ра юрид. наук: 12.00.08 «Уголовное право и криминология» / А.Г. Блинов. — Саратов, 2014. — 561 с.

8 Бердичевский Ф.Ю. Уголовная ответственность медицинского персонала за нарушение профессиональных обязанностей / Ф.Ю. Бердичевский. — М.: Юрид. лит., 1970. — 128 с.

9 Огарков И.Ф. Врачебные правонарушения и ответственность за них / И.Ф. Огарков. — М.: Медицина, 1966. — 197 с.

10 Ившин И.В. Судебно-медицинские аспекты профессиональных преступлений медицинских работников против жизни и здоровья: дис. … канд. мед. наук: 14.00.24 «Судебная медицина» / И.В. Ившин. — М., 2005. — 261 с.

11 Приказ Министра здравоохранения Республики Казахстан от 3 июля 2017 года № 450 «Об утверждении Правил оказания скорой медицинской помощи в Республике Казахстан» [Электронный ресурс]. — Режим доступа: http://adilet.zan.kz/rus/docs/V1700015473.

12 Горелик И.И. Ответственность за оставление в опасности по советскому уголовному праву / И.И. Горелик. — М.: Госюриздат, 1960. — 72 с.

Е.В. Еспергенова

Қазақстан Республикасы ҚК-нің 320-бабында қарастырылған «Науқасқа көмек көрсетпеу» қылмыстық-құқықтық нормаларын жетілдірудің кейбір мәселелері

Аталған жұмыстың мақсаты қылмыстық заңнаманы және оны қолдану тәжірибесін жетілдіру бойынша ғылыми негізделген ұсыныстарды әзірлеу болып табылады. Автор жүргізілген зерттеудің нәтижесі бойынша қолданыстағы заңнаманы және науқасқа көмек көрсетпеуге қарсы әрекет ету мәселелері бойынша құқық қолдану тәжірибесін жетілдіру жөнінде ұсынымдар жасады, атап айтсақ, қажетті көрсетілетін көмектің түсінігі, түрі мен көлеміне қатысты авторлық позициясын ұсынды. Сондай-ақ автор заңгер-ғалымдардың пікірлеріне жүргізілген талдауды ескере отырып, «науқас» және «емделуші» ұғымдарын анықтаумен байланысты жасалған бірқатар қорытындылардың негізінде аталған ұғымға қатысты өзіндік көзқарасын ұсынады. Жұмыста көрініс тапқан қорытындылар, нәтижелер, ережелер заң әдебиеттеріне, құқық қолдану тәжірибесінің материалдарына жүргізілген талдауға және респонденттердің белгілі бір тобына жүргізілген сауалнамаға негізделген. Оларды әрі қарай ғылыми зерттеулерде, заңнамаға ұсыныстар әзірлеуде, қылмыстық құқық курсын оқытқан кезде оқу үдерісінде пайдалануға болады.

Кілт сөздер: қылмыстық заңнама, қылмыстық кодекс, қылмыстық-құқықтық нормалар, медициналық құқықбұзушылықтар, медицина қызметкерлерінің жауаптылығы, көмек көрсетпеу, кәсіби міндеттер, науқас.

Е.В. Еспергенова

Некоторые вопросы совершенствования уголовно-правовой нормы, предусмотренной ст. 320 УК Республики Казахстан «Неоказание помощи больному»

Цель данной работы заключается в разработке научно обоснованных предложений по совершенствованию уголовного законодательства и практики его применения. По результатам проведенного исследования автором предлагаются рекомендации по совершенствованию действующего уголовного законодательства и правоприменительной практики в вопросах противодействия неоказанию помощи больному, в частности, предложена авторская позиция относительно понятия, вида и объема необходимой оказываемой помощи. Кроме того, с учетом анализа существующих точек зрения ученых-юристов, сделан ряд выводов, связанных с определением понятий «больной» и «пациент», на основе которых автором предложено собственное видение данных понятий. Выводы, результаты, положения, нашедшие отражение в работе, основаны на анализе юридической литературы, материалов правоприменительной практики и опросе соответствующего круга респондентов и могут быть использованы в ходе дальнейших научных исследований, при разработке предложений в законодательство, в учебном процессе при преподавании курса уголовного права.

Ключевые слова: уголовное законодательство, Уголовный кодекс, уголовно-правовые нормы, медицинские правонарушения, ответственность медицинских работников, неоказание помощи, профессиональные обязанности, больной.

References

1 Krelin, Iu. Hippokrata kliatva [Hippocratic oath]. Entsiklopediia Kruhosvet. Universalnaia nauchno-populiarnaia onlain-entsiklopediia – Encyclopedia World tour. Universal online popular science encyclopedia]. Retrieved from: http://www.krugosvet.ru/ [in Russian].

2 Kodeks Respubliki Kazakhstan «O zdorove naroda i sisteme zdravookhraneniia» ot 18 sentiabria 2009 hoda № 193-IV [The Code of the Republic of Kazakhstan «On the health of the people and the health care system» of September 18, 2009 No. 193-IV]. *adilet.zan.kz.* Retrieved from: http://adilet.zan.kz/ [in Russian].

3 Ofitsialnyi sait Komiteta po pravovoi statistike i spetsialnym uchetam Heneralnoi prokuratury RK. Informatsionnyi servis «Pravovaia statistika». Statisticheskie otchety [The official website of the Committee on Legal Statistics and Special Accounts of the General Prosecutor's Office of the Republic of Kazakhstan. Information service «Legal statistics». Statistical reports]. *pravstat.prokuror.kz.* Retrieved from: http://pravstat.prokuror.kz/ [in Russian].

4 Myts, Ya.A. (2006). Ostavlenie v opasnosti v uholovnom prave Rossii [Leaving in jeopardy in the criminal law of Russia]. *Candidate's thesis.* Ulianovsk [in Russian].

5 Ozhegov, S.I. (2011). *Tolkovyi slovar russkoho yazyka [Explanatory dictionary of the Russian language]*. Moscow: Mir i obrazovanie; Oniks [in Russian].

6 Otlichie poniatii «patsient» i «bolnoi» [The difference between the concepts of «patient» and «patient»]. *e-reading.club.* Retrieved from: http://www.e-reading.club/chapter.php/69038/36/Zaiiceva_-_Medicina %2C_kotoraya_vas_razoryaet.html [in Russian].

7 Blinov, A.G. (2014). Uchenie ob uholovno-pravovoi okhrane prav i svobod patsienta [The doctrine of the criminal-legal protection of the rights and freedoms of the patient]. *Doctor's thesis.* Saratov [in Russian].

8 Berdichevsky, F.Yu. (1970). *Uholovnaia otvetstvennost meditsinskoho personala za narushenie professionalnykh obiazannostei [Criminal liability of medical personnel for violation of professional duties]*. Moscow: Yuridicheskaia literatura [in Russian].

9 Ogarkov, I.F. (1966). *Vrachebnye pravonarusheniia i uholovnaia otvetstvennost za nikh [Medical offenses and criminal liability for them]*. Moscow: Meditsina [in Russian].

10 Ivshin, I.V. (2005). Sudebno-meditsinskie aspekty professionalnykh prestuplenii meditsinskikh rabotnikov protiv zhizni i zdorovia [Judicial-medical aspects of professional crimes of medical workers against life and health]. *Candidate's thesis.* Moscow [in Russian].

11 Prikaz Ministra zdravookhraneniia Respubliki Kazakhstan ot 3 iiulia 2017 hoda № 450 «Ob utverzhdenii Pravil okazaniia skoroi meditsinskoi pomoshchi v Respublike Kazakhstan» [Order of the Minister of Health of the Republic of Kazakhstan of July 3, 2017 No. 450 «On Approval of the Rules for the Provision of Emergency Medical Assistance in the Republic of Kazakhstan»]. *adilet.zan.kz.* Retrieved from: http://adilet.zan.kz/ [in Russian].

12 Gorelik, I.I. (1960). *Otvetstvennost za ostavlenie v opasnosti po sovetskomu uholovnomu pravu [Responsibility for leaving in danger under Soviet criminal law]*. Moscow: Hosiurizdat [in Russian].

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А.А. Тұрұнтаева

Каспий қоғамдық университеті, Алматы, Қазақстан
(E-mail: kazupi_1993@mail.ru)

Қазақстан Республикасында салықтық жоспарлаудың құқықтық негіздері

Салықтық жоспарлауға негіз болып мемлекеттің салық, бюджет, инвестициялық саясаттарының негізгі даму бағыттарын ескеру; кәсіпорынның есеп саясатын жүргізу; заң бойынша белгіленген барлық салық жеңілдіктерін толық және дұрыс қолдана отырып, салық төлеушінің салық міндеттемесін орындау; салық төлеу мерзімін ұзарту, салық және инвестициялық жеңілдіктерді алу мүмкіндігін бағалау, тағы басқа факторлар танылады. Салықтық жоспарлау жедел (оперативті), бақылау, жоспарлау тәрізді функцияларды атқарады. Салықтық жоспарлауды жедел, тактикалық және стратегиялық элементтерді қамтитын үш деңгейлі жүйе ретінде де қарастыруға болады. Қарастыратын мәселесінің маңыздылығына және шаруашылық жүргізуші субъектінің қаржы қызметінің соңғы нәтижесіне салықтардың тигізетін әсеріне байланысты салықтық жоспарлау стратегиялық және жедел (оперативті) кезеңдерді қамтиды. Мемлекеттік салықтық жоспарлау көбінесе ағымдағы салықтық жоспарлау түрінде жүзеге асырылғандықтан, ол нақты қаржылық жылға түсетін салықтық түсімдердің жоспарын қалыптастырумен байланыстырылады және салықтық міндеттемелердің орындалуын қамтамасыз ететін тәсілдерден тұрады. Мемлекеттік салықтық жоспарлауды іске асыру кезінде салық салуға байланысты болжамдар бюджеттік тапсырмалар негізінде қалыптастырылады және еліміздің әлеуметтік-экономикалық дамуының багдарламаларында беріледі. Бұл бағдарлама салық салу аясындағы қағидалар мен ережелерді, салық заңдарын және қаржылық заңдарды қабылдау (салық салу жөнінде қабылданған нормативтік актілер, өзгерістер мен толықтырулармен қабылданған салық кодексі, барлық қызмет көрсету сферасындағы заңды және жеке тұлғаларға біркелкі салық саясатын жүргізу құралы) негізін құрайтын экономикалық тұрғыдан негізделіп, заң түрінде ресімделген қағидалар мен ғылыми тұжырымдарды белгілеу жүзеге асырылады.

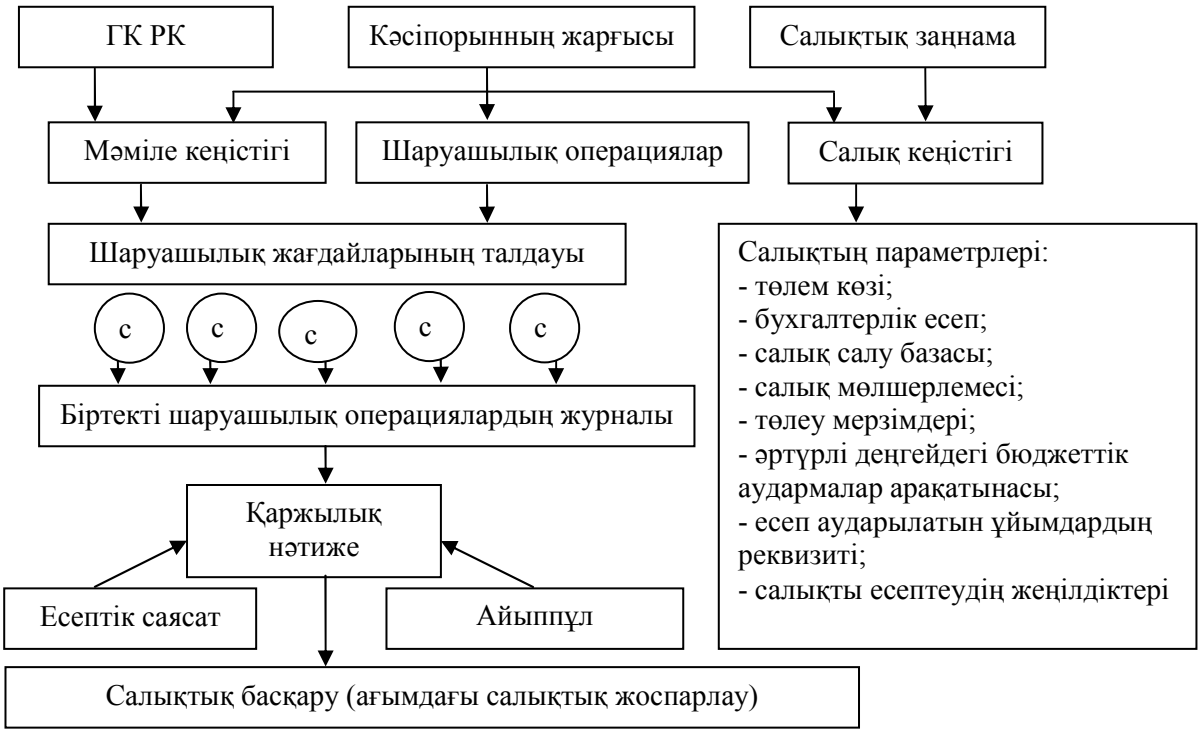
Кілт сөздер: салық, салықтық жоспар, салықтық міндеттемелер, салықтық жеңілдіктер, инвестициялық саясат, бақылау, салық функциялары, салықтық жоспарлау кезеңдері.

Салық салу мәселесі кез келген кәсіпорын үшін өте маңызды, себебі салық кәсіпорынның кірісінің белгілі бір мөлшерін мемлекетке міндетті түрде аударуы, сондықтан кәсіпорындар кіріс бөлігін барынша азайтуға тырысады. Сол себепті салықтық жоспарлау түсінігі қолданылады, салықты жоспарлау көмегімен салықтық міндеттемелерді заңды түрде қысқарту салық жоспарлау бойынша маманның көмегімен жүзеге асырылады. Салық жоспарлаудың қажеттілігі – егер олар Үкімет органдарының бағдарламаларына сай қызмет етсе, онда салық төлеушілерге түрлі салық жеңілдіктері мен салық базасын есептеудің түрлі әдістерін салық заңнамасында бекітілген осы және басқа да салықтық режимдерді қарастыру.

Салықтық жоспарлау – бұл салықтық міндеттемелерді заңда қарастырылған жеңілдіктер мен әдістерді қолдана отырып қысқарту. Оның маңызы салық төлеушілердің өз салықтық міндеттемелерін максималды азайту үшін заңда белгіленген тәсілдер мен құралдарды қолдану құқықтарына ие болу. Салықтық жоспарлау бизнесті ұйымдастыруда тиімдірек, себебі ұйымдастырушылық-құқықтық форманы, ұйымды тіркеу орнын, ұйымның ұйымдастырушылық құрылымын жасауда бастапқыда дұрыс таңдаудың маңызы зор. Өткен ғасырдың 90-жылдары мамандар мен практиктердің нұсқаулары салықтық төлемдерді минимализациялауға байланысты жеке басқарушылық шешімдерден айырмашылығы болды. «Салықтық жоспарлау» түсінігі салықтық міндеттемелер мен төлемдер түсінігімен бірге пайда болды. Салықтық жоспарлау салықтық міндеттемелерді заңдастыру жолымен анықталды, яғни салық төлеушінің бюджетке төленетін салықтық төлемдерін заңға сәйкес әрекеттендіруі. Шаруашылық жүргізуші субъектілердің басым бөлігі салық заңдарында бекітілген көптеген салықтар бойынша жеңілдіктерді дұрыс қолданбайды. Сонымен қатар салық зардаптарын ескере отырып, мәмілелердің мүмкін болатын формаларына талдау жүргізуі қажет. Қателердің аз болуын салық есептемелерінің ішкі бақылау технологиясының процедурасы мен қағидаттары қамтамасыз етеді. Сонымен қатар бақылау органы салық төлеу мерзімінен асып кетпеуін бірінші орынға қояды. Бірақ салықтар және алымдар төлеудің мерзімі салық заңнамаларында белгіленген болса, оларды қолдану керек [1; 115]. Салықты азайтудың әдістерінің бірі шетелдерде оффшорлық компанияны ашу және Қазақстан аумағында салықты аз төлейтін компания ашу болып табылады. Сондай-ақ салық ауыртпашылығын заңды түрде азаюын және бизнестің ортақ схемасына дәлме-дәл болуы керек. Схемасы дәл болмаса бақылау органдары салық төлеушіні үнемі тексереді.

Салықтық жоспарлау процесі бір-бірімен тығыз байланысты кезеңдерден тұрады. Олар келесідей: Бірінші кезең — бизнесті ұйымдастыру идеясының пайда болуы, мақсаттары мен міндеттерін жасақтау, сондай-ақ заң шығарушы органдар беретін салықтық жеңілдіктерді қолдану туралы сұрақтарды қарастыру. Екінші кезең — салықтық көзқарастан қарағанда кәсіпорынның өндіріс орындарына және кеңселеріне, сондай-ақ филиалдарына, еншілес компанияларына және басқарушы органдарына тиімді орын таңдау. Үшінші кезең — заңды тұлғаның ұйымдастырушылық-құқықтық формасын таңдау және салық режимімен пайда болатын қарым-қатынасын анықтау. Төртінші кезең салықтық жеңілдіктердің талдауын көздейтін кәсіпорынның салықтық кеңістігінің пайда болуын қарастырады. Бесінші кезең — кәсіпорынның мәмілелер бойынша қатынастарының жүйесін жүзеге асыру (пайда болған салық кеңістігін есепке ала отырып). Қорытындысында шаруашылық субъектінің мәмілелік кеңістік пайда болады. Алтыншы кезең түрлі жағдайға талдау жүргізіледі: штрафтық және басқа да санкциялармен айқындалып алынған қаржылық көрсеткіштерді мүмкінді шығындармен салыстыру. Жетінші кезең — қате жібермеудің негізгі тәсілі болып салық есептемелерінің ішкі бақылау технологиясы табылады.

Салықтық жоспарлаудың шектеріне келесілер жатқызылды: *заңнамалық шектеулер* — оларға салық заңнамаларын бұзғаны үшін белгіленген жауапкершілік шараларын жатқызуға болады. *Әкімшілік ықпал ету шаралары* — тексеріс жүргізіп, сәйкесінше санкцияларды қолдану туралы шешім қабылдай алады, әсіресе салық төлеушінің шотындағы есеп айырысу операцияларын тоқтату, салық төлеушінің мүлігін тәркілеу. *Арнайы соттық доктриналар* — салықтарды заңсыз төлеу мен жалтаруда заң талаптарына сәйкес келмейтін мәмілелерде қарастырылады. Оларға «формадағы қалып» және «іскерлік мақсат» доктриналары жатады. Салықтық жоспарлаудың негізгі шегі салық төлеуші өз салық міндеттемелерін тек заңды түрде ғана жүзеге асыруында. Олай болмаған жағдайда салық үнемділігінің орнына үлкен қаржылық шығындар, банкроттық, тіпті бостандығынан айырылуға дейін барады. Кәсіпорындар мен ұйымдарда салықтарды басқару жүйесін құру мен сәтті жұмыс істеуін қамтамасыз ету үшін жағдайлар жасалу керек. Олар: даму стратегиясы, бизнес-жоспары және бюджетінің арақатынасының болуы; әкімшіліктің стратегиялық және тактикалық жоспарлар негізінде салықтық жоспарлауды, сондай-ақ басқарудың мінсіз үрдістерін жүзеге асыру; Интернет-ресурстарын және жүйелік технологияларды қолдана отырып, жинақтау жүйесін ұйымдастыру мен ақпараттарды өңдеу; құрылымдық бөлімшелерге бөлу (тұлға), бірегей жүйе ретінде салықтық жоспарлауды ұйымдастыруға жауапты; салықтық жоспарлаудың схемасын құрастыру (салық кеңістігі, мәмілелік кеңістік); факторлар жүйесінің мониторингісі) [2; 87] (сур. қара).



Сурет. Кәсіпорындар мен ұйымдардың салықтық жоспарлауының жалпы схемасы

Көптеген мемлекеттерде салық төлеуден жалтаруды азайтудың әдістері қолданылады, олар салықтық жоспарлаудың қолданылу саласын азайтуды қарастырады. АҚШ, Ұлыбритания және тағы басқа елдерде «антитрансферттік», «антиоффшорлық» және «антидемпингтік» заңнамалар қатаң қолданылады. Сондықтан салық шығындарын азайту мүмкіндіктері тек қана жүргізілетін шектеулер жүйесі шеңберінде жүзеге асырылады.

Төменде салықтық жоспарлаудың ірі сегіз процедурасынан тұратын реті көрсетілген:

1. Шаруашылық субъектінің салық кеңістігін сипаттайтын салық кестесі толтырылады, мұнда әр салық келесі негізгі көрсеткіштермен сипатталады: төлем көзі; бухгалтерлік есеп; салық салу базасы; салық мөлшерлемесі; төлеу мерзімдері; әртүрлі деңгейдегі бюджеттік аудармалар арақатынасы; есеп аударылатын ұйымдардың реквизиті; салықты есептеудің жеңілдіктері мен ерекше шарттары.
2. Кәсіпорынның жарғысына сәйкес және азаматтық заңнама негізінде мәмілелік жүйе қатынасы құрылады. Қорытындысында шаруашылық субъектінің мәмілелік кеңістік пайда болады.
3. Кәсіпорын орындауға тиіс біртекті шаруашылық операциялар таңдалады.
4. Салықтық, мәмілелік және шаруашылық қызметтерді есепке ала отырып, әртүрлі жағдайлар қарастырылады.
5. Бухгалтерлік және салықтық есептер түрінде рәсімделетін, ең тиімді нұсқаларды таңдау.
6. Қаржылық және салықтық есеп жүргізудің негізі болатын шаруашылық операциялардың журналы толтырылады.
7. Салық тәуекелдерін есепке ала отырып, максималды қаржылық нәтижені бағалау, салық көзқарасынан қарағанда кәсіпорынның активтері мен пайдаларын тиімді орналастыру.
8. Ұйымның есептік саясатының альтернативті әдістері анықталады.

Кәсіпорындардың практикалық қызметінде пайда болатын салықтық қателер келесілер: алғашқы құжаттардың болмауы немесе дұрыс толтырылмауы; қолданыстағы салық заңнамаларын дұрыс түсінбеуі нәтижесіндегі қателер; салық салудағы өзгерістерге уақтылы назар аудармауы, әсіресе жергілікті; арифметикалық есептеудің дұрыс еместігі; салықтық есеп құжаттарын уақтылы тапсырмауы; салық төлеу мерзімінің өтіп кетуі.

Қателерді азайтудың негізгі әдісі салық есебінің ішкі бақылау технологиясын қолдану болып табылады. Ішкі бақылау технологиясының негізін қалаушы қағидаттары: технология шегінде барлық салықтық шешімдер белгілі бір процедуралардың көмегімен шешіледі; барлық салықтық шешімдер технологияны енгізу кезеңінде белгіленіп, ешқандай субъект ешбір шешім қабылдай алмайды. Жағдай өзгергенде салықтық қорытындыны сарапшылар тобы (комиссия) шешеді; кәсіпорын салыққа байланысты процедуралар мен белгіліс жүргізуге құқығы бар бір топ тұлғаларды белгілеуі керек; әрбір салық шаруашылық операциясы белгілі мысалда көрсетілген жазбаша құжатпен көрсетілуі тиіс; салықтық қателерді азайту үшін стандартталған құжаттар қолданылады; күнделікті бақылауға салықтық жеңілдіктердің әрбір мәмілеге негізделуі жатады; барлық бухгалтерлік өткізгіштер мен салықтық есептер біртекті шаруашылық жағдайлардың кестесінің негізінде жасалады; барлық ақпараттық-құқықтық жүйенің қолданушылары өздеріне қажет ақпаратты ала алады.

Әр мемлекетте салық заңдарының ерекшеліктеріне байланысты салық режимін қолданатын белгілі бір қызмет түрі мен ұйымдастырушылық-құқықтық форма бар. Осы заңдарға сәйкес салық салудың төмен мөлшерлемесі арқылы шетел заңды тұлғаларын тартуға негіз болады [3; 201].

Оффшорлық бизнес — бұл кіріс көздері шетелден болатын, сондықтан салық салу жеңілдіктерін қолданатын, берілген заңнамадан тыс жүргізілетін қызмет болып табылады. «Оффшорлық зона» түсінігі бойынша заңды түрде оффшорлық кәсіпорындардың мәртебесі мен нормалары анықталған және соған сәйкес қаржылық-экономикалық операциялар жүргізілетін заңнамалар жатады. Сонымен қатар бұндай зоналарда пайда болатын заңды тұлғалардың ұйымдастырушылық-құқықтық формалары келесідей: серіктестік, жауапкершілігі шектеулі қоғамдастық, акционерлік қоғам және т.б. Қазіргі кезде дүниежүзінің салық картасында, салықтық жоспарлау тұрғысынан қарағанда, әлемдік қаржылық операциялар қызығушылығын білдіретін 300 бірлік жеңілдетілген заңнамалар мен зоналар бар. Оффшорлық компаниялардың жалпы саны бірнеше жүз мыңға жетуде.

Оффшорлық зоналар жер шарының ең негізгі бірнеше нүктелерінде белгіленген: Кариб бассейні (Багам, Виргин, Кайман, Барбадос және Гренада аралдары); Ортатеңіз (Андорра, Гибралтар, Монако, Кипр); Еуропа (Швейцария, Люксембург, Лихтенштейн, Гернси, Джерси және Мэн, Сан-Марино, Ирландия аралдары); Араб елдері (Ливан, ОАЭ, Бахрейн); Африка (Сейшел аралдары, Либерия); Азия-Тынық мұхиты маңы (Қытай, Гонконг, Сингапур, Малайзия, Филиппин). Оффшорлық

компаниялар ұсынатын жеңілдіктер түрі: салық салудың жеңілдетілген тәртібі, валюталық автономияны ұсыну, тауарды импортқа шығарғандағы кеден жеңілдіктері, тіркелу процедурасы мен есеп берудің жеңілдеуі, банктік және коммерциялық құпияға кепілдік және т.б. Оффшорлық зонада салық мәртебесі әртүрлі компаниялар қызмет жүргізеді. Оффшорлық компания – ұлттық компанияның арнайы түрі, Кипрдің заңнамасымен қарастырылған; белгілі ережелерді бұзбаған жағдайда салық салу мөлшерін таңдау мәртебесіне ие компания [4; 101]. Босатылған компания салық төлеуден толық босатылады, бірақ қағаз жүзінде салық төлеуші ретінде тіркеуде тұр. Резидент емес компания ұлттық заңға сәйкес салық салуға жатпайды.

Дүние жүзіндегі мемлекеттердің төрттен бірі шетел резиденттеріне әлемдік салықтық жоспарлауды және оның элементтерін қолданады. Оффшорлық бизнес негізінде құруға болатын схемалар: 1) оффшорлық компания — *сауда жүргізудегі делдал.* Сыртқы сауда операцияларын сатушы мен сатып алушы арасында жүргізгенде компания құрылады, ол салық салу объектісінде көбірек кірісті локализациялау; 2) оффшорлық компания — *мердігер*. Бұл жағдайда компанияны салық салу базасын азайту мен өз құнын қоса алғанда шығындың көбеюіне ықпалын тигізу үшін қолданады; 3) оффшорлық компания – құны қымбат тұратын мүліктің иесі. Бұл схема мүлік иесі өз иелігіндегі құнды мүлік бар екендігі құпияда қалдырғысы келген кезде қолданады; 4) оффшорлық компания — *тауар белгісінің иесі және лицензиар*. Бизнесті тұрақты емес мемлекетте жүргізсе, тауар белгісін осы компанияға тіркеуге болады немесе тіркелген күйде сатуға болады; 5) оффшорлық компания — *авторлық құқық иесі.* Бұл схема салықты азайтудың және капиталды экспорттауда қолдануға болатын ыңғайлы әдіс; 6) оффшорлық компания — *банк шоттарын ұстаушы.* Бұл жағдайда иесі берілген компанияны өз қадағалауына алады, ал компания банкте, белгілі уақыт өткеннен кейін корпоративтік кредиттік картаны алу үшін шот ашады; 7) оффшорлық компания — *кепілдік ұстаушы*. Бұл схема салықтық жоспарлауда қолданылады, егер мүлік иесі мүлігінің сақталуына күмәнді болса; 8) оффшорлық компания — *инвестор*. Оффшорлық компания шығарылған инвестицияларды жаңа инвестициялық жобаға өз еліне қайтару үшін аудару қызметін атқарады; 9) оффшорлық компания — *кеме иесі*. Көптеген оффшор орталықтары олардың туы астында жүретін кемелерге салық салу шарттарының жеңілдіктерін ұсынады; 10) оффшорлық компания – *құрылыс жұмыстарын орындаушы.*

Қаржылық операциялар үшін әртүрлі кәсіпорындардың түрлері ғана қолданып қоймай – оффшорлық серіктестік, компаниялар, кепілдіктен шектелген, акционерлік қоғам, сонымен қатар жаңа ұйымастырушылық-құқықтық формалар енгізілуде. Көптеген трасттық қағидалар мен нормаларға негізделген арнайы қаржылық қызмет қазіргі бизнес сұранысына бейімделген. Траттар (сенімгерлік меншік) оффшорлық бизнесте жиі қолданылады немесе бірқатар жағдайларда жай компаниялармен салыстырғанда қалаулы болады [5; 17]. Көптеген шетелдік оффшорлық компаниялар сыртқы экономикалық операцияларды жүргізуде мүлдем қажет болмаса, келесілеріне өте қажет болады.

Оффшор — бұл қызмет атқаратын және оны қолдануға болатын салықтық жоспарлаудың анық құралы. Бірақ соңғы жылдары оффшорлық бизнес өте маңызды өзгерістерге ұшырағанына көңіл аударайық. Сондықтан оффшорлық бизнестегі әлем тенденциясына, сондай-ақ өндірісі дамыған мемлекеттер тарапынан оффшорға қарсы әдістерді есепке ала отырып, оффшорлық орталықтың қатысуымен жүргізілген салықтық схеманы құруға аса назар аудару қажет.

Әдебиеттер тізімі

1 Абиев С.Н. Салық және салық салу: оқу құралы / С.Н. Абиев, М.М. Алиева. — Алматы: Дәуір, 2012. — 244 б.

2 Нұрымов А.А. Салық және салық салу / А.А. Нұрымов, С.А. Шоимбаева. — Алматы: Жеті жарғы, 2013. — 215 б.

3 Есенғалиева Қ.С. Экономикалық теория: оқулық / Қ.С. Есенғалиева. — Алматы: Экономика, 2015. — 576 б.

4 Елшібаев Р.Қ. Шағын және орта бизнесті ұйымдастыру: оқу құралы / Р.Қ. Елшібаев. — Алматы: Экономика, 2016. — 172 б.

5 Герун А. Планирование налоговых проверок / А. Герун // Вестн. налоговой службы Республики Казахстан. — 2016. — № 1. — С. 15–18.

А.А. Турунтаева

Правовые основы налогового планирования в Республике Казахстан

В статье отмечено, что основой для налогового планирования являются: учет основных направлений развития государственной налоговой, бюджетной и инвестиционной политики; ведение учетной политики предприятия; выполнение налогового обязательства налогоплательщика при полном и правильном применении всех налоговых льгот, установленных законом; продление налогового платежа, оценка возможности получения налоговых и инвестиционных пособий и т.д. Автором выделены функции налогового планирования, такие как оперативное управление, контроль, планирование. Налоговое планирование можно рассматривать как трехуровневую систему, включающую оперативные, тактические и стратегические элементы. Оно включает стратегические и быстрые (оперативные) этапы, которые имеют отношение к характеру проблемы и влиянию налогообложения на конечный результат финансовых результатов хозяйствующего субъекта. Подчеркнуто, что, поскольку государственное налоговое планирование в основном осуществляется в форме текущего налогового планирования, оно связано с формированием плана налоговых поступлений за финансовый год и включает методы, обеспечивающие выполнение налоговых обязательств. В случае публичного налогового планирования основанные на налогообложении предположения формулируются на основе бюджетных ассигнований и приводятся в программах социально-экономического развития страны. Автор доказал, что эта программа определяет экономическое наследие, законные принципы и научные выводы, которые составляют основу для принятия принципов и положений налогообложения и финансовых вопросов (нормативные акты, принятые по налогообложению, налоговый кодекс с внесенными в него поправками и дополнениями — инструментом единого налогообложения для юридических и физических лиц во всех областях обслуживания).

Ключевые слова: налог, налоговый план, налоговые обязательства, налоговые льготы, инвестиционная политика, контроль, налоговые функции, этапы налогового планирования.

A.A. Turuntayeva

Legal basics of tax planning in the Republic of Kazakhstan

The basis for tax planning is to take into account the main areas of development of the state's tax, budget and investment policies; maintaining accounting policy of the enterprise; fulfillment of the tax liability of the taxpayer with full and correct application of all tax privileges established by law; prolongation of tax payment, assessment of the possibility of obtaining tax and investment benefits, etc. such factors are recognized.Tax planning functions like operative, control, planning. Tax planning can be considered as a three-tier system that includes operational, tactical and strategic elements. Tax planning involves strategic and operational (operational) stages, which are relevant to the nature of the issue and the impact of taxation on the ultimate outcome of the business entity's financial performance. Since the state tax planning is mainly carried out in the form of current tax planning, it is associated with the formation of a tax revenue plan for the fiscal year and includes methods that ensure compliance with tax obligations. In the case of public tax planning, tax-based assumptions are formulated on the basis of budgetary allocations and are listed in the country's socio-economic development programs. This program defines the economic legacy, legal principles and scientific conclusions that form the basis for the adoption of the principles and provisions of taxation, taxation and financial matters (normative acts adopted on taxation, the tax code, as amended and supplemented, is a single taxation instrument for legal entities and individuals in all areas of service).

Keywords: taxes, tax plan, tax obligations, tax incentives, investment policy, control, tax functions, tax planning stages, tax code, program, legal and physical person, tax policy.

References

1 Abiyev, S.N., & Aliyeva, M.M. (2012). *Salyk zhane salyk salu [Taxes and Taxation]*. Almaty: Dauir [in Kazakh].

2 Nurumov, A.A., & Choimbaeva, S.A. (2013). *Salyk zhane salyk salu [Taxes and Taxation]*. Almaty: Zheti zharhy [in Kazakh].

3 Esengalieva, K.S. (2015). *Ekonomykalyk teoriia [Economic theory]*. Almaty: Ekonomika [in Kazakh].

4 Elshibayev, R.K. (2016). *Shahyn zhane orta biznesty uymdastyru [Organization of small and medium business]*. Almaty: Ekonomika [in Kazakh].

5 Gerun, A. (2016). Planirovanie nalohovykh proverok [Planning of tax audits]. *Vestnik nalohovoi sluzhby Respubliki Kazakhstan – Bulletin of the Tax Service of the Republic of Kazakhstan, 1,* 15–18 [in Russian].

АВТОРЛАР ТУРАЛЫ МӘЛІМЕТТЕР
СВЕДЕНИЯ ОБ АВТОРАХ
INFORMATION ABOUT AUTHORS

Akhmetov, A.S. — Doctor PhD, Associate professor, Pavlodar Pedagogical State Institute, Kazakhstan.

Aliyeva, L.R. — Master of jurisprudence, Senior teacher of civil and labor law chair, Ye.A. Buketov Karaganda State University, Kazakhstan.

Amirbek, K.S. — Master of jurisprudence, PhD the doctoral candidate, Ye.A. Buketov Karaganda State University, Kazakhstan.

Arenova, L.K. — Candidate of jurisprudence, Associate professor of Department of the criminal procedure and criminalistics chair, Ye.A. Buketov Karaganda State University, Kazakhstan.

Arystan, A. — Master of jurisprudence, Senior Researcher of the Department of civil, civil procedural legislation and executive proceedings, Astana, Kazakhstan.

Beken, A. — Master of jurisprudence, Researcher of the Department of civil, civil procedural legislation and executive proceedings, Astana, Kazakhstan.

Botagarin, R.B. — Doctor PhD, Ye.A. Buketov Karaganda State University, Kazakhstan.

Bozhkarauly, A. — Candidate of juridical sciences, Associate professor, Department chair of the constitutional and international law, Ye.A. Buketov Karaganda State University, Kazakhstan.

Complak, K. — Doctor of law science, Professor school of law, administration and economy, Wrocław University, Poland.

Khlus, A.M. — Candidate of juridical sciences, Associate professor, Belarusian State University, Minsk, Belarus.

Khorami, Nia Anvar Bahman — Doctoral PhD student, Baku State University, Azerbaijan.

Kim, A.A. — Master of jurisprudence, Main transport prosecutor's office of the Republic of Kazakhstan, Assistant prosecutor, Astana, Kazakhstan.

Kizdarbekova, A.S. — Candidate of juridical sciences, Associate professor, Department chair of the civil and labor law chair, Ye.A. Buketov Karaganda State University, Kazakhstan.

Kozhakhmetov, G.Z. — Doctor of juridical sciences, Professor, Dean of faculty of law, Ye.A. Buketov Karaganda State University, Kazakhstan.

Kyzdarbekova, B.Zh. — Candidate of legal sciences, Associate professor of the criminal law and criminology, Ye.A. Buketov Karaganda State University, Kazakhstan.

Lavnichak, A. — Doktor of legal sciences, Professor of the Chair of constitutional law, University of Wroclaw, Poland.

Makhanov, T.G. — Master of jurisprudence, Senior researcher of the Academy of Law Enforcement Agencies attached to the General Prosecutor's Office of the Republic of Kazakhstan, Astana, Kazakhstan.

Myrzaliyeva, Zh.T. — Master of jurisprudence, Senior teacher of civil and labor law chair, Ye.A. Buketov Karaganda State University, Kazakhstan.

Nabiyeva, Ye.A. — Master of jurisprudence, B.Beisenov Karaganda Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan, Kazakhstan.

Nukusheva, A.A. — Candidate of juridical sciences, Associate professor, Academy «Bolashak», Karaganda, Kazakhstan.

Nurbekova, G.T. — Master of jurisprudence, Senior teacher of the chair of constitutional and international law, Ye.A. Buketov Karaganda State University, Kazakhstan.

Polevoy, S.V. — Master's student of economics, Ye.A. Buketov Karaganda State University, Kazakhstan.

Rahimberlina, A.K. — Master of jurisprudence, Senior teacher of civil and labor law chair, Ye.A. Buketov Karaganda State University, Kazakhstan.

Rakhimbekov, M.M. — Master of jurisprudence, Doctoral PhD student, B.Beisenov Karaganda Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan, Kazakhstan.

Rustembekova, D.K. — Doctor PhD, Senior teacher of chair of the constitutional and international law, Ye.A. Buketov Karaganda State University, Kazakhstan.

Seitaeva, Zh.S. — Candidate of juridical sciences, Associate professor of the Academy of Law Enforcement Agencies attached to the General Prosecutor's Office of the Republic of Kazakhstan, Astana, Kazakhstan.

Sukhoterin, V.E. — Senior lecturer, Department of criminal procedure and criminalistics, Ye.A. Buketov Karaganda State University, Kazakhstan.

Sydykova, L.Ch. — Doctor of law, Professor, B.N. Yeltsin Kyrgyz-Russian Slavic University, Bishkek, Kyrgyzstan.

Ternovaya, N.S. — Master of jurisprudence, Senior teacher of the chair of constitutional and international law, Ye.A. Buketov Karaganda State University, Kazakhstan.

Tokatov, R. — Master of jurisprudence, Senior teacher of civil and labor law chair, Ye.A. Buketov Karaganda State University, Kazakhstan.

Turuntayeva, A.A. — Master of jurisprudence, Doctoral PhD student, Caspian University, Almaty, Kazakhstan.

Yerzhanova, F.A. — Candidate of juridical sciences, Associate professor, Chair of constitutional and international law, Ye.A. Buketov Karaganda State University, Kazakhstan.

Yespergenova, E.V. — Master of jurisprudence, Doctoral PhD student, B.Beisenov Karaganda Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan, Kazakhstan.

Zadorozhnyi, B.Y. — Master of laws, V. Getman Kyiv National Economic University, Ukraine.

Zalimbayeva, I.V. — Master of jurisprudence, Teacher of civil and labor law chair, Ye.A. Buketov Karaganda State University, Kazakhstan.

Zhagalov, R.B. — Master of jurisprudence, Teacher of civil and labor law chair, Ye.A. Buketov Karaganda State University, Kazakhstan.